PROTECTING TRUTH: AN ARGUMENT FOR JUVENILE RIGHTS AND A RETURN TO *IN RE GAULT*

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In the 1967 case In re Gault, *the U.S. Supreme Court revolutionized juvenile criminal proceedings by holding that children were constitutionally entitled to legal counsel and the privilege against self-incrimination. In contrast to* Miranda v. Arizona, *decided the previous year, the Court's reasoning was not centered on preventing involuntary confessions. Instead, the Court was concerned that information obtained from juveniles was untrustworthy—indeed, some children might confess to crimes they did not actually commit. Improved procedural protections were necessary to guarantee the accuracy of the factfinding process.*

Subsequent cases have moved away from this principle, and the Court has never held that children in criminal proceedings are entitled to greater constitutional procedural protections than adults. This retreat from Gault *does not easily reconcile with increased research showing that children are fundamentally different from adults in comprehending and exercising their rights. Furthermore, advances in DNA analysis and other investigatory techniques have shown that false confessions are a very real phenomenon of particular danger to juveniles vulnerable to the coercive environment of an interrogation room.*

This Article discusses the importance of a return to Gault*'s principles: providing juveniles with enhanced due process protections to ensure the accuracy of legal proceedings and to prevent wrongful convictions based on false confessions. Two proposals are discussed: a non-waivable right to legal counsel and mandated electronic recording of juvenile interrogations.*

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INTRODUCTION

The juvenile court system came into being over a century ago amidst a series of progressive reforms recognizing that children had different needs than adults.[1] The new courts were based on a model of rehabilitation and care rather than punishment.[2] Because the courts were viewed as helping juveniles instead of subjecting them to criminal penalties, judges dispensed with many of the constitutional rights and procedures inherent to adult criminal proceedings.[3]

From its inception, the juvenile court was criticized for failing to live up to its ideal of providing therapeutic, individualized treatment to juvenile delinquents.[4] Critics claimed the proceedings in practice were much closer to criminal proceedings, and juvenile judges abused their broad discretion.[5] The U.S. Supreme Court addressed these concerns in the 1967 case *In re Gault*,[6] which granted juveniles procedural rights in court proceedings, including the right to legal counsel and the privilege against self-incrimination.

The courts could have read *Gault* broadly to require additional protections to juveniles greater than those granted to adults.[7] But the Supreme Court has never mandated additional protections based on the age of a suspect. Instead, subsequent cases at best granted equivalent rights and at worst gave children lesser protections.[8] In *Fare v. Michael C.*,[9] the Court held that the validity of a

1. W. Jeff Hinton et al., *Juvenile Justice: A System Divided*, 18 CRIM. JUST. POL'Y REV. 466, 468–69 (2007). This Article uses the terms children, youth, minors, and juveniles interchangeably to refer to people under the age of eighteen.

2. Joanna S. Markman, *In re* Gault*: A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 126 (2007).

3. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 263 (2007).

4. *Id.*

5. *See id.*

6. 387 U.S. 1 (1967).

7. *See* Irene Merker Rosenberg, Gault *Turns 40: Reflections on Ambiguity*, 44 CRIM. L. BULL. 330, 337 (2008) (stating that the Court's decision in *Gault* "portended, or at least would have permitted enhanced protection for children tried in juvenile court").

8. *See In re* Winship, 397 U.S. 358 (1970) (requiring that criminal cases against juveniles, like those against adults, be proved beyond a reasonable doubt); McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (denying juveniles the right to a jury trial).

juvenile's waiver of his privilege against self-incrimination and of his right to counsel would be judged under the same flexible totality of the circumstances test applied to adults, with youth as merely one factor to consider.

