

## “I AIN’T TAKIN’ NO PLEA”: THE CHALLENGES IN COUNSELING YOUNG PEOPLE FACING SERIOUS TIME

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Criminal defendants daily entrust their liberty to the skill of their lawyers. The consequences of the lawyer’s decisions fall squarely upon the defendant. There is nothing untoward in this circumstance. To the contrary, the lawyer as the defendant’s representative is at the core of our adversary process.<sup>1</sup>

### I. INTRODUCTION: A WORK IN PROGRESS

This Essay, though a published work, is more properly seen as a work in progress. It reflects my current thinking about a topic requiring constant rethinking: how to effectively counsel clients—especially young clients—facing serious charges in juvenile and criminal court. This Essay is a work in progress because client counseling is itself a work in progress—an uncertain and ever-changing landscape, depending on the case, the client, the lawyer-client relationship, and some very real external constraints. Young people are also, by definition, works in progress.<sup>2</sup> The more I think

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1. *Jones v. Estelle*, 722 F.2d 159, 165 (5th Cir. 1983).

2. This is especially true of young people’s brains. *See generally* DANIEL R. WEINBERGER ET AL., NAT’L CAMPAIGN TO PREVENT TEEN PREGNANCY, THE ADOLESCENT BRAIN: A WORK IN PROGRESS (2005); NAT’L INST. OF MENTAL HEALTH, TEENAGE BRAIN: A WORK IN PROGRESS, *available at* [www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml](http://www.nimh.nih.gov/health/publications/teenage-brain-a-work-in-progress.shtml) (last visited Dec. 4, 2007) (noting the “dynamic nature” of the teenage brain, and the delayed maturation of cognitive processing).

By “young people,” I do not mean only juveniles. Distinguishing children from adults based on age alone reflects a “crude judgment[] about psychological development and . . . policy concerns.” Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811 (2005); *see also* *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.”). When I refer to young people here, I mean adolescents and postadolescents in juvenile proceedings, transfer proceedings, and criminal court, who are still developing neurologically, intellectually, emotionally, and psychosocially. *See* Scott & Grisso, *supra*, at 811-17.

about how to effectively advise and guide young, often frightened clients, the less I seem to know.

I am particularly interested in counseling young people about the decision whether to plead guilty or go to trial in serious cases. But let me be clear, by counseling, I am not talking about grand theories about interviewing and counseling as they pertain to young people. Although this topic is important, it has been well covered by others.<sup>3</sup> I am focused instead on how to *convince* a young person to take a favorable plea rather than go to trial when the chances of prevailing are low and the stakes are high. This is something that experienced defenders do everyday. Yet, very little has been written about how we do it.

Though I had initially hoped to put forward a single, overarching strategy for how to convince young clients to cut their losses in the face of certain disaster—a brilliant, original, groundbreaking technique that would work with even the most recalcitrant youth—sadly, I will not be offering anything like that here. The problem is, no matter how much I admire a particular strategy, the client invariably gets in the way. Theories are helpful, but somehow when they rub up against hard reality things go awry. It is not just the tough clients; even relatively submissive clients require lawyerly flexibility, adaptability, and nuance. In the end, there are too many vagaries—the kind of vagaries that are endemic in law practice—for me to offer a definitive formula for effective counseling in this context.

As practicing lawyers know, interviewing and counseling are at the heart of legal representation.<sup>4</sup> This is what lawyers *do*, even trial lawyers: we talk with and advise clients. As criminal lawyers know, the decision whether to go to trial is “the most important single

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3. See generally DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004) (offering a “client-centered” model for interviewing and counseling). For a thoughtful discussion of myriad forms of client-centered representation, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369 (2006). For thoughtful discussions of the unique challenges in counseling juveniles, see Emily Buss, *The Role of Lawyers in Promoting Juveniles’ Competence as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 243, 243 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *YOUTH ON TRIAL*]; Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 *TEMP. L. REV.* 357 (2006); Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 *NOTRE DAME L. REV.* 245 (2005).

4. See Cohen & Mandelbaum, *supra* note 3, at 360 (“Effective client interviewing and counseling constitute the core of legal representation and serve as the basis for the trust and rapport that are essential to a successful attorney-client relationship.”).

decision" a client faces,<sup>5</sup> and requires wise counsel. When the decision is a close call—there is no great cost to going to trial, no clear benefit to accepting a plea, and no serious downside either way—it is easy to accede to a client's wishes. But when there is no question that going to trial will be ruinous, and the client does not understand this, it is incumbent upon the lawyer to *get through* to the client. This is especially true when the client is developmentally immature and emotionally traumatized.<sup>6</sup> Although I have been practicing criminal law for more than twenty-five years, I am still thinking about how to do this.

## II. ABOUT BENNY

Let me tell you about a recent case involving a young man I will call Benny.<sup>7</sup> When I first met him, Benny had just turned nineteen

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5. 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES: PROCEEDINGS THROUGH ARRAIGNMENT § 201 (5th ed. 1988). *See also* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1308 (1974) ("[T]he choice of plea is not a mere question of tactics; it involves the most basic of the defendant's rights.").

6. *See generally* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) (finding that the developmental immaturity of many juveniles raises competency questions); Thomas Grisso, *What We Know About Youth's Capacities as Trial Defendants*, in YOUTH ON TRIAL, *supra* note 3, at 158-59 (reviewing literature on the effects of emotion, mood, and stress on children's cognitive capacities); Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375 (2006) (arguing that emotion plays a key role in decision making). The situation is even more complicated when the young person is intellectually impaired. *See* Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 9 (2006) (noting that the IQ of youths in detention is considerably lower than in the general population, and most detained youth meet the criteria for one or more mental disorders in the diagnostic and statistic manual). Although this Essay is not specifically addressed to these impaired youth—some of whom are arguably incompetent—it hopefully has some applicability. Because courts are generally loath to find defendants incompetent based on intellectual impairment or developmental delay, especially when the crime is serious, defenders must determine how to effectively counsel these clients. For the author's account of her representation of one such client, see Abbe Smith, *Defending and Despairing: The Agony of Juvenile Defense*, 6 NEV. L. J. 1127 (2006) [hereinafter *Defending and Despairing*].

