THE ROLE OF THE PARENT/GUARDIAN IN JUVENILE CUSTODIAL INTERROGATIONS: FRIEND OR FOE?

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I. INTRODUCTION

It is, unfortunately, an all-too-common scenario. The phone rings at home; it is the police; they have a minor – let's call him Jeremy – in custody.

Jeremy waits in a holding cell. His mother arrives. She is angry – angry that her son has gotten himself into trouble. She is embarrassed – embarrassed that the state has cause to intrude into their lives. She is upset – upset that something serious enough to warrant police involvement has occurred. She wants to cooperate, defer to the police, and get home to a familiar and comfortable environment where she can deal with this privately. What is the most expeditious route to that end?

A polite and commiserating police officer presents Jeremy and his mother with an unfamiliar form. The mother and son confer privately, neither considering the legal implications of the *Miranda* rights printed on the form. Instead, they sit with fear, anger, and frustration. The choice seems clear. Fearful of the only consequence he knows – parental discipline – Jeremy defers to his mother's desire: Cooperate with the police. Jeremy and his mother re-enter the interrogation room and sign away Jeremy's right against self-incrimination.

Add to this common scenario that the mother, or someone she loves, is the victim of the alleged offense.[1] Suppose Jeremy is accused of damaging her property, or injuring her other minor child.

Alternately, add to this common scenario that the mother, or someone she loves, is a suspect in the investigation.[2] Suppose the mother believes that the police suspect her or her significant other of committing the offense of which Jeremy is accused.

Add to this scenario that Jeremy and his family have limited financial resources. They live in a state that has a statute that requires a parent or guardian to reimburse the state for a juvenile's counsel fees.[3] Suppose Jeremy and his mother believe

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1. *See* discussion *infra* Part IV.

2. *See id.*

3. *See id.* For examples of parent reimbursement statutes, see, e.g., CAL. PENAL CODE § 987.4 (West 2003); COLO. REV. ST. ANN. § 19-2-706 (West 2003); MD CODE ANN. art. 27A § 7 (2003); N.H. REV. STAT. ANN. § 604-A:9 (2003).

that, if they cooperate with the police, the matter will be resolved without further state involvement or the incurrence of counsel fees.

Juvenile confessions raise many questions, ranging from those concerning their reliability, the voluntariness with which they were given, and the juvenile's comprehension of the *Miranda* rights at the time the confessions were obtained.[4] When a parent or guardian is present at a juvenile's interrogation, stark conflicts of interest and an array of parenting goals may loom large in this pressure-filled atmosphere.[5] These conflicts of interest may manifest themselves in decisions having social, moral and legal repercussions that may last for the lifetime of the juvenile.

This Article is about the role the judiciary, legislatures, and law enforcement expect and encourage parents and guardians to play, as third-party advisors to juvenile suspects both prior to and during custodial interrogations. The Article examines the assumptions supporting the presence of parents at juvenile interrogations and reveals the inadequacies of assigning either a parent or guardian as the sole protector of this critical right. The expectation is that parental presence will provide juveniles with additional protections in the face of state interrogation, but data regarding parental attitudes toward a child's right to withhold information from the police and statistics concerning adult comprehension of *Miranda* requirements both serve to challenge the assumption that parents can adequately advise juveniles regarding the waiver of their right against self-incrimination.[6] I suggest that the most authentic approach to ensuring that a juvenile's waiver is knowing,

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4. In one landmark survey, 55.3% of juveniles surveyed failed to understand at least one of the *Miranda* rights. Only 20.9% of juveniles under age fifteen understood all four warnings, compared to 42.3% of all adults surveyed. The study showed no correlation between scores and the juvenile's gender, socioeconomic status, or prior criminal experience. However, the study did reveal a significant relationship between a juvenile's age, race, IQ and the juvenile's *Miranda* comprehension. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1161 (1980).

5. *See* discussion *infra* Part IV.

6. One study, which surveyed approximately 750 parents of high school students in two schools in St. Louis, Missouri, revealed that only 20% of parents believed juveniles should be able to withhold information from police. Over half of the parents surveyed expressly disagreed with the idea that juveniles should be allowed to avoid incriminating themselves by withholding information. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 175-80 (1981). These findings were drawn from responses to two sets of questions: One set of questions involved a hypothetical juvenile arrest and police request to question the child; the second set of responses derived from questions concerning legal self-determinism (a subscale of the Children's Rights Attitude Scale). It should be taken into consideration that parents who seem in surveys to acknowledge a juvenile's right to avoid self-incrimination may nevertheless encourage their own children to waive their right to silence during actual interrogations. *See id.* at 183; *see also* Barry Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 182 (1984) ("Rather than mitigating the pressures of interrogation, parents appear predisposed to coercing their children to waive the right to silence."); Barbara Kaban & Ann E. Tobey, *When Police Question Children, Are Protections Adequate?*, 1 J. CENTER CHILD. & CTS., 151, 154 (1999) ("[I]t has been anecdotally observed that parents often push their children to 'talk' to authorities and to 'tell the truth.'"); discussion *infra* Part IV. As of this writing, no study comparable in subject matter and scope to Dr. Grisso's 1981 study has been published. Therefore, this Article relies on Dr. Grisso's findings for empirical data. However, there is an acute need for a current study of parental responses in actual interrogations.

voluntary and intelligent, would be to require a non-waivable right to an attorney for purposes of consultation regarding the decision to waive Fifth Amendment protections.[7]

At the outset, it is important to note that I do not advocate the per se exclusion of the parent from the interrogation process. Nor do I intend to imply that parents *never* provide advice that may be legally beneficial to the child, either in the context of the delinquency matter or in the best legal interest of the juvenile. There are valid reasons, however, for the wide array of parental responses to alleged child misconduct. Some parents, albeit with the best of intentions and out of benevolent concern for the welfare of the child, encourage the juvenile to waive his right to counsel and silence, thereby enhancing the potential for finding the child delinquent.

This Article is not about the motivations or competencies of the individual parent, but rather how the legal presumptions concerning a parent's role in a juvenile custodial interrogation affect the admissibility of statements by accused juveniles. Those presumptions find their origin in family law jurisprudence, where it is assumed that minor children are the property of their parents and that parents act in the best interests of their children.[8] This Article examines two contexts – the abortion and paternity areas – in which traditional presumptions of parental authority give way to the juvenile's right to exercise a constitutional right. Examination of these two contexts lends support to the proposition that in order to achieve the laudable goal of extending meaningful due process rights to juvenile suspects, juveniles should consult with lawyers before they make a decision with constitutional implications. Further, by choosing lawyers to serve the limited function of advising the juvenile in the interrogation room, parents will feel free to respond to their child's predicament with their own parenting goals in mind, unburdened by the potential legal consequences of their advice.

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7. Endorsements for the appointment and consultation with counsel before any waiver of rights shall occur have been issued by the President's Commission on Law Enforcement and Administration of Justice, the National Advisory Committee Task Force on Juvenile Justice and the American Bar Association's Juvenile Justice Standards. Barry Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and Right to Counsel, in* YOUTH ON TRIAL 119 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *Juveniles' Waiver of Legal Rights*]. The President's Commission on Law Enforcement and the Administration of Justice was established in 1965. The Commission brought together an array of experts, ranging from local justice officials to law professors, with the purpose of investigating virtually every aspect of crime, law enforcement, and the administration of justice in the United States. The ABA Juvenile Justice Standards Project was established in the 1970's and sought to develop, promote and implement policies benefiting juveniles in the criminal justice system. Today a major outgrowth of the Juvenile Justice Standards Project is the ABA Juvenile Justice Center, which is dedicated to monitoring legislative, fiscal, policy and administrative changes affecting juvenile justice in both state and federal courts.

8. *See generally* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999); JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1583 (1996) (pointing out that in child custody litigation, "[a]lthough the child may in fact be the person with the greatest interest at stake . . . the child's wishes may not receive due consideration unless the child is represented by counsel").

Part II briefly sets out the historical context of juvenile delinquency proceedings before and after the landmark U.S. Supreme Court case *In re Gault*.[9] Part III discusses the two current approaches to assessing the validity of a juvenile's waiver. Part IV examines three inadequacies with the parent/guardian advisor: (1) the standardless approach with which courts assess their appropriateness; (2) the inadequacy with which adults understand *Miranda*; and (3) the conflicts of interest that arise in this context. Part V analogizes to the abortion and paternity contexts to support the argument that lawyers should act as primary advisors to juveniles in the interrogation context. Part VI argues that adoption of this Article's proposal will enhance parental autonomy. Finally, Part VII evaluates potential reform efforts and concludes that there is no adequate substitute for consultation with counsel in a pre-interrogation setting.

II. BACKGROUND

A. *Statistics on the Enhancement of Juvenile Adjudications and Punishment in the Juvenile Justice System*

For slightly more than a decade this country has experienced a boom in the number of juveniles adjudicated in our juvenile justice system, despite periods of overall decline in serious violent crime.[10] The number of youth placed in juvenile facilities by judges, police officers and probation officers has increased significantly.[11] Over the past decade jurisdictions have passed laws and prosecutor's offices have instituted criteria that have caused many more juveniles to face harsher penalties, including being treated as an adult in the criminal justice

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9. 387 U.S. 1, 3 (1967) (ruling that the constitutional protections afforded to adults must also be afforded to juveniles during delinquency proceedings).

10. In 1996, juvenile courts handled a total of 1.8 million delinquency cases – 1,600 more cases each day than in 1987. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 144 (1999), *available at* http://www.ncjrs.org/html/ojjdp/nationalreport99/chapter6.pdf (last visited May 3, 2004). In addition, between 1985 and 2000, the number of delinquency cases involving detention increased by 41% – an increase of 95,200 cases in which the juvenile was detained. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, OJJDP STATISTICAL BRIEFING BOOK [hereinafter STATISTICAL BRIEFING BOOK], *available at* http://ojjdp.ncjrs.org/ojstatbb/html/qa184.html (last visited May 3, 2004). "While the proportion of cases in which the juvenile was detained fluctuated between 1985 and 2000, the volume of cases generally grew." *Id.* During the same time period, the number of adjudicated delinquency cases resulting in residential placement increased by 49%, the number of cases resulting in formal probation increased by 108%, and the number of cases resulting in other court sanctions increased by 84%. *Id.*

11. On an average day in 1995, over 108,700 juveniles were in detention, correctional, or shelter facilities. STATISTICAL BRIEFING BOOK, *supra* note 10. This one-day count represents a 47% increase since 1983. *Id.* Of the 108,700 juveniles in custody in 1995, 84% were accused or had been adjudicated of law violations, including both delinquency and status offenses. *Id.* Perhaps surprisingly, juveniles held for Violent Crime Index offenses accounted for only 20% of juvenile offenders in custody. *Id.* The remaining juveniles were held for such offenses as property damage, drug trafficking, truancy, and underage drinking. *See id.*

system.[12] There should be a direct correlation between enhanced punishment of adjudicated juveniles and increased due process protections for those juveniles. To paraphrase the Supreme Court in *Gault*, the closer we get to a retributive system, the greater the need for the panoply of due process rights.[13]

B. Juvenile Proceedings Before Gault

From its inception in 1899, the first juvenile court embraced the doctrine of *parens patrie*.[14] Under this doctrine, the state acted *in loco parentis*;[15] its mission was to treat wayward youth. Judges treated juveniles that came before them like sons and daughters in need of guidance.[16] Juvenile proceedings were considered civil, not criminal, and were therefore not subject to procedural due process protections afforded to all persons whose liberty was at stake.[17] Tracing the history of the juvenile justice system, the United States Supreme Court observed in *Gault*:

> The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be

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12. As reported by national news media, the number of juveniles who were tried as adults was on the rise during the 1990s. *See, e.g.*, *Number of Juveniles Sent to Adult Prisons Skyrocketing, Study Shows*, CNN.COM, Feb. 28, 2000 (stating more than twice the number of youths under 18 committed to adult prisons in 1997 than in 1985), *at* http://www.cnn.com/2000/US/02/27/juveniles.in.jail/#2 (last visited May 6, 2004) Within 40 of the nation's largest urban counties, over 7,100 juvenile defendants were charged in adult court with felonies in 1998 alone. *See* BUREAU OF JUSTICE STATISTICS, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS (2003), *available at* http://www.ojp.gov/bjs/pub/pdf/jfdcc98.pdf (last visited May 6, 2004). Of these, 52% did not receive pretrial release. *Id.* Sixty-three percent were ultimately convicted of a felony, and 43% of those convicted received a prison sentence with another 20% being sentenced to jail. *Id.* From 1992 through 1997, 44 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults; 28 states expanded the list of crimes eligible for exclusion and seven states lowered age limits for exclusion. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 (1998), *available at* http://www.ojjdp.ncjrs.org/ojstatbb/html/qa091.html (last visited May 6, 2004). Between 1985 and 1994, the number of delinquency cases judicially waived to criminal court increased by 70%; this number then declined by 54% between 1994 and 2000. *See* STATISTICAL BRIEFING BOOK, *supra* note 10. A survey conducted by the U.S. Department of Justice found that of prosecutors' offices handling juvenile cases, almost two-thirds transferred at least one juvenile case to criminal court in 1994. *See* OFFICE OF JUSTICE PROGRAMS, NATIONAL SURVEY OF PROSECUTORS, 1994, (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/jpscc.txt (last visited May 3, 2004). Nineteen percent of prosecutors' offices had a specialized unit to deal with those juvenile cases that were transferred to criminal court. *Id.*

13. *See Gault*, 387 U.S. at 28-31.

