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Managing Parents: Navigating Parental Rights in Juvenile Cases

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Article

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In criminal and delinquency proceedings against juveniles, who determines how much or how little a child's parents participate in the case? This has much to do with the parental inclinations, of course, but the legal answer regarding the parental authority to participate resides in two distinct but related areas of law. Part of the answer to this question comes from In re Gault*, in which the Supreme Court held that minors in delinquency proceedings are guaranteed certain constitutional safeguards. This means, for instance, that children have the right to counsel. It also implies—as most scholars have since argued—that children have the right to expect their lawyers to act as their agents and to follow their directions without regard to parental directives. Another part of the answer comes from a line of cases starting with* Meyer v. Nebraska *and* Pierce v. Society of Sisters*, which held that parents have broad constitutional rights to raise and make decisions regarding their children. Whatever the doctrinal merits of these two separate threads of case law, they fail to provide a coherent vision of parental involvement or the rights of parents in the juvenile justice process.*

Gault*'s failure to account for the then well-established line of cases of* Meyer *and* Pierce*, has led to a juvenile court system in which parents have* no *decision-making authority over the juvenile delinquency process. Yet, the reality is that parents do participate in the juvenile court process. In this Article, I consider the parental role that parents and guardians play in their children's legal cases and ask whether the exclusion of parents from decision making is doctrinally and normatively sound. In considering the doctrinal question, I compare the parental role in other legal contexts and examine the applicability of the rules that courts employ to determine parental exclusion. In assessing the normative question, I weigh the existing research on the impact of parental involvement, when it occurs, to determine if parental participation yields results that are in the minor's best interest.*

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INTRODUCTION

> Ted, a teenager, is a good kid who has joined up with a bad crowd. His worried parents don't know exactly what he is up to, but one day they get a call from the police that he's been arrested for drugs. They write a letter to the court and their son's lawyer begging that he be "sentenced" to a juvenile facility where he can get drug treatment—something they can't afford.
>
> Tara, a teenager, is a good kid. She is facing aggravated battery charges for causing serious bodily injury to another child during a cafeteria riot started by other students. The charge usually involves a mandatory minimum sentence of ten years, but the prosecutor has offered a twelve-month sentence. Tara is inclined to take the offer but her parents are adamant that their daughter not have a violent felony on her record or spend any time in custody.

For lawyers and legal scholars, these scenarios raise complex legal questions. But for the lay person, these scenarios represent extraordinarily difficult parenting decisions. Yet the law doesn't recognize them as such.

They are not considered under the rubric of cases that concern the parents' constitutional rights to protect or to raise their children, but rather under the rubric of cases that address a minor's constitutional rights in a quasi-criminal context to make her own decisions regarding her case. Simply put, this Article considers why this is the case, and asks whether this approach is sound. In this Article, I consider the parental role that parents and guardians play in their children's legal cases and ask whether the exclusion of parents from decision-making is doctrinally and normatively sound. In considering the doctrinal question, I compare the parental role in other legal contexts and examine the applicability of the rules that courts employ to determine parental exclusion. In assessing the normative question,

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I weigh the existing research on the impact of parental involvement, when it occurs, to determine if parental participation yields results that are in the minor's best interest.

This Article takes us back to the legal and historical juncture during which juvenile adjudication cases were neither clearly "quasi-criminal" nor clearly family law. It identifies *In re Gault*[1] and its treatment of juvenile delinquency as a criminal case as an important point in that juncture. Without calling for a complete reversal, this Article engages in a reimagining of the juvenile court process with a more robust account of the parental role. It also examines opportunities lost and the traps avoided under the current construct. It proceeds in four parts beyond the Introduction. Part I considers the two lines of cases preceding *In re Gault* and the modern-day understanding of the juvenile court. It identifies *Gault* as an important juncture in the diminution of parental rights.

Part II provides a brief summary of the strength of the parents' constitutional claim to raise and direct the affairs of their children. I contrast this against the sometimes-competing claims of minors to direct their own affairs, particularly when their constitutional rights are implicated. I consider how the parental role in juvenile cases is analyzed differently from the parental role in other legal realms. Typically, cases involving the parent, child, and state follow a pattern—a triad of rights and liberties and privileges—that is not found in juvenile cases. I show that this is, at least in part, because the juvenile is treated like an adult and provided with a lawyer who facilitates the child's actions in ways normally reserved to the parent. I conclude that decision making in juvenile court cases is an anomaly doctrinally, not only *because* parents are excluded, but because of the *manner* in which their exclusion takes place.

Part III assesses the potential impact of parental inclusion and exclusion in juvenile cases more directly. I explore the impact of parental involvement in the context of two contemporary legal developments—one that is parent-including and one that is parent-excluding. The parent-including policy is the right of juveniles in some jurisdictions to include parents in the interrogation room. Underpinning this policy is the recognition that juveniles are vulnerable and in need of protection and guidance. I examine a practice that exemplifies parental exclusion—the continued refusal of courts and legislatures to extend the attorney-client privilege to conversations between the child, parent, and attorney. I consider how minors fare under these developments and what they reveal about the exclusion of parents generally.

In Part V, I conclude by discussing the implications for juvenile justice, parental rights, and the legal profession.

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

I. *IN RE GAULT* AND ITS PREDECESSORS: TWO LINES OF CASES

Sometimes one must look a gift horse in the mouth. This is true in life and also true in law. For thousands of children and their families, the case of *In re Gault* was such a gift horse. In 1967, when *Gault* was decided, juveniles had few articulated due process rights when confronted with delinquency charges. Gerald Gault's case provided an excellent example of the unregulated procedures in such cases and the often-unjust results they yielded.

The facts of *Gault* are well-known among students and practitioners of juvenile law. Fifteen-year-old Gerald Gault and his friend Ronald Lewis were arrested for making a prank phone call to one Mrs. Cook, a neighbor.[2] Upon receiving the call, during which the caller or callers made lewd remarks of the "irritatingly offensive, adolescent, sex variety[,]" Mrs. Cook called the police.[3] Gerald was arrested at home at around 10 a.m.[4] When his mother arrived home from work to an empty home, she sent his older brother to search for him.[5] Gerald's brother learned from friends that Gerald had been taken to the Children's Detention Home and was scheduled for a juvenile court hearing the following day.[6] That hearing, and each subsequent hearing, was held without formal notice to Gerald or to his parents.[7] Gerald was not represented by counsel, as the common understanding of juvenile proceedings at the time was that they were "nonadversarial" conferences with a family law judge who sought to determine the result that was in the best interest of the child.[8] Mrs. Cook, the victim and the complaining witness, never testified at any of the hearings and therefore Gerald had no opportunity to confront her or her statements.[9] This would have been especially important in a case where the nature and tone of the statements—as well as the identity of the caller—were critical factors (there was some dispute as to whether the caller was Gerald Gault or his friend Ron Lewis).[10] Almost none of the procedural safeguards to which Gerald would have been entitled in adult criminal court were made available to him.

Gerald would have been better off had he been charged in adult criminal court. Indeed, had an adult been charged with the same offense, he or she would have been sentenced to a maximum of a $50 fine and 60 days in jail.[11]

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[2] *Id.* at 4.
[3] *Id.*
[4] *Id.*
[5] *Id.* at 5.
[6] *Id.*
[7] *Id.*
[8] *See id.* at 78 n.1 (Stewart, J., dissenting) (discussing the type of non-adversarial juvenile proceedings that were at issue in *Gault*).
[9] *Id.* at 5–6.
[10] *Id.* at 6.
[11] *Id.* at 29.

Gerald Gault's judge, following a series of informal hearings, sentenced him to a maximum of six years in juvenile detention.[12] To add insult to injury, Gerald Gault had no statutory right to appeal his sentence or the manner in which it was determined.[13]

In a last resort habeas petition to the U.S. Supreme Court, the Court soundly rejected the juvenile court's proceedings, declaring them to be in violation of Gault's constitutional rights.[14] For Gerald Gault and juveniles like him, this was a gift horse. There was no precedent clear enough to make this result a forgone conclusion.[15] There were at least two lines of cases from which the Court could have drawn, as delinquency cases sit at the intersection of family law and criminal law.