7. Benny's story is based on several actual cases. Although I have changed his name and some of the facts in order to maintain confidentiality, I acknowledge that there is an element of exploitation in sharing this kind of a story. *See generally* Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998) (discussing the use of client and student stories in clinical scholarship); Binny Miller, *Telling Stories about Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 48-52 (2000) (discussing the use of client stories, and noting that changing names and facts may not protect a client's identity). Still, I believe stories based on real cases and

and lived with his grandmother. His mother died of cancer when he was ten and his father was never in the picture. Although Benny grew up in a poor, crime-ridden neighborhood in Washington, D.C., he had managed to stay out of trouble. He had no juvenile record, and never spent time in a juvenile institution. He was arrested once when he was fifteen for being a passenger in a stolen car, but no charges were filed.

Although Benny had been a decent student, he quit high school midway through the eleventh grade. Having time on his hands proved not to be a good thing. He started hanging out with a different crowd, a wilder crowd. Soon after turning eighteen, he was arrested a number of times: (1) for possessing marijuana (he was smoking a “blunt” on a park bench); (2) shoplifting (he stole a candy bar and a bottle of after-shave); and (3) assaulting a police officer (he pushed past a plain-clothes police officer who tried to stop him at the Metro). These weren’t serious offenses, but for the first time in his life Benny found himself under court supervision.

Then things took a turn for the worse. Two days after turning nineteen, Benny was arrested and charged with armed carjacking and related charges,<sup>8</sup> and was held in jail. The allegation was that, together with another teenager, Benny had approached a forty-year-old man who had gotten into a shiny new Lexus GX 470 sport utility vehicle (SUV), and threatened to kill the man if he didn’t get out of the car and give up his keys. It was broad daylight. Neither of the young men attempted to hide their faces. One of the teenagers held what appeared to be a gun. The SUV owner complied, but also got a good enough look to be able to describe the young men in detail to the 911 operator—which is what he did as soon as the two fled in his car. It took the police less than ten minutes to spot the Lexus, pursue and apprehend the occupants, and obtain a positive identification from the car’s owner. Upon searching the vehicle, the police found a “starter pistol” (a gun that looks like a real pistol but is incapable of firing real bullets) under the driver’s seat. If this were not enough, both young men later gave incriminating statements at the police station.

The evidence was overwhelming. Nonetheless, Benny disputed the charges, offering several different accounts: (1) he had just barely

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clients are an important part of legal scholarship—something clinical scholars are uniquely positioned to contribute. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485 (2000) (telling the story of an innocent woman who spent decades in prison); Smith, *Defending and Despairing*, *supra* note 6; see also Abbe Smith, *Telling Stories and Keeping Secrets*, 8 UDC/DCSL L. REV. 255, 256 (2005) (“[W]hat makes these *client* stories, and not *lawyer* stories?”).

8. The other charges included robbery, assault, theft, unauthorized use of a vehicle, and fleeing from a law enforcement officer.

gotten into his buddy's car when the police stopped him and he knew nothing about any carjacking; (2) the complaining witness (who turned out to be a doctor who had served in the Peace Corps, and who now, in addition to having a successful private practice, volunteered one day a week at an inner-city health clinic) was a crack cocaine addict who voluntarily *gave* his friend the car because of a drug debt; and (3) it wasn't even a real gun. Although identification cases are always troubling, and all good defenders *investigate* before ruling out even outlandish defenses, nothing the client offered had the makings of a viable defense. His first two "tries" were belied by the evidence, and the third was not a defense. I had gone with an investigator to interview the complaining witness and nothing about him said "crackhead." Nothing suggested that he was either lying or mistaken.

The prosecutor offered a preindictment plea: if Benny pled guilty to a lesser charge—assault with intent to rob—all the other charges would be dismissed. Under the sentencing guidelines in effect at that time, if Benny took this plea he was looking at eighteen to sixty months.<sup>9</sup> In view of his age, relative lack of record, and his "assumption of responsibility," he had a good chance of getting a "split sentence" of prison time and probation, with the prison time in the low range of the spread.<sup>10</sup> If Benny went to trial and was convicted of armed carjacking, he was facing a possible thirty years, with a fifteen-year mandatory minimum,<sup>11</sup> and would be lucky to get no more than the mandatory minimum.<sup>12</sup> If he went to trial and was convicted of unarmed carjacking, he was facing a possible twenty-one years, with a seven-year mandatory minimum,<sup>13</sup> and would be lucky to get no more than the mandatory seven years.<sup>14</sup> The plea would be held open for a few of weeks, but not much longer.

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9. See D.C. SENT'G COMM'N, 2006 PRACTICE MANUAL: THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA VOLUNTARY SENTENCING GUIDELINES FOR PLEAS AND VERDICTS ENTERED ON AND AFTER JUNE 14, 2004 app. A-1 (2006).

10. See *id.*

11. See D.C. CODE § 22-2803(b) (2001). Although he was not subject to the mandatory minimum for having an operable pistol or firearm, he might still be convicted of committing a felony while armed. See *id.* § 22-4502.

12. Although the sentencing guidelines indicate that Benny was looking at anywhere from ninety to 180 months (seven and a half to fifteen years) for armed carjacking in view of "criminal history score," the guidelines are trumped by the fifteen-year (180 month) mandatory minimum. See *id.* § 22-2803(b)(2); D.C. SENT'G COMM'N, *supra* note 9, app. A-1.

13. See D.C. CODE § 22-2803(a).

14. Although the sentencing guidelines indicate that Benny was looking at anywhere from thirty-six to eighty-four months for unarmed carjacking in view of his criminal history score, the guidelines are trumped by the seven year (eighty-four month) mandatory minimum. See *id.* § 22-2803.

Because I believe that lawyers should give advice,<sup>15</sup> sometimes forcefully,<sup>16</sup> I proceeded to do so. I offered this advice in what I have come to regard as an increasingly “mothering style.”<sup>17</sup> I told Benny

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15. See Cohen & Mandelbaum, *supra* note 3, at 403 (“All clients look to lawyers for advice and guidance. Children are no exception.”); see also Henning, *supra* note 3, at 314 (“Children have limited experience . . . and need and want the assistance and advice of a knowledgeable adult and legal advisor.”). Even ardent believers in client-centered counseling—David Binder, Paul Bergman, Susan Price, and Paul Tremblay—say it is okay to give advice sometimes. See BINDER ET AL., *supra* note 3, at 368-71 (permitting lawyers to give advice under the client-centered model so long as the lawyer truly knows the client’s subjective values). Notwithstanding the above support, advice-giving seems to be an increasingly retrograde position, at least among progressive legal ethics scholars. See generally Paul R. Tremblay, *Critical Legal Ethics Review of Lawyers’ Ethics and the Pursuit of Social Justice: A Critical Reader*, 20 GEO. J. LEGAL ETHICS 133 (2007) (reviewing Susan D. Carle’s collection of essays on lawyers as “collaborators,” “community-based rebels,” and “moral activists”). I share some of Tremblay’s nostalgia for the “olden days” when “lawyers for poor people . . . went to court and fought hard to win . . .” *Id.* at 133.