14. Literally, "parent of his or her country." BLACK'S LAW DICTIONARY 511 (2d pocket ed. 2001).

15. Literally, "in the place of a parent." *Id.* at 351.

16. *See Gault*, 387 U.S. at 15 ("The child . . . was to be made 'to feel that he is the object of [the state's] care and solicitude.'" (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909))). Juvenile court judges rarely appointed lawyers for indigent defendants and discouraged parents from retaining counsel. *See generally* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 7, at 105.

17. *Gault*, 387 U.S. at 17.

> "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[18]

Prior to *Gault*, the Supreme Court reversed two convictions of juveniles, finding that the confessions were involuntary under the Due Process Clause of the Fourteenth Amendment.[19] *Haley v. Ohio* concerned a fifteen-year-old African-American boy, arrested for the murder of a store clerk during a robbery.[20] After his arrest, police confined him in a police station for a total of five days without any contact with the outside world.[21] Shortly after taking the boy into custody, the police subjected him to five hours of questioning.[22] At no time prior to this did the police advise him of his right to counsel.[23] After he signed a confession, the police held him incommunicado for three days.[24] During this time, they did not permit him to see the counsel retained by his mother, despite counsel's efforts to gain access to him.[25]

Writing for a plurality of the Supreme Court, Justice Douglas reversed the conviction, finding that the confession was obtained in violation of the Due Process Clause.[26] The Court focused its attention on the isolation of the young defendant:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.[27]

In *Haley*, the Court confronted the question of whether police tactics directed at a juvenile during a custodial interrogation are inherently coercive. Responding in the affirmative, the Court suggested that the presence of an ally for the juvenile would lessen this intense pressure.[28] Although the Court stopped short of announcing guidelines for police questioning of juveniles, it did suggest that, without "someone to lean [on]," a juvenile will be "crush[ed]" by "the overpowering presence of the law" and our established understandings of fairness and due

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18. *Id.* at 15-16.
19. *See* Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962).
20. *Haley*, 332 U.S. at 597.
21. *Id.*
22. *Id.* at 598.
23. *Id.*
24. *Id.* at 598-99.
25. Haley v. Ohio, 332 U.S. 596, 598 (1948).
26. *Id.* at 599.
27. *Id.*
28. *Id.* at 599-600.

process will be violated.[29]

Fourteen years after *Haley*, the Supreme Court in *Gallegos v. Colorado* confronted the scenario of a fourteen-year-old juvenile who had been questioned by police during an assault and robbery investigation in the absence of a parent or guardian.[30] In *Gallegos*, the Court reaffirmed that, without adult protection, a juvenile may be unable to "protect his own interests or . . . get the benefits of his constitutional rights."[31] Following his arrest, the juvenile suspect had been held in police custody for five days without any contact with a "lawyer, parent, or other friendly adult."[32] After the victim died from the injuries he sustained during the assault and robbery, the juvenile was charged with first-degree murder.[33]

Stating that the totality of the circumstances indicated that the confession had been obtained in violation of the Due Process Clause, the Court reversed the juvenile's conviction.[34] Once again, the Court took note of the petitioner's youth and immaturity, stating: "[W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded."[35] In attempts to reduce the "unequal footing" between the juvenile and police, a lawyer, relative, or adult friend should have been made available to the juvenile, as these individuals "could have given the petitioner the protection which his own immaturity could not."[36]

In *Haley* and *Gallegos*, the Supreme Court sought to provide some protections to juvenile suspects through the Due Process Clause. In *Gallegos*, Justice Douglas' majority opinion conceded that "there is no guide to the decision of cases such as this."[37] In both of these early cases, however, the Court remarked on the vulnerability and immaturity of a young person, the isolation of the custodial environment, and the lack of an adult known to the juvenile during the interrogation.

C. In re Gault

In 1967, the Supreme Court decided *In re Gault*, extending constitutional due process protections to juveniles.[38] The petitioner, a fifteen-year-old boy originally taken into custody for making obscene phone calls while on probation for petty theft, had been committed to a state institution until his eighteenth birthday.[39] The

29. *Id* at 600.
30. 370 U.S. 49, 54 (1962).
31. *Id.* at 54.
32. *Id.* at 50.
33. *Id.*
34. *Id.* at 55.
35. *Id.* at 54.
36. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
37. *Id.* at 55.
38. In re Gault, 387 U.S. 1 (1967).
39. *Id.* at 4.

petitioner argued that the Arizona juvenile code was facially invalid because it denied defendants the right to notice of charges, the right to counsel, the right to confrontation and cross-examination, the privilege against self-incrimination, and the right to full appellate review.[40] Thus, the Court was called upon to determine the impact of the Due Process Clause on juvenile delinquency proceedings.[41]

The Court held that juveniles should be afforded the right against self-incrimination[42] and the right to counsel under the federal Constitution.[43] Writing for the majority, Justice Fortas noted that the juvenile justice system had taken on a different character since the early 1900s. His opinion described the meaning of *parens patriae* as "murky" and "its historic credentials of dubious relevance."[44] The Court cited sociological studies for the proposition that "the appearance as well as the actuality of fairness, impartiality and orderliness – in short, the essentials of due process – may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[45] In the Court's holding, it affirmed that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise."[46]

Though holding that juveniles can waive their privilege against self-incrimina-

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40. *Id.* at 10.

41. *Id.* at 13-14. *Gault* expressly limited the scope of its inquiry to adjudicatory proceedings, not pre-adjudicatory or post-adjudicatory stages of the delinquency proceeding. *See id.* at 13 ("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.") (internal citations omitted); *see also id.* at 78 (Stewart, J., dissenting) (expressing fear that the majority's holding converts a juvenile proceeding into a criminal prosecution).

Notwithstanding contrary language in *Gault*, statutes and subsequent case law have interpreted *Gault*'s holding to apply *Miranda* to juvenile pre-adjudicatory custodial interrogations. David T. Huang, Note, *"Less Unequal Footing": State Courts' Per Se Rules For Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 444 n. 46 (2001). Such legislation and case law have relied on the following language in *Gault*:

> It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. . . . [I]t is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

In re Gault, 387 U.S. 1, 47-49 (1967).

42. *Gault*, 387 U.S. at 55. *Gault* made the Fifth Amendment right against self-incrimination applicable to juveniles, and as a result made the protections of *Miranda* applicable to juveniles. Accordingly, any waiver of *Miranda* rights by a juvenile must be knowingly, voluntarily and intelligently made. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

43. *Gault*, 387 U.S. at 36. *See generally id.* at 34-36, 38-42 (discussing the historical development, scholarly commentary, and reasoning behind the Court's determination that the Constitution requires the right to counsel in juvenile proceedings).

44. *Id.* at 16.

45. *Id.* at 26. In discussing the effectiveness of the juvenile court, Justice Fortas stated: "[History] has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Id.* at 18.

46. *Id.* at 20.

tion, the Court stressed the importance of establishing additional protections for juveniles subject to police interrogations.[47] In *Gault*, neither the juvenile nor his parents were advised that the juvenile had a right not to speak to police or that an incriminating statement may be used against him in a juvenile proceeding.[48] Following *Haley* and *Gallegos*, the Court adopted a cautionary approach toward evaluating the reliability of juvenile confessions[49] and turned a skeptical eye on their purported 'therapeutic' value.[50] Indeed, the *Gault* court suggested that when a juvenile, acting on an authority figure's assurance of benevolent purpose, confesses and is subsequently severely punished, the juvenile is likely to feel betrayed and resistant toward the rehabilitation process.[51]

III. CURRENT APPROACHES TO ASSESSING THE VALIDITY OF A *MIRANDA* WAIVER

In the wake of *Gault*, courts employ one of two tests to determine the validity of a juvenile's waiver of his *Miranda* rights: the totality of the circumstances approach or the per se approach.[52] Recognizing that juveniles merit added protections not afforded adults in the interrogation setting, courts either require a review of all the circumstances surrounding the waiver or they require certain procedural safeguards to be met before validating the juvenile's waiver. Under either test, the opportunity for the juvenile and the adult advisor (parent, guardian or lawyer) to consult prior to the interrogation is seen as an additional protection not afforded adults.[53]

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47. *See id.* at 55. The Court elaborated:

> If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair.

Id. (internal citations omitted).

48. *Id.* at 43-44.

49. *See id.* at 45 ("This Court has emphasized that admissions and confessions of juveniles require special caution.").

50. *Id.* at 51.

51. In re Gault, 387 U.S. 1, 51-52 (1967) ("[T]he child may well feel that he has been tricked into confession.").

52. A small minority of states employ what has been termed a "two-tier" model. Under this model, the age of the juvenile determines whether a court evaluates the waiver's validity according to the totality of the circumstances or the per se test. *See, e.g.*, MONT. CODE ANN. § 41-5-331 (2003) (requiring an effective waiver by a youth under sixteen years of age be made with the agreement of the youth's parent, guardian, or with advice of counsel). *See generally* Kimberly Larson, Note, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 648 (2003) (explaining "two-tiered" approach).

53. *See In re* Gault, 387 U.S. 1 (1967); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948); Commonwealth v. A Juvenile, 449 N.E.2d 654, 656 (1983). *But see* Yarborough v. Alvarado, 124 S.Ct. 2140 (2004) (holding that the age of a suspect is not a factor to consider in the context of a Miranda custody determination).

A. The Totality of the Circumstances Approach

The federal courts and the majority of state courts employ the totality of the circumstances approach.[54] Under this test, the presence or absence of a parent, guardian or lawyer prior to a juvenile's waiver of his *Miranda* rights is but one factor in determining whether the waiver was knowingly, voluntarily, and intelligently made. Additional factors include the juvenile's age, intelligence, background, experience, education, mental capacity, physical condition at the time of the questioning, and any abuse by the police.[55] As the consensus amongst judges, prosecutors, and law enforcement officers is that the presence of an adult prior to and during interrogation is an added protection for a juvenile suspect, it follows that this presence will be given great weight by a court employing the totality of the circumstances test to determine a waiver's validity. In other words, a court may determine that what a juvenile lacks in maturity or intelligence is compensated for by the presence of his parent or guardian during the interrogation.[56]

In the landmark case *Fare v. Michael C.*, the U.S. Supreme Court adopted the totality of the circumstances test as a means of determining the validity of a juvenile's waiver, and laid out the factors which courts may consider in making this inquiry.[57] In *Fare*, a sixteen-year-old suspect with prior arrests was taken into custody on suspicion of murder.[58] After being fully advised of his *Miranda* rights, the juvenile requested to speak with his probation officer.[59] The police denied his request, and the juvenile subsequently made self-incriminating statements.[60]

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54. Alabama, Alaska, Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, and Wyoming are among the states that employ the totality of the circumstances test. Andy Clark, Comment, *"Interested Adults" with Conflicts of Interest at Juvenile Interrogations: Applying the Close Relationship Standard of Emotional Distress*, 68 U. CHI. L. REV. 903, 910 n.51 (2001).

55. *See* Fare v. Michael C., 442 U.S. 707, 725 (1979) ("[Totality of circumstances inquiry] includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him.").

56. Several state supreme courts have commented on the great weight given to the presence or absence of a parent in determining the validity of a juvenile's waiver. *See, e.g.*, *State v. Presha*, *748 A.2d 1108, 1110* (N.J. 2000) ("[C]ourts should consider the absence of a parent or legal guardian from the interrogation area as a *highly significant fact* when determining whether the state has demonstrated that a juvenile's waiver of rights was knowing, intelligent, and voluntary.") (emphasis added); Commonwealth v. Jones, 328 A.2d 828, 831 (Pa. 1974) ("*An important factor*, therefore, is whether the juvenile had access to the advice of a parent, attorney, or other adult who was primarily interested in his welfare, before making a decision to waive constitutional rights.") (emphasis added). Though a court will stop short of explicitly giving per se weight to the presence or absence of a parent, it may nonetheless recognize that this factor weighs heavier in the totality of the circumstances analysis than do other factors. *See, e.g.*, State v. Barnaby, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997) ("While parental protection is of *great importance* in affecting the totality of the circumstances involved, our courts have not held that a parent's absence makes a resulting statement illegal per se.") (internal citations omitted) (emphasis added).