In the context of family law, the Supreme Court had developed a parental rights jurisprudence most notably with cases such as *Meyer v. Nebraska*[16] in 1923 and *Pierce v. Society of Sisters*[17] in 1925. By the mid-1900s, it was well established that parents had constitutional liberty interests in raising and making decisions on behalf of their children. The juvenile court was initially seen as an extension of the family function, with all the informality that such an extension of that role would suggest. The juvenile court was not viewed as merely a mini-version of the criminal court. That said, by the 1960s, the Supreme Court's criminal law jurisprudence was rapidly transforming under the Warren Court. It quickly bore some influence in juvenile law. The Court's decision in *United States v. Kent*,[18] decided in 1966 just shortly before *Gault*, revealed the Court's willingness to apply criminal procedural reforms to juvenile cases. While *Kent* paved the way, *Gault*, in many ways, is the case that catapulted juvenile law into the criminal law arena. The Court's reasoning and resolution in *Gault* leads us today to view juvenile matters questions more as criminal rights questions than as children's rights questions.

A. *Delinquency Cases and Procedural Due Process Rights*

In re Gault fundamentally changed the landscape of the juvenile delinquency process. It is consistently recognized as the high point of children's rights because it opened the door to the possibility that the expansion of liberty rights recognized in adult criminal proceedings under the Warren Court would extend to the quasi-criminal context of juvenile

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[12] *Id.*

[13] *Id.* at 8.

[14] *Id.* at 59.

[15] Both the Arizona Superior Court and the Arizona Supreme Court dismissed Gault's petition on the merits before it was heard by the U.S. Supreme Court. *Id.* at 3–4.

[16] 262 U.S. 390, 402–03 (1923).

[17] 268 U.S. 510, 534–35 (1925).

[18] 383 U.S. 541, 561 (1966).

delinquency adjudications. The Court in *Gault* declared that children have procedural constitutional rights that parallel, in kind, if not degree, the rights of adult criminal defendants.[19] Without delineating the particulars of the rights guaranteed to minors, the Supreme Court held that, generally, minors are protected by the Due Process Clause of the Fourteenth Amendment in juvenile delinquency determinations.[20] Although the Court stated that the safeguards provided to adults in criminal court were highly contextual and that the full array of constitutional rights might not apply wholesale to minors, it nonetheless made plain that a delinquency "hearing must measure up to the essentials of due process and fair treatment."[21] Justice Fortas, writing for the Court, described the reform process mandated by *Gault* as the "constitutional domestication" of the juvenile courts, implying in part that the adult criminal courts had already been constitutionally domesticated.

The Supreme Court likely viewed the *Gault* decision as the natural progression of what had been taking place in criminal courts and a natural progression of procedural due process. Indeed, the constitutional domestication of the adult criminal courts had a profound impact in setting the stage for reforms in juvenile courts.[22] In individual contests throughout the country, juveniles were not always granted the same rights guaranteed to adults, but the Warren Court decisions nonetheless shaped the landscape of the debate. Juvenile courts began to consider minors' claims regarding the applicability of *Miranda* warnings,[23] *Brady* discovery,[24] jury trials,[25] plea

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[19] *Gault*, 387 U.S. at 13.

[20] *Id.*

[21] *Id.* at 30 (internal quotation marks omitted) (quoting Kent v. United States, 383 U.S. 541, 562 (1966)).

[22] *See id.* at 22 ("[T]he commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion."); *see also* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187 (1970) (recognizing that the decision led to a complete reexamination of the juvenile justice system and describing the emerging reforms as arguably the third great wave in the juvenile justice movement).

[23] *See* Miranda v. Arizona, 384 U.S. 436, 504–05 (1966) (holding that law enforcement must cease questioning when a criminal suspect requests an attorney); Fare v. Michael C., 442 U.S. 707, 727–28 (1979) (finding that a minor's request for an adult other than an attorney does not require cessation of questioning by law enforcement).

[24] *Compare* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding unconstitutional a prosecution's failure to disclose favorable material evidence upon request of defendant), *with* K.C. v. State, 92 P.3d 805, 810 (Wyo. 2004) (applying *Brady* in a juvenile delinquency adjudication).

[25] *See* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) (holding that the Sixth Amendment right to trial by jury applied to the states). *Cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 529 (1971) (holding that the Due Process Clause of the Fourteenth Amendment does not mandate jury trials in delinquency petitions).

procedures,[26] and the standard of proof[27] in juvenile courts, among other things. There can be little doubt that *Gault* and its progeny are themselves the products of the expansion of procedural constitutional rights for the accused.

B. *Delinquency Cases and Substantive Due Process Rights*

But if we see *Gault* only as a variant of the constitutional criminal procedures, we may be missing something important about what the decision failed to do. *Gault* was also positioned to be the jurisprudential inheritor of a different legal trend: the development of substantive due process rights, particularly as applied to parents' authority over their children. In other words, the *Gault* Court could have achieved the same result by arguing that the boy's parents' rights were violated by an adjudication process that rendered it impossible for them to adequately protect or make decisions for their child. The diminished and clearly secondary role of parents in the juvenile justice process that was ratified in *Gault*—and now largely taken for granted—was not preordained by precedent. Gault's parents, working-class parents who both worked outside of the home in 1964,[28] were wronged in the handling of his case. Their child was forcibly removed from their home, with neither notice nor permission, and confined for the remainder of his childhood. Gerald Gault's parents argued that these actions not only violated Gerald's rights as the accused, but that they violated their own due process rights as parents.[29] Yet their parental rights were given short shrift by the Supreme Court of Arizona in its response that even absent formal notice, "Mrs. Gault knew the exact nature of the charge."[30] While the U.S. Supreme Court ultimately found in favor of Gerald Gault, it relied largely on the due process rights to which juveniles are entitled and said vary little about the concomitant notice and process rights of their parents. In other words, the Court treated the parental rights as a collateral and secondary function of the accused juvenile's rights.

This treatment was inconsistent with the generation of cases preceding *Gault* and starting famously with *Meyer v. Nebraska*[31] and *Pierce v. Society of Sisters*[32] that give priority to parental rights over children's rights, or at

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[26] *Compare* Boykin v. Alabama, 395 U.S. 238, 242 (1969) (requiring courts to assess whether a defendant's guilty plea is free and voluntary through plea colloquy), *with In re* E.F., 862 A.2d 239, 242 (Vt. 2004) (applying *Boykin* in a juvenile proceeding).

[27] *See In re* Winship, 397 U.S. 358, 368 (1970) (defining the standard of proof in criminal cases as beyond a reasonable doubt and finding that it applied to the adjudicatory stage of the delinquency hearing, but leaving the question undecided as to other phases in the juvenile process).

[28] *In re* Gault, 387 U.S. 1, 5 (1967).

[29] *Id.* at 32.

[30] *Id.*

[31] 262 U.S. 390, 402–03 (1923).

[32] 268 U.S. 510, 534–35 (1925).

the very least view the parental rights as a means to achieve the interests of the child. In this line of cases, the Supreme Court recognized the substantive due process rights of parents and guardians to direct the upbringing of children.[33] The contemporary formulation is that parents have "a constitutional right to determine, without undue interference by the State, how best to raise, nurture, and educate the child."[34] While *Gault* paid homage to this idea by requiring soft rights for parents, such as notice of charges and proceedings,[35] it provided no robust analysis of what the parent's decision-making rights in the juvenile justice process ought to be. Although the American Parents Committee filed an amicus brief in *Gault*, it is not clear that the Court considered in any serious way the interplay between procedural constitutional rights for children and substantive constitutional rights for their parents.[36] It may be that as a strategic matter, the American Parents Committee did not want to dilute the appellants' claim for children's rights by raising the specter of unmet parental entitlements. Accordingly, the question of parental rights in *Gault*, and across the juvenile justice process system generally, has received relatively little attention in the legal literature. *Gault* did nothing to foreclose a more structured or expansive parental role, but it declined to require it. In the absence of clear guidance, the role played by parents in proceedings that can result in their children being sent to prison varies dramatically by jurisdiction and, indeed, by judge.

The Supreme Court left a void in the process by failing to account for the minor's need for parental guidance and assistance in making decisions. The Supreme Court almost certainly anticipated that parents would have *some* role in the juvenile justice process, but the Court failed to articulate a vision—either positive or normative—of what that role might be. In this Article, I undertake an examination of what greater parental involvement in juvenile court might look like. I consider the juvenile delinquency process through the lens of parental rights and the substantive due process cases that

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[33] *See id.* at 534–35 (explaining that the Constitution guarantees the "liberty of parents and guardians to direct the upbringing . . . of children under their control"); *Meyer*, 262 U.S. at 399 (listing, among other Fourteenth Amendment due process rights, the right to "establish a home and bring up children").