16. See AMSTERDAM, *supra* note 5, § 201 (emphasis added):

[C]ounsel may and must give the client the benefit of counsel’s professional advice on this crucial decision [of whether to plead guilty]; and often counsel can protect the client from disaster only by using a *considerable amount of persuasion* to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince the client that s/he should plead guilty in a case in which a not guilty plea would be destructive. The limits of allowable persuasion are fixed by the lawyer’s conscience.

See also Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of The Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 37 (1993) [hereinafter *Rosie O’Neill Goes to Law School*] (“There are times when a . . . caring and zealous advocate[] must lean hard on a client to do the right thing. The clearer the right thing is . . . the stronger the advice.”). But see Buss, *supra* note 3, at 261 (“[A] lawyer should take care in how forcefully she pushes to persuade her [adolescent] client. . . . A lawyer who has gained the respect of her client will have more credibility when she pushes her client to reassess his priorities, but there is only so far that a lawyer can push in that direction without undermining . . . the relationship . . .”); Kruse, *supra* note 3, at 372 (“[T]he core values of client-centered representation can sometimes come into conflict in situations of actual practice, posing dilemmas for client-centered lawyers about whether—or how forcefully—to intervene into client decision-making.”). Of course, ultimately the decision to plead or not is the client’s. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION 199-200 (1993) (noting that first among the decisions that are to be made by the accused after full consultation with counsel is what plea to enter).

17. This reflects two things: (1) I am a mother, and (2) most of my clients are young enough to be my children. See U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., NCJ 201932, PROFILE OF JAIL INMATES, 2002, at 1 (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/pji02.htm> (last visited Dec. 4, 2007) (detailing a Justice Department study that, in 2002, sixty-two percent of jail inmates were under thirty-five, down from sixty-eight percent in 1996). Indeed, juveniles make up a sizeable percentage of jail detainees. See U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., PRISON AND JAIL INMATES AT MIDYEAR 2006 (2007), available at

that if he were my son or my brother, I would advise him to take the plea. I said it wasn't even close. I explained why in plain terms. I talked about the strength of the prosecution's case and the lack of any real defense. I described how the case would look if we went to trial, witness by witness. I told him that, in my judgment, no judge or jury would ever acquit him because the complainant would come across as truthful, he was found in the stolen car less than ten minutes after the crime looking exactly as the complainant had described him, he had fled the police, he was found with a gun matching the one used in the crime, and he gave an incriminating statement to the police. I explained the huge difference between the sentence Benny would get if convicted at trial and the sentence he would get if he pled guilty. I said that most judges would find this case upsetting. I talked about how sometimes the "fight" is at sentencing, not at trial, and we had strong arguments for lenience.

I did my best to engage Benny. I asked questions. I urged him to ask me questions. I shared the police and investigative reports with him. I used "silence," sitting quietly with Benny while everything sunk in. Benny seemed to listen hard during all this. He seemed to be considering what I had said.

When I asked him what he was thinking, Benny paused and looked down as if deep in thought. I felt certain he was about to accept the plea. Then he looked up and said, "I ain't takin' no plea."

This was not the first time I had failed to persuade a client. Sometimes I feel like the Rodney Dangerfield of criminal and juvenile defenders: while many lawyers worry about overly submissive clients who readily defer to their adult authority—especially young clients<sup>18</sup>—mine seem to have no trouble challenging me.

Understanding that it sometimes "takes a village" to counsel a client, I turned to a clinic colleague. An experienced lawyer on leave from the local public defender office, my colleague was a few years younger than I am, male, and had the southern "gift of gab." We went to the jail to meet Benny.

My colleague covered much the same ground that I had, but with a slightly different spin. He emphasized that this was Benny's choice, all the while urging the plea. He paid homage to Benny's values, in keeping with the client-centered model of counseling.<sup>19</sup> He said, "Look, I don't know you. You might be the kind of person who looks back after getting a fifteen-year sentence instead of a mere year and

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[www.ojp.gov/bjs/glance/jailag.htm](http://www.ojp.gov/bjs/glance/jailag.htm) (last visited Dec. 4, 2007) (finding that one out of ten jail inmates in 2006 is a male under eighteen).

18. See Cohen & Mandelbaum, *supra* note 3, at 403; Henning, *supra* note 3, at 273.

19. See BINDER ET AL., *supra* note 3. Benny repeatedly articulated two "values": (1) he wanted to beat the case, and (2) he wanted to go home.

a half and says, 'I'm glad I went to trial, it was worth it.' Only you can know this."

Benny listened hard. He seemed to be considering what my colleague had said. When asked what he was thinking, Benny paused and looked down as if deep in thought. I felt certain that he would accept the plea. Then he looked up and said, "I ain't takin' no plea."

Two smart and appealing postgraduate fellows also worked on Benny's case.<sup>20</sup> Separately and together, they spent hours with Benny, urging him to accept the plea offer. They did so until the first preindictment plea offer was replaced with a slightly less generous offer. Throughout the life of the case, they did everything they could to win Benny's trust and confidence. They visited him regularly, even when there was nothing new to talk about. They wrote him letters. They talked to him on the phone. Every time they thought they had gotten through, Benny would pause, look up and say, "I ain't takin' no plea."

Benny's resistance is not unique. No accused person, young or old, jumps at a plea that carries prison time. It doesn't matter how hardened the accused; nobody likes the prospect of incarceration.<sup>21</sup> From Benny's perspective, we were urging a teenager, to accept a deal that would send him away for at least a couple of years to an adult prison. Benny's youth made it especially difficult for him to think things through. At nineteen, being locked up for two years was being locked up *forever*. Two years was a lifetime to Benny. Two years, seven years, fifteen years—it was all the same to Benny. And we couldn't seem to convince him otherwise.

### III. WHAT WE KNOW ABOUT THE ABILITY OF YOUNG PEOPLE TO MAKE DIFFICULT, LIFE-CHANGING DECISIONS

Young people like Benny are less able than older people to recognize, understand, and carefully weigh consequences when making important life decisions. This is something about which law and science are in synch. The Supreme Court has noted young people's lesser capacity for decision making in a variety of contexts:

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20. The fellows did the lion's share of the work. I was a mere supervisor.