57. 442 U.S. 707, 725 (1979).

58. *Id.* at 710.

59. *Id.*

60. *Id.*

The Court found that the juvenile's request for his probation officer was not an invocation of his Fifth Amendment right to remain silent or to have counsel present.[61] Writing for a plurality of the Court, Justice Blackmun emphasized that a probation officer, as an employee of the state, has an inherent conflict of interest, rendering him an inappropriate advisor for the juvenile.[62] In addition to noting this conflict of interest, the Court reflected on a probation officer's inability to fill the role of an attorney:

> A probation officer is not in the same posture with regard to either the accused or the system of justice as a whole. Often he is not trained in the law, and so is not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before the police and courts.[63]

The *Fare* Court reasoned that there are virtually an infinite number of factors that affect a waiver's validity, and that the totality of the circumstances test allows for sufficient "flexibility" to take into account "those special concerns that are present when young persons . . . are involved."[64]

B. The Per Se Approach

A minority of the states responded to *Fare* by putting in place, via case law and legislation, certain additional procedural "safeguards" which must be adhered to in order for statements made by a juvenile during interrogation to be admissible.[65] Grouped under the umbrella term of the "per se approach," these requirements range from mandating the presence of counsel during the interrogation of a juvenile under thirteen years of age, to mandating the presence of a parent or guardian who has been apprised of the juvenile's *Miranda* rights and is capable of knowingly and intelligently waiving these rights on the juvenile's behalf.[66] As will

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61. *Id.* at 727-28.

62. *See id.* at 720 ("In most cases, the probation officer is duty bound to report wrongdoing by the juvenile when it comes to his attention, even if by communication from the juvenile himself.").

63. Fare v. Michael C., 442 U.S. 707, 719 (1979).

64. *Id.* at 725.

65. Colorado, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Montana, North Carolina, Oklahoma, and West Virginia are among the states that employ some version of the per se approach. *See* Clark, *supra* note 54, at 912 n.60.

66. *See, e.g.*, COLO. REV. STAT. § 19-2-511 (2002) (limiting the admissibility of statements made by a juvenile suspect to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); CONN. GEN. STAT. § 46b-137 (2003) (limiting the admissibility of statements or a confession made by a juvenile suspect to those made in the presence of a parent or guardian after both juvenile and adult have been apprised of the juvenile's *Miranda* rights); 705 ILL. COMP. STAT. 405/5-170 (2003) (requiring that a juvenile under thirteen years of age suspected of murder or sexual assault be represented by counsel during custodial interrogation); N.D. CENT. CODE § 27-20-26 (1991) (requiring that a juvenile be represented by a parent, guardian, or counsel during custodial interrogation). The Vermont Supreme Court has indicated that a juvenile must consult with an interested adult who is not a member of law enforcement before making a waiver, and the

be discussed in more detail below,[67] the criteria that courts use to evaluate an adult's capacity to serve as a juvenile's advisor during interrogation appear to vary; an "interested adult" in one jurisdiction may not qualify as such in another. Some jurisdictions refer to the rule mandating the presence of an adult as the "interested adult rule."[68] Broadly speaking, the aim of these criteria seems to be an assurance that the adult is capable of advising the juvenile of the costs and benefits of a waiver and that the adult is interested in the juvenile's welfare.[69]

IV. POTENTIAL ISSUES WITH PARENTS/GUARDIANS SERVING AS ADVISORS IN THE PRE-INTERROGATION SETTING

In the most significant study relating to juveniles and Fifth Amendment waiver to date, Dr. Thomas Grisso concluded that juveniles do not adequately understand *Miranda* warnings.[70] Dr. Grisso's study measured whether the subject understood the words and phrases of the *Miranda* warnings and whether the subject accurately perceived the function and significance of the rights conveyed in the warnings.[71] The study revealed that the majority of juveniles under the age of fifteen are not able to understand their right to silence and counsel.[72] According to the study, the *Miranda* right most commonly misunderstood by juveniles was the right to consult

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adult must be apprised of the juvenile's *Miranda* rights. *See In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982). In Indiana, a juvenile's *Miranda* rights may only be waived (1) by counsel if the juvenile knowingly and voluntarily joins in the waiver; (2) by a parent or guardian if that person knowingly and voluntarily makes the waiver, that person has no "adverse interest," and the juvenile knowingly and voluntarily joins the waiver; or (3) by the juvenile if the juvenile knowingly and voluntarily makes the waiver and has been legally emancipated. *See* IND. CODE § 31-32-5-1 (1998). In Massachusetts, a juvenile under 14 years of age must be afforded the opportunity to confer with a parent or guardian before making the waiver. *A Juvenile*, 449 N.E.2d at 657. A juvenile over 14 years of age must consult with a parent or guardian unless he is found to be highly intelligent. *Id.* In Kansas, a juvenile under 14 years of age must consult with a parent, guardian, or counsel during custodial interrogation in order for subsequent statements made by the juvenile to be admissible. *In re* B.M.B., 955 P.2d 1302, 1312-13 (Kan. 1998).

67. *See* discussion *infra* Part IV.A.

68. A recent survey of case law revealed that this term of art has been employed by courts in many jurisdictions, including Louisiana (State v. Fernandez, 712 So.2d 485, 488 (La. 1998)); Massachusetts (Commonwealth v. Alfonso A., 780 N.E.2d 1244, 1254 (Mass. 2003)); New Hampshire (State v. Farrell, 766 A.2d 1057, 1061 (N.H. 2001)); Pennsylvania (Commonwealth v. Harvey, 812 A.2d 1190, 1199 (Pa. 2002)); Rhode Island (State v. Campbell, 691 A.2d 564, 567 (R.I. 1997)); Tennessee (State v. Callahan, 979 S.W.2d 577, 583 (Tenn. 1998)); and Vermont (State v. Mears, 749 A.2d 600, 604 (Vt. 2000)).

69. However, there is not a well-defined set of criteria courts can employ in making such a determination. For instance, should the adult have the juvenile's best *legal* interest in mind, or some other "best interest"? *See* discussion *infra* Part IV.C.

70. *See* Grisso, *supra* note 4, at 1153. A Canadian study of juvenile comprehension of warnings revealed results consistent with Dr. Grisso's study. *See* Rona Abramovitch et al., *Young Persons' Comprehension of Waivers in Criminal Proceedings*, CANADIAN J. OF CRIMINOLOGY 309, 320 (1993) ("[I]t seems likely that many if not most juveniles who are asked by the police to waive their rights do not have sufficient understanding to be competant to waive them."). However, the Grisso study remains the preeminent authority regarding juvenile comprehension of *Miranda*.

71. Grisso, *supra* note 4, at 1143.

72. *See id* at 1152 ("[J]uveniles younger than 15 years of age failed to meet both the absolute and relative (adult) standards for adequate comprehension of their *Miranda* rights.").

an attorney before interrogation and to have an attorney present during interrogation.[73] Dr. Grisso concluded that most juveniles' comprehension of the *Miranda* rights is insufficient to intelligently and knowingly waive these rights.[74]

There are inherent problems in the current regime of evaluating juvenile Fifth Amendment waivers that exacerbate the concerns highlighted by Dr. Grisso's findings. First, courts employ a standardless approach in determining the appropriateness of a given lay advisor. Second, parents, who most often act as the juvenile's lay advisor, lack an adequate understanding of *Miranda* rights.[75] Finally, conflicts of interest existing between the juvenile and parent/guardian undermine the efficacy of relying on the same relationship to insure the juvenile's Fifth Amendment rights.

A. The Standardless Approach With Which Courts Determine the Appropriateness of the Lay Advisor

One problem with the way courts currently assess the appropriateness of the layperson advisor is the lack of criteria defining what constitutes an appropriate or adequate parent/guardian advisor. The lack of criteria leaves discretion to the judge to apply his or her own view of appropriate parental advice, resulting in vast disparity among the judiciary as to what constitutes an appropriate adult advisor. For example, one court commended a parent's statement to her child to "tell the truth or I'll clobber you" while at the police station; the court deemed the statement not coercive primarily because it came from someone responsible for the moral upbringing of the child.[76] Another court found a woman, the sister of one of the murder victims and also the aunt of the juvenile defendant, was an adequate advisor to the juvenile because there was no outward expression of animosity between aunt and juvenile, and because during questioning, when it became evident that the juvenile was involved in the murder of the advisor's sister, the aunt continued to express a willingness to act on the juvenile's behalf.[77] The court rejected the arguments that the police were required to determine whether the aunt could provide the necessary advice regardless of conflicting interests and that the aunt's presence was psychologically coercive.[78] The juvenile was convicted of first-degree murder for the premeditated killings of his mother, father and sister.[79]

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73. Of those surveyed, 44.8% of juveniles gave inadequate descriptions of this warning. *Id.* at 1154.

74. *See id.* at 1153.

75. *See supra* Part III.B.

76. Anglin v. State, 259 So. 2d 752 (Fla. Dist. Ct. App. 1972).

77. Commonwealth v. McCra, 694 N.E.2d 849, 853 (Mass. 1998).

78. *Id.* at 853; *see also* Commonwealth v. Alfonso A., 780 N.E.2d 1244, 1253 n.8 (Mass. 2003) ("We have not required that the adult be completely free of conflicting loyalties or tensions."). In *Alfonso A.*, the court went on to note that, "[I]f, however, the adult is 'actually antagonistic' to the juvenile, the adult does not qualify as an 'interested adult.'" *Id.* All the reported Massachusetts cases considering the "interested adult" standard have involved relatives. *See* Commonwealth v. Alfonso A., 758 N.E.2d 1070, 1081 (Mass. App. Ct. 2001).

79. *McCra*, 694 N.E.2d at 850.

Despite the popularity of the totality of the circumstances test, some have argued that it grants the courts "virtually unfettered discretion" in evaluating the validity of juvenile waivers – and that in practice this discretion is almost always exercised to sustain questionable waivers.[80] Even a defendant's youth and immaturity, coupled with an IQ level that indicates sub-normal intelligence, are not always sufficient to invalidate the waiver.[81] A survey of juvenile cases in Florida, a totality of the circumstances jurisdiction, revealed that judges overwhelmingly upheld the validity of juveniles' *Miranda* waivers.[82] In a totality jurisdiction, particularly because parental/guardian presence is not mandated, the fact that a parent consulted privately with the juvenile before he waived his *Miranda* rights is interpreted as affording the juvenile additional protections that may mitigate another evaluative factor such as the juvenile's IQ or physical condition.[83]

Though states which have adopted a per se approach to evaluate the validity of a juvenile's waiver have ostensibly done so to provide greater protection to juvenile suspects, the perceived virtues of such an approach are rarely borne out. In Massachusetts, for instance, a juvenile under fourteen years of age must only be *afforded the opportunity* to consult with a parent or guardian regarding the juvenile's rights; actual consultation is not required for the waiver to be valid.[84] Thus, though Massachusetts courts employ a per se approach for juveniles under 14 years of age, this "requirement" does not guarantee a certain level and quality of consultation between a juvenile and his parent or guardian.

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80. *See* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 7, at 113 ("Without clear-cut rules to protect children who lack the maturity or knowledge of adults, the totality approach leaves judges' discretion virtually unlimited and unreviewable. When judges actually apply the test, they exclude only the most egregiously obtained confessions and then only on a haphazard basis."); *see also* Grisso, *supra* note 4, at 1137 (stating that the totality approach allows for minimal interference with police investigation while considering all factors related to the juvenile and the interrogation); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing A Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996).

81. *See* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 7, at 131-32 n.36-39.

82. Elizabeth J. Maykut, *Who is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. R. 1345, 1359 n.107 (1994).

83. *See* discussion *supra* note 56.