While a totality test allows the possibility of enhanced protections because of youth, in practice judges tend not to weigh age heavily when determining whether the waiver of rights was valid (that is, knowing and voluntary).[10] As a result, courts deem juvenile waivers valid the vast majority of the time, leaving children to negotiate police interactions without the aid of an attorney.[11] This unsympathetic treatment of juveniles is likely due to a perceived increase in youth crime and violence, which has driven courts and legislatures to eschew the therapeutic model of juvenile courts in favor of a more punitive standard.[12]

This retreat from *Gault* does not easily reconcile with increased research showing that children are fundamentally different from adults in comprehending and exercising their rights, and that it is almost impossible to judge whether a juvenile is competent to waive his constitutional protections. Further, *Michael C.* overlooked a key concern in *Gault*: The absence of due process can lead to inaccurate outcomes in criminal proceedings, including false confessions and conviction of the innocent.[13] *Gault* was indeed prescient. In the four decades since that opinion, advances in investigatory techniques, including DNA technology, have shown that false confessions are a very real phenomenon of particular danger to juveniles vulnerable to the coercive environment of an interrogation room.[14]

This Article discusses the importance of a return to *Gault*'s principles: providing juveniles enhanced due process protections to ensure the accuracy of legal proceedings and to prevent wrongful convictions based on false confessions.[15] Part I describes the history and Supreme Court jurisprudence on minors' rights in juvenile proceedings. Part II outlines the tension between the current state of juvenile jurisprudence and the scientific evidence indicating that children are sufficiently different from adults to need added procedural protections. Part III discusses the issue of false confessions leading to the wrongful conviction of juveniles. Part IV analyzes several reform proposals for protecting the rights of youth and reducing the number of false confessions,

9. 442 U.S. 707, 725, 728 (1979).
10. *See infra* Part II.
11. Drizin & Luloff, *supra* note 3, at 266.
12. *See infra* Part II.
13. *See infra* Part III.
14. *See id.*
15. *See* Drizin & Luloff, *supra* note 3, at 261 ("[We] suggest that juvenile justice advocates and juvenile court apologists might be wise to reframe or broaden their reform efforts by focusing on the risk of wrongful convictions rather than amorphous concepts like 'due process' or 'fundamental fairness.'").

particularly a non-waivable right to legal counsel and mandated electronic recordings of juvenile interrogations.

I. EVOLUTION OF THE CONSTITUTIONAL RIGHTS OF JUVENILES

In 1899, Illinois created the first separate juvenile court system; most other states followed shortly thereafter.[16] The new system removed juveniles from the adult criminal courts with the intention to focus on rehabilitation rather than punishment; the perception was that children were both less culpable for their actions and more responsive to rehabilitative treatment than adult offenders.[17] The hope was that a specially trained juvenile court judge could determine individualized therapeutic remedies in the best interests of each child.[18]

Because of the view that the juvenile courts acted out of compassion for the child's interests, the procedures and constitutional protections inherent in criminal trials seemed unnecessary.[19] Children in the juvenile court were not entitled to legal counsel, hearing procedures were informal and confidential, and juvenile judges had broad discretion when dealing with children and their families.[20] Critics objected that the lack of procedural due process led to arbitrary and unfair judicial decisions and that the proceedings were similar enough to criminal prosecutions to deserve full constitutional protections.[21] But for decades, the juvenile court maintained its "best interests of the child" model with its accompanying lack of procedural due process.[22]

This changed with the Supreme Court's 1967 landmark decision *In re Gault*, which granted juveniles procedural rights such as formal hearings, legal counsel, and protection against self-incrimination.[23] Gerald Gault was a fifteen-year-old boy arrested and charged with making an obscene phone call.[24] The

16. *Id.* at 262; Francis Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 458 (1981).

17. Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71 (1997); Markman, *supra* note 2, at 126. The juvenile court movement coincided with other movements urging special protections for children, including foster care and campaigns against child labor. *See* Hinton et al., *supra* note 1, at 469.

18. Feld, *supra* note 17, at 71–72.

19. Drizin & Luloff, *supra* note 3, at 263.

20. Markman, *supra* note 2, at 127.

21. Drizin & Luloff, *supra* note 3, at 263.

22. *Id.*; Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 971 (1995).

23. *In re* Gault, 387 U.S. 1, at 32–33, 41, 55 (1967); Markman, *supra* note 2, at 132; *see also* Drizin & Luloff, *supra* note 3, at 263–64 (stating that *Gault* "set the stage for a major procedural overhaul of the juvenile court").

