Patient Warnings in Court-Ordered Evaluations of Children and Families

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The rules covering disclosure of information generated by court-ordered clinical evaluations in Massachusetts require that patients be warned that the patient-psychotherapist privilege does not apply to the evaluation interview. The nature of the warning required ("the *Lamb* warning") is not perfectly clear and is especially uncertain when those being warned are children and families. Comparing the *Lamb* warning to the *Miranda* warning offers some insight but is not conclusive. To reach conclusions regarding the type and degree of procedural protections for children required by the *Lamb* warning, it is necessary to analyze the stakes, interests, and capacities involved for children in juvenile court. This analysis suggests that in most situations a relatively informal procedure is sufficient to provide the required warning. However, there are some exceptional circumstances in which more formal and thorough warnings should be required. These include juvenile transfer hearings and some situations involving child abuse and neglect.

Forensic psychiatric evaluations raise a variety of ethical and procedural concerns.[1] One concern in this special context is the problem of confidentiality of the doctor-patient relationship. Ethical standards require that the evaluator explain the limits of confidentiality to patients,[2] but it is not perfectly clear what represents an adequate explanation. When children and families are involved in forensic psychiatric evaluations, the issues become more confused as questions arise about children's roles in the legal process, their rights, and their capacities to understand questions of confidentiality.

This paper will review the rules of confidentiality in court-ordered clinical examinations in Massachusetts, to elucidate some basic principles involved. It will explore the requirement that patients be given notice of the lack of confidentiality in such situations, and it will focus especially on problems interpreting this requirement for evaluations of children and families. Finally it will make some specific suggestions about ways to handle problems of confidentiality in court-ordered evaluations of children and families.

Disclosure of Clinical Information in Legal Settings

Massachusetts statutes and regulations[3-6] in this area define two kinds of clinical information: (1) that derived from court-ordered evaluations and (2) that derived from "other clinical activities." These "other activities" include treatment and consultations that may

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end up being reported in court, but have not been explicitly ordered by the court. Two kinds of disclosure are also defined: (1) the release of clinical records and (2) testimony in court. The two types of disclosure and the two types of information interact to make four types of information disclosure, depicted schematically in Table 1.[7]

Rules

Differentiating these types of information disclosures is important, as each type is governed by different rules. These rules are depicted schematically in Table 2. They determine the procedural protections required for each of the four types of information disclosure.

It is artificial to consider any of these types of disclosure in isolation from one another because the rules of disclosure in different situations have some important interactions. However, the major focus here will be on disclosure to the court of information generated in court-ordered evaluations (upper left in Tables 1 and 2). This focus will aim to generate a clearer understanding of the elements of procedure required by the warning process itself. The other element of procedural protection involved in the presentation of clinical material to a court is how the court either protects or releases the information for other uses (lower left in Tables 1 and 2). This element will be touched on only briefly below.

Disclosure of clinical material to a court is governed in Massachusetts by a statute defining a "patient-psychotherapist privilege" and its exceptions[4] and by a Massachusetts Supreme Judicial Court case *Commonwealth v. Lamb*,[8] which interprets that statute. The substance of the law is that communications made to a psychiatrist or licensed psychologist (clinical social workers are covered by a similar law) are generally privileged, meaning that the clinician may not be forced to testify about them in court unless the patient waives the privilege or unless certain exceptions apply. The relevant exception is that communications are *not* privileged if they have been made in a court-ordered examination and if the patient has been *warned* that the

Table 1
Types of Information Disclosure

	Court-Ordered Evaluations	Other Clinical Activities
Testimony in court	Reporting results of court-ordered examinations to court, in writing or testimony	Reporting to court on treatment or other non-court-ordered activities, in writing or testimony
Release of records	Sending the results of court-ordered examinations to agencies or clinical providers other than the court	Sending reports of treatment experiences or other non-court-ordered clinical evaluations to other agencies or providers

Table 2
Rules for Information Disclosure

	Court-Ordered Evaluations	Other Clinical Activities
Testimonial privilege	Examinee must be given notice before interview that patient-psychotherapist privilege does not apply: "Lamb warning"	Patient-psychotherapist privilege must be waived by patient, unless child custody or other specific exception is applied by court
Release of records	These records are available to court, attorneys, and patient. They may be released to other agencies only by court order. No clear standard for such orders	These records may be released to others with the consent of the patient, or if it is "in the patient's interest"

patient-psychotherapist privilege does not apply.