21. Amazingly, a former Prettyman fellow—he defended the poor accused in Georgetown's E. Barrett Prettyman Program from 1978–1980—has come to believe that jail is no big deal for many defendants. See Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 172 n.32 (1996) ("[J]ail alone may not be terrifying to . . . defendants who are used to it and come from a community where incarceration is routine. Likewise, the effect of incarceration on defendants' lives may not be as severe for those who are unemployed and whose community accepts incarceration as relatively routine . . ."). I couldn't disagree more.

when they are in need of mental health treatment;<sup>22</sup> when they seek an abortion;<sup>23</sup> when they want to take up cigarette smoking;<sup>24</sup> and when they are prosecuted for capital murder.<sup>25</sup>

In *Roper v. Simmons*,<sup>26</sup> the case that abolished the death penalty for offenders under eighteen, the Court relied heavily on studies about the decision-making capacity of adolescents. In recounting the facts of the case, the Court noted evidence that the seventeen-year-old Simmons was “‘very immature,’ ‘very impulsive,’ and ‘very susceptible to being manipulated or influenced.’”<sup>27</sup> In finding that the juvenile death penalty violated the Eighth Amendment, the Court pointed to three things that distinguish juveniles from adults: (1) their lack of maturity and less developed sense of responsibility; (2) their greater susceptibility to peer pressure; and (3) their unformed character.<sup>28</sup>

Scientific research—both social science and “hard science”—confirms that young people are less capable of careful deliberation than adults.

Developmental psychologists who have evaluated adolescents’ cognitive capacities (ability to reason and understand), emotional development (ability to manage emotions and control impulses when emotional arousal is high), and psychosocial development (risk

22. See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (“[P]arents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions . . . . Most children, *even in adolescence*, simply are not able to make sound judgments concerning many decisions.”) (emphasis added).

23. *Belotti v. Baird*, 443 U.S. 622, 634 (1979) (noting the “peculiar vulnerability of children” and “their inability to make critical decisions in an informed, mature manner”).

24. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587 (2001) (“[Children] lack the judgment to make an intelligent decision about whether to smoke.”).

25. See *generally* *Roper v. Simmons*, 543 U.S. 551 (2005) (finding that adolescents are different from adults in the context of capital punishment); see also *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (“A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”).

26. 543 U.S. 551 (2005).

27. *Id.* at 559.

28. See *id.* at 568-70. In *Roper*, the Court specifically cites work by Laurence Steinberg and Elizabeth Scott, well-known researchers on adolescent development and crime, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003), and the late Erik Erikson, perhaps the most influential developmental psychologist of all time, *IDENTITY: YOUTH AND CRISIS* (1968). See *Roper*, 543 U.S. at 569-70. The Court also notes that the DSM does not allow anyone under eighteen to be diagnosed with antisocial personality disorder, because the personalities of children and adolescents are still evolving. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 645-46 (Michael B. First ed., 4th ed. 1994).

perception, future orientation, and response to adult and peer influence) find that they lag behind adults in ways that significantly affect their ability to make good decisions.<sup>29</sup> For example, adolescents are generally less capable of assessing risks (they tend to overestimate rewards and underestimate risks), more vulnerable to peer pressure (it is harder for adolescents to exercise independent judgment in the face of peer pressure than adults), less capable of considering and weighing long-term consequences (they have a distorted sense of time and are much more focused on immediate desires and short-term consequences), and less able to resist impulse and control their moods and emotions (they are more impulsive and emotionally labile) than adults.<sup>30</sup>

In short, adolescents not only “make bad decisions,” they “make decisions badly.”<sup>31</sup>

Neurological research on the frontal lobe—the part of the brain that manages impulse control, long-term planning, priority setting, calibration of risk and reward, and insight—supports the psychological research.<sup>32</sup> Neurological research has demonstrated that the frontal lobe is still growing and changing during adolescence and beyond,<sup>33</sup> the connection between the prefrontal cortex (the subsection of the frontal lobe that controls executive function, including judgment) and the limbic system (primarily responsible for emotion and memory) is still developing during adolescence and

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29. See Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, in YOUTH ON TRIAL, *supra* note 3, at 325, 331-33 (summarizing studies on adolescent development, and noting the stressful context in which accused adolescents make decisions); Scott & Grisso, *supra* note 2, at 813-16 (discussing the spheres of adolescent development and noting that there is little research examining adolescent decision making in stressful contexts that require experience and knowledge).

30. See Steinberg & Scott, *supra* note 28, at 1014-15; see also Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 70 (2005) (“[A]t the core of adolescent cognitive development is the attainment of a more fully conscious, self-directed and self-regulating mind.”).

31. Cauffman & Steinberg, *supra* note 29, at 327-28.

32. For a useful and accessible explanation of the still-growing teen brain, see PBS Frontline, *Inside the Teenage Brain, Interview: Jay Giedd*, [www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html](http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html) (last visited Dec. 4, 2007) (prominent neuroscience researcher at the National Institute of Mental Health discussing his work on adolescent brain development); see also AM. BAR ASS'N, JUV. JUST. CTR., CRUEL AND UNUSUAL PUNISHMENT: THE JUVENILE DEATH PENALTY, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY (January 2004) (containing a primer on the basics of the human brain, the new research about adolescent brain development, and the relevance of this research to juvenile crime).

33. See generally Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859 (1999).

beyond,<sup>34</sup> and myelination—the process by which neurons (the brain's circuitry) are insulated by white matter (fatty tissue)—continues throughout adolescence and into adulthood.<sup>35</sup> In short, during adolescence and beyond, the part of the brain that relates most to careful decision making is not done being built yet.<sup>36</sup>

All of this—the cognitive, emotional, psychosocial, and neurological limitations of youth—has a direct impact on a young person's ability to make a reasoned decision about whether to take a plea or go to trial. This is what makes it difficult for a young person to understand and accept that while it may be unpleasant in the short term to take a plea that puts him in prison, it will be far worse later on if he doesn't.

It was hard to know what exactly was going on with Benny. Consistent with what we know from developmental psychology, Benny seemed to overestimate rewards ("I ain't takin' no plea cause we're gonna beat this case and then I'm goin' home.") and underestimate risks ("Nobody will believe that crackhead complainant."). Although we didn't know whom exactly he was talking to about his case, he seemed to be influenced by his peers in the jail ("Everyone here is sayin' I should fight the case, not take no plea."). He seemed utterly incapable of considering and weighing the long-term consequences of rejecting the plea offer because he could not fathom being in prison for any period of time. ("Two years? I might as well be locked up for seven. Ain't no difference.").