[34] Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (describing this formulation as a point of perhaps unanimous agreement among the justices notwithstanding their separate opinions).

[35] *Gault*, 387 U.S. at 33–34.

[36] The American Parents Committee filed an amicus brief on behalf of Appellant Gault but none of the most prominent parental rights cases of the day were cited or discussed. As amicus, American Parents Committee argued that the child, society, and presumably the family benefited from "the extension of constitutional safeguards to the juvenile process." Brief of The American Parents Committee as Amicus Curiae, *In re* Gault, 387 U.S. 1 (1967) (No. 116), 1996 WL 100789, at *25. The sponsors of the brief did not advance an argument in favor of greater parental decision-making rights in delinquency cases. Rather than arguing that parents had special insights or interests in determining a court's course of action, the brief for amicus conceded that "often the parents themsel[ves] come with an admission of failure" before the juvenile court. *Id.* at *21.

articulate those liberty interests. To do this, I consider how parental participation is managed and regulated in juvenile criminal and delinquency cases. By leaving unanswered the question of whether any particular standard or test should govern the nature and extent of parental involvement, the Court left the issue open to be determined on an ad hoc basis. To answer how that void is filled, I begin by examining how courts traditionally analyze a competition of rights between the parent, child, and state for guidance on how we might do so here. This examination reveals important differences between other parent-child-state decision-making cases and the decision making in the juvenile's case.

II. THE ABERRANT CASE: PARENTAL RIGHTS IN JUVENILE CRIME AND DELINQUENCY CASES

The juvenile case stands as an aberration to other parent-child decision-making cases in important ways. It is most commonly *against* the state that the parent's constitutional right to raise and direct the child is claimed and exercised.[37] That is to say, in case after case on parental rights, the state is the parent's primary competitor for decision-making authority over the child.[38] In the juvenile case, the parent who seeks to exercise her right to make decisions on behalf of her child must interact with the child's lawyer if there is a disagreement. The involvement of the lawyer alters the parent-child relationship and its dynamic in important ways. Although most juveniles are represented by public defenders or other state-appointed counsel, the attorney does not act "as the state." Indeed, the juvenile's attorney often opposes the state as it is embodied by the prosecutor or the judge. To suggest otherwise grossly oversimplifies the lawyer's role.[39] This

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[37] Of course, the child might also compete with parents for rights to make decisions over important matters in their lives. *See, e.g.*, Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 35–36 (2004) (discussing justification for affording children rights as related to children's development of decision-making skills).

[38] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925) (finding state requirement compelling children to attend public school unconstitutional because parents have constitutional right to choose their children's schooling under Fourteenth Amendment); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (declaring Illinois statute presuming unfitness of unwed fathers "constitutionally repugnant" for violation of protected parental rights); Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (finding unconstitutional strict application of compulsory education laws preventing Amish parents from withdrawing their children from school two years early); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that parents have constitutional right to decide on religious training and practice).

[39] It is well established that the public defender, which I take the appointed juvenile criminal attorney to be, does not act "under the color of state law" when performing traditional criminal defense functions. Polk v. Dodson, 454 U.S. 312, 318 (1981). As the *Dodson* Court further notes: "In our system a defense lawyer characteristically opposes the designated representatives of the State. The system . . . posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'" *Id.* at 318–19. The only difference

is especially true in the quasi-criminal context of judicial proceedings. Nonetheless, the characterization is fitting in important ways if we consider the lawyer's role as intermediary between parent and child. Still, the role of the state qua state is difficult to discern. In every other legal context, a child who opposes her parent's constitutional authority does so only with the state's approval. In the context of juvenile criminal defendants, the lawyer is more of a legal hired gun who facilitates the child's wishes, whether they oppose the state or the parent. And in the lawyer, the parent faces a formidable potential adversary—a trained legal professional who is usually a repeat player in the system. It is the lawyer who is complicit with the child in potentially opposing the parent's authority. The child can conspire in secrecy (based on attorney-client confidentiality) with her state-sponsored attorney to make important life-changing decisions (for instance, to accept a plea deal or go to trial) with total disregard of her parents' wishes.

Of course, not every attorney who represents children in this context is employed by the state, but most are.[40] And certainly the state sanctions the system by which the child, aided by her lawyer, can circumvent the parent and oppose her wishes. That said, the lawyer's participation accentuates the disempowerment of the parent in the juvenile law context but it doesn't create it.

The parental role in the juvenile justice case stands in stark contrast to our constitutional and societal understanding of the parent's role in other areas of their children's lives. It is well established that parents enjoy broad constitutional rights in making decisions regarding the upbringing of their minor children.[41] A principal embodiment of these rights is the ability to make decisions on behalf of their children without undue interference from the state or third parties.[42] This parental decision-making authority extends to virtually all matters, including matters of the greatest importance to the lives of their children such as education, religion, medical treatment,

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between the private attorney and the appointed attorney, according to the *Dodson* Court, is the lawyer's source of payment. *Id.*

[40] *See* JJGPS, JUVENILE DEFENSE (2017), http://www.jjgps.org/juvenile-defense (providing data that, for the few states that do report such data, in 2001, 20% of juveniles had court appointed counsel, 72.3% were represented by a public defender, and 7.6% were represented by private attorneys).

[41] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (holding that the right to teach German in schools to children at the request of their parents relates to the constitutional right recognized for parents to educate their children); *Pierce*, 268 U.S. at 534 (holding that the Fourteenth Amendment protects the liberty of parents to direct their children's education); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that the right to make parental decisions is an important liberty, but not an absolute liberty).

[42] *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2415 (1995) (arguing that parent is better positioned than state to make child-rearing decisions on behalf of child). *Cf.* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 284–90 (discussing parental rights cases and noting possible weakening state of parental rights post-*Troxel* in Court's suggestion that third-party visitation claims could succeed under certain circumstances).

nationality, residency, custody, visitation, and other social associations.

Remarkably, the story is much different in juvenile criminal and delinquency proceedings, where the parent's rights to make decisions for the child are much more limited and less well defined. Here the child, not the parent, is presumed to make her own decisions regarding the goals and important strategies in her case. The child juvenile "defendant"[43]—like the adult criminal defendant—consults with her lawyer to set the legal agenda, decides whether to concede the allegations or go to trial, whether to testify or not, and countless other decisions that arise during the course of the case. There are other instances in the law where children are granted decision-making authority over their lives without regard to parental or governmental interference (consider the abortion decision for example).[44] Yet, a comparison between these cases and the juvenile delinquency cases reveals two important anomalies from the traditional framework of decision-making authority.

The first anomaly is that the juvenile justice case does not obviously fit the child/parent versus state or the child/state versus parent triadic formulation of most juvenile cases. This anomaly is further complicated by the necessarily active role of the child's counsel in these cases, particularly with younger minors. The lawyer arguably becomes a fourth party in some cases, pressing forth her own views of the optimal outcome. The second anomaly is that the traditional measures for parental disenfranchisement used in other contexts—a declaration of parental unfitness, a finding of maturity/competence of a minor, a state's claim of parens patriae or police power—are circumvented here. Typically, a parent's decision-making authority can be overcome if there is a showing that the child, though a minor, is competent to make her own decisions or that the parent is incompetent or unfit. In the instance of juvenile adjudications, the parent's advice is legally inconsequential even if it is in the best interest of the child.