The required warning to the patient is familiarly known as the *Lamb* warning. The basic practical question raised by the law concerns the nature of this warning. How formal need it be, how complete, and what efforts need to be made to ensure that it is understood? The secondary questions of particular concern relate to children and families. Given differences between children and adults and given the nature of children's and families' court involvements, what special procedures need to be adopted in providing the *Lamb* warning to children and families?

The basic goal in answering these questions is to ensure that the actual procedures used in warning patients succeed in creating a fair balance of the various rights and interests at stake in the situations in which they are used. Many interests are in tension with one another in determining what kinds of procedural protections make sense. Among them are the individual's rights to privacy and against self-incrimination, the state's interest in furthering trust within a patient-psychotherapist relationship by making it privileged, and the state's interests in furthering family autonomy and welfare, in protecting the welfare of individual children, and in promoting public safety. Finding the right guiding principles for protecting or divulging information in general involves finding the proper balance of these interests. Failure to find the right balance brings two kinds of potential costs to the juvenile justice system specifically. One is more procedural, the other more substantive.

The procedural costs have to do with the generation and use of clinical information for the legal process. If the information is generated improperly, e.g., by a court-ordered clinical examination *not* preceded by a warning, then it may not be usable. The effort of conducting the

evaluation will have been wasted, and any possible benefit that the results of the evaluation might have afforded to the legal process or to the parties involved will be lost. On the other hand, if too much effort is spent on formally protecting patients' rights, then clinical rapport between examiner and patient will be inhibited. The result may be that the examination will fail to generate complete and valid clinical data,[9] which may leave the legal process without information that it needs to go on properly.

The more substantive and fundamental kind of cost relates to the issue of children's capacity or lack of it. It is assumed that in some manner the child is an individual who has rights related to clinical information that are similar to those of an adult. It is further assumed that some warning or consent process as described above is required to divulge clinical information about children. Giving a child a *Lamb* warning, or allowing him or her to consent to release of records in other circumstances, appears to satisfy this requirement for procedural protection. However, if the child is in some way not really capable of giving consent or understanding a warning, then this appearance of procedural protection is a sham. As such, it is worse than offering no protection at all. By providing the appearance of due process protection without its substance, this kind of warning or giving of consent may allow the legal process to go on with no protection at all for the child and with no awareness of the true lack of protection.

Standards for the *Lamb* Warning with Children and Families

Neither the statute nor *Lamb* makes any explicit comment regarding either how complete the warning needs to be or how careful one must be to ensure that it is understood and used. They require only that notice be given of the lack of privilege. There are no Massachusetts cases on this specific point, and the common interpretation is that the evaluator is required only to inform the patient that no privilege applies, and not of anything further such as to what uses the evaluation may be put, who may have access to it, and so forth. Common practice is to leave clarification of these issues for the patient to the patient's attorney.[10]

One United States Supreme Court case addresses the issue indirectly. In *Estelle v. Smith*[11] the court examined the constitutionality of the use of a forensic evaluation for a purpose other than that about which the client had originally been informed. It found that the patient's constitutional rights were violated when an evaluation done originally to determine his competency to stand trial was used later at the dispositional phase of the criminal proceeding to support the death penalty. The case suggests that there may be an obligation under some circumstances to inform the patient not only that the privilege does not apply, but also to what purpose the evaluation will be put.

Turning specifically to warnings in court-ordered evaluations of children and families, there are special problems

because of the ambiguous rights and capacities of children. These come from questions about whether a child can understand or accept a warning; if not, then who can on his or her behalf; and what standards of formal procedure need to be established to protect a child's rights.

Two comparisons may help to clarify the issues involved. One is between the characteristics of children and of adults. The other is between the *Lamb* warning and the more familiar *Miranda* warning. The interactions of each of these two create four warning situations, depicted schematically in Table 3. Because the *Miranda* warning has been examined much more closely in its application to children, exploring these four different situations may offer some insight into how to deal with the *Lamb* warning when applied to children.

The Miranda Warning The *Miranda* warning, like the *Lamb* warning, is a warning required before an interview. It is the notification to an arrestee of his constitutional rights to remain silent and to retain counsel before the police conduct an in-custody interrogation. The language of *Miranda* itself indicates that this "warning" is meant to function essentially the same as a defendant consenting to the interrogation: "... A heavy burden rests on the ... [prosecution] to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[12] This language, emphasizing the defendant's intelligence and knowledge of the process and characterizing it as an active process of "waiver," makes the receiving of the *Miranda* warning similar to a process of giving informed consent to the interrogation and to its use in court. Furthermore, the court places a "heavy burden" on the prosecution to show that the process of giving and receiving this warning really worked, i.e., that the defendant understood the warning and knew what he was doing in agreeing to proceed with the interrogation.