He wasn't terribly emotional; if anything, he was reticent. But he did seem to enjoy being able to say *no* after graciously allowing us our various counseling spiels.

Perhaps it was biology; barely nineteen, his brain was probably still growing, especially the prefrontal cortex, and myelination was likely still in process. Perhaps he said *no* because his brain wouldn't allow him to contemplate what *yes* might mean.

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34. See WEINBERGER ET AL., *supra* note 2, at 6-18 (discussing ongoing changes in the cellular structure of the brain during adolescence as revealed through neuroimaging techniques, and offering behavioral evidence that the brain is still developing); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003) (discussing the research on brain development and noting that brain development continues through adolescence, particularly the areas of the brain controlling "long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward"); see also Mary Beckman, *Crime Culpability, and the Adolescent Brain*, SCI. MAG., July 30, 2004, at 596 (noting that Dr. Giedd "consider[s] 25 the age at which brain maturation peaks").

35. Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI 77, 77, 79-80 (2004). Myelination is critical to the brain's ability to transmit information precisely and efficiently. *Id.* at 80.

36. *Id.*

Maybe it was an existential assertion of self: I can say *no*, therefore I am.<sup>37</sup>

Maybe it was just adolescent contrarianism.<sup>38</sup>

In some ways, Benny's situation was especially hard because, in addition to facing serious charges and serious time, he had little or no family support, no community support (he hadn't been in school in two years, had never held a regular job, was not involved in a church), and had suffered significant loss for one so young (his mother's death, abandonment by his father). He felt alone in the world. His grandmother, whom he loved dearly, was unwell and increasingly frail. Although we urged Benny to talk to her, he didn't want to burden her.

Yet Benny had it better than many young people facing time. He functioned fairly well intellectually. He had never been physically or sexually abused. Though he had suffered real loss, he had a devoted grandmother. And he wasn't facing as much time as some. In my experience, the most difficult cases involve young adolescents—kids who are thirteen, fourteen, fifteen—who have been terribly victimized themselves and commit brutal crime in response.<sup>39</sup> When they are faced with the prospect of challenging their transfer to adult criminal court, where they will surely be convicted and possibly get a life sentence, or agreeing to a transfer to adult court in exchange for a decades-long prison sentence, they cannot begin to fathom this “choice.” In my experience, any plea that involves substantial adult prison time will cause a young client to balk. It is the rare youth who can get beyond the initial shock and dismay. Often the youth's family is no better.<sup>40</sup>

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37. See generally JEAN-PAUL SARTRE, *EXISTENTIALISM AND HUMAN EMOTION* (Bernard Frechtman & Hazel E. Barnes trans., Philosophical Library 1957) (Sartre's most accessible volume on existentialist philosophy).

38. See generally J. D. SALINGER, *THE CATCHER IN THE RYE* (Little, Brown & Co. 1951) (classic American novel about teenage angst and rebellion).

39. See generally Smith, *Defending and Despairing*, *supra* note 6.

40. Consider, for example, the 1999 Lionel Tate case, in which a twelve-year-old boy was accused of the first-degree murder of a six-year-old girl in Pembroke, Florida. The initial plea offer was time in a juvenile institution, not an adult prison, and Lionel's mother and lawyer both rejected it. Looking back, I'm sure they wish they had made a different decision. See David A. Tanenhaus & Steven A. Drizin, “*Owing to the Extreme Youth of the Accused*”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 678-81 (2002). The first offer was that Lionel plead guilty to second-degree murder in exchange for three years in a juvenile center, one year of house arrest, ten years of psychological testing and counseling, and 1000 hours of community service. *Id.* at 678. Lionel turned the offer down not once, but twice. *Id.* at 679. Professors Tanenhaus and Drizin ask the questions that apply in all these cases, whether the accused is twelve or twenty: “Can a twelve- or thirteen-year-old child like Lionel Tate be expected to appreciate the consequences of pleading guilty to murder in adult court? Can he or she truly understand the jeopardy faced by rejecting

## IV. STRATEGIES

This paper was motivated by my fear that young people like Benny will end up doing much more time for the same crimes than their older counterparts because they are incapable of making a good decision.<sup>41</sup> I worry that the cognitive, emotional, psychosocial, and neurological limitations of youths like Benny pose very real challenges—and their lawyers don't do enough to help. Although I believe strongly that these limitations raise competency issues—in particular, “decisional competency”<sup>42</sup>—I have not had much luck persuading judges of this.<sup>43</sup>

So, lawyers must develop strategies for persuading young clients to limit their exposure and make the best of a bad situation. Let me say again that I am not talking about cases about which reasonable lawyers and clients might differ. In those close cases, the lawyer must make certain that the client is making a fully informed decision and is aware of the risks, consistent with prevailing models of client counseling.<sup>44</sup> I am talking instead about clients headed straight for

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a plea? Can a present-oriented, impulsive adolescent possibly fathom a sentence of life without the possibility of parole?” *Id.* at 679 n.157.

41. One prominent scholar has noted that it is the rare defendant who is truly capable of making this all-important decision without considerable assistance from counsel: “The principal vice of the guilty-plea system is that it turns major consequences upon a single tactical decision, and few defendants seem truly capable of making the decision for themselves.” Alschuler, *supra* note 5, at 1313.

42. See Grisso, *Adolescents' Decision Making*, *supra* note 6, at 12 (2006) (discussing research on youths' abilities to make decisions regarding plea bargains); Scott & Grisso, *supra* note 2, at 819-20 (arguing that in order for an accused to be competent to stand trial, he or she must also be able to make considered decisions about pleading and the waiver or assertion of rights). As Scott and Grisso explain:

These decisions involve not only adequate factual and rational understanding, but also the ability to consider alternatives and make a choice in a decision making process. These abilities can be compromised by mental disorders and mental retardation. In addition, due to intellectual immaturity, youths may lack adequate capacities to process information and reason in making trial decisions, especially when the options are complex and their consequences far-reaching. Moreover, emotional and psychosocial immaturity may influence youths to make choices that reflect immature judgment.

*Id.* at 819; see also Maroney, *supra* note 6, at 1385-90 (arguing that decisional competence is a component of adjudicative competence).

43. Arguing that a client is incompetent in making decisions can be a way of buying time, however. Time is often the most important variable in counseling clients about these weighty decisions.