24. *Gault*, 387 U.S. at 4.

police did not notify his parents of his detention or of the charges against him.[25] Likewise, the police did not inform Gault of his right to counsel or his right against self-incrimination, and he did not have a lawyer during the hearing in juvenile court.[26] The woman who allegedly received the obscene phone call did not appear at the hearing.[27] Based on Gault's vague testimony, which the judge interpreted as an admission of guilt, and some concerns about his past behavior,[28] Gault was sentenced to a maximum of six years in a youth correctional facility.[29] Had an adult been convicted of the same crime, the penalty would have been a maximum fine of $50 and two months in jail.[30]

Undoubtedly, the Supreme Court saw Gault's case as a graphic illustration of the juvenile court's failure to live up to its ideal of serving the child's best interests.[31] The Court was concerned that juveniles received neither the specialized care promised by the juvenile courts nor the constitutional protections adults were entitled to, thus giving them "'the worst of both worlds.'"[32] The Court cited reports stating that juvenile-court judges lacked the necessary expertise and resources to fulfill their intended function.[33] The juvenile-court judges' "unbridled discretion" and "[d]epartures from established principles of due process" had led to "arbitrariness."[34] And however rehabilitative the juvenile court's goals might ideally be, this case involved the incarceration of a child, and thus "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'"[35]

Gault could be seen as somewhat analogous to *Miranda v. Arizona*,[36] decided by the Supreme Court a year earlier. *Miranda*, which involved adult defendants, held that a statement obtained from a suspect during custodial interrogation by police was admissible as evidence only if it had been preceded by admonitions informing the suspect of his constitutional rights and guarantees against

25. *Id.* at 5.
26. *Id.* at 34, 43–44.
27. *Id.* at 7.
28. *Id.* at 7–9.
29. *Id.* at 29.
30. *Id.*
31. *See id.* at 17–18 ("[I]n practice . . . the results [of the juvenile justice system] have not been entirely satisfactory."); *id.* at 22 n.30 ("[T]o the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*."; *see also* Drizin & Luloff, *supra* note 3, at 264 ("Shocked by the absence of due process for Gault, the Supreme Court minced no words in its criticism of the juvenile court . . . .").
32. *Gault*, 387 U.S. at 18 n.23 (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).
33. *See id.* at 14 n.14.
34. *Id.* at 18–19.
35. *Id.* at 27–28.
36. 384 U.S. 436 (1966).

self-incrimination.[37] The police must tell the suspect that he has the right to remain silent, that any statement he makes could be used as evidence against him, and that he has the right to legal counsel, "either retained or appointed."[38] Similarly, *Gault* affirmed a juvenile's right to legal counsel[39] and privilege against self-incrimination.[40]

The reasoning behind the two holdings, however, is strikingly different. *Miranda* was premised on procedural rights that prevent the police from compelling an individual to provide a confession against his will.[41] The concern was the "respect a government . . . must accord to the dignity and integrity of its citizens."[42] Procedural rights served to "respect the inviolability of the human personality"[43] and to limit the "scope of governmental power over the citizen."[44] A confession, even if truthful and corroborated by other evidence, would be inadmissible if not given voluntarily.[45] In other words, the privilege against self-incrimination was of such importance that the Court would rather let a guilty man go free than allow police tactics that led to an involuntary confession or even a voluntary confession that was not preceded by the *Miranda* warnings.[46]

Gault, in contrast, based its reasoning on the need for accuracy in the fact-finding process rather than on protecting juveniles' dignity in court proceedings.[47]

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37. *Id.* at 444–45.

38. *Id.* at 444.

39. *Gault*, 387 U.S. at 41.

40. *Id.* at 55. Although *Miranda* and *Gault* have similarities, it would be an oversimplification, if not outright erroneous, to characterize the latter as an extension of *Miranda* protections to juveniles. *Gault* specifically states that the Court is "not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process . . . " which would be the stage where *Miranda* would apply. *Id.* at 13. However, because both cases focus on the right to counsel and the privilege against self-incrimination, it is useful to compare the different bases on which the Court grounds those rights.

41. *Miranda*, 384 U.S. at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

42. *Id.* at 460.

43. *Id.*

44. *Id.*

45. *See id.* at 464 n.33 ("It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, *regardless of its truth or falsity* . . . . This is so even if there is ample evidence aside from the confession to support the conviction." (emphasis added)).

46. *See* McCarthy, *supra* note 16, at 475 ("The result [of *Miranda*] . . . is that a trustworthy confession, offered without official coercion will be excluded unless the rights have been knowingly waived. Such a rule is explainable only with reference to a societal concept of 'dignity' which . . . serves to proscribe the power and manner of a state's intrusion with relation to an individual.").