A. *Anomaly Number One: Defying the Triad*

Cases involving the rights of children or of parents are commonly described as "triadic" among family law scholars. The parent, the child, and the state—each at opposing ends of a triangle—compete for the authority to make important decisions on behalf of the child. The triads are a useful concept in analyzing who has the presumptive right of decision making and how the other two parties in the triad are involved in supporting or challenging that right. There are three formulations of the triad, each giving

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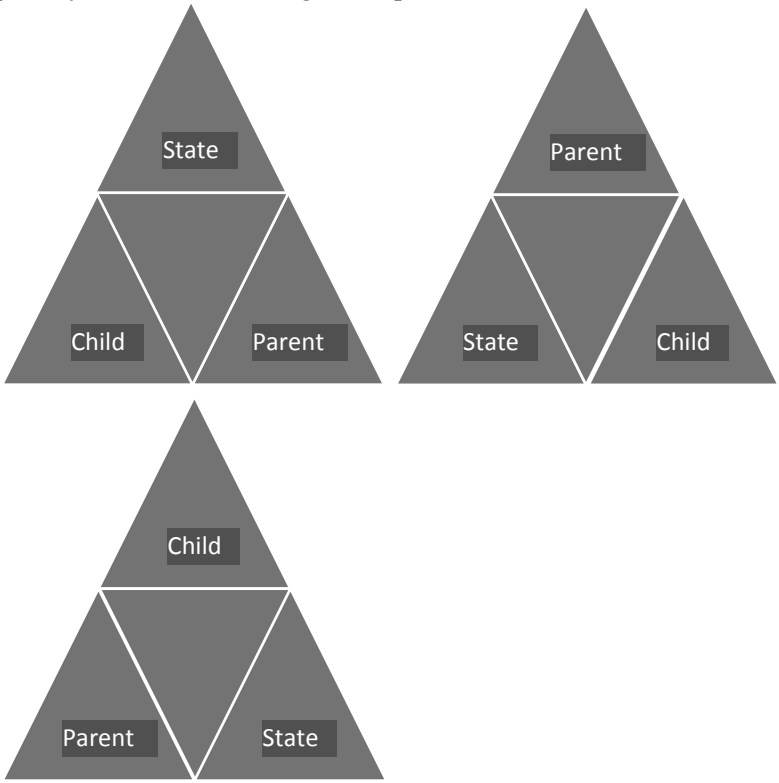
[43] I use the term "defendant" here to stress the parallels between the adult and child proceedings but the juvenile adjudication is not formally a criminal or adversarial proceeding.

[44] *See, e.g.*, Belotti v. Baird, 443 U.S. 622, 632 (1979) (holding that minor who is mature and well enough informed to make intelligently the abortion decision on her own must be authorized to act without parental consent or notification).

priority in decision making to the parent, the child, or the state.



Triad 1 (top left); Triad 2 (top right); Triad 3 (bottom left)
Figure 1

In some instances—what I will call Triad One—the state's presumptive authority is challenged by a parent, generally but not necessarily, in collaboration with the child. Residing in this category of cases might be a parent who wants to homeschool her child in contravention of state regulations that she deems onerous. The parent here argues that she has a right as a parent to make educational decisions for her child. The state may assert its own interest in protecting the child or ensuring a well-educated citizenry.

In another iteration of Triad One, a child challenges state rules permitting suspicionless searches in schools in an assertion of privacy rights. These are cases in which the child and or the parent question the state's *parens patriae* authority over the child in some particular context.

In cases characteristic of Triad Two, the parent's presumptive authority is challenged by the child (often with the state's help). Or the state (typically on its own) rejects the parent's commonly-accepted right to exert parental will over the child. Examples of such cases include medical decision

making, underage marriage, emancipation, and compulsory education. In each of these, the state or child argues that the parent's wishes are inconsistent with the child's best interest or other important public policy, and the state is asked to relieve the child of the parent's authority to control the child.

The cases represented by the configuration in Triad Three are the most unusual of all parent-child-state conflicts. These are the cases in which the state and parents join forces against the child to further restrict the child's autonomy or rights. An example might be a case in which a minor runs away from home and the parent seeks the intervention of the state to facilitate the child's return, or a case in which a parent seeks a court declaration that her child is "in need of supervision."

Although virtually all children's and parent's rights cases can be categorized into one of the three triads, the juvenile justice proceeding—and particularly the parent's role in decision making—does not fit comfortably into the traditional triad model. The juvenile defense lawyer's role in the case contributes in large part to the anomaly.

How might we consider the juvenile adjudication case under the triad model? At first blush, these cases most resemble those in Triad One. When the child faces a delinquency proceeding, the child is a party seeking to preserve her own constitutional rights or decision-making authority. In Triad One, the first category of cases, the child challenges state authority. Recall here the challenge to a locker search under the Fourth Amendment. But this view of a minor as an independent litigant asserting a constitutional right is extraordinarily unrealistic. The notion that most minors can direct their own affairs—particularly legal affairs—without adult facilitators is simply a fiction that the law does not typically indulge. When the minor asserts a right against the state, she usually does so with parental or other adult support.[45] Many, though not all, of these cases occur in the school context.[46] Although these cases involve the rights of minors (as opposed to their parents), minors typically need the help of a parent facilitator. The First Amendment case of *Tinker v. Des Moines*[47] illustrates the point. John Tinker and a group of other students were prohibited from wearing armbands to school protesting the Vietnam War.[48] Twelve-year-old John Tinker, his younger sister, and a third unrelated minor took the case to the Supreme Court. Famously stating that a child's "constitutional rights to freedom of speech or expression [does not end] at the schoolhouse gate," the Court held that the school's policy

[45] *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (providing an example where a complaint was filed by the parents of the children who were prohibited from wearing armbands to school protesting the Vietnam War).

[46] *See, e.g.*, *id.* (arising from school punishing students for wearing armbands to school protesting the Vietnam War).

[47] *Id.* at 503.

[48] *Id.* at 504.

violated the children's rights under the First Amendment.[49] Further exploration into the facts of the *Tinker* case reveals, not surprisingly, that John's parents were activists and war protestors.[50] While we could speculate about the degree of parental influence or orchestration, there is no clear evidence that they put him and his sister up to organizing the protest. Nonetheless, it is unfathomable that John Tinker could have brought a case to the United States Supreme Court without considerable assistance from a parent or other adult.[51] In an interview many years later, Tinker explained that the other children "couldn't participate in the suit because their parents had issues with their work" and feared the political and social isolation.[52] The *Tinker* case is not unusual. Children typically need adult help to defend against state overreaching or abuse. Even adults themselves face tremendous societal pressure based on the legal positions they are presumed to adopt when they facilitate legal action on behalf of their children.

We might consider the child's decision-making authority in juvenile delinquency cases under Triad Two. But this triad does not quite fit the situation either. This is the category of children's rights cases in which the child seeks to assert a liberty claim against the parent's presumed right of authority over the child. In these cases, the state or a third party often plays the role of facilitator that the parents play in the first category of cases. For example, a minor's constitutional right to an abortion, without more, does not overcome her parents' rights to make decisions on her behalf. A minor girl may not enter a family health clinic and make a decision to terminate her pregnancy without parental consent; however, the minor can obtain an abortion without the consent of her parents if a judge agrees that it is in her best interest or finds that she is sufficiently mature to decide for herself.[53]

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[49] *Id.* at 506.

[50] Joseph Russomanno, *Dissent Yesterday and Today: The* Tinker *Case and Its Legacy*, 11 COMM. L. & POL'Y 367, 378–79 (2006).

[51] John and Mary Beth Tinker would not have been able to litigate their case without the support of their parents. One scholar reminds us the three minor plaintiffs in this case "were not the only students who took part in the protests. But they are the only students whose parents were willing to take the risks associated with filing legal claims." *Id.* at 381.

[52] According to John Tinker,

> [t]he other kids that were kicked out of school didn't have support from their parents. Although they may have had moral support, they couldn't participate in the suit because their parents had issues with their own work. They believed it would harm their chances to keep their job or get promoted. We were considered to be out on very thin ice, politically and socially.

Id.

[53] *See, e.g.*, Belotti v. Baird, 443 U.S. 622, 649–50 (1979) (holding that a minor cannot be unduly burdened by the absolute requirement of parental consent or notification but that a parental bypass provision—in this case judicial consent—must be permitted).

This is oftentimes also true, for example, of the minor who refuses medical treatment against her parent's wishes,[54] seeks contraception for premarital (and, under many statutory rape statutes, per se nonconsensual) sex,[55] or wants to control her own assets. In these sorts of cases, the avenues for circumventing parental decision-making rights exist but are closely regulated.[56]

Triad Three does not seem to apply to the juvenile context either. One argument might be that the state and parent team up to discipline the child, but this bears little semblance to reality.