84. *See* Commonwealth v. A Juvenile (No.1), 449 N.E.2d 654, 657 (Mass. 1983) ("We conclude that, for the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and *had the opportunity* to explain his rights to the juvenile. . . .") (emphasis added); *see also* Commonwealth v. Ward, 590 N.E.2d 173, 174 (Mass. 1992) (holding that a minor's right to meaningful consultation with an interested adult does not require that police expressly inform the minor and adult they may confer in private). But see *Alfonso A.*, for a different view:

> The very purpose of our rules pertaining to the opportunity for consultation with an adult is because "most juveniles do not understand the significance and protective function of these rights even when they are read the standard Miranda warnings," they "frequently lack the capacity to appreciate the consequences of their actions," and the opportunity for consultation with an adult "prevent[s] the warnings from becoming merely a ritualistic recitation wherein the effect of actual comprehension by the juvenile is ignored."

780 N.E.2d at 1252-53 (quoting A Juvenile (No. 1), 449 N.E.2d at 656). If the juvenile needs to assert his rights in order to obtain the benefit of any consultation with an adult, the purpose behind the requirement is nullified.

Without a clear set of guidelines as to who constitutes an inappropriate advisor for the juvenile, the ad hoc nature in which courts wrestle with this issue will persist.

B. Parents Themselves Do Not Adequately Understand Miranda *Rights*

Dr. Grisso's study – discussed above – also revealed that a significant number of adults do not understand at least one of the four *Miranda* warnings.[85] Although the primary purpose of Grisso's study was to measure juveniles' capacity to comprehend *Miranda* warnings, two separate sample groups of adults were compiled for the purpose of comparing adult comprehension to that of the subject juveniles.[86] Only 42.3% of the adults expressed an adequate understanding of each of the four warnings when asked to paraphrase each warning.[87] As significant, 23.1% of the adults expressed inadequate understanding of at least one of the four warnings.[88] These statistics, combined with earlier statistics detailing parental attitudes toward juveniles' rights in an interrogation, challenge the assumed competence and appropriateness of parents serving as advisors.

C. Parents/Guardians Have Conflicts of Interest

Despite case law and empirical data suggesting that parental advice may at times be contrary to legal advice, parents are nonetheless permitted – arguably, encouraged – to serve as advisors to children in pre-interrogation settings.[89] One can surmise that there are three primary reasons why courts have allowed parents rather than lawyers to act as advisors to juveniles in pre-interrogation settings: (1) the long-standing legal presumption in favor of parental autonomy in relation to decisions affecting a child; (2) the *parens patrie* origin of the juvenile court; and (3) efficiency, *i.e.*, the provision to juveniles of protection without reducing the number of confessions obtained during the investigation of crimes. Courts have condoned a parent's encouragement of a child to cooperate with the police and a parent's willingness to act as a juvenile's advisor, despite apparent conflicts of interest.

Unfortunately for courts and, ultimately, juveniles, no clear standards exist for determining when a conflict of interest exists between an adult advisor and a

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85. *See* Grisso, *supra* note 4, at 1154.

86. The adult sample groups were comprised of one ex-offender group and one non-offender group. Each group was demographically diverse by race, class, age, and gender. One group consisted of 203 parolees residing in halfway houses immediately following release from jail or prison. The non-offender group was comprised of fifty-seven volunteers from custodial services and university and hospital maintenance crews. *See id.* at 1150.

87. *See id.* at 1153.

88. *See id.* at 1154.

89. *See* discussion *supra* Part I.

juvenile suspect.[90] Open questions, such as what constitutes a conflict of interest, and from whose perspective that conflict of interest is to be judged, persist.[91] Codes of professional conduct may be instructive when considering a standard by which courts can evaluate the appropriateness of an adult's competency to advise in the pre-interrogation context. The *Model Rules of Professional Conduct* [hereinafter *Model Rules*] offer perhaps the most useful guidepost because of the similarities between the lawyer-client relationship and the types of conflicts arising between the parent advisor and the juvenile.[92] This is not to say that the *Model Rules* are applicable whenever there is a corresponding situation between parents and children. The lawyer-client relationship is a professional relationship and the parent-child relationship a personal one. Nonetheless, courts are assessing the adequacy of a parent or guardian as advisor to a juvenile without any set standards for what constitutes an adequate and appropriate advisor. The *Model Rules* provide a useful set of standards concerning conflicts of interest, as well as an explanation for why representation is prohibited under such circumstances.

Analogizing to the *Model Rules*, which bar lawyers from representation, may illustrate how a conflict of interest can compromise decision-making in the best legal interests of the child. If professional rules prohibit lawyers from advising clients in such situations, one can certainly question how allowing parents to serve as the sole advisor to the juvenile assists the aim of providing more protection for the suspect juvenile. In other words, where there has been a waiver by the juvenile, and a parent or guardian has consulted with the juvenile concerning the waiver, the court should examine whether a conflict of interest exists according to the same standards it would use had a lawyer been providing the consultation and there was a challenge to the competency of that lawyer. The *Model Rules* expound on the different types of conflicts of interest, such as third-party conflicts of interest, personal conflicts of interest, and financial conflicts of interest.[93] These same conflicts arise in the parent-child advisor context. Applying a consistent set of criteria, such as the *Model Rules*, will reduce the potential conflicts that go unrecognized because the court will consider all relevant facts pertaining to the relationship between advisor and child.

1. Third-Party Conflicts of Interest

Perhaps the most familiar type of conflict of interest is the third-party conflict. Under *Model Rules* Rule 1.7, a lawyer has a third-party conflict of interest if "the representation of one client will be directly adverse to another client" or "there is a

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90. In broad terms, a conflict of interest may be defined as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." BLACK'S LAW DICTIONARY 128 (2d pocket ed. 2001).

91. *See generally* Clark, *supra* note 54.

92. *See generally* MODEL RULES OF PROF'L CONDUCT (2002). Other examples of professional rules regulating conflicts of interest regarding professionals include corporate directors and shareholders, doctors and patients.

93. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7.

significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."[94] When serving as a juvenile's advisor, an adult may have a conflict of interest arising from her responsibilities to or relationship with a third party. As the case law and empirical examples show, a wide range of factual scenarios in the advisory context may give rise to what can be generally termed a third-party conflict of interest.

First, and perhaps most obvious, the adult may have a relationship – be it familial, sexual, or otherwise – with another suspect in the investigation. For example, in *Matter of Steven William T.*, the juvenile's guardian, who was present when he confessed to his involvement in a murder, allegedly maintained a sexual relationship with the other suspect; also present at the confession was the juvenile's estranged biological mother.[95] The court found that both adults failed to be sufficiently interested in the juvenile's welfare, and, therefore, that neither the defendant's biological mother nor his guardian were in a position to give him the advice or protection contemplated by the statute.[96] Nonetheless, the court suggested that authorities cannot be expected to inquire into the nature of the relationship between guardian and child.[97] Where interrogators have knowledge of a conflict they are admonished to inquire further, but when no conflict is apparent law enforcement cannot be held to such a heavy burden.[98]

Alternatively – or perhaps additionally, depending on the factual situation – the adult may have a relationship with the victim or victims of the crime. In these

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94. MODEL RULES OF PROF'L CONDUCT R. 1.7. Notwithstanding a concurrent conflict of interest, a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the affected client, the representation is not prohibited by law, the representation does not involve a claim by one client against another client represented by the lawyer in the same litigation or other proceeding, and the affected client gives informed consent in writing. *See id.*

95. 499 S.E.2d 876, 886 (W. Va. 1997). The juvenile confessed to authorities in the presence of his biological mother, whom he had not seen for four years prior to the murder, and a woman who purported to be his legal guardian. The latter allegedly maintained an intimate relationship with the other suspect in the murder, and Steven claimed that she "pressured him into confessing" in order to protect the other suspect. *Id.*

96. *See id.* at 886.

97. *See id.*

98. *See id.* Similarly, the Massachusetts Supreme Court has declared that when a juvenile claims the adult has a conflict of interest, the facts must be examined from the perspective of the interviewing officials:

> If, at the time of interrogation (as assessed by objective standards), it should have been reasonably apparent to the officials questioning a juvenile that the adult who was present on his or her behalf . . . was actually antagonistic toward the juvenile, a finding would be warranted that the juvenile has not been assisted by an interested adult.

Commonwealth v. Phillip S., 611 N.E.2d 226, 231 (Mass. 1993) (discussing Commonwealth v. Berry, 570 N.E.2d 1004 (Mass. 1991)). This approach will not reveal many instances where a potent conflict of interest exists because many conflicts may not surface in the presence of the investigating officers. *But see Berry*, 570 N.E.2d at 1007-08 (finding that a father who evicted his son from the home following an altercation only twelve hours prior to the interrogation was an appropriate advisor to the juvenile as there were no objective indications of continuing animosity between father and son).

situations, the adult may operate, consciously or subconsciously, as more of a fact-finder or inquisitor in order to determine how her loved one was harmed. Despite this apparent conflict, courts have repeatedly upheld the convictions of juvenile suspects when relatives of the victims served as adult advisors.[99] For example, in *Commonwealth v. Hunter*, a Pennsylvania court refused to conclude that the juvenile's mother had a per se conflict of interest because her stepmother was the victim of the rape of which the juvenile was accused, stating, "[The juvenile] failed to establish . . . that his mother and step-grandmother had the kind of relationship that would have resulted in a conflict of interest. . . ."[100]

2. *Personal Conflicts of Interest*

Another familiar conflict of interest arises from one's personal interests. In addition to regulating third-party conflicts, *Model Rules* Rule 1.7 precludes a lawyer from representing a client if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[101] When a parent, guardian or any other adult charged with the responsibility of the moral development of a child serves as the advisor to that juvenile suspect, the risk of a conflict arising from the adult's personal interests seems strong.[102] In this context, the lines may become so blurred that it is difficult to determine when the adult has a personal interest that conflicts with her role as advisor, and when she has a personal interest that strengthens or does not affect this role.

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99. *See, e.g.*, *McCra*, 694 N.E.2d at 853. The Massachusetts Supreme Court upheld the conviction of a fifteen-year-old defendant for the murders of his mother, father, and sister. The court found that the defendant's aunt acted as an "interested adult" during his questioning, and it stated that "[t]here is no merit to the defendant's argument that the police were first required to determine whether his aunt could 'provide the defendant with the necessary advice regardless of any conflicting interests.'" *Id.* at 852 n.3; *see also* State v. Whisenant, 711 N.E.2d 1016, 1023-24 (Ohio Ct. App. 1998) (rejecting a fifteen-year-old defendant's claim that his father, who acted as his advisor during initial questioning by authorities, had a conflict of interest because the murder victim was his father's live-in girlfriend).

100. 554 A.2d 112, 118 (Pa. Super. Ct. 1989).

101. MODEL RULES OF PROF'L CONDUCT R. 1.7.

102. For example, consider a parent who wishes to teach her child to respect authority and to always tell the truth. As a result of these parenting goals, she may advise her child to take a course of action during interrogation that is not in the child's best legal interest. The child, believing his parent to be the best judge of what constitutes the "right" course of action, may make a decision that is not in fact in his best interest. Though there have been numerous cases in which adult advisors have urged juveniles to tell the truth to authorities, courts have been reluctant to examine whether the adults who offered this advice had an underlying conflict of interest. For example, see *Philip S.*:

> We reject the notion that a parent who fails to tell a child not to speak to interviewing officials, who advises the child to tell the truth, or who fails to seek legal assistance immediately is a disinterested parent. Our interested adult rule . . . is not violated because a parent fails to provide what, in hindsight and from a legal perspective, might have been optimum advice.

611 N.E.2d at 231; *see also In re* C.P., 411 A.2d 643, 645 (D.C. 1980) (noting that the juvenile suspect's mother repeatedly urged him to tell the truth about what happened "because he was in serious trouble"); Anglin v. State, 259 So. 2d 752, 752 (Fla. Dist. Ct. App. 1972) (noting that juvenile suspect's mother told him to tell "the truth").

There are some scenarios that may be easily characterized as personal conflicts of interest. For example, the adult advisor may believe herself to be, or may actually be, a suspect. In the context of an investigation, there may be no stronger personal interest than the interest in maintaining one's own innocence.[103] In *Little v. Arkansas*, the juvenile suspect's mother had been questioned earlier by police and believed that she herself was a suspect.[104] The juvenile and her mother spent between ten and fifteen minutes alone in the stationhouse.[105] When the mother and daughter emerged from their private consultation, the mother told police that her daughter wanted to confess.[106] The juvenile then waived her Fifth Amendment rights.[107] The Arkansas Supreme Court held that the mother was an appropriate advisor to the juvenile.[108]

Further, the adult may have an interest in learning whether the juvenile committed the crime of which he is accused, especially when she is the juvenile's parent or guardian. Though similar to the third-party conflict of interest in which the adult has a relationship with the victim, this situation may be distinguished on the ground that the adult is functioning as a fact-finder or inquisitor for her own interest in the truth. This interest may take the form of pleadings or urgings with the juvenile to tell the truth to authorities.[109] The adult's urgings may have strong moral reasons,[110] but may not be in the best legal interest of the child. Here, it may

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103. *See generally* Little v. Arkansas, 554 S.W.2d 312 (Ark. 1977).