The Lamb Warning Both the *Miranda* and the *Lamb* warnings serve to provide some protection to a person with regard to the generation and use of information, the nature of which the person will not have the opportunity to censor once developed. Does the *Lamb* warning require in general the same standard of "knowledge and intelligence" as *Miranda*? The specific questions at issue are (1) how detailed, ex-

Table 3
Characteristics of Warnings

	Miranda	Lamb
Adults	"Knowing and intelligent waiver"	"Notice given" of nonconfidentiality; noninculpatory
Children	Extra caution required; "interested adult" must be involved under age 14	Standards not clear; stakes, interests, and capacities must be explored

plicit, and thorough the warning needs to be; (2) what needs to be shown to establish that the patient in fact heard and understood it; and (3) whether anything further in terms of an active statement of waiver or consent is required to show that something like a "knowing and intelligent waiver" has occurred.

The Massachusetts Supreme Judicial Court opinion in *Commonwealth v. Lamb* makes clear that the Lamb and the Miranda warnings do not require the same due process protections. The court explains the statute as one that sets forth a public policy "to permit a court to utilize expert psychiatric evidence by ordering an examination," and which, recognizing "that such court-initiated interviews entail certain risks for the person to be examined . . . provides the procedural protection *that notice is to be given* if the privilege is not to apply" [emphasis added]. Further, despite recognizing that "the patient runs the risk of commitment . . . depending on what he says" in an evaluation interview, the court makes it clear that "the procedures that constitutionally must be accorded one who is the subject of a proceeding under G.L. c. 123A *are not identical to those required for persons accused of crimes* since G.L. c. 123A proceedings are civil and nonpunitive in nature" [emphasis added]. Finally, the Court explicitly states that in resolving this case it means only to interpret the policies set forth by the statute, which are that patient-psychotherapist communications are privileged, even if made in a court-ordered examination, "absent a showing that [the patient] was informed that the communication would not be privileged and thus, inferentially, that it would be used at the commitment hearing." The court makes no mention of a need for a "knowing and intelligent waiver," and instead requires only that "notice is to be given." The court's use of the term "inferentially" suggests that the court does *not* require an explicit warning that the information will be used in the hearing, but rather only notice that the privilege is suspended. Finally, the court makes explicit that it is not addressing the constitutional issue related to the right against self-incrimination, which is the central issue in the *Miranda* case. It does not say whether the use in court of communications made to a psychotherapist by a patient who had been warned would or would not violate the patient's constitutional right against self-incrimination.[8]

The last point is especially true when examinations are conducted within the framework of Ch. 123. In none of these examinations does the issue of guilt or innocence become relevant. Furthermore, the patient-psychotherapist statute exception for court-ordered examinations explicitly rules out the use in court of inculpatory statements even when the patient has been warned.[4]

It is clear from these considerations that the *Lamb* warning and the *Miranda* warning are in general not legally equivalent processes. *Lamb* requires different procedural protections than does *Miranda*. It relies less on "intelligent waiver" (like informed consent) at the time of the interview, and requires only notice before the interview. Other state

law[3] may add some protection, by giving the court control of the information once it is generated.

Children versus Adults Although the *Lamb* warning may in general not require the same degree of procedural formality as does the *Miranda* warning, things may be different for children. What impact does youth and/or immaturity have on a person's ability to accept a warning?

The legal cases involving the *Miranda* warning for juveniles are fairly consistent. They deliver an explicit message that juveniles are considered by reason of immaturity generally less likely to have the capacity to make the sort of knowing and intelligent waiver required by *Miranda.* In the landmark US Supreme Court case *In re Gault*[13] the court ruled that juveniles have the right against self-incrimination, that they can, like adults, waive that right, but that "special problems may arise with respect to waiver" where juveniles are concerned. The court went on to claim that, with the admissions of children, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." the implication is that the process of "knowing and intelligent waiver" by children is a more vulnerable one than it is with adults, and inferentially more in need of special procedural protection.

To date the Supreme Court has declined to articulate such special protections. In *Fare v. Michael C.*[14] it was satisfied to "assume without deciding that *Miranda* principles were fully applicable" to the juvenile case at hand, but it found on the basis of the "totality of the circumstances" that the 15-year-old defendant was indeed capable of making a knowing and intelligent waiver without any additional special procedures involved.