47. *See generally id.* McCarthy divides procedural rights and protections into two categories: "those designed to lead to accurate determinations and to preserve judicial integrity, and those procedures designed to safeguard some other substantive right which achieves a balance in the relationship between an individual and the government." *Id.* at 464. The former procedures are based on principles of "adjudication," and the latter are based on principles of "dignity." *Id.* According to McCarthy, *Miranda* relies

The majority began its discussion of the privilege against self-incrimination with a quotation about the dangers of false confessions,[48] stating "[t]he privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are *reasonably trustworthy*, that they are not the mere fruits of fear or coercion, but are *reliable expressions of the truth*."[49] The opinion devoted several pages to the discussion of prior cases of juveniles giving false or unreliable confessions.[50] The Court explicitly noted that in a past juvenile court ruling that excluded oral statements, "[the court] did not rest its decision on a showing that the statements were involuntary, but because they were untrustworthy."[51] This was a clear contrast to *Miranda*'s exclusion of trustworthy statements if they were obtained at the cost of a suspect's personal dignity. Whereas *Miranda* was primarily concerned that confessions be voluntary, *Gault* was concerned that confessions be trustworthy.

This concern for truth is understandable given that the juvenile court convicted Gault based on an unsubstantiated admission of guilt, with no opportunity to cross examine the chief witness against him.[52] Unlike *Miranda*, in which the Court was concerned with coerced but possibly true statements, the *Gault* Court was faced with a juvenile deprived of his liberty based on untrustworthy evidence.

Thus, in *Gault*, constitutional procedure served to protect the truth: "It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.'"[53] Constitutional protections and procedures do not simply protect individuals from excessive

on arguments based both on adjudication and dignity, while *Gault* and the other juvenile cases can be supported entirely on principles of adjudication. *Id.* at 473–75, 480.

48. *See In re* Gault, 387 U.S. 1, 44–45 (1967) ("[E]nough [instances of untrue confessions] have been verified to fortify the conclusion . . . that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt." (quoting 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940) (internal quotation marks omitted)).

49. *Id.* at 47 (emphasis added).

50. *See id.* at 52–55.

51. *Id.* at 54–55.

52. *See id.* at 7. When questioned at a habeas proceeding, the juvenile-court judge testified that Gault had admitted to making lewd comments on the telephone. *Id.* Gault's parents testified that Gault had made no such admission. *Id.* The probation officer testified that Gault had admitted guilt at one hearing but not at another. *Id.* at 6–7. These conflicting accounts were exacerbated by the fact that "[n]o transcript or recording" was made of Gault's hearings. *Id.* at 5.

53. *Id.* at 21 (quoting Henry Foster, *Social Work, the Law, and Social Action*, 45 SOC. CASEWORK 383, 386 (1964)).

government encroachment on their dignity but also protect the accuracy of factfinding.[54]

This theme of procedure as a guarantee of accuracy continued in subsequent juvenile cases. In *In re Winship*,[55] which held that charges against juveniles must be proved beyond a reasonable doubt, the Supreme Court stated that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions based on factual error."[56] However, the accuracy justification was also used to deny juveniles certain rights. In *McKeiver v. Pennsylvania*,[57] the Court denied juveniles the right to a jury trial on the basis that juries were not necessary for accurate factfinding.[58]

Some scholars predicted that the *Gault* ruling would lead to expansive procedural protections for juveniles.[59] *Gault* implied these broad protections when the Court suggested that in obtaining admissions of guilt from children, "the *greatest care* must be taken to assure that the admission . . . was not the product of ignorance of rights or of adolescent fantasy, fright, or despair."[60] However, at best the Court went on to grant juveniles equivalent rights to adults, such as in *Winship*.[61] And the Court was not even willing to grant juveniles all the

54. *See* Drizin & Luloff, *supra* note 3, at 293 ("One of the enduring lessons of *Gault* is that due process is not just about fairness, it is about accuracy . . . ."); McCarthy, *supra* note 16, at 464. *Miranda* also mentioned the importance of procedural rights in promoting accuracy, albeit briefly. For example, it stated that lawyers could help ensure that a suspect gave a "fully accurate statement," although this was a "subsidiary function[ ]." 384 U.S. 436, 470 (1966). Also, a footnote briefly mentioned the possibility of false confessions. *Id.* at 455 n.24. *See also* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 744–45 (1997) (stating that *Miranda* mentioned false confessions but "focused primarily on protecting values and interests apart from the inherent reliability of confessions as evidence").