44. See Cohen & Mandelbaum, *supra* note 3, at 369-82 (discussing the lawyer's role in counseling juvenile clients under the ethical rules and existing paradigms); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 894-907 (1998) (discussing the proper role of defense counsel in the decision of whether to plead guilty); see also Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's*

disaster because of poor decision-making skills, who are about to make a bad decision that will affect their lives for years to come.<sup>45</sup> When gentle client-centered counseling fails to avert the danger, I believe devoted lawyers should consider the following counseling techniques: pestering and “hocking,”<sup>46</sup> bullying and manipulation, and facilitating the five stages of grief.

*A. Pestering and Hocking*

As with Benny, I believe in persistence in client counseling. In order to effectively counsel a client who is about to do something he or she will soon regret (and ultimately blame *you* for, because you let them do it), you have to be willing to pester and hock and hound. You have to spend time. You have to be willing to do a lot of talking, bring others in to talk, find different ways of saying the same thing, and be willing to repeat yourself. You can't give up. Although there might come a time when the pestering and hocking becomes excessive and

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*Tactical Choices*,” 68 U. CIN. L. REV. 763, 834 (2000) (“[R]espect for the client requires that the client be afforded the right to be foolish or wrong. That right is not, in my view, absolute. Rather, the good lawyer, like the good parent, will struggle to balance the client’s freedom of choice with the lawyer’s duty to prevent clients from inflicting harm upon themselves. Respecting client decisionmaking means allowing some defendant’s [sic] to suffer the consequences of their foolhardy strategy. In some instances, however, conscientious counsel should . . . override the defendant’s strategic wishes.”).

The ethical rules that pertain to the lawyer-client relationship in counseling young people are set forth in MODEL RULES OF PROF’L CONDUCT R. 1.14 (1983):

- (a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

*Cf.* MODEL CODE OF PROF’L RESPONSIBILITY EC 7-11 (1969) (“The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition, or age of a client . . .”).

45. It should be noted that this kind of counseling is never pleasant. *See* AMSTERDAM, *supra* note 5, § 201 (“[C]ounsel’s difficult and painful responsibilities include making every reasonable effort to save the defendant from the defendant’s ill-informed or ill-estimated choices.”)

46. Hocking is Yiddish for “nagging.” *See* LEO ROSTEN, THE NEW JOYS OF YIDDISH 138-39 (2001) (defining “hok” as “to talk a great deal; to yammer, to yak”). Hock comes from “hok a chainkik” (pronounced “sock a guy Nick”), which translates loosely to “strike a tea kettle.” *Id.*

threatens to damage the lawyer-client relationship, this is usually a long way down the road. So long as you make plain that it is the client's decision, and you will represent the client zealously at trial if the plea is refused,<sup>47</sup> there is no need to fear for the relationship. Good lawyers know how to avoid the breaking point.<sup>48</sup>

The problem with pestering and hocking is not that the lawyer will go too far, but that he or she will not go far enough because of lack of time, impatience, or a sense of resignation that continued counseling will make no difference. As others have pointed out, excessive caseloads and the shortage of time undercut the ability of otherwise devoted defenders to effectively counsel and advocate for young clients.<sup>49</sup> Still, some cases demand more time, and caring lawyers usually find a way to make that happen. Cynical and burned-out lawyers do not.<sup>50</sup>

### B. *Bullying and Manipulation*

As we did with Benny, I believe in sending in the troops, in whatever form will work for that client—an older and more experienced lawyer, a younger and hipper lawyer, an African American or Latino lawyer, a male lawyer with *machismo*. I believe in double- and triple-teaming clients, sending in a few at a time, and recruiting a client's friends and family to lean on the client and help him or her make the right decision. Although I am mindful that the developmental status of young people "renders them both in greater need of guidance, and at the same time, more vulnerable to

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47. See AMSTERDAM, *supra* note 5, § 201 ("Of course, s/he must make absolutely clear to the client that if the client insists on pleading not guilty when the lawyer thinks a guilty plea wise, the lawyer will nevertheless defend the client vigorously and will raise every defense that the client legitimately has.").

48. I have indicated in previous work that I believe in "arm-twisting but not arm-breaking" in client counseling. See Smith, *Rosie O'Neill Goes to Law School*, *supra* note 16, at 37. In situations where the client is young and about to make a foolish, irrevocable decision, I confess I might come close to arm-breaking. See Amsterdam, *supra* note 5, § 201 (noting famously but unhelpfully that "the limits of allowable persuasion are fixed by the lawyer's conscience"); see also Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 131 (1995) ("[H]ow hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client's ability to make informed decisions, the certainty of the harm, the client's rationale for his or her decision and the means used to change the defendant's mind."). But see Alschuler, *supra* note 5, at 1310 ("If, after all the badgering, the cajolery, and the verbal abuse is concluded, a defendant still insists that he wishes to stand trial, the attorney's ethical obligation is simply to carry out his client's decision.").

49. See, e.g., Cohen & Mandelbaum, *supra* note 3, at 411.

50. For the author's view of how to sustain a career in indigent defense and not give in to cynicism and burnout, see Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004).

overreaching,”<sup>51</sup> I am willing to err on the side of overreaching when necessary.

By bullying, I mean applying pressure. Forceful language is sometimes necessary, even “verbal abuse.”<sup>52</sup> Badgering, cajoling, needling, riling, inciting—all are methods that might help a client to finally see the light.<sup>53</sup> Some counseling sessions are emotionally grueling, leaving both lawyer and client drained. These sessions are far more taxing than actually trying the case—a fact I often share with the client. “It’s much more fun for me to try the case,” I tell these clients. “And I am ready to try the case. But it’s not good for you. That’s why I’m killing myself here, talking till I’m blue in the face, trying to get you to do the wise thing.” I seldom worry about exerting too much pressure. I worry instead about failing to exert enough.<sup>54</sup>

By manipulation, I mean a range of techniques that might work to get under the client’s skin, get him to lower his defenses, and ultimately get him to change his mind.<sup>55</sup> I do not mean coercing

51. Cohen & Mandelbaum, *supra* note 3, at 382 n.124.

52. Alschuler, *supra* note 5, at 1309-10.

53. *See id.* (referring to “badgering” and “cajolery,” along with “verbal abuse”).

54. *See id.* at 1310:

[D]efendants may not fully realize the extent of the penalty that our system exacts for an erroneous tactical decision. For these reasons, a Chicago public defender observed, “A lawyer shirks his duty when he does not coerce his client,” and this statement suggests a fundamental dilemma for any defense attorney working under the constraints of the guilty-plea system. When a lawyer refuses to “coerce his client,” [however], he also insures his failure; . . . he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve. The defense attorney’s lot is therefore not a happy one—until he gets used to it.