The juvenile justice context defies easy sorting into the conventional formula of rights competitions of child/parent-versus-state or child/state versus-parent. A legal contest between the state and the child that could result in a loss of liberty for the child is similar to the instances in which the child attempts (with parental help) to challenge the state's power (Triad One). On the other hand, the notion that a child could direct her own legal case (with the assistance of state-appointed counsel) to effectuate her own desired outcome without regard for her parent's desires presents a classic challenge to parental authority (Triad Two). The child's ability to exercise the rights guaranteed to all persons accused of crimes without intrusion from a third party is neither child/parent versus state nor child/state versus parent. Neither of the potential triads quite fit.

B. *Anomaly Number Two: Maturity and Best Interest Findings*

An examination of the parent's role in the juvenile justice case reveals a second important anomaly. Here, parental rights are undermined even when there is reason to suspect that the parent is a particularly bad decision maker, or that the child is a particularly good one. Parental rights can be overridden when a child has been adjudicated a mature minor, a parent has been legally declared unfit, or a judicial determination is made that the state's parens patriae or police power supersedes the parent's substantive due process

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[54] *See, e.g.*, Parham v. J.R., 442 U.S. 584, 603 (1979) (explaining that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized).

[55] Planned Parenthood v. Danforth, 428 U.S. 52, 104 (1976); Carey v. Population Servs., Int'l, 431 US 678, 692–93 (1977) (recognizing minors' rights to contraception).

[56] The norms against bypassing parental authority are strong. For instance, in its reluctance to apply the mature minor doctrine, the Supreme Court concluded in *Parham v. J.R.*, that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . . . Parents can and must make those judgments." 442 U.S. at 603. The Supreme Court has consistently held that the decisions of fit parents are "presumed to be in the best interest of the child." Troxel v. Granville, 530 U.S. 57, 90 (2000). When the minor lacks the competence or maturity to decide for herself, the state must determine whether a choice contrary to the parent's choice is in the child's best interest. *Id.* Children need the assistance or approval of the state to overcome the dominant notion that the parent's decisions should govern. *Id.* This is the case in nearly every legal context with the exception of juvenile justice.

rights. In these instances, the allocation of decision-making authority is determined by examining the relative ability of the decision maker. The exclusion of parents in juvenile delinquency decision making does not comport with this model. The doctrinal rationale for limiting parental involvement has nothing to do with the parent's history of making poor decisions and a great deal to do with other considerations.

Similarly, the child is presumed to control the case not because she has been found to be particularly mature or wise, but for entirely separate reasons.

Consider first the application of the "mature minor" doctrine in other parent-child-state conflicts. The developmental limitations of minors, including older adolescents, are by now well documented[57] and are often used to support claims of incompetence in decision-making cases. Still, there are exceptions. In some situations, a court can make a judicial determination that a particular minor is sufficiently mature to make competent decisions. Absent a finding of maturity, the parent is authorized to decide for the child.[58] For children who are charged with wrongdoing, there is no procedure in criminal or juvenile justice that seeks to resolve the "mature minor" question before a child, rather than her guardian, is permitted to make legal decisions on her own behalf. Children can make a series of legally-binding and life-altering choices. They can, for instance, consent to searches, make statements to law enforcement, enter pleas and admissions, agree to assist the authorities in perilous situations—all without parental input and without a judicial finding of maturity.

Being declared mature is not the only way to circumvent the parental right to direct the child's conduct. There are cases outside the criminal context in which the child lacks the maturity to bypass parental decision making but other justifications exist to reject or forego parental input. In those instances, a state actor is permitted to decide for the child but the state decision-maker is typically required to elect an outcome that is in the best interest of the child. This is in part because the state is said then to be acting in loco parentis, or in the place of the parent, and is required to decide based on the standard that all fit parents are presumed to use.

In the juvenile criminal case, while it may be true that parents are perceived as having failed in childrearing duties, there is no explicit or implicit assumption by juvenile courts that the parent is unfit or disqualified

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[57] Buss, *supra* note 37, at 41. *See also* Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process and Juvenile Justice Policy*, 83 N.C.L. REV. 793, 811–17 (2005) (discussing four spheres of development that impact decision-making capacity in minors).

[58] *See, e.g.*, Belotti, 443 U.S. at 632 (holding that minor who is mature and well enough informed to make intelligently the abortion decision on her own must be authorized to act without parental consent or notification).

to parent. The standard for unfitness is, and ought to be, extremely high,[59] as a determination of unfitness is the key determinant in the termination of parental rights. A parent is not deemed unfit merely because she has made a decision with which reasonable people might disagree or with which the state differs. Even a determination of abuse or neglect does not create a presumption of unfitness.[60] Parents are presumed to act in the best interest of their children and so if a parent is deemed unfit or unable to make best-interest determinations for the child for some other reason—as in the case of parental incapacity or legal conflict of interest—the state can provide the child with a guardian ad litem.

A guardian ad litem (GAL) serves this role in some juvenile court cases. Judicial intervention is generally required before a state actor or guardian is assigned the role of helping the accused minor make legal decisions during the course of the representation that are in the child's best interest. A guardian can be assigned at the behest of the attorney. The child's attorney can notify the court that her client lacks the capacity to assist in her defense. Alternatively, the court can consider the question of capacity on its own motion. In such cases, the court could appoint a guardian for the child. Interestingly, the appointment of a GAL does not occur as a matter of course in juvenile cases even though all juvenile cases involve minors by definition. Only a tiny fraction of juvenile justice cases involve the appointment of a GAL.[61]

The exclusion of parents from making decisions about their children in the juvenile case is not premised on the maturity of the minors. These cases, unlike others in the juvenile law area require no finding of maturity before a child is able to make decisions without regard to her parents' wishes or instructions. Nor is this system based on the implied unfitness of parents in these cases. Indeed, parents are given limited rights of notice and minimal participation in most states. Their opinions are regularly, if informally, sought by judges and their involvement is often required for temporary release, probation, or court supervision. Finally, no other adult is systematically appointed to replace the parent's decision-making role or to assist the court or defense attorney in making choices consistent with the best interest of the child.

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[59] *See* Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 678 (2002) (deducing that the Supreme Court ruling in *Santosky v. Kramer* "endorsed a high, unfitness-based standard"); *see also* Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[60] Justine A. Dunlap, Book Review, *A Review of What's Wrong with Children's Rights: Still a Slogan in Search of a Definition*, 11 U.C. DAVIS J. JUV. L. & POL'Y 181, 191 (2007) (describing the vagueness of the unfitness test generally and contrasting it with the neglect determination).

[61] Even with cases involving guardians ad litem, there is great uncertainty regarding the appropriate role of the GAL and to whom—the court or the child— the GAL owes her allegiance. *See* Margaret E. Sjostrom, *What's a GAL to Do? The Proper Role of Guardians Ad Litem in Disputed Custody and Visitation Proceedings*, 24 CHILD. LEGAL RTS. J. 2, 3–5 (2004).

C. *Reimagining the Triad: Juvenile Cases and the Parents' Role*

The assumption that the child will be in charge of her case is in many cases a convenient fiction. Yet parents have been excluded from exercising authority in these cases. To understand the diminished role of parents, one must first understand the role of a lawyer, the adult presumed to help the child. Indeed, the attorney's prominent role in the juvenile justice case and the relatively minor role for parents raise profound questions about the application of the triadic model.

The conventional wisdom today—and indeed, the position mandated by some state statutes and urged by the American Bar Association and the Institute of Judicial Administration[62]—strongly rejects the contention that juvenile defense attorneys apply the best-interest standard in representing juveniles. Lawyers are urged to treat their child clients' instructions just as they would treat the directives of adult criminal defendants, even when the lawyers believe that the outcome would not be in the child's best interest. As the argument goes, any other representational model would equate replacing the child's stated interests with the attorney's personal opinion of the child's interests.[63] While practitioners accept this interpretation of children's formal authority, the reality is that children are highly malleable clients. In other words, although all criminal defendants have the right to determine their own legal interests and the goals of their representation, attorneys play a crucial role in shaping their minor clients' stated interests. As one scholar put it, "It is also fair to assume that few children fully understand their right to assert a directive role in the attorney-client relationship. Even when there is no confusion regarding the attorney's loyalty, children are generally socialized to expect adults to make decisions for them and may defer to the lawyer by default."[64] In many cases, the lawyer is an active player in setting the goals of the representation in juvenile cases and is not merely a passive agent of the minor client. This active role makes the lawyer more than a mere agent of the child client. It adds a new angle to the case and warrants perhaps the addition of a fourth side to the traditional triad, turning it into a quadrangle.