The Massachusetts Supreme Judicial Court has articulated specific procedural requirements regarding the *Miranda* waiver for children in *Commonwealth v. a Juvenile.*[15] The court stated "for the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and has the opportunity to explain his (or her) rights to the juvenile so that the juvenile understands the significance of waiver of these rights. For the purpose of obtaining the waiver, in the case of juveniles who are under the age of 14, we conclude that no waiver can be effective without this added protection." For children 14 or over, a waiver can be valid without such consultation only if "the circumstances . . . demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile."

What implications does this increased caution in procedural protection for juveniles regarding the *Miranda* warning have with respect to the *Lamb* warning? The differences explored above between the *Miranda* and *Lamb* warnings suggest that *Lamb* requires a lower standard of protection than does *Miranda*, but re-

viewing the differences between children and adults suggests that when dealing with children there may be a need for more protection than with adults.

Because the comparisons between *Lamb* and *Miranda* on the one hand and between children and adults on the other argue in opposite directions, it is not clear what lesson is to be learned from them. We will need to return to basic consideration of the variables that appear to determine the degree of protection required. These are the stakes of the process, the interests involved, and the capacities of the parties involved.

Stakes As described above, in *Lamb* the Massachusetts Supreme Judicial Court explicitly noted that the procedures required in giving notice of the suspension of the patient-psychotherapist privilege are not identical to those required in warnings against self-incrimination. A major reason was that the issue at stake was psychiatric commitment, a civil and nonpunitive rather than a criminal and punitive process. The key concern is that the process is nonpunitive, that is, the patient puts himself at risk only of being committed by the examination process and not of being punished.

In juvenile court the stakes can vary a great deal. In delinquency proceedings it is important to appreciate that the findings of clinical examinations are not used to determine guilt or innocence, but instead are used just as in criminal court to determine competency to stand trial and criminal responsibility and, most importantly, to aid in arriving at dispositions after a finding has been made. At disposition, juveniles are generally at less risk in juvenile court than adults would be if charged with similar offenses in criminal court. The most restrictive disposition available to the juvenile court is commitment to the state's Department of Youth Services (DYS). The degree of restrictiveness involved in such commitment actually is not determined until after the commitment is made, and not by the court but rather by DYS itself. Only a minority of DYS committed youth end up in secure facilities. Furthermore, commitment only lasts until the child is 18 years old or, in rare cases, until a maximum of 21 years old.

Interests In addition to having lower stakes than criminal court in terms of the potential intrusiveness or restrictiveness of the state's response, juvenile court also differs in terms of the interests involved. Criminal court is an arena in which the interests of the state are pitted quite explicitly against those of the criminal. Indeed, it is both because of the stakes involved and because of this clear divergence of interests that criminal procedure offers such high levels of caution and protection of defendants' rights.[16]

In juvenile court the interests involved are more ambiguous. The original theory of the juvenile court was based on the doctrine of *parens patriae*, or "the state as parent." It held that delinquent or wayward children were in need of guidance, counsel, or supervision and that the court was to provide these to the child as would a "wise parent." The history of the juvenile court system has left doubt about the degree to which this theory has really described reality. The US Supreme Court has found, because

the juvenile court has not in fact seemed to succeed in providing care and treatment for children, that children do need substantial procedural protection from potential intrusions of the state in juvenile proceedings. However, the Supreme Court has not declared the juvenile court identical to the criminal court and has never required that the identical procedural protections be followed.[17] Indeed, the Supreme Court has recently indicated that it sees differences between children and adults that warrant less procedural protection for children.[18] Furthermore, in Massachusetts the juvenile court statute is quite explicit that the goal of the delinquency jurisdiction is not punitive, but is instead to further the welfare of the child.[19]

These facts indicate that in spite of the application of some procedural protections in juvenile court, the notion that it is different from criminal court still lives. One of the major differences is that the goal of juvenile court involvement is not punitive, but rather is to provide whatever help may be needed for the child to be able to carry on with his or her development in as normal a way as possible. In this view, the interest of the child in his or her own normal development is identical with that of the state, rather than in opposition to it.

In the nondelinquent jurisdictions of the juvenile court the issue of interests is even clearer. Status offense and dependency cases are explicitly civil actions, the object of which is to provide appropriate state intervention to benefit children and their families. The interests involved in such cases were addressed by the Massachusetts Supreme Judicial Court in an opinion that applies explicitly to the current issues.