55. For a thoughtful examination of the role of manipulation in client counseling, see Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987). Ellmann defines manipulation broadly:

[M]anipulation includes a wide range of behavior. Some of this conduct will be frankly exploitative, while some will be intended to be benign. Some will profoundly and permanently breach a client’s right to choose for himself, while some may in the long run vindicate this right. Some, finally, will be unjustifiable, while some may be proven to be essential to the proper practice of law.

*Id.* at 727. *See also* David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 458 (“[A] lawyer’s manipulating a case or client for the client’s own good—or, rather, for what the lawyer takes to be the client’s own good even though the client does not see it that way . . . is called paternalism.”); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975) (discussing paternalism in the lawyer-client relationship); *cf.* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116 (1990) (critically discussing David Luban’s endorsement of certain kinds of client manipulation in the course of reviewing Luban’s book, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988)).

clients by threatening to withdraw if the client does not go along with the lawyer, or suggesting that the lawyer will be less than zealous at trial.<sup>56</sup> I also do not mean lying to clients.<sup>57</sup>

But I have no objection to working on the emotions of clients—including playing on their vulnerabilities and fears—in order to get them to make a sane decision. For example, using Benny's ailing grandmother—"Don't you want to get out of prison while she is still alive? Don't you want to be there for her when she needs you most?"—was something we did repeatedly. We also pointed out men at the jail who were in their late twenties and thirties—they looked much older than Benny, because there is no harder time than jail time—to show Benny what he would look like after serving a posttrial sentence.<sup>58</sup> Though we meant to enlighten him, I cannot deny that we also meant to scare him.<sup>59</sup>

Strangely enough, I think defenders could learn a thing or two from police interrogators who successfully manipulate our young

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56. See Alschuler, *supra* note 5, at 1310 (arguing that a defense lawyer should never threaten to withdraw because a client declines to take the lawyer's advice, and arguing that professional codes should "be revised to make this action grounds for professional discipline"); AMSTERDAM, *supra* note 5, § 201 (counsel should avoid using language that "makes it seem as though *counsel* is threatening the client"); ABA STANDARDS, *supra* note 16, at 201 (allowing the use of fair persuasion to counsel a defendant to accept a plea bargain, but not "undue influence"); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 6.3(b), available at [http://www.nlada.org/Defender/Defender\\_Standards/Performance\\_Guidelines](http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines) (last visited Dec. 4, 2007) ("The decision to enter a plea of guilty rests solely with the client, and counsel should not attempt to *unduly influence* that decision.") (emphasis added). *But see* Uresti v. Lynaugh, 821 F.2d 1099, 1102 (5th Cir. 1987) (finding that counsel may request permission to withdraw if the client insists on making the "foolhardy" choice of going to trial in lieu of pleading guilty).

57. See generally Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

58. I often use pictures to help young clients conceptualize the difference between one sentence and another. It is not always effective. In a recent case involving a fifteen-year-old client facing a life sentence who was offered a twenty-year plea, I brought my client photographs of what I thought were youthful-looking sports figures in their mid-thirties. He thought they were all old.

59. The film that best conveys how difficult it can be to counsel criminal defendants in serious cases—where the defendant maintains innocence—is *Criminal Justice*, starring Anthony LaPaglia (the public defender), Forest Whitaker (the accused), Jennifer Grey (the prosecutor), and Rosie Perez (the complainant). CRIMINAL JUSTICE (HBO 1990). In the film, Whitaker is charged with a vicious assault and robbery, one that left Perez with a permanent scar across her face. *Id.* He receives a generous plea offer, and LaPaglia has to point out the advantages of the plea while still indicating his willingness to go to trial. *Id.* In one of the more controversial scenes (with my students at least), LaPaglia explains the difference between the sentence after plea and the likely sentence after trial as between walking his son to kindergarten and seeing him graduate from high school. *Id.* This is good client counseling.

clients in myriad ways, for good and ill.<sup>60</sup> If they can do it in the interests of law enforcement, why can't we do it in the interests of helping our clients to avoid excessive criminal punishment?

I am only being slightly facetious. Although I would not want to emulate or endorse police trickery and deception, it would not hurt if defenders became more psychologically sophisticated about how to influence and persuade clients.<sup>61</sup> The police have become very good at it. We could be better.

### C. *The Five Stages of Grief*

When I first set out to write this Essay I thought this might be the one truly original contribution I would make. I was wrong. In researching Elisabeth Kübler-Ross's groundbreaking theory about death and grief,<sup>62</sup> I came upon a *Wikipedia* description and there it was, big as life, apparently so much a part of popular culture that it appeared on *Wikipedia*, the online "peoples' encyclopedia,"<sup>63</sup> as an illustration of the broader uses of Kübler-Ross's theory:

For example, experienced criminal defense attorneys are aware that defendants who are facing stiff sentences, yet have no defenses or mitigating factors to lessen their sentences, often experience the stages. Accordingly, they must get to the acceptance stage before they are prepared to plead guilty.<sup>64</sup>

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60. See generally GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003) (discussing the psychology of interrogations and offering recommendations for avoiding false confessions); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 907-23 (2004) (discussing the social psychology of police interrogation and false confessions); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 220 (2006) (arguing that a criminal confession is invariably "compelled, provoked and manipulated . . . by a detective who has been trained in a genuinely deceitful art," and noting that interrogation manuals teach the use of psychological tactics and strategies that heighten suspects' stress and anxiety and manipulate their vulnerabilities); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808-16 (2006) (reviewing interrogation manuals that prescribe trickery and deception).

61. GUDJONSSON, *supra* note 60, at 8 (noting that that all psychologically sophisticated interrogation practices rely on a mix of influence and persuasion).

62. See ELISABETH KÜBLER-ROSS, *ON DEATH AND DYING* (1969) (offering research on people coping with terminal illness, and arguing that when people confront death they go through a cycle of emotional states in order to cope with grieving: denial and isolation, anger, bargaining, depression, and acceptance).

63. Wikipedia is described as a "free content encyclopedia project written collaboratively by volunteers." Wikipedia, *Criticism of Wikipedia*, [http://en.wikipedia.org/wiki/Criticism\\_of\\_Wikipedia](http://en.wikipedia.org/wiki/Criticism_of_Wikipedia) (last visited Nov. 16, 2007).