Alternatively, we could retain the triad formulation and imagine that lawyer replaces the parent in the triad. In making decisions about the child's

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[62] *See* Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of the Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 255–59 (2005) (discussing joint standards by the ABA and IJA requiring the attorney to respect the client's determination of her own interests); *see also* Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 334–36 (2003); Robert E. Shepherd, Jr. & Sharon S. England, *I Know the Child is My Client, But Who Am I?*, 64 FORDHAM L. REV. 1917, 1935–40 (1996) (further explaining the various standards applicable to the GAL).

[63] Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U.L. REV. 76, 79–80 (1984).

[64] Henning, *supra* note 62, at 273.

case, the parent currently has no legally recognized role. The parent is involved only to the extent that the juvenile and her lawyer permit. In actuality, either the parent would partner with the child in working with the lawyer, or the parent would partner with the lawyer in advancing the representation of the child. Either way, the parent's participation is determined by others and does not occur as a matter of right, constitutional or otherwise. The displacement of the parent by the lawyer was perhaps not envisioned by the *Gault* court, but it exists nonetheless.

The problem arises because, in the words of family law scholar Martin Guggenheim, "[t]he immutable truth of childrearing is that someone has to be in charge."[65] Frequently, the only state actor feasibly positioned to make a best-interest determination on behalf of the minor is the minor's attorney. How can the lawyer's participation transform the direction of the case? The lawyer comes to the representation with a distinct perspective and the power to help implement it. Despite good intentions, the child's counsel can subordinate her client's specific wishes to the lawyers' own notions of what is good for the child.[66] These defense lawyers enter the case with their own worldviews of what is in the best interest of a child. As defense lawyers, they have particular biases and motives shaped by their training and profession.[67] These lawyers view themselves as part of the criminal defense bar rather than the children's bar and tend to view their goals in terms of protecting liberty interests of their clients. That is, they want mostly to "get the client off." In addition to their defense-attorney orientation, attorneys in juvenile cases have the characteristics of most lawyers. Lawyers generally tend to be more focused on legal rights and evidence than their lay clients.[68] They are selected and trained to be more analytical and prone to compartmentalizing.[69] Lawyers in these cases will have greater difficulty following "a best-interest standard" outcome that competes with their defense- and rights-oriented training. Even if the child client or parent seeks a "best-interest" outcome, many lawyers—with the best intentions—interpret this as a "liberty-maximizing" outcome. Essentially, lawyers have their own professionally-driven agendas.

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[65] MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 42 (2005).

[66] Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 722 (2006). *See also* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1656 (1996) (describing the grave imbalance of power between attorney and minor client).

[67] *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1201–03 (2005) (discussing empirical study on motivations and self-perceptions of criminal defense lawyers).

[68] *See* Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U.L. REV. 1337, 1411–12 (1997).

[69] Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 87 (1997).

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The limitations and safeguards on child decision-making autonomy that are well rehearsed in other legal contexts are not brought to bear in the areas of juvenile and criminal law. But for the lawyer's possible intervention, the child rises or falls on her own in making decisions about the handling of her case. The conventional rule that parents have a constitutional right to make decisions of import for their minor children (absent a showing of unfitness, conflict with the child's ability to exercise her constitutional rights, or a strong countervailing policy reason) appears to go unheeded.

Several hypotheses might explain why we disallow parental intrusion into the life-altering decisions of their children, though there are apparent anomalies. Greater judicial oversight over juvenile cases leads us to worry less about reduced parental oversight. Our commitment to providing rights to the accused adult leads us to an exaggerated conception of individual autonomy for the accused minor. Society is unconcerned with juveniles charged with crimes and uninterested in helping them acquire more adult strategies to "game" the system. Parents of juvenile delinquents are either undeserving of the broad rights over their children's upbringing or are estopped from now trying to exert control over their children's lives. But if one or more of these hypotheses is correct, the cases have so far not said so explicitly. In the end, none of these possible explanations suffices to explain the nearly wholesale disregard for the legal rights of parents in these cases.

The law's disregard in this context raises several important questions. At the outset, it is worth noting that the fact that parental decision making is not legally protected in these cases does not mean that parental participation does not occur. To the contrary, there is much evidence that parents "remain integrally involved"[70] and play a significant informal role in advising and guiding their minor children in criminal and delinquency cases.[71] But how do parents participate and under what circumstances? How and why do lawyers, given their positions of trust and power in orchestrating case-related decisions,[72] exert influence over the parental decision-making and childrearing role? Should parents be permitted a more formal role—as in other contexts—absent a finding of parental unfitness or a determination of maturity on the part of the minor?

Many of the questions are empirical and must be left for another day. Understanding how parents engage in their children's cases and how parents and lawyers interact are important empirical considerations that will contribute toward discerning the optimal parental role under the law. That is, how should the law go about determining the optimal level of

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[70] Kristin Henning, *It Takes a Lawyer To Raise a Child?: Allocating Responsibilities Among Parents, Children, and Lawyers in Delinquency Cases*, 6 NEV. L.J. 836, 837 (2006).

[71] *Id.*

[72] *See* Federle, *supra* note 65, at 1693 (discussing the power of attorneys and the powerlessness of clients and the impact on the lawyering relationship).

participation for parents in juvenile criminal proceedings? One way to get at the normative question is to consider what we know now about the impact of parental inclusion and exclusion in the instances where they occur today.

III. ASSESSING EXISTING CASES OF PARENTAL EXCLUSION AND INCLUSION

Underlying much of the attorney conduct described in this study is the contention that some parental involvement and decision making—even when parents are fit in other contexts—can endanger their children's legal cases. First, I consider whether the attorneys' stated concerns about the potential hazards of parental decision making in some cases are exaggerated. I explore the merits of their claims in part by examining two paradigmatic examples of parental inclusion and exclusion.

A. *A Case of Parental Inclusion: Parents in the Interrogation Room*

Parents do not a have a constitutional right to be present during the police interrogation of their children. However, states have taken varying approaches to the inclusion of parents in the interrogation room and this variation has created a natural experiment. In some states, law enforcement can refuse a child's request to have a parent present.[73] In some states, a child's request for a parent's presence must be honored before questioning can occur,[74] whereas in other states, a parent is permitted to make the request to confer with a child.[75] Finally, there are several states in which a child may waive the right against self-incrimination, but must do so in the presence of a parent or other interested adult.[76] Most states are silent regarding the role of parents in interrogations, and thus leave it up to local law enforcement policy or individual officers.

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[73] *See, e.g.*, *In re* Doe, 978 P.2d 684, 686 (Haw. 1999) ("[T]he plain language of HRS § 571–31(b) requires neither an opportunity for parent-child communication prior to police interrogation nor parental presence during the custodial questioning of a minor."); Moore v. State, 30 A.3d 945, 952, 954 (Md. 2011) (recognizing that the denial of parental access to a juvenile charged as an adult is only an important factor in assessing voluntariness).

[74] *See, e.g.*, *In re* Gregory S., 112 Cal. App. 3d 764, 773 (Cal. Ct. App. 1980) ("Custodial interrogation of a minor is improper following his unhonored request to see his parents.") (citation omitted). *See also* N.Y. Fam. Ct. Act §§ 305.2(3)–(4) (McKinney 2017) (requiring that a reasonable effort be made to locate parents or guardians).

[75] *See, e.g.*, M.A.C. v. Harrison County Family Ct., 566 So. 2d 472 (Miss. 1990) (holding law enforcement officials' refusal to allow juvenile's mother to be present during interrogation violated state statute). *See also* People v. Griffin, 763 N.E.2d 880, 887 (Ill. App. Ct. 2002) (holding the minor-defendant's parents had a valid interest in wishing to confer with their child before questioning that strongly weighed against a finding that defendant's statement was voluntary).

[76] *See, e.g.*, CONN. GEN. STAT. § 46b-137; COLO. REV. STAT. § 19-2-511(1); IND. CODE § 31-32-5-1; N.D. CENT. CODE § 27-20-26(1).