In a case involving a petition to terminate parental rights,[20] the Court determined that a termination case is not a "child custody" case in the meaning of the statute; it explained (among other distinctions) that in a child custody case:

> ... evaluations may be used in assisting the department and the judge to determine a parent's fitness for custody of the child. In each of these endeavors, *the interests of the parents, the child, and the department should be identical*: strengthening the family in order to provide a safe and healthful environment for the child. When the Department ... petitions ... to dispense with the natural parent's consent to adoption, the cooperative effort between the parent and the intervening agency ... necessarily ceases, and the relationship between the parent and the government *acquires an adversary character* [emphasis added].

The fundamental point is that when the interests of the state and (in this case) a parent coincide, there is less need for special caution regarding procedural protection than there is when parent and state interests are in opposition to one another. The nature of status offense and dependency cases clearly falls within the realm of those "child custody" cases in which state and family interests coincide in wanting to strengthen the family for the benefit of the child.

Capacities The final factor to weigh in finding the right balance of procedural protections for children in this area is what a child is really capable of in terms of protecting himself. A child's actual capacity to understand and respond appropriately to the notice involved in the *Lamb* warning may be affected by the age of the child. Indeed, minors are gen-

erally not considered to be competent in a variety of areas simply by virtue of age. It is instructive in this context to see (1) how the law treats children's capacities in general and (2) what empirical evidence there is that bears on the issue of whether a child really can appreciate this notice.

There are many anomalies and inconsistencies in the rights and capacities afforded to children in general, and not least in the area of the capacity to consent.[21] One way of understanding these apparent inconsistencies is that the state has carefully assessed what kind of knowledge and maturity is required for carrying out different tasks, and has assigned different ages and qualifications for capacity for them accordingly. A more realistic understanding is that the inconsistency comes not from statutory attempts to assess true competence, but instead reflects the impact of other interests that override the presumption of incompetence of a minor.[22] Whatever the reason for the inconsistency, it allows laws regarding children's capacities in general to offer little guidance regarding the role of capacity in this situation.

What can be said on an empirical basis about the general relationship between age and the skills required to receive a *Lamb* warning in a competent manner?

There are a variety of developmental models which purport to describe the changes in various reasoning capacities of children as they mature through adolescence. The most familiar of these is that of Piaget.[23] Piaget characterizes children of about seven to 12 years of age as reasoning in a "concrete operational" fashion, and after age 12 or so moving into a "formal operational" stage. Only in the formal operational stage can hypothetical or abstract reasoning occur, but as noted this can begin quite early in adolescence. Another theoretical perspective is offered by Tapp and Levine.[24] They describe a simple development of "legal reasoning" from "preconventional" to "conventional" to "postconventional" levels. Children typically respond to problems in the law-deferring, sanction-oriented preconventional mode, while adolescents tend to respond at a conventional level, involving "a confusion of rights with privileges associated with being 'nice' or accorded by one's role, physical competence, or social status." Most importantly, although some late adolescents and adults tend to use the more abstract reasoning of the "postconventional" level, the majority of both adolescents and adults continue to use the "conventional" mode.[25]

On the basis of these developmental models, there seems little reason to draw any significant differences between adults and adolescents with regard to style of or capacity for reasoning. To the extent that these cognitive features are important to the process of receiving the *Lamb* warning, there would not appear to be much reason to distinguish between adults and adolescents with regard to the issue of capacity.

There are some more concrete empirical investigations that bear more directly on the issue of capacity. Studies by Weithorn[26] and by Grisso and Vierling[27] of minors' hypothetical responses to treatment decision problems indicate that in general children over 14

or 15 tend to reason similarly to adults, while those younger than 14 are less mature and effective in their approaches to these problems.

Another study by Grisso[28] of minors' responses to *Miranda* warnings focused not only on reasoning, but also on simple comprehension of the information presented. In this study the vast majority of juveniles under 15 years misunderstood at least one the statements in the *Miranda* warning and in general showed significantly poorer comprehension of the warning than did adults. Fifteen- and 16-year-old adolescents with IQs below 80 performed similarly to younger subjects, but 15- and 16-year-old adolescents with higher IQs tended to perform similarly to 17- to 22-year-old adolescents. Prior court experience bore no direct relationship to simple comprehension of the warning, but was related to the extent to which a youth appreciated the actual significance of the specific rights described in the warning.