64. Wikipedia, *Kübler-Ross Model*, [http://en.wikipedia.org/wiki/K%C3%BCbler-Ross\\_model](http://en.wikipedia.org/wiki/K%C3%BCbler-Ross_model) (last visited Nov. 16, 2007).

What had I been thinking? Apparently, anyone who knows anything about criminal defense knows that the five stages of grief is an essential part of the guilty plea process, that you have to help clients *grieve* before they see the writing on the wall and take a favorable plea.<sup>65</sup>

But in case not *everyone* knows about this, let me offer a few thoughts on how the stages of grief might apply in counseling young people.

The stages of grief are as follows:

(1) Denial. During this stage the client, perhaps in a state of shock and disbelief over the charges, says things like "This can't be happening, I don't know nothin' 'bout this crime, I didn't do it, and I ain't takin' no plea."

(2) Anger. The client, who might be angry at him or herself, the system, or life in general, says things like "They're lying, They're out to get me, I don't want to talk to you, and I ain't takin' no plea."

(3) Bargaining. The client, starting to see that the case is not going away but still wanting to have some control, says things like "I'll plead to unauthorized use of a vehicle but not no carjacking, I'll plead to probation, I'll plead for juvenile time, and I ain't takin' that plea."

(4) Sorrow. The client, finally recognizing that he or she is in serious trouble and will have to do serious time, and truly feeling it for the first time, says things like "I'm sorry for what I did, I don't know why I did it, It doesn't feel like the real me, I'm sad to be in jail and I'm scared about going to prison, and I cry a lot at night because it feels like there's no hope for me."

(5) Acceptance. The client accepts the reality of the situation and says things like "I can't change what happened then or the choices I have now, I want to get the shortest prison sentence possible, Maybe this plea is the only way to cut my losses, and I guess I should take the plea."

The idea of grief and its stages seems especially apt for traumatized young people, some of whom have dealt daily with

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65. See Joe Nocera, *Fastow's Long Walk to Less Time*, N.Y. TIMES, Sept. 30, 2006, at C1 (describing how the lawyer of Enron defendant Andrew Fastow moved him through "denial, depression, anger, acceptance and, finally, surrender"). There were a couple of wrinkles in the Fastow case, which helped move the process along. First, a frustrated prosecution began to hone in on Fastow's wife for filing a false income tax return, which led Fastow to cooperate with the government. *Id.* Second, it took Fastow *three years* after the Enron investigation began to agree to a plea bargain. *Id.* Fastow was accused of a white collar crime. *Id.* Most accused—especially those accused of ordinary street crime—do not get the luxury of this kind of time.

violence and loss and who have never really grieved.<sup>66</sup> Now, they have also committed a life-altering crime, and it seems a lifetime of grief is backed up in them. All of this feels daunting to the average criminal or juvenile lawyer who is not an expert in mental health counseling. We might feel okay about moving our clients through denial, anger, and bargaining, but *sorrow*? How can we get them through sorrow? And what if there is no end to the sorrow?

I think we have to try no matter how difficult the challenge. We should also consult with and bring along mental health professionals whenever possible.

But the problem once again will be lack of sufficient time. Getting through the various stages of grief cannot happen in a single counseling session, whether one is young or old. Yet, plea offers usually come with short deadlines—far too short for most young defendants to meaningfully consider them.

The first thing then, is to negotiate with the prosecutor for as much time as possible to consider any plea. When the prosecutor resists, educate him or her with the social science and neurobiology research. If possible, try to get the judge's help in lengthening the time a plea offer is on the table for pragmatic reasons—most judges want to resolve cases short of trial—if not on due process grounds.

The second thing is to be patient. Understand that the process will likely take time and the client will likely be resistant—“angry” or “in denial.”

Third, stop talking. Sometimes silence is the best way to get another person to start talking. Sit quietly with the client and create the space for sorrow. If you must speak, say very little. Say to the client, “I'm sad about this.” And then be quiet.<sup>67</sup>

## V. CONCLUSION

Maybe I am the worst, most paternalistic lawyer ever.<sup>68</sup> Maybe I have no regard for my client's individual autonomy and am a proponent of lawyer-centered rather than client-centered counseling.<sup>69</sup> Maybe I am importing some of the most obnoxious, heavy-handed counseling practices in adult criminal defense to the

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66. See generally JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE (1992) (exploring the lives of children in urban “war zones” and proposing strategies to help these children cope with violence and loss).

67. I know this is hard for lawyers. It's hard for me. Lawyers are not known for being quiet.

68. See generally Luban, *supra* note 55; Henning, *supra* note 3.

69. See Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1663-71 (1996) (discussing the “lawyer autonomy model” of client counseling).

representation of easily influenced children and adolescents.<sup>70</sup> But is a young person's ill-considered but autonomous decision making more important than his or her freedom? Is it always wrong to be heavy-handed?

I often say to my clients, "I work for you." I consider myself a client-centered advocate,<sup>71</sup> and do my best to model this approach to students and fellows. I tell my clients it is my job to pursue their interests and no one else's. I am always clear with clients that the decision whether to plead or go to trial is theirs, not mine. But none of this answers the fundamental question here: What should a devoted, client-centered lawyer do to save a young client in trouble from a foolish decision?

In a case where it is clear that a young client is going to serve much more time for no good reason—when refusing a favorable plea offer is ill-considered and irrational—I believe that lawyers should do almost *anything* to change that client's mind.

Benny ended up taking the plea, largely due to a rare combination of luck and time. For unknown reasons, the government took a long time to get an indictment and reoffered the initial plea, which they then left open for nearly a year. In the meantime, Benny was locked up, giving him a taste of incarceration and allowing him to sit with his options. The additional time also allowed Benny to *grow up*. He became more mature in his thinking. He became better at considering risks and weighing consequences. His brain probably grew and developed. Not to mention that the postgraduate fellows working on Benny's case did an exemplary job of pestering and hocking over the many weeks and months.

I am glad for Benny and proud of the lawyering in the case.

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70. *See id.* at 1656 (referring to "invasive [lawyering] practices that systematically disempower the client").

71. I attribute the phrase "client-centered" to Monroe Freedman, whom I regard as the quintessential client-centered lawyer. *See generally* MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); *see also* Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 88 (2003) (crediting Freedman as the architect of "client-centered" advocacy). Freedman's notion of client-centered lawyering owes a debt to the work of Lord Henry Brougham. *See* Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213 (2006); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 64 n.360 (2005) (noting the "Brougham-like view of Monroe Freedman").