Miranda v. Arizona, and its mandates regarding safeguards to protect the Sixth and Fifth Amendments,[77] has raised many questions regarding the rights of the juvenile in the interrogation room. *Miranda* requires quite clearly that interrogation ceases when a custodial suspect asks for the assistance of counsel. But what happens when a minor, perhaps feeling pressured, uncomfortable, or even coerced, asks for the assistance of a trusted adult without specifically invoking the right to counsel? In *Fare v. Michael C.*, the Supreme Court provided some insight on the constitutional weight to be given a child's request for help in the interrogation room.[78] In that case, the juvenile, asked the police to speak to his probation officer and his request was denied. The petitioner argued that the statements obtained from him thereafter were done so unconstitutionally. The Court ruled that a minor's ignored request for his probation officer during interrogation did not violate the minor's Fifth and Sixth Amendment rights.[79] *Fare* held that the voluntariness of juvenile confessions should be evaluated under a "totality of the circumstances" test rather than any special rule for juveniles.[80] The Court did not address the question of whether a minor is entitled to speak with a parent or other adult before being interrogated. In light of *Fare,* it is dubious that the child is entitled to parental assistance or a parent is entitled to assist her child during questioning. Of course, *Fare* created no constitutional impediment to a parent's presence or participation either. Accordingly, the decision led to a flurry of criticism and proposals for reform at the state level. The most far-reaching proposals would require either that attorneys be provided automatically to minors prior to police questioning or, as was argued in *Fare*, that a minor's request for adult assistance be construed by law enforcement as the equivalent of a *Miranda* request for an attorney. The vast majority of states follow *Fare* in that a juvenile's waiver of rights is assessed just like an adult's waiver—based on the totality of the circumstances.[81] Age and experience are merely among the many factors considered under that test.[82]

Rule	**State**
Officer must grant juvenile's request to	AL, AR, CA, FL

[77] Miranda v. Arizona, 384 U.S. 436, 465–66 (1965).

[78] 442 U.S. 707, 709 (1978).

[79] *Id.* at 719–22.

[80] *Id.* at 725.

[81] Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of Miranda*, 48 VILL. L. REV., 629, 645–46 (2003) (detailing the states that apply *Fare* and the totality of the circumstances test).

[82] *Id.* at 646.

speak with parent[83]	
Officer must grant parent's request to speak with child[84]	MS
Officer is not required to grant parent or child's request to confer[85]	HI, OR, IL
Parent is required for juvenile to waive rights; "Interested-adult" rule[86]	CO, CT, IN, ND, OK, PA, VT
Totality of circumstances test to determine if valid waiver of juvenile rights[87]	AZ, GA, LA, MD, MI, MN, MO, NV, NH, NY, OH, RI, SC, SD, TN, UT, VA, WV, WI
A juvenile may voluntarily waive her rights without parental presence[88]	AK, DE, ME, TX

[83] ARK. CODE § 9-27-317; Carr v. State, 545 So. 2d 820, 822 (Ala. Crim. App. 1989); *In re* Anthony J., 107 Cal. App. 3d 962, 973 (Cal. Ct. App. 1980); Dowst v. State, 336 So. 2d 375, 376 (Fla. Dist. Ct. App. 1976).

[84] MISS. CODE § 43-21-151 (1972); *see also* Edmonds v. State, 955 So. 2d 787, 804 (Miss. 2007) (finding mother's removal from the interrogation violated the Youth Court Act).

[85] HAW. REV. STAT. § 571-31; *In re* Doe, 978 P.2d 684, 686 (Haw. 1999); State *ex rel.* Juvenile Dep't of Lane Cty. v. Gibson, 718 P.2d 759, 765 (Or. App. 1986); *see also* People v. Pogue, 724 N.E.2d 525, 531 (Ill. App. Ct. 1999) ("[A] juvenile has no per se right to have a parent present during questioning, or to consult with one prior to questioning . . . . Thus, the absence of a parent is one factor to consider, but is not, itself, determinative of whether the juvenile's confession should be suppressed." (citations omitted)), *appeal denied*, 744 N.E.2d 287 (Ill. 2001).

[86] CONN. GEN. STAT. § 46b-137; IND. CODE § 31-32-5-1(2); Grant v. People, 48 P.3d 543, 550 (Colo. 2002); *In re* Kevin K., 7 A.3d 898, 906 (Conn. 2010); *Ex rel.* B.S., 496 N.W.2d 31, 33 (N.D. 1993); J.D.L., Jr. v. State, 782 P.2d 1387, 1390 (Okla. Crim. App. 1989); Com. v. Williams, 475 A.2d 1283, 1285 (Pa. 1984); *In re* E. T. C., 449 A.2d 937, 939 (Vt. 1982).

[87] State v. Burrell, 697 N.W.2d 579, 592–93 (Minn. 2005); *In re* Jerrell C.J., 699 N.W.2d 110, 164 (Wis. 2005); *In re* Andre M., 88 P.3d 552, 555 (Ariz. 2004); State v. Jones, 607 S.E.2d 498, 504–05 (W. Va. 2004); *In re* Joseph B., 822 A.2d 172, 174 (R.I. 2003); State v. Rodriguez, 559 S.E.2d 435, 437 (Ga. 2002); People v. Hall, 643 N.W.2d 253, 257 (Mich. Ct. App. 2002); State v. Horse, 644 N.W.2d 211 (S.D. 2002); State v. Farrell, 766 A.2d 1057, 1061 (N.H. 2001); *In re* Goins, 738 N.E.2d 385, 388 (Ohio Ct. App. 1999); State v. Fernandez, 712 So. 2d 485, 487 (La. 1998); *In re* Phillip J., 683 N.Y.S.2d 293, 295 (N.Y. App. Div. 1998); State v. Dutchie, 969 P.2d 422, 427 (Utah 1998); State v. Barnaby, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997); Grogg v. Commonwealth, 371 S.E.2d 549, 556 (Va. Ct. App. 1988); McIntyre v. State, 526 A.2d 30, 37 (Md. 1987); Quiriconi v. State, 616 P.2d 1111, 1114 (Nev. 1980); *In re* Williams, 217 S.E.2d 719, 722 (S.C. 1975); Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

[88] State v. Jones, 55 A.3d 432, 438 n.2 (Me. 2012); Smith v. State, 918 A.2d 1144, 1150 (Del. 2007); Conner v. State, 982 S.W.2d 655, 659 (Ark. 1998); *In re* E.M.R., 55 S.W.3d 712, 726 (Tex. App. 2001).

Child under certain age cannot waive rights without consent of parent or guardian[89]	IA (16 years), KS (14 years), MA (14 years), MT (16 years), NJ (14 years), NC (14 years), NM (13 years), WA (12 years)
No relevant statute or case law identified	ID, KY, NE, WY

While most states apply *Fare*, a handful of states require authorities to allow children to speak to their parents or require an interested adult to be present before the juvenile is permitted to waive Fifth and Sixth Amendment rights. These states provide a natural experiment on the impact of parental inclusion in the juvenile justice process. From the perspective of the legal welfare of juveniles, this experiment has gone terribly wrong.

The most recent research findings on this subject echo the view that parents are generally lousy at protecting the rights of their children in the interrogation room.[90] Most parents encourage their children to confess, and indeed can be just as coercive, if not more so, than the law enforcement officers.[91] Parents, of course, are not state actors under most circumstances, which makes it harder for attorneys to challenge the coercive practices used by parents even when the parents are clearly brought in to assist the police.

Many parents are easily duped into believing that confession is in their child's best interest legally. Convincing the suspect (and/or her parents) that a full confession is the best course of action and will result in a lenient outcome is an important law enforcement strategy.[92] If law enforcement can persuade parents of this, they can then enlist parents in persuading their children. Children in turn are more likely to believe their parents than the police.[93]

Moreover, some parents likely believe that confession is in the best interest of the child from a moral standpoint. Good parents, after all, are

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[89] *See, e.g.*, IOWA CODE § 232.11; MONT. CODE § 41-5-331(2)(a); N.C. GEN. STAT. § 7B-2101; WASH. REV. CODE § 13.40.140; State v. DeAngelo M., 344 P.3d 1019, 1025 (N.M. Ct. App. 2014), *aff'd on other grounds*, 360 P.3d 1151 (N.M. 2015); State v. Presha, 748 A.2d 1108, 1115 (N.J. 2000); *In re* B.M.B, 955 P.2d 1302, 1312 (Kan. 1998); Commonwealth v. MacNeill, 502 N.E.2d 938, 941 (Mass. 1987).

[90] *See* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1291–98 (2004) (describing many ways in which a parent's presence in the interrogation room often hurts juveniles).