104. *See id.* at 314-15.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id* at 319. The U.S. Supreme Court denied certiorari. *See* Little v. Arkansas, 554 S.W.2d 312 (Ark. 1977), *cert. denied*, 435 U.S. 957 (1978). In a vigorous dissent decrying the Court's refusal to resolve the question of whether a juvenile is entitled to competent advice, free from significant conflicts of interests, before waiving her constitutional right to remain silent and consult an attorney, Justice Marshall argued that the juvenile's waiver is questionable given that "the parent has two obvious conflicts of interest, one arising from the possibility that the parent herself is a suspect, and the other from the fact that she is 'advising' the person accused of killing her spouse." *Id.* at 960 (Marshall, J., dissenting).

109. *See, e.g.*, *A Juvenile*, 449 N.E.2d at 655. A father brought two sons, ages twelve and thirteen, suspected of robbery, to speak to the investigating detective. *See id.* Prior to the waiver of *Miranda*, the suspects' father was very upset about the evidence linking his sons to the crime and urged the juveniles to "tell [the authorities] what they knew." *Id.* The defendant subsequently confessed and was sentenced to the Department of Youth Services. *See id.* Another example of parental encouragement to be truthful with police can be found in *Philip S.* 611 N.E.2d at 229. During the questioning of a twelve-year-old suspected of arson and manslaughter, the juvenile's mother repeatedly "encouraged the juvenile to tell the truth." *Id.* At one point during the questioning, the juvenile became angry and ran out of the room. On her own volition, the juvenile's mother located the juvenile and brought him back to the interview room to continue the questioning. *See id.* A final example can be found in *Anglin v. State*, 259 So. 2d 752 (Fla. Dist. App. 1972), where the court, expressing tacit approval of the adult advisor's threat that the juvenile should tell the truth or she would "clobber him," stated that "[t]he moral upbringing of . . . a useful citizen necessarily encompasses advice by a parent for the child to be truthful. The motherly concern of [the juvenile's] parent for her offspring and at the same time her concern for the basic precepts of morality are to be commended." *Id.* at 752.

110. *See* discussion *infra* Part VI.

be impossible to tell whether the adult is urging the juvenile to tell the truth because she believes it to be in his best interest.

The most personal conflicts of interest are likely to arise from motivations that are less apparent than the interest in maintaining one's own innocence or determining whether or not the juvenile committed the crime. One example of this is the adult who has an interest in the juvenile being removed from her physical custody. The adult advisor and juvenile suspect may have a history of violent confrontations, and the adult may feel safer if the juvenile is kept in police custody. In *Commonwealth v. Berry*, the juvenile and his father had been involved in an altercation the evening before the father was called to the stationhouse to serve as his son's advisor.[111] Arguably, the father had a conflicting interest in ensuring that the juvenile did not return to his custody. Despite this possible conflict of interest, the Massachusetts Supreme Judicial Court upheld the juvenile's waiver of his *Miranda* rights in the presence of his father as valid.[112]

Finally, the adult may be overwhelmed by feelings of confusion and concern. Though difficult to quantify and perhaps not rising to the level of a conflict of interest per se, these feelings may prevent the adult from providing the juvenile with effective advice, or they may prompt her to advise the juvenile to tell the authorities everything he knows in hopes the situation will "just go away."[113] Courts have nonetheless repeatedly upheld the validity of juvenile confessions in the presence of parents who were visibly upset or stunned at the charges.[114] Courts have appeared reluctant to ferret out the meaning of the adult's emotional state. For example, in *Commonwealth v. Laudenberger*, a Pennsylvania court rejected a juvenile's claim that his mother's emotions prevented her from providing effective advice, stating that, "The fact that [the juvenile's] mother was upset with him is as indicative of concern as it is of disinterest."[115]

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111. Commonwealth v. Berry, 570 N.E.2d 1004, 1005-06 (Mass. 1991). As a result of the altercation, the father forcibly ejected the juvenile from the family home. *Id.* at 1005. When the juvenile returned home the next morning, his father telephoned the police. *Id.* The father filed a complaint with police claiming that the juvenile had threatened his life; the juvenile was later arrested. *Id.* While the juvenile was in custody, the police came to believe that he had been involved in an unrelated robbery and murder. *See id.* at 1006. The juvenile's father came to the stationhouse, where he and the juvenile were read the *Miranda* warning. *Id.* The juvenile subsequently confessed to his involvement in the robbery and murder. *Id.*

112. Commonwealth v. Berry, 570 N.E.2d 1004, 1008 (Mass. 1991).

113. According to one study that examined hypothetical adjudication and disposition decisions by judges, probation officers, and court service workers, those juveniles who admitted to having committed the crime were prosecuted for more serious offenses than those juveniles who denied committing the crime. *See* R. Barry Ruback & Paula J. Vardaman, *Decision Making in Delinquency Cases: The Role of Race and Juveniles' Admission/Denial of Crime*, 21 LAW AND HUM. BEHAV. 47, 65 (1997). As important, the admit/deny variable was not significantly related to the disposition juveniles received. *Id.* This suggests that cooperation was not a mitigating factor.

114. *See, e.g.*, Commonwealth v. Phillip S., 611 N.E.2d 226, 231 (Mass. 1993) (stating that the juvenile's mother "became upset at times over his behavior and responses"); *Berry*, 570 N.E.2d at 1006 (noting that the juvenile's father later claimed to be "in a daze" and "out of it" during the interrogation).

115. 715 A.2d 1156, 1159 (Pa. Super. Ct. 1998).

3. Financial Conflicts of Interest

One of the perhaps less familiar conflicts of interest arises from the financial interests that are at stake for an adult when a juvenile in her care is suspected of a crime. Under *Model Rules* Rule 1.8(f), a lawyer may not accept financial compensation from any party other than the client unless certain specifications are met: the client must give informed consent, the compensation must not interfere with the lawyer's professional judgment, and client's information must be protected.[116] Under *Model Rules* Rule 1.8(i), a lawyer may not "acquire a proprietary interest in the cause of action or subject matter of litigation" except that the lawyer may acquire a lien in order to secure his fees or expenses, or he may contract with the client for a contingency fee in a civil case.[117] Though not precisely analogous to the financial conflicts of interest covered by these rules, a layperson adult may have similar interests at stake when providing advice to a juvenile suspect.[118]

When the adult who serves as the juvenile's advisor is financially responsible for his care, the adult may be consciously or subconsciously influenced by the potential financial repercussions of the juvenile's behavior during the investigation. For example, the adult may be concerned about the costs of providing the juvenile with an attorney.[119] Many states have statutes in place that require a parent or guardian to reimburse the state for any attorney's fees incurred in connection with the representation of a juvenile.[120] Cooperating fully with the police – with the supposed guarantee that cooperation (or even confession) "will make it all go much easier" may seem like the most financially sound option, both to the adult

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116. MODEL RULES OF PROF'L CONDUCT R. 1.8(f).

117. MODEL RULES OF PROF'L CONDUCT R. 1.8(i).

118. *See generally* Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1844-47 (1996) (discussing the conflicts that potentially arise between a juvenile, the juvenile's parent, and the juvenile's attorney in securing representation for a juvenile).

119. A publication by the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) recommends that, when determining appropriate fees for representation of a juvenile, a lawyer may take the resources of the parent(s) into account. JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 71-72 (Robert E. Shepherd, Jr. ed., 1996). However, if the attorney believes a conflict of interest exists between the parent and child, the lawyer should reconsider the fee taking into account the juvenile's resources alone. *Id.* The IJA/ABA publication does not specifically explore the possibility of the fee itself creating a conflict of interest between the parent and child.

120. *See, e.g.*, CAL. PENAL CODE § 987.4 (West 2004) (allowing a court to order "the parent or guardian of [a] minor to reimburse the [state] for all or any part of such expense, if it determines that the parent or guardian has the ability to pay such expense"); COLO. REV. ST. § 19-2-706(2)(b) (2002) (mandating that the state seek reimbursement for the cost of an appointed counsel for a juvenile defendant where the parents refused to retain counsel); MD. CODE ANN. art. 27A, § 7(h)(ii) (2003) (allowing the state to collect from the "parents, guardian, or custodian of the minor . . . an amount that the parents, guardian, or custodian may reasonably be able to pay" in cases where the court is exercising other than criminal jurisdiction); N.H. REV. STAT. ANN. § 604-A:9(I-a) (2003) (permitting the state to collect the cost of providing a public defender to a juvenile from the juvenile defendant or the person liable for the juvenile's support commensurate with present or future ability to pay).

and even to the juvenile.[121]

Though there is very little case law squarely on this issue, one can imagine the frequency with which financial concerns affect the decision to cooperate with the police. Arguably, the adult has a financial interest at stake in every phase of the investigation, from the interrogation of the juvenile to conviction and sentencing. As previously mentioned, the adult may be concerned with the costs associated with providing the juvenile with an attorney. She may also have such "real world" concerns such as whether she will be able to miss work or arrange for care of her other children if the case is eventually taken to court.[122] Finally, she may be cognizant of the possible financial burdens in the event that the sentence includes counseling, special schooling, or other potentially expensive rehabilitative measures.[123]

Arguably, conflicting interests are inherent in the lay advisor-juvenile suspect relationship. An adult who is close enough to the juvenile to act as his advisor will almost certainly have some combination of third-party, personal, and financial interests at stake in the outcome of the investigation. Under the current system, the question is: When do these potentially conflicting interests rise to the level of a disallowable conflict of interest? As the preceding sections have attempted to demonstrate, the adult may have a conflict of interest that is analogous to those barred by the *Model Rules*. Given the wide range of potential conflicts and the strong possibility that they will arise but go undetected – by authorities, juveniles, courts, and even the adults themselves – perhaps the question is not how the adult advisor framework works but whether it is workable at all.

V. TWO CIVIL ANALOGUES: ABORTION AND PATERNITY

Unfortunately for every party involved in juvenile investigations – adult advisors, juvenile suspects, authorities, and courts – the standards to be applied to these situations are far from clear. The questions of whether an "interested adult" can be too interested – or, put differently, inappropriately interested – and from whose perspective this is to be judged remain ambiguous. We may gain some perspective on how such standards should be applied by looking at two examples that derive from the recognition that, when a minor's constitutional right is at

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121. For an analysis of the effects of reimbursement statutes on juvenile defendants, see In re *Ricky H.*, 468 P.2d 204, 211 (Cal. 1970) (en banc) (holding that a juvenile should not be permitted to waive his right to appointed counsel in order to prevent his father from owing money to the state under the California reimbursement statute).

122. Many jurisdictions require the presence of a parent of guardian at every court appearance in a delinquency proceeding. *See, e.g.*, N.H. REV. STAT. ANN. § 169-B:7 (2003) ("After a legally sufficient petition has been filed, the court shall issue a summons to be served personally . . . at the usual place of abode of the person having custody or control of the minor . . . requiring that person to appear with the minor at a specified place and time . . . .").

123. *See, e.g.*, N.H. REV. STAT. ANN. § 169-B:40 (requiring parents or legal guardians to partially reimburse the state for the cost of rehabilitative services).

stake, minors should receive "adult-like rights," whereby they can make decisions without the consent of their parents and be independently represented by counsel.[124] In both the abortion and paternity contexts, courts have recognized the divergent interests that may exist between parent and child, allowing for an independent third party, such as a guardian ad litem or a lawyer to assist the minor in decision-making without finding the parent unfit.[125]

A. Abortion: The Judicial Bypass Mechanism

The emotional and time-sensitive nature of the abortion decision can be compared to the waiver decision in a pre-interrogation setting. Both decisions implicate fundamental constitutional interests. Both affect familial relations. The tension between trying to preserve a parent's right to raise her own child while simultaneously protecting constitutional rights is similar in both contexts.

The U.S. Supreme Court has declared unconstitutional state statutes that require a mature pregnant minor to obtain parental consent before having an abortion.[126] If a state requires a minor to consult with a parent before deciding to terminate her pregnancy, the state must offer the minor a judicial bypass option if she chooses not to involve a parent.[127] The states vary as to the means by which the minor may obtain this judicial bypass; specific measures adopted include creation of a statutory right to counsel and to the appointment of a guardian ad litem, and authorization by a physician.[128]

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124. Lawyers who represent parents have no professional obligation to act upon the child's wishes; their only professional obligation is to their client (the parent). *See* Ross, *supra* note 8, at 1583.