Another line of empirical study focuses on the psychological processes involved in warnings and interrogations as opposed to the simple degree of comprehension or appreciation of a warning. These studies are specifically relevant to the concerns raised in *Gault*, that the admissions of a juvenile might be likely to be "the product of adolescent fright, fantasy, or despair."[13]

Extensive research in social psychology has documented how vulnerable ordinary people tend to be to the suggestions of people in authority. The most dramatic of this research is probably Milgram's[29] classic experiment in which subjects were asked to administer electric shocks to other subjects as part of an "experiment" monitored by a white-coated "scientist." "Shocks" were given at what appeared to the subjects to be increasingly high dosages, even accompanied by (sham) screams from the subjects supposedly being shocked. Most subjects continued to administer the shocks in response to prodding from the "scientist," in spite of apparent risks and obvious discomfort to the subjects receiving the shocks. When the experiment was conducted by an "ordinary man," not dressed in a white lab coat, only about one third as many subjects continued to administer the high levels of "shock" that had been administered in compliance with the orders of the "scientist."

Although this experiment was conducted with adults and does not address the differences between adults and children with regard to their tendencies to be compliant with authority, it highlights the powerful pressures toward compliance that may be present in an interrogation or examination situation. Driver[30] suggests that these pressures appear likely to be greater to the extent that (1) the relationship between the interrogator and suspect is of an intimate distance, (2) there is isolation from persons who provide consensual validation, (3) the interrogator is of high social status or prestige, and (4) the suspect is of low social status and inexperienced with the police. Handler[31] suggests that a "high level of informality leads to confusion and lack of perception or understanding of roles and standards," and thus increases pressure toward communication. Both a high level of informality

and the status differences and isolation described tend to be characteristics of the juvenile court system. This suggests the presence of greater pressures toward communication than in the adult system.

Juveniles tend in fact to communicate in interrogation situations much more readily than do adults. It has been estimated that over 95 percent of the children brought into juvenile court for delinquency admitted involvement in the offense.[32] Long[33] indicates that "most kids, when confronted by the police, not only confess to the matter at issue, but will voluntarily involve themselves and others in offenses the officers had not even heard of." One study found that of children institutionalized by juvenile courts, 74 percent said that it was better to talk to than not to talk to the police in an interrogation.[34]

In summary, the issue of children's true capacities to accept a *Lamb* warning is complex. Other legally prescribed capacities offer little guidance, because they are inconsistent and affected by other interests. Adolescents seem to reason in a manner comparable to that of adults, although younger children do not. Even adolescents, especially those who are not bright and not experienced with the legal system, have difficulty simply understanding the full content of the *Miranda* warning. Juveniles in general do appear to have a greater tendency than adults to communicate and confess. This might reflect a greater effective psychological pressure on juveniles to confess. On the other hand, it might simply reflect the fact that the general population of delinquents is less seriously antisocial than the general population of adult criminals.[35,36] With regard to the basic issue noted above, this greater tendency to communicate might indicate an increased need for protection for juveniles or instead might reflect the efficiency of the juvenile system in establishing rapport with the juveniles whose interests it serves.

Conclusions Searching for appropriate standards for procedural protections for children in court-related clinical examinations has involved reviewing the stakes of such involvement, the interests involved, and the capacities of the children being examined to make use of protections offered. This review indicates that (1) in general the stakes of juveniles' court involvements are less than those of adults' court involvements; (2) there is an explicit and general tendency for the parties' interests and state interests to converge in juvenile court matters; and (3) juveniles' capacities appear in some ways different from those of adults, but the issues are ambiguous and need better empirical grounding. Specific empirical exploration of children's and adolescents' capacities to accept the kind of simple notice involved in the *Lamb* warning has yet to be carried out.

Recommendations

What specific recommendations can be made regarding the degree and type of procedural protection needed for the *Lamb* warning process in juvenile courts? Although the discussion tends to argue against the creation of elaborate standards for procedural protections for

juvenile court clinical examinations, it would probably be a mistake to attempt to reach any homogenized standards covering all situations. A more practical approach is to set a standard practice applicable to most situations and to highlight situations that are likely to be exceptional. An appropriate minimal standard practice is as follows.

Anyone being interviewed in a court-related clinical examination, including both child and parents, should be informed at the start whether any patient-psychotherapist privilege obtains, or whether there is any other applicable privilege (such as attorney-client if the examination is being conducted for the defense rather than for the court). It is best to be fairly concrete about giving this information and to provide it in language that the examinee is likely to understand. Notice should also be given if a report is to be written, including who will have access to it and who will not. Some effort should be made to ensure that the examinee has understood this information. In most cases this effort should be informal and take the form of brief discussion of the examination context and of the examinee's understanding of and feelings about the process. Such an informal discussion is in most cases procedurally adequate and is also likely to further the process of establishing clinical rapport in the interview. Documentation should be made of this conversation in the clinical record and in the examiner's report. Such an informal procedure meets the minimal standards for a *Lamb* warning and should be sufficient in most cases.