[91] *See id.* at 1289; *see also* Jonathan Eig, *Making Them Talk*, CHI. MAG., Jan. 1, 1999, at 50.

[92] Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Policy Interrogation*, 31 L. & PSYCHOL. REV. 53, 66 (2007).

[93] *See* Jamie L. Flexon et al., *Exploring the Dimensions of Trust in the Police Among Chicago Juveniles*, 37 J. CRIM. JUST. 180 (2009) ("Historically, research has shown that younger members of the community are less likely to trust and cooperate with police officers than older members of the community." (citation omitted)).

making parenting decisions and may seize the interrogation process as a "teaching moment" in which to instruct minors about the difference between right and wrong, the importance of honesty, and taking responsibility for one's actions. As a childrearing moment, some parents encourage their children to talk to police because "they're teaching their children to respect authority or take responsibility."[94] These are indeed important lessons and are nearly impossible to distinguish from a parent's rights to raise and discipline her child or the right to provide religious instruction. Yet parents may not understand the full implications of confessions.

Then there is the worrisome case of the parent who has a conflict of interest. The parent may be involved in the wrongdoing or seeking to protect someone else who is, for instance a co-conspirator or another child. Parents may face lawsuits or be at risk of losing state or federal benefits—such as housing, student loans, or immigration status—based on the conduct of their children.[95] This could influence the parental advice in either direction with a reduced interest on what is strictly in the child's legal interest.

Beyond all this, parents who have participated in the interrogation process may have difficulty limiting their involvement to just that process. They frequently become unwitting witnesses against their children. Even the parent who did not encourage her child to waive her constitutional rights, later serves to buttress the prosecution's argument of voluntariness.

Consider how parents might be questioned by the state regarding the procedures they witnessed during interrogation: Did we read your child his or her *Miranda* warnings? Did anyone threaten or coerce or make promises to your child? You certainly would not have stood by and watched as we mistreated your child, would you? And so forth. Law enforcement officers and prosecutors could take advantage of parental presence in these circumstances.

There is a strong argument that parent's presence in the interrogation is more harmful than it is helpful to the juvenile's legal case.[96] Except for those cases in which there is potential for physical or strong psychological coercion, the parent's role in the interrogation process does not necessarily lead to a better legal result. It is unclear if the parental presence is helpful to the child in non-legal ways. Of course, the interrogation process is frightening and stressful. It is particularly so for minors. It may be that the

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[94] THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 167 (1981).

[95] Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F.L. & SOC. CHANGE 109, 113–15 (2011); *see also* Kim Bellware, *They've Lived Their Lives As Americans, But They Can Still Be Deported*, HUFF. POST (Oct. 27, 2016), http://www.huffingtonpost.com/entry/adopted-children-deportation-adam-crapser_us_566a0cd9e4b080eddf57b949 ("Foreign-born adoptees who have green cards can work, are eligible for a driver's license and even qualify for Social Security benefits and student loans. Unlike citizens, they can be deported, even for nonviolent misdeeds.").

[96] *See generally* Farber, *supra* note 90.

parent's presence is comforting for the child, and perhaps it is in the child's best interest holistically, but the evidence that it is in the child's best *legal* interest is quite slim.

B. *A Case of Parental Exclusion*

An ongoing debate among legal scholars who study and analyze questions of juvenile representation concerns the extension of the attorney-client privilege to parents. The limited rule, as it currently exists, excludes parents from participating in privileged conversations with clients except under very limited circumstances.[97] Attorneys are required to advise their minor clients against discussing their cases with their parents or anyone else—thereby creating a potential wedge within the family or the parent-child relationship.

Although forty-five states and the federal government do not recognize a parent-child testimonial privilege, many scholars have long argued in favor of such a privilege.[98] Nonetheless, it seems that such an expansion could make the juvenile lawyer's jobs harder rather than easier. First, the existing rules provide cover for lawyers and their older teen clients to have honest discussions without the presence of the parent. One might imagine that teens would be reluctant to admit embarrassing facts to their parents, especially in sexual assault or violent cases. In those cases, attorneys could rely on the formalistic rule restricting privileged communications. The parents were told that they had to be kept in the dark in order to protect their child's legal case. Without such a rule, parents might be less willing to accept their exclusion (especially if they were paying the attorney's fees) and children might be less open with their attorneys about important facts.

But what about the argument that, absent a broader privilege, parents open themselves to having to testify against their children's interests? The reality is that there are few recorded instances in which parents are asked to testify against her child on a substantive factual matter.[99] Many recall the outrage over Independent Counsel Kenneth Star's decision to subpoena Monica Lewinsky's mother to testify regarding their mother-daughter communications.[100] The criticism of seeing "a mother being hauled" to court

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[97] Wendy Meredith Watts, *The Parent-Child Privileges: Hardly a New or Revolutionary Concept*, 28 WM. & MARY L. REV. 583, 598–99 (1987).

[98] *See generally* Hillary B. Farber, *Do You Swear to Tell the Trust, the Whole Truth, and Nothing But the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551 (2010); J. Tyson Covey, *Making Form Follow Function: Considerations in Creating and Applying a Statutory Parent-Child Privilege*, 1990 U. ILL. L. REV. 879 (1991).

[99] *See* Farber, *supra* note 98, at 555–56 (noting factors that might contribute to the scarcity of cases in which parents are subpoenaed by the opposing party to testify against minor children).

[100] 144 CONG. REC. S803 (daily ed. Feb. 23, 1998) (citing statement of Sen. Leahy: "One of the most disturbing spectacles we have seen from Mr. Starr's inquest is that of a mother being hauled before a grand jury to reveal her intimate conversations with her own daughter.").

"to reveal her intimated conversations with her own daughter"[101] were shocking in part because such a strategy is so infrequently exercised. Why? Prosecutors may be reluctant to subpoena parent witnesses who are likely to be hostile and uncontrollable on the stand. In other words, the fear about not having the privilege is likely not as realistic as many might suppose because there are very good reasons the state might not seek the forced testimony of a parent.

Finally, it is likely that in some cases, parents are needed to facilitate the attorney-child conversation. For very young or otherwise incompetent clients, most states have evidence rules that would allow for an "interpreter" or guardian to assist in difficult communications. These assistants are then covered under the attorney-client privilege.[102] However, far more common than this application of the evidentiary exception is that many attorneys appeared willing to ignore the lack of privilege in instances where they believed doing so was best for the case. Attorneys might let a parent stay in the room if the child requested it, precisely because the attorneys had little reason to believe from experience that prosecutors would discover or act upon the unprivileged communication. In this instance, the parental-exclusion rule created a default position that attorneys either abided or ignored, based on their own judgment of the inherent risks for their clients.

IMPLICATIONS AND CONCLUSION

It is widely accepted, and Courts have consistently held, that parents are presumed to act in the best interest of their children. The Due Process Clause of the Fourteenth Amendment has been interpreted to guarantee to parents the right to make decisions for their children, unless a judge or legal authority finds the parent to be unfit or there is a strong countervailing public policy concern. In the juvenile justice context, as a result of the procedural safeguards heralded by *Gault* and the post-*Gault* cases, the traditional parental role was nearly eliminated. The parties engaged in the traditional adversarial triad of children-related cases are no longer parent-child-state, but rather lawyer-child-state. The person best positioned to make and facilitate legal decisions with the juvenile may not be the child's guardian at all, but rather the child's lawyer. The case law presents a telling story of how the lawyer and parent compete for decision-making authority in the child's case in those instances in which there is disagreement regarding strategy and outcome. In addition, research studies reveal, from the attorney's perspective, the very high legal stakes involved when parents make improvident legal decisions.

The two examples discussed—allowing parents to assist in the

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[101] *Id.*

[102] Robert L. Maxwell, *The Parent-Child Privilege*, 1984 BYU L. REV. 599, 609–13 (1984).

interrogation room and allowing parents to participate in otherwise privileged conversations—buttress the claims that parental inclusion and exclusion can have serious ramifications on the child's legal case. But the binary choice between parental inclusion and exclusion is perhaps too simplistic a framework from which to consider the question of the parents' role. The question is not simply whether parents should be included or excluded, but rather who is best positioned to make that determination and under what circumstances would inclusion be preferable to exclusion. Juvenile defense attorneys currently make this determination, but do so guided by the norms of the criminal defense profession, not by the desire to address normative and legal claims of parental prerogative or the child's best interest.