125. Other contexts that require representation for the child include allegations of abuse and neglect, termination of parental rights, custody and contested major medical procedures. *See generally id.* at 1575.

126. Bellotti v. Baird, 443 U.S. 622, 651 (1979) (finding that a Massachusetts statute requiring a mature, unemancipated minor to obtain parental consent or judicial approval after notification of her parents unconstitutionally burdened the minor's right to seek an abortion).

127. *See id.* at 647 ("[U]nder state regulation . . . every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents.").

128. *See, e.g.*, MASS. GEN. LAWS ch. 112, § 12S (2003):

> A pregnant woman less than eighteen years of age may participate in proceedings in the superior court department of the trial court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

Id.; *see also* OHIO REV. CODE ANN. § 2151.85(B)(2) (West 2003) ("The court shall appoint a guardian ad litem to protect the interests of the complainant at the hearing that is held pursuant to this section. If the complainant has not retained an attorney, the court shall appoint an attorney to represent her."); PA. CONS. STAT. § 3206(e) (2002):

> The pregnant woman may participate in proceedings in the court on her own behalf and the court may appoint a guardian ad litem to assist her. The court shall, however, advise her that she has a right to court appointed counsel, and shall provide her with such counsel unless she wishes to appear with private counsel or has knowingly and intelligently waived representation by counsel.

Id. For a list of state parental notification laws, see http://www.crlp.org/st_law_notification.html (last updated Nov. 10, 2003).

The Supreme Court has recognized the right of a minor to demonstrate that she is capable of deciding, without parental advice, whether or not to terminate her pregnancy or whether an abortion is in her best interests.[129] Offering a rationale for allowing a minor to pursue a court order that is potentially contrary to her parents' wishes, Justice Powell in *Bellotti* pointed to "the unique nature of the abortion decision."[130] In particular, he noted the limited time frame in which the decision must be made, and the burdensome consequences of an unwanted pregnancy, considering the mother's "probable education, employment skills, financial resources, and emotional maturity."[131]

Importantly, the Supreme Court has recognized the possibly overwhelming nature of parental influence in the abortion context. *Bellotti* rejected the parental notification requirement based in large measure on the concern that some parents may "obstruct both an abortion and their [pregnant minor's] access to court."[132] In cases where parents hold strong views on subjects such as abortion, minors, especially those dependent on parental support, are influenced by their parents' wishes, even when those wishes may not be in the minors' best interest. In his dissenting opinion in *H.L. v. Matheson*,[133] Justice Marshall noted that, "In addition to parental disappointment and disapproval, the minor may confront physical or emotional abuse, withdrawal of financial support, or actual obstruction of the abortion decision."[134] In another case involving parental notification in the abortion context, Justice Blackmun seemed to echo Marshall's point: "[B]ecause of the minor's emotional vulnerability and financial dependency on her parents, and because of the 'unique nature of the abortion decision' . . . and its consequences, a parental-notice statute is tantamount to a parental-consent statute."[135]

Implicit in the holding of *Bellotti,* and the sentiments expressed by Justices Powell and Marshall, is the recognition of potentially conflicting interests between the pregnant minor and her parents. Parents may have many personal reasons (for example moral beliefs, position in the community, and financial concerns) to try and influence their daughter to abort or to carry an infant to term.[136] As Justice Marshall has pointed out:

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129. *See Bellotti*, 443 U.S. at 643-44.

130. *Id.* at 642.

131. *Id.*

132. *Id.* at 647.

133. 450 U.S. 398 (1981).

134. *Id.* at 438-39 (Marshall, J., dissenting); *see also Bellotti*, 443 U.S. at 623 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)) ("[T]he provision requiring parental consent [must] not in fact amount to an impermissible 'absolute, and possibly arbitrary, veto.'").

135. Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 526 (1990) (Blackmun, J., dissenting) (internal citations omitted).

136. *See* Ross, *supra* note 8, at 1583 (arguing for legal representation of children in all civil matters involving essential needs of children).

> Forced notification . . . would amount to punishing the daughter for the lack of a stable and communicative family environment, when the blame for that situation lies principally, if not entirely, with the parents. Parental notification in the less-than-ideal family, therefore, would not lead to an informed decision by the minor.[137]

The interests at stake in the abortion context may be compared to those in the context of the juvenile justice system, in which the possibility of the loss of liberty exists. One's decision to waive the right to remain silent can be the watershed moment in cinching a conviction or exposing oneself to prosecution for more serious offenses.[138] Furthermore, the moral and reputation-based concerns that may lead to a divergence of opinion between parents and child are likely to be as significant in the context of juvenile crime as in the abortion context.[139]

The recognition of divergent parental and child interests is notably absent in the interrogation context. Despite the *parens patrie* origin of both family law and juvenile law, courts and legislatures have been slow to repudiate the presumption that parents always act in the best interests of the child.[140] Perhaps the potential for denial of a minor's fundamental right to choose to terminate a pregnancy is more glaring than the potential for denial of fundamental rights in the interrogation context. As some of the decisions discussed in this Article illustrate, telling a child to "tell the truth," as opposed to refusing to consent to the termination of a pregnancy, plainly invites fewer objections from the courts. It remains, however, that in both instances, important constitutional interests are at stake.

Of course, this is not to deny that there are parents who lack conflicting interests and who have the capacity to offer their children sound advice on whether to terminate a pregnancy or speak to the police. Nonetheless, as this Article has discussed, there are many situations that are rife with the potential for conflict, that produce decisions with detrimental consequences for kids, and that evade judicial review. A tacit assumption in the abortion context is that counsel will assist minors in making informed choices. By providing juveniles with lawyers to advise them regarding the waiver of the right to remain silent, the number of uninformed, involuntary waivers that result in the admissibility of harmful statements will be reduced. Consequently, the provision of counsel for minors in the judicial bypass situation should provide strong support for the required presence of a lawyer at a juvenile's pre-waiver consultation.

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137. Hodgson v. Minnesota, 497 U.S. 417, 469-70 (1990) (Marshall, J., dissenting).

138. *See* Ruback & Vardaman, *supra* note 113.

139. *See* discussion *supra* Part IV.

140. *See* Troxel v. Granville, 530 U.S. 57, 70 (2000) (according "special weight" to a fit parent's decision regarding matters of child's visitation with other family members). There are other contexts in which states do not provide children with a statutory right to counsel in contested circumstances, such as detention of children for status offenses (e.g., incorrigibility, runaway, failure to attend school) and commitment to a psychiatric facility. *See* Ross, *supra* note 8, at 1579-80.

B. Paternity

The paternity context also provides a useful analogy, because it once again demonstrates that in situations of "constitutional dimension," courts recognize potential conflicts of interest between parent and child, and have not been reluctant to provide the juvenile an independent third party, such as a guardian ad litem, to represent the interests of the child. In several states, a guardian ad litem must be appointed to represent a child's interests in paternity actions.[141] Failure to appoint one may constitute reversible error.[142] Courts generally offer a two-fold rationale for providing a minor with counsel who is independent of the minor's parents. First, courts recognize that the welfare of the child is paramount in a paternity action.[143] Courts have noted that the child's interests affected by a paternity action include matters of money, familial bonds, cultural heritage, and medical care.[144] In examining the potentially lasting effects of a paternity determination, one judge stated:

> I am not warranted in ignoring the child's right to be represented or heard in a proceeding which may have a lasting bearing on the determination of his parentage. . . . Suppose the husband has a substantial estate – should there even be any tangential determination by this court that the husband is not the father of the child – and thus render it more difficult, if not impossible, for the infant in later life to obtain a just inheritance?[145]

In addition, not only is the child's relationship with his alleged father placed in question; the child's relationship with his mother "may be severely impacted by the court's paternity determination."[146]

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141. The Uniform Parentage Act, which has been adopted in several states, requires that a child be made a party to a paternity action. *See* Unif. Parentage Act, 9B. U.L.A. 287 (1973). *See generally* Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 271 (1991). Generally speaking, there are two types of paternity proceedings, one where an unmarried mother seeks to establish paternity against a putative father, most commonly for purposes of receiving child support. In this type of action the interests of mother and child are usually not adverse, and appointment of a guardian ad litem would not be needed. *See In re* Paternity of H.J.F., 634 N.E.2d 551, 553 (Ind. Ct. App. 1994). The second most common paternity proceeding involves a presumptive father seeking to retain his parental rights. In this type of proceeding a child's interests are more likely to conflict with the mother's. Some courts recognize that the potential for divergent interests requires the appointment of a guardian ad litem for the child. *See id.* at 554; *see also* Ross, *supra* note 8, and accompanying text.

142. *See, e.g., In re* Paternity of H.J.F., 634 N.E. 2d at 556; Lechner v. Whitesell by Whitesell, 811 S.W.2d 859, 861 (Mo. Ct. App. 1991).

143. *See, e.g., In re* Paternity of H.J.F., 634 N.E.2d at 553.

144. *Id.* at 555; *see also* Michael K.T. v. Tina L.T., 387 S.E.2d 866, 873 (W.Va. 1989) ("[C]hildren clearly have a right to discover who their parents are and to have support and maintenance obligations established in their favor."); Majidi v. Palmer, 530 N.E.2d 66, 70 (Ill. App. Ct. 1988) ("[T]he outcome of the paternity action by petitioner would directly affect the child's right to visitation with her father and to receive child support.")

145. *In re* Paternity of H.J.F., 634 N.E.2d at 554 (citing Melis v. Dep't of Health of City of New York, 24 N.Y.S.2d 51, 55 (N.Y. App. Div. 1940)).

146. *In re* Paternity of H.J.F., 634 N.E.2d at 556.

The second dimension of the rationale for providing a minor with counsel in a paternity action is a recognition of the potentially conflicting interests among all parties involved in the suit; underlying this recognition is usually a concern that neither of the parents may be relied upon to place the child's best interests before their own.[147] In a particularly contentious custody suit, one court observed:

> No clearer example could be found of a situation where the fact finding process is tainted by the positions of the parties. In this case, the mother obviously asserts illegitimacy to defeat the presumptive father's claim to a custodial relationship with the child. The presumptive father, on the other hand, has asserted the illegitimacy to defeat the mother's claim to maintenance, a fact acknowledged in the motion for rehearing filed by counsel when the original opinion in division was announced. *This posture of the parties demonstrates the debilitation of the fact finding process when the parties' interests are not addressed to the central issue, but relate to their own concerns and attitudes with respect to the marital situation.*[148]

The delinquency action is against the child and the right against self-incrimination belongs to the child.[149] In the interrogation context, waiving one's constitutional right to remain silent may implicate one's liberty.[150] Borrowing from the reasoning and policy rationales of the paternity cases, it would seem that a decision of this magnitude requires the presence of someone other than a parent,

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147. *See* discussion *supra* Part IV.

148. S. v. S., 595 S.W.2d 357, 361 (Mo. Ct. App. 1980) (emphasis added); *see also Majidi*, 530 N.E.2d at 70 ("Where a trial court has notice that a minor's interests are not properly represented, it is the duty of the trial court to appoint a guardian *ad litem* to safeguard and protect those interests.") (internal citations omitted). The Indiana Court of Appeals has stated:

> A child born out of wedlock who establishes paternity in a timely fashion has certain rights to inherit from the father . . . as well as certain rights to claim other economic benefits upon the death of the father. . . . These rights, in addition to the right to receive child support, are of constitutional dimensions and are entitled to protection under the equal protection clause of the United States Constitution.

Kieler v. C.A.T. by Trammel, 616 N.E.2d 34, 38 (Ind. Ct. App. 1993) (citations omitted). Similarly, one year later, in *In re* Paternity of H.J.F., they noted:

> Underlying these decisions is a policy recognizing the importance of protecting the child's interests where there exists a potential adversity of interests between the mother and child. . . . [T]hese interests may clash with the mother's interests in preserving her marriage or preventing the child's relationship with the presumptive father from being disturbed.

634 N.E.2d at 553.

149. Although the petition of delinquency may be served on the parent of the minor and/or require the parent or guardian to be present at the proceedings, the adjudication is of the child. *Gault* makes it explicit that the due process protections are afforded to the juvenile in the delinquency adjudication, including the right to remain silent and be represented by counsel; however, *Gault* also noted that the right against self-incrimination does not turn upon the type of proceeding. *In re* Gault, 387 U.S. 1, 55 (1967).