Exceptions

There will certainly be some exceptional circumstances in which the stakes will be unusually high, the interests of the state and the examinee will not be clearly convergent, or the capacity of the examinee to understand or use the notice given will be questionable. Under such circumstances more formal or elaborate procedures for giving notice or obtaining waivers may be required. Some of these circumstances may be hard to predict, but others are quite clear.

Transfer The most clear-cut exception is in the case of a clinical examination for the purpose of a juvenile transfer hearing. This is the process by which a juvenile court may elect to waive jurisdiction for a particular offense and transfer it instead to the jurisdiction of the criminal court. Clinical examinations may often be requested in this context, especially with regard to the issue of whether a juvenile can be expected to respond to efforts at rehabilitation within the juvenile system.[37,38]

It should be perfectly clear that the general analysis of stakes and interests in juvenile court process does not apply to the transfer process, because the potential outcome of this process may be entry into the criminal system. Furthermore, the stakes of the clinical examination itself may be extraordinarily high, because (in Massachusetts) a juvenile defendant may only be transferred if found to be not "amenable to treatment as a juvenile." The centrality of the issue of treatability in these cases can make the clinical examination the deciding

factor in whether a juvenile defendant is exposed to the supposedly helpful actions of the juvenile system or to the potentially intrusive and punitive actions of the criminal system. The interests involved in the examination itself are also different from those of other examinations in the juvenile system. The goal of the examination is not just to determine what course of action may be helpful for the juvenile, but more primarily to determine for the public interest which of two very different modes to use in responding to the juvenile's alleged offense. The examination serves the public interest first. In doing so, it may put the examinee in a position in which his or her interests are directly opposed by those of the state, i.e., that of a criminal defendant.

Because the stakes and interests involved are so different from most juvenile and other clinical examination situations, it makes sense to treat the warning issue in such examinations more like a *Miranda* warning. The examinee's participation in the clinical interview should represent his having made a "knowing and intelligent waiver" of the patient-psychotherapist privilege. The issue of capacity becomes important here because of the *Miranda* standard that in most cases such a waiver can only be given by a juvenile after consultation with an interested adult. The issue of capacity in a juvenile under 14 years of age is not a problem in jurisdictions in which only those 14 and over may be exposed to the transfer process. The issues of intelligence, sophistication, and experience are central. It should be assumed that, in the absence of unusual amounts of these qualities, a juvenile of any age should have the opportunity to consult with a parent and/or counsel before the clinical examination.

Procedurally, the clinician conducting an evaluation for a transfer hearing should inform the juvenile (and the parents if they are involved) not only that the patient-psychotherapist privilege is suspended, but also of the following three specific points. First, the examination will be used in the transfer process. This process should be explained and efforts should be made to establish the juvenile's understanding of the process. Second, the major focus of the examination will be on the juvenile's amenability for treatment. It is only fair that the juvenile understand that, for the purpose of this type of examination (unlike some other circumstances), the discovery by the clinician of problems suffered by the juvenile for which treatment may be useful will be to the juvenile's advantage. Third, the clinician should determine whether the juvenile has discussed the transfer evaluation with his or her parent or attorney; if there is any substantial doubt about his or her understanding of the foregoing points, the evaluation should be deferred until such a discussion has taken place.

Parents in Dependency Cases Dependency cases are clearly child custody cases and so fall within the analysis of convergent state and family interests above, with one significant caveat. The caveat is that some dependency cases ultimately become termination of parental rights cases, and in Massachusetts and in other jurisdictions termination cases have been clearly determined to

involve opposing state and parent interests, involving the high stakes of a parent's legal ownership of a child.[9,20] The problem for clinical evaluations in dependency cases arises if the results of those evaluations become part of a juvenile court record that might become part of a termination case record at a later time. A warning to the parent regarding the absence of patient-psychotherapist privilege in the dependency (custody) case might not offer the same high level of procedural protection as the termination case, with its higher stakes and more divergent interests, would require.

There are two potential solutions to this problem. One would be to disallow the clinical information used in a dependency case from being considered in any subsequent termination case. This would make gathering historical information in the termination case significantly more difficult and might make termination cases harder to sustain. It would require that any clinical information for the termination would have to be generated anew in the context of a current evaluation, which would have been preceded by a warning with greater completeness and care regarding the establishment of full understanding and waiver on the part of the parent, especially with regard to the high stakes involved, much as in the transfer hearing situation above. Such a procedure would be less efficient for the court and might mean that less complete or less valid clinical information was generated. Those problems might be balanced by the greater fairness to parents that such a procedure would offer.