55. 397 U.S. 358 (1970).

56. *Id.* at 363; *see also* McCarthy, *supra* note 15, at 479 ("When the Supreme Court later ruled in *Winship* that proof in a delinquency action must be measured by the test of beyond a reasonable doubt, the trustworthiness of the result was also a key factor." (footnote omitted)).

57. 403 U.S. 528 (1971).

58. *See id.* at 543 ("All the litigants here agree that the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. As that standard was applied in those two cases, we have an emphasis on factfinding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. *But one cannot say that in our legal system the jury is a necessary component of accurate factfinding*." (emphasis added)); *see also* McCarthy, *supra* note 16, at 480–81. Some commentators have taken issue with *McKeiver* and argue that juries are preferable to judges as finders of fact. *See, e.g.*, Drizin & Luloff, *supra* note 3, at 319 ("[N]ot only are juvenile court judges worse [than juries] in their fact finding, but they also often do not uphold *Winship*'s promise of guilt beyond a reasonable doubt in juvenile proceedings.").

59. *See* Rosenberg, *supra* note 7, at 337 (stating that the Court's decision in *Gault* "portended, or at least would have permitted, enhanced protection for children tried in juvenile court").

60. 387 U.S. 1, 55 (1967) (emphasis added).

61. 397 U.S. 358, 367 (1970); *see also* Rosenberg, *supra* note 7, at 340 (stating that *Gault* and *Winship* "suggested a functional equivalence approach," making the juvenile court more similar to adult criminal courts).

protections of the criminal justice system, as evidenced by *McKeiver*'s denial of a right to a jury trial.[62] So despite *Gault*'s admonition to take "the greatest care," juveniles were not granted any special protections in deference to their youth.

Any vestige of hope that *Gault* would lead to greater protections for juveniles was derailed by *Fare v. Michael C.*,[63] in which a more conservative Court held that a juvenile's waiver of his *Miranda* rights would be evaluated under the same totality of circumstances test applied to adult waivers.[64] The police arrested Michael C., age sixteen and a half,[65] on suspicion of murder.[66] During police interrogation, he requested to see his probation officer.[67] After the police denied his request, Michael C. gave several incriminating statements that resulted in his placement into juvenile proceedings.[68] In ruling on a suppression motion, the California Supreme Court held that the request for a probation officer was equivalent to invoking the right to an attorney, which under *Miranda*[69] would have required the police to cease their questioning.[70]

The U.S. Supreme Court overturned the California Supreme Court in a 5–4 decision, stating that a probation officer did not serve the same function as an attorney, and therefore requesting one did not invoke the *Miranda* rule.[71] As to whether Michael C., absent the request for the probation officer, had "knowingly and intelligently" waived his *Miranda* protections, the Court said the appropriate test was to evaluate the totality of circumstances, taking into account the juvenile's "age, experience, education, background, and intelligence."[72] Since Michael C. had been informed of his rights, had prior experience with the police, and was of normal intelligence, the Court held that he had properly understood and waived his rights.[73]

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62. *See* 403 U.S. 528, 545 (1971).
63. 442 U.S. 707 (1971).
64. *Id.* at 724–25 (1979); Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 31 (2006).
65. *Michael C.*, 442 U.S. at 713.
66. *Id.* at 709–10.
67. *Id.* at 710.
68. *Id.* at 710–11.
69. 384 U.S. 436 (1966). *Miranda* held that if a person indicates that he does not wish to answer questions during a custodial interrogation or wishes to speak with an attorney, the questioning must cease. *Id.* at 473–74.
70. *Michael C.*, 442 U.S. at 714–15.
71. *Id.* at 723–24.
72. *Id.* at 724–25.
73. *Id.* at 726–27.