150. Depending on the statements the juvenile provides, the police may decide following the interrogation to hold the juvenile in custody pending the arraignment.

such as a lawyer, to ensure that the juvenile's interests are fully considered.[151]

As in the abortion context, courts presiding over paternity cases appear to have rejected the presumption that parents always act in the best interests of their children unless found to be "unfit." Courts in the abortion and paternity contexts recognize that divergent interests among parents and children do not necessarily cause a parent to be declared unfit. Nonetheless, because of the constitutional dimensions of the legal rights implicated, an alternative to parental decision-making on behalf of the child is deemed appropriate. These two scenarios in the family law context, both involving constitutional principles, support the argument for providing lawyers to juveniles before an interrogation without there being a requirement to find either parent unfit.

VI. PARENTING THEORY

An additional reason for providing a lawyer to serve as advisor in the pre-interrogation setting is that it actually preserves parental autonomy. Providing a lawyer in the pre-interrogation consultation accommodates the full range of parental responses to the juvenile's alleged misconduct, while avoiding irreparable legal consequences. Outside the confines of a pressure-packed interrogation room and inside the private family setting, parental responses ranging from anger to sadness, and protection to accountability, can be explored and pursued without irreparable legal consequences. Although parents may initially be at the police station with the child, it is important for the juvenile to have a private conversation with counsel. Perhaps the lawyer may even serve as a mediator between parent and child, assisting the parent in finding alternatives and resources that might mitigate the circumstances.

Commentators recognize that in instances in which state intervention already exists, the best interests of the child are paramount. In these instances, a parent's preferences, if inconsistent, yield to the best interests of the child.[152] Allowing a lawyer to serve as advisor to the juvenile only enhances the best interest of the child. The lawyer would presumably enhance the juvenile's understanding of her *Miranda* rights and represent the desires of the juvenile free of any conflicts of interest. The scheme I suggest is that the role assumed by the lawyer in this pre-adjudicatory stage be limited to the waiver decision – issues specific to parenting should continue to be reserved for the parent-child relationship. The purpose of consultation with an attorney is not to do away with law enforcement's investigative efforts, but to insure an informed and rational choice by the juvenile. This reform fulfills the spirit and admonition of *Gault*.

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151. Both guardians ad litem and defense attorneys act independently of the parents. However, a guardian ad litem acts based on what is in the best interests of the child, whereas a defense attorney is charged with acting on behalf of his client's wishes, within the bounds of the law and rules of professional conduct. *See* CAL. ST. TRIAL CT. R. 1448(D); FLA. STAT. § 61.403 (1993); 705 ILL. COMP STAT. 405/2-17 (2002).

152. *See* GOLDSTEIN ET AL., *supra* note 8.

The proposal this Article makes strengthens the sanctity of parents' right to raise their children. I recognize that the appointment of counsel for the juvenile, by inserting a third party into the parent-child decision-making process, may have a significant impact on the integrity of the family unit.[153] The law recognizes the sanctity of the parent-child relationship by reserving intervention for only the occasions that threaten the child's well-being or constitutional rights.[154] Under the proposed policy of limited state intervention, the duration of the appointment of counsel shall be limited to the period of time required to ensure that the legal interests of the child are competently represented in the interrogation setting. This proposal eliminates the Hobson's choice that a parent who acts as an advisor must make under the current system.

By serving in an advisory capacity, a parent may be forced to choose between teaching the child moral lessons and exercising the best legal option for the child. Whether the parent recognizes this or not, the advice she provides will affect the future of her relationship with the juvenile. If a parent encourages the child to remain silent in the face of the police, what message is communicated to the child about obeying authority? If a parent encourages the child to "tell the truth" and the child subsequently confesses and is incarcerated, the parent may ultimately feel that she did not protect her child in the face of adversity. In addition to questions surrounding the parent-child relationship, there may be concerns raised by the parent's view of her place relative to society as a whole. Arguably, an adult who serves as an advisor may be forced to choose between her loyalty to her child and her loyalty to the state and society as a whole.[155]

As discussed above,[156] the Supreme Court emphasized in *Fare* that a probation officer is not an adequate advisor for a juvenile suspect because a probation officer has potentially conflicting obligations to the state and the juvenile probationer.[157] As previously discussed, there is an array of conflicts that may plague a parent. Unlike probation officers and parents, whose interests may significantly diverge from those of a juvenile suspect, a lawyer has a more clearly defined role relative

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153. *See generally id.*

154. Abuse, neglect, custody, necessary medical treatment, proceedings involving abortion, paternity, and delinquency all allow intervention. This is not a question of determining what instances are sufficient for state intervention. By virtue of the detention of the juvenile and the state's interest in questioning the juvenile, "state action" is satisfied. *See* U.S. CONST. amend. V, XIV. "As Justice Marshall observed in the context of abortion, controversies between children and parents only reach the court 'where the minor and the . . . parent[s] are . . . fundamentally in conflict and the very existence of the [dispute] already has fractured the family structure.'" Ross, *supra* note 8, at 1585 (quoting Justice Marshall in *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976)). The question here is under what circumstances the law should require appointment of legal counsel to represent a child without regard to or against parents' wishes.

155. *See generally* ROSELLEN BROWN, BEFORE AND AFTER (1998).

156. *See* discussion *supra* Part III.A.

157. Fare v. Michael C., 442 U.S. 707, 720-21 (1979). For similar reasons, the parent or guardian of the juvenile is not an appropriate legal advisor.

to his advisee client, regardless of whether this client is an adult or juvenile.[158] Whereas a lawyer may be exercising good professional judgment in advising his client to remain silent during an interrogation, a probation officer or a parent may advise the child to cooperate for moral reasons; these moral reasons, though virtuous, may nonetheless be legally harmful.[159] Because communications between a juvenile and his probation officer are not confidential, the probation officer is obliged to report any wrongdoing by the juvenile that may come to his attention.[160] Similarly, a parent may be forced to disclose communications between the parent and the child, including communications that may implicate the child in a crime.[161]

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158. At this stage, it is important to distinguish between the roles of a lawyer and a guardian ad litem. They serve different purposes and have different obligations to their clients. As a result, a guardian ad litem is not a substitute for a lawyer whose duty it is to represent the child. For a discussion of the relationship between a child and a guardian ad litem, see Elizabeth Susan Graybill, *Assisting Minors Seeking Abortions in Judicial Bypass Proceedings: A Guardian Ad Litem is No Substitute for an Attorney*, 55 VAND. L. REV. 581, 585-86 (2002).

159. *See* discussion *supra* Part I. Illuminating this scenario is the nationally publicized murder case of eleven-year-old Ryan Harris. In this case, the mother of a seven-year-old boy agreed to let the police question her son. Despite forensic evidence that later excluded him as the perpetrator, the charge of murder against two boys, seven and eight years old was based largely on the confession to police. Regarding the decision to allow the police to interrogate her son, the juvenile's mother was quoted as saying "I'm trusting the police. . . . I never dreamed this would happen. It was the biggest mistake I will ever make." Maurice Possley, *Officer In Harris Case Coaxed Similar Confession in '94*, CHI. TRIB., Sept. 10, 1998, at 1.

160. *Fare*, 442 U.S. at 720.

161. The so-called 'parent-child privilege' is recognized in only a handful of states. After surveying case law on the issue of this privilege, one federal court concluded, "What case law exists does not reveal a groundswell in favor of recognizing a broad privilege. To the contrary, the vast majority of states that have considered this issue have declined to recognize a parent-child privilege, or some variation thereof, on the facts presented to them." *In re* Grand Jury Proceedings, Unemancipated Minor Child, 949 F.Supp. 1487, 1495 (E.D. Wash. 1996); *see also* State v. Good, 417 S.E.2d 643, 644-45 (S.C. 1992) (stating that neither common law nor statute permitted privilege where juvenile defendant made inculpatory statement to uncle who was serving as guardian ad litem); State v. Willoughby, 532 A.2d 1020, 1021 (Me. 1987) (holding that a privilege not to testify about communications between child and parents is not recognized); People v. Sanders 457 N.E.2d 1241, 1244-45 (Ill. 1983) (holding that no privilege between parents and child is recognized). Eight federal courts of appeals have entertained the question and refused to recognize the privilege, and the remaining courts of appeals have not addressed the issue. *See In re Grand Jury Proceedings*, 949 F.Supp. at 1495.

Only four states – Connecticut, Idaho, Minnesota, and New York – recognize the privilege in terms of protecting a parent from testifying against his child. *See id.* at 1495-96 n.13. Massachusetts recognizes the parent-child privilege insofar as juveniles are not required to testify against their parents in criminal proceedings in most circumstances; however, Massachusetts does not recognize a privilege that would protect parents from testifying against their children. *See id.* at 1495 n.13; Mass. Gen. Laws ch. 233 § 20 (2004). In the first three states, the privilege is statutory. In Connecticut, a parent or guardian "may elect or refuse to testify for or against the accused child" unless the juvenile has been charged with personal violence against the adult. CONN. GEN. STAT. ANN. § 46b-138a (West 2003). Similarly, in Idaho, a parent or guardian "shall not be forced to disclose any communication made by their minor child or ward to them concerning matters in any civil or criminal action to which such child or ward is a party" unless the case involves violence against the adult. IDAHO CODE § 9-203 (Michie 2003). Finally, in Minnesota, a parent may not be compelled to testify "as to any communication made in confidence by the minor to the minor's parent," except in certain enumerated situations. MINN. STAT. ANN. § 595.02 (West 2003). In New York, by contrast, the privilege has been recognized exclusively at common law. *See, e.g.*, *In re* Mark G., 410 N.Y.S.2d 464-65 (N.Y. 1978); *In re* A & M, 403 N.Y.S.2d 375 (N.Y. 1978). In *In re A & M*, a New York court concluded that the privilege is rooted in the state constitution's right to privacy. 403

When a child is suspected of a crime, his parent may demonstrate a range of emotions, such as fear, anger or protectiveness.[162] Parental shame or discipline is a common reaction to a socially-stigmatizing situation, such as the suspicion of culpability of one's child. Expecting parents to respond with level-headedness, reason or objectivity is unrealistic. In addition, and perhaps more importantly, this expectation represents a sort of imposition of conduct standards in an otherwise private arena.[163] Again, the adult advisor context prevents a parent from teaching her child moral lessons without imposing potentially irreparable legal consequences.

A parent should not be forced to decide between teaching a child a moral lesson and protecting them from grave legal consequences. We must recognize and provide for a separation between a child's need for a moral advisor and a child's need for a legal advocate. Adding an objective, trained professional who can deliver informed advice to the juvenile regarding his *Miranda* rights will alleviate the tension between moral advisor and legal advisor. This alternative would enable the adult to fully embody her role as a parent without state control or interference.[164] In effect, this alternative preserves a parent's "right" to protect her child

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N.Y.S.2d at 381. However, the court suggested that recognition of the privilege would be appropriate only "under some circumstances." *Id.* Accordingly, New York courts have "sparingly" recognized the parent-child privilege. *In re* Grand Jury, 103 F.3d 1140, 1148 n.15 (3d Cir. 1997). Furthermore, the privilege has not been recognized by the New York Court of Appeals; thus, the precedential value of these lower courts' recognition of the privilege is unclear. In *Fare*, the Supreme Court relied on the non-confidential nature of the communications between a probation officer and a juvenile as justification for barring an officer from serving in this advisor capacity. 442 U.S. at 720.

162. Dr. Grisso studied parental advice, reasoning and response in a hypothetical arrest situation. Grisso devised three categories for the common reasons given by parents for advising their children to comply with police requests: 1) moralistic, 2) strategic, and 3) responsibility. "Moralistic" was the most common reason given by parents who advised their children to cooperate with police. The moralistic rationale emphasized deference to authority and the belief that "honesty is the best policy." "Strategic" was the second-most common reason given by parents. Underlying the strategic rationale was the belief that cooperation would result in more lenient treatment. Finally, "responsibility" was the reason given by 20% of parents. These parents expressed the belief that their children must learn to face consequences of their actions, no matter how painful. GRISSO, *supra* note 6, at 180-181.

It should be noted that a larger percentage of parents indicated that they would advise their children not to speak with the police. However, of these parents, approximately 50% implied that they viewed silence as a temporary tactic and that they expected their children to eventually comply with police requests. *Id.* Finally, one must keep in mind that Grisso presented parents with a hypothetical arrest situation; actual parental responses may differ greatly in real-life custodial interrogation situations.

163. Consider, by contrast, states' reluctance to intrude on what have traditionally been seen as private parental spheres, such as education or medical care. *See generally* Ross, *supra* note 8, at 1583. The "right" to raise one's child as one wishes, within extremely broad parameters, would seem to imply a "right" to interact with one's child as one wishes. Short of sanctions for abuse or neglect, it seems as though the states have not imposed analogous conduct standards in the realm of the parent-child relationship.