The other potential solution would be to set a standard for warnings for clinical evaluations of parents in dependency cases that would be sufficiently formal and complete that it would suffice at the termination phase as well, in cases that went that far. Such a warning would inform the parent that, although the current evaluation would be used in an attempt to find ways to provide treatments and services that would ideally sustain and improve the integrity of the family, there would be some likelihood that the information generated would be used at a later time in a process that could result in the parent losing all rights with regard to the child. Such a procedure would solve the problem of protecting the parent against unfair use of information gleaned by a process the potential result of which they did not understand. However, it is important to appreciate that this solution would accomplish such protection at the cost of bringing a much more adversarial character to the dependency process than it should have or has so far had. This increased adversarial character would likely make the gathering of complete and valid clinical data at the dependency stage more difficult and less likely. This in turn would likely reduce the efficacy of treatment and service efforts at this stage, thus adversely affecting family integrity and increasing the need for more termination cases.

Preadolescent Children Children under the age of 14 present a variety of special concerns by virtue of cognitive differences from adolescents and adults. They tend to reason more concretely, to understand less of the information pre-

sented to them, and to be less able to understand the significance of information presented. Furthermore, although the issue has not been studied empirically, it is very likely that younger children do not have much of a capacity to censor their communications (or to know what to censor), especially in situations in which some trust has been established, even if they have been given a warning that they do understand. Because of these real differences in capacity, there may be circumstances in which special caution needs to be taken regarding the *Lamb* warning, just as with the *Miranda* warning.

For most status offense and delinquency cases involving younger children it is probably sufficient, for purposes of this protection, that the child and parent both be warned and that they have the opportunity to review the nature of the evaluation situation together before proceeding. A simple warning at the time of clinical referral should be sufficient for this purpose. In these cases it is generally reasonable to assume that parent and child interests are convergent.

In dependency cases, it is the legal assumption that parent and child interests converge, as they are "child custody" cases. However, there are clearly cases in which this assumption is open to serious question. In such cases it may not be adequate to rely on consultation between child and parent as procedural protection for the child.

The most dramatic such case is that of a child who has been seriously abused either physically or sexually or both. It would probably be foolish to expect that the child's parent could provide adequate counsel to the child regarding participation in a clinical evaluation for court. This is especially true if the parent is likely to be exposed to criminal prosecution stemming from the abuse. In such a situation the child's and the parent's interests are clearly not convergent. Furthermore, if the results of the child's clinical evaluation might expose the child to being forced to be a witness against the parent in a later criminal proceeding, then the stakes of the evaluation for the child become extraordinarily high and the issues complex. Under such circumstances it might appear that the child should have the opportunity to consult with independent counsel as part of the warning process. However, it is doubtful that simply providing such opportunity could afford even much clarity about the child's interests under the circumstances. Furthermore, the problems of protecting the child against the impact on self and family of his or her own disclosures usually go beyond what such a simple consultation process could expect to address.

The problem is similar to that involving parents in the same cases. As described above, one way to solve it would be to prohibit required disclosure to the criminal court of clinical evaluations in dependency cases, for children as for adults. Such a solution would make criminal prosecution of parents more difficult but would allow children to testify if they wanted to or if it were determined in some other way that it would be in their interest to do so. Another type of solution receiving increasing attention is the use of guardians *ad litem* or other special advocates for children

in these cases, to provide broader investigative and advocacy services than are routinely provided by counsel.

Summary

The rules for use of the *Lamb* warning cannot be interpreted and applied concretely without an appreciation of the basic issues involved in establishing procedural protections for children and families involved in court. The nature and degree of these protections required for court-ordered examinations varies with the stakes of the evaluation, with the nature of conflicting interests involved, and with the degree to which youth or immaturity impairs the capacity of an examinee to understand the examination and to manage his or her response to it.

Exploration of these variables leads in most juvenile court circumstances to the acceptance of relatively informal procedures for protecting the rights of the children and families involved. In some specified situations—transfer hearings, dependency cases, and some examinations of young children—the issues are more complex and there is some need for more elaborate procedural protections. There will certainly be other such circumstances as well that have not been addressed.

This discussion should be understood in general as quite preliminary. It is intended to rough out some procedural guidelines as a start, but more importantly to draw attention to the issues involved and to provoke further discussion about what kinds of rules really make sense in this area. The issues are complex and the topic is important; further work is certainly called for.

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