The *Michael C.* opinion, which did not cite *Gault* at all,[74] gives no indication of concern that the defendant's incriminating statements might be untrustworthy. There is no mention of the possibility of a false confession. The Court was faced with an admitted murderer, and extending special protections based on his youth would have resulted in a murderer going free. The Court applied the standard *Miranda* rule, granting Michael C. the same right of waiver and test of voluntariness that applied to adults.[75] Age became just one of a long list of factors to be considered, and in this case the majority gave it no particular weight—in fact, when applying the totality test to the circumstances of the case, the Court did not discuss Michael C.'s age at all other than to mention that he was sixteen and a half.[76] Thus, although *Michael C.* did not overturn *Gault*, it signaled an end to the hope that *Gault* would lead to special constitutional protections for juveniles.

II. THE CURRENT APPROACH TO JUVENILE WAIVER

Under *Gault*, juveniles have more procedural rights than previously granted in juvenile courts, yet these rights must be affirmatively invoked and may be waived as long as the waiver is knowing and voluntary under the *Michael C.* totality test. Theoretically, this test allows judges the discretion to weigh the age of a child more heavily and thereby extend greater protections to juveniles. In practice, however, judges generally do not grant these protections. Kenneth King's analysis of several hundred juvenile-waiver cases reveals only "grudging, if any, accommodations to the youth of the accused."[77] While some states have adopted rules rendering certain juvenile interrogations per se inadmissible if a parent or other interested adult is not present,[78] thirty-five states and the District

74. The two dissents in *Michael C.* cited to *Gault* for the proposition that "the greatest care must be taken" to ensure that a juvenile's confession is voluntary. *See id.* at 729 (Marshall, J., dissenting); *id.* at 733–34 (Powell, J., dissenting). Justice Marshall's dissent was joined by Justices Brennan and Stevens.

75. *See id.* at 725 (majority opinion) ("We discern no persuasive reasons why any [approach other than the totality of circumstances test] is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.").

76. *See id.*; *see also* Drizin & Luloff, *supra* note 3, at 267 (stating that in *Michael C.*, "the Court did not deem age as a major factor").

77. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 456.

78. *Id.* at 451–52 ("Seven states have created presumptions that a juvenile under a set age cannot waive *Miranda* rights or cannot waive these rights without an opportunity to consult with a parent. Seven states require that a parent is present during questioning only when the child is younger than a designated age, typically thirteen or fourteen." (footnotes omitted)); *see also* Lisa M. Krzewinski, Note, *But I Didn't Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 374–78 (2002) (discussing various per se rules in different jurisdictions). Although these rules are intended to provide greater protection for juveniles, in most cases the presence of a parent does not particularly benefit the

of Columbia use the *Michael C.* totality test without modification.[79] Many state courts analyze waiver under adult *Miranda* jurisprudence, which takes no account of a suspect's age and therefore often leads to a finding of valid waiver.[80] The legacy of *Michael C.* is that juveniles now are found to have validly waived their *Miranda* protections more than 90 percent of the time.[81]

The application of the *Michael C.* test reflects a trend of states moving away from the rehabilitative best-interests model of the juvenile courts. States now emphasize punishment based on public safety concerns,[82] and courts assert "society's [need for] self-preservation" as a justification for rejecting greater procedural protections for juveniles.[83]

Moreover, states have instituted harsher penalties for juveniles,[84] and all fifty states have recently passed laws permitting juveniles to be tried as adults.[85] The lack of sympathy towards juveniles is likely a result of a perceived increase in youth crime, particularly violent crime, coupled with the seeming ineffectiveness of the rehabilitative ideal of the juvenile courts.[86] Indeed, from the

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child, as the parent likely cannot give proper legal advice and in some cases will in fact urge the child to cooperate with the police. *See infra* Part IV.

79. King, *supra* note 77, at 452. Texas has neither a per se parent rule nor does it follow the *Michael C.* test. Instead, a magistrate is required to read the juvenile his rights outside the presence of any law enforcement officials. *Id.* at 453 n.93 (citing TEX. FAM. CODE ANN. § 51.095(a)(1) (Vernon Supp. 2005)).

80. *Id.* at 456.

81. *See* Drizin & Luloff, *supra* note 3, at 266.

82. Feld, *supra* note 22, at 1071 ("[A]bout one-quarter of the states have redefined their juvenile codes' statements of legislative purpose. These recent amendments have downplayed the role of rehabilitation in the child's 'best interest' and acknowledge the importance of public safety, punishment, and individual accountability in the juvenile justice system." (footnotes omitted)).

83. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1142 (1980) ("It is apparent most courts, required to deal pragmatically with an ever mounting crime wave in which minors play a disproportionate role, have considered society's self-preservation interest in rejecting a blanket exclusion for juvenile confessions." (quoting *In re* Thompson, 241 N.W.2d 2, 5 (Iowa 1976)) (internal quotation marks omitted)).

84. *See* Feld, *supra* note 17, at 86 ("A strong, nationwide policy shift both in theory and in practice away from therapeutic dispositions toward punishment or incapacitation of young offenders characterizes sentencing practice in the contemporary juvenile court.").

85. Krzewinski, *supra* note 78, at 364. Ironically, children tried in adult court may receive greater procedural protections than they would in juvenile court, such as the right to a jury trial. *See generally* Feld, *supra* note 17 (arguing for the abolition of juvenile courts and for granting children the full procedural protections of the adult criminal system with enhanced accommodations for youth). But even if children are given the same protections as adults, they are nonetheless at a disadvantage due to their immaturity. *See* Rosenberg, *supra* note 7, at 344 ("[E]ven when the Court gives children the same protection as adults, children still end up getting less simply because they are children.").

86. *See* Hinton et al., *supra* note 1, at 467 ("The trend of rising juvenile crime rates, especially violent crime rates, combined with the lack of well-designed scientific studies documenting the effectiveness of juvenile justice interventions left public policy makers with little choice but to conclude that more punitive sanctions based on the offense committed rather than offender characteristics, including age, was the answer.").

mid-eighties to the early nineties, the period following *Michael C.*, violent crime by juveniles increased 57 percent, and by 1992, one in seven homicide arrests was a juvenile.[87] Some commentators have claimed that the media has played an important role in exaggerating the problem, causing a public perception that juvenile crime is out of control.[88] Whatever the cause, the result is that in the years following *Gault* and *Michael C.*, society and the courts have come to view juveniles as a potential menace rather than as vulnerable and in need of special protections.[89]

This unsympathetic view of juveniles is in tension with substantial empirical, psychological, and neurological research establishing that children are fundamentally different from adults when it comes to understanding and invoking their rights.[90] In fact, "age and intelligence remain the primary predictors of *Miranda* comprehension."[91] Research on juvenile brain development suggests

87. Feld, *supra* note 22, at 976–77; *see also* Hinton, *supra* note 1, at 470 (claiming that the rate of juvenile arrests increased significantly during the '80s and '90s).

88. *See* Markman, *supra* note 2, at 129–30. For example, in 1989 when five teenagers were convicted for a brutal rape of a jogger in New York City's Central Park, the city's major newspapers ran stories reporting increasing numbers of violent juveniles in the streets. *See, e.g.*, Pete Hamill, *A Savage Disease*, N.Y. POST, Apr. 23, 1989; *Wolf Pack's Prey*, N.Y. DAILY NEWS, Apr. 21, 1989. The mayor called for a toughening of penalties for juvenile offenders, New York reinstituted its death penalty, and some scholars even developed theories of violent adolescents taking over the city. Ultimately, the five teenagers were exonerated in 2002, the true culprit having been an adult serial rapist, but the damage was done. The boys had already served their full sentences, and "[w]e ended up with some of the most damaging juvenile laws in our nation's history." Lynnell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, COLUM. JOURNALISM REV., Jan. 2003, at 38, 40 (quoting Steven Drizin, supervising attorney at Northwestern University's Children and Family Justice Center).

89. *See* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 388 (2008) ("By the 1980s, with the perceived increase in juvenile crime and the resulting public demand for harsher penalties for juveniles at increasingly younger ages, the political will to sustain a separate system for youth had all but disappeared."); Hinton et al., *supra* note 1, at 472 ("Public opinion also shifted during the late 1980s and 1990s from support of treatment and rehabilitation to support of management and control strategies aimed at protecting the public and holding the delinquent youth accountable for his or her actions."). There are, however, indications that the trend may be reversing. In the 2005 case of *Roper v. Simmons*, the U.S. Supreme Court held that capital punishment of juveniles was unconstitutional. 543 U.S. 551, 578 (2005). The holding rested on fundamental differences between juveniles and adults, notably a lack of maturity and responsibility, a vulnerability