164. Although the traditional argument against independent counsel for minors is that they would intrude upon parental sovereignty or family privacy, the fact that the state has already intervened significantly reduces the privacy concern. *See generally* Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 92 (1984). The justice system is already implicated

and a juvenile's "right" to be protected, both as a suspect with constitutionally-guaranteed *Miranda* rights and, simply, as a child.

VII. PROPOSED REFORM

Several reforms to the current scheme would provide more effective procedural safeguards and develop criteria to preserve a juvenile's right against self-incrimination in the interrogation context. These changes include a simplified juvenile rights form;[165] the appointment of a guardian ad litem for consultation in the pre-interrogation setting; and the required presence of counsel for consultation regarding *Miranda* waiver. The most protective remedy, and the one supported by juvenile rights advocates, is the requirement of counsel at the pre-interrogation consultation. The other reforms address one or possibly two of the inadequacies with the present scheme but are not likely to significantly alter the quality of consultation juveniles should receive prior to a waiver. For example, the use of a simplified *Miranda* form, constructed for differing levels of maturity, IQ and sophistication, would likely enhance comprehension on the part of some juveniles but would still be inadequate for others. More importantly, simplifying the *Miranda* form is not likely to redress the problem of the influence exerted over the child by a parent or guardian in this critical setting.

The appointment of a guardian ad litem for the juvenile in the pre-interrogation setting allows for the intervention of a third party, assumedly someone trained to offer guidance and explanation when needed to both the adult and the juvenile. The efficacy of a guardian ad litem depends largely on the expertise of the individuals chosen and the quality of training they receive. Quality control over these two variables is likely to be inconsistent from region to region, and state to state. Additionally, such a reform would require states to incur large financial responsibility for the training and monitoring of guardians ad litem. Organizations that oversee the administrative responsibility and/or the continuing educational responsibility may be subject to financial constraints and hardships that public defenders and court-appointed attorneys are less likely to face.

A second drawback to the guardian ad litem proposal is that a guardian ad litem is not bound by the same obligations and duties that apply to attorneys.[166] Guardians ad litem are appointed to act in the best interest of the child. There may be situations where the guardian finds that the course of action that is in the best interest of the juvenile is contrary to the desire of the juvenile and perhaps the best legal course of action. The obligation of the guardian ad litem falls short of what is expected from counsel for the juvenile, effectively re-creating the same predica-

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when a police investigation is underway. By assigning counsel the function of advisor in the pre-interrogation setting, the sanctity of the parenting function is, in fact, preserved.

165. New Hampshire currently uses a "juvenile rights form," which must be recited to all juveniles before they make a valid waiver. *See* State v. Benoit, 490 A.2d 295, 304 (N.H. 1985).

166. *See supra* note 158.

ment with the parent acting as the sole advisor. Third, if one is in a jurisdiction where client/guardian ad litem communications do not receive the same level of confidentiality as lawyer/client communication, guardians ad litem could not serve as advisor without seriously compromising the juvenile's right against self-incrimination.

The mandatory, non-waivable right to counsel in the pre-interrogation setting is the soundest method of ensuring that juveniles receive the constitutional protections they are entitled to. Unlike most parents, a lawyer who assumes the responsibility of representation of a detained juvenile is trained to understand the import of the *Miranda* rights and should act in the best legal interest of the juvenile. The practicality of instituting this reform measure will vary from state to state. In Illinois, the non-waivable right to counsel was adopted, albeit only guaranteeing a small proportion of juvenile suspects the proper level and quality of consultation. In July 2000, the Illinois legislature passed a statute that requires that a juvenile under thirteen years of age suspected of murder or sexual assault be represented by counsel during interrogation.[167] The inspiration for the bill arose out of several high-profile false confession cases involving juveniles in Chicago over the past decade.[168] Debate over the bill spawned recognition on the part of legislators that our juvenile justice system has become increasingly punitive. Legislators recognized that serious crimes such as sexual assault and murder were causing prosecuting attorneys to pursue adult criminal charges against accused juveniles, exposing them to greater punishment.[169] Further, the law seems to take into consideration that lawyers are better able to protect the child's legal rights than parents in an interrogation setting.[170]

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167. 705 ILL. COMP. STAT. 405/5-170 (West 2002). A survey conducted by the *Chicago Tribune* found that, of the 71 juveniles whose murder convictions were thrown out by Illinois courts or proved too questionable to net a conviction, only three would have been protected by the new law. The remaining 68 surveyed were over thirteen years of age when interrogated. Ken Armstrong et al., *Officers Ignore Laws Set up to Guard Kids: Detective Grills Minors Without Officers, Parents Present*, CHI. TRIB., Dec. 18, 2001, at 1.

168. *See* Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487-90 (2002).

169. *See id.* at 513 n.221 (citing S.B. 730, 113th Legis. Day (Ill. 2000) (comments of Rep. Scott)). Representative Scott further observed:

> [R]ecognize what we've done in the last couple years. We've made many, many juvenile court cases that used to be under the Juvenile Act now transferable to adult court. . . . [A] juvenile who confesses to these crimes may end up going to prison for the rest of his or her life.

Id.

170. In August 2001, the Juvenile Competency Commission in Chicago, comprised of child psychiatrists, police, prosecutors, defense lawyers, social workers, and others, recommended that confessions in "serious cases" be considered invalid if the juvenile did not consult with a lawyer before being questioned. The majority of the commission noted that "a parent is not an adequate substitute" for legal counsel, citing examples of parents acquiescing to police and encouraging their children to speak to police. *See* Armstrong et al., *supra* note 167. Similarly, *Gault* noted that the President's Crime Commission recommended counsel be appointed as a matter of course wherever coercive action is a possibility. 387 U.S. 1, 38 (1967) (quoting from STANDARDS FOR JUVENILE AND FAMILY COURTS).

For those states with public defender organizations, coordination and implementation may be slightly easier than for the states that provide appointment of counsel from a panel of private lawyers.[171] Nonetheless, as long as there is a constitutional right to a lawyer, court-appointed attorneys will be the essential factor that helps judges meaningfully assess whether the juvenile's decision was made knowingly, intelligently, and voluntarily.

As in all professions, there are some lawyers who will fall short of what the law and this Article expect and require of them when providing representation at this critical stage of an investigation. It is widely recognized that some juvenile defense attorneys do not perceive it as their role to provide zealous representation to a juvenile; rather they see their aim as trying to achieve for the juvenile the services necessary for rehabilitation and reform.[172] There are undoubtedly lawyers who fail to appreciate the mission of a criminal defense lawyer, particularly in juvenile delinquency proceedings. However, this failing is not exclusive to lawyers and can be remedied with proper training and support by local bar associations and juvenile rights groups. Much of the problem stems from the *parens patrie* philosophy of juvenile court judges and others working in the juvenile justice system.[173] Training lawyers to assume a stronger advocacy role in a delinquency proceeding, particularly in light of the stakes of the outcome, is not as daunting a task as trying to remedy the conflicts of interest that are borne out of having parents serve as advisors to their children during interrogation.

Proponents of stricter laws and punishment for juveniles may argue that the intervention of counsel at the interrogation stage will impede law enforcement officials' ability to investigate and solve crimes. Indeed, a byproduct of consultation with counsel may be a reduction in the number of waivers police obtain from juveniles. Nevertheless, *Miranda* and *Gault* require that juveniles receive due

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171. Public defender offices may be more equipped to coordinate an on-call system of lawyers available to go to the police station for consultation at any hour of the night. In cities and counties where public defender offices do not commence appointment until after the arraignment, such as Chicago, private non-profit organizations such as Chicago's First Defense Legal Aid (FDLA) provide representation for the duration of the pre-arraignment detention. The FDLA has two full-time attorneys and dozens of volunteer attorneys. The attorneys volunteer for twelve-hour shifts. The attorneys are not paid. People who have a family member taken into police custody call a toll-free number, which is answered by staff during the day and an answering service at night. The people at the service get the following information: name and phone number of the person calling, name of the person taken into custody, date of birth, location of arrest and/or police station they think the person was taken to. The service calls or pages the volunteer attorney and gives her the information. The volunteer attorney then calls the police station, asks if they have the person in custody, identifies herself as the person's attorney, tells the police that she is on her way and that her client should not be questioned or subject to a line-up procedure until her arrival. The attorney then goes to the police station, meets with the client, gets the client's signature on a declaration of rights and serves the declaration on the officers. The attorney will try to arrange for the client to be released or taken to court. This FDLA representation is limited to the duration of custody. Priority is given to juveniles in custody. E-mail from Cathryn Stewart Crawford, Member Advisory Board, Chicago First Defense Legal Aid (FDLA), to the author (March 3, 2004) (copy on file with American Criminal Law Review).

172. *See* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 7, at 124, 127.

173. *Id.* at 127.

process at interrogation, and if those rights are not fully realized under the present scheme, reforms to restore these constitutional rights to their intended purpose and effect are mandatory.

VII. CONCLUSION

In *Haley*, *Gallegos*, and *Gault*, the Supreme Court suggested that the presence of a parent or guardian may mitigate the potential for unchecked police pressure and ensure against false confessions from juvenile suspects.[174] In these cases, the Court asserted the proposition that the presence of one type of authority figure – a parent or guardian – would reduce the coerciveness posed by the presence of another type of authority figure – a police officer.

This argument fails to appreciate that the parent or guardian may also act with interests other than the child's best legal interests in mind, causing their presence, although a perceived virtue, to frustrate *Gault's* admonition that the "greatest care"[175] must be exercised when considering waivers made by juveniles. Summoned to the police station at any time of the day or night, an angry and distressed parent who insists that the juvenile cooperate may pose more of a tangible threat to the juvenile than a police officer who similarly tells the juvenile it is in his best interest to cooperate.[176] Alternately, a confused and embarrassed parent may be incapable of effectively advising the juvenile of the *Miranda* rights.[177] Even if well-meaning, the advice of a parent or guardian may diverge from the juvenile's best *legal* interests.[178] Finally, summoned to the police station, a clear-headed but partial parent may improperly advise the juvenile of his *Miranda* rights due to a conflict of interest.[179]

Simply put, the unchecked influence of a parent or guardian shifts the concern

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174. *See* Robert E. McGuire, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1383-85 (2000) (arguing that the presence of a parent or guardian alleviates the concern that the juvenile will be unable to assert his *Miranda* rights because the adult will ensure that the rights are sufficiently understood and freely exercised). *See generally* Raymond Chao, *Mirandizing Kids: Not As Simple as A-B-C*, 21 WHITTIER L. REV. 521 (2000) (examining the approach historically taken by courts regarding the Fifth Amendment privilege against self-incrimination as applied to juveniles and arguing that additional safeguards beyond the standard constitutional warnings are necessary).

175. *Gault*, 387 U.S. at 55.

176. *See generally* Stephen J. Blumberg & David H. Silvera, *Attributional Complexity and Cognitive Development: A Look at the Motivational and Cognitive Requirements for Attribution*, 16 SOC. COGNITION 253, 263-65 (1997); McGuire, *supra* note 174, at 1382 (stating that a juvenile, in the face of a coercive environment or demonstration of authority, is more likely to do what it appears the authority figure wishes) (quoting Blumberg & Silvera, *supra*). Police officers are trained to manipulate the juvenile's parents to help elicit a confession. *See* FRED INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 139 (3d ed. 1986) (serving as the leading interrogation manual for police academies throughout the country). For example, interrogators are taught to assure parents that no one blames them for their child's behavior. If a parent is overprotective toward the child, interrogators are advised to request that parents refrain from talking and confine their function to that of an observer. *See id.*

177. *See* Grisso, *supra* note 4, at 1152-54; *see also* discussion *supra* Part IV.B.

178. *See* GRISSO, *supra* note 6, at 175-80.

179. *See* discussion *supra* Part IV.C.

from the effect of the presence of police to the effect of the presence of the adult advisor, and it gets us no closer to an unmitigated confidence that the juvenile is fully informed of the *Miranda* rights prior to waiver. As this Article argues, the so-called "interested" adult rule, and its accompanying definition of who may qualify as "interested," may in itself present a potential violation of a juvenile's due process rights and an erosion of the very protections the Court sought to provide in *Gault*. When evaluating the appropriateness of the presence of a non-lawyer advisor during a juvenile's interrogation, recall Justice Douglas' admonition in *Haley* that "formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."[180] Ultimately, providing juveniles with a mandatory non-waivable right to counsel in the pre-interrogation setting is the surest way to insure the protections aspired to in both *Miranda* and *Gault*.

180. Haley v. Ohio, 332 U.S. 596, 601 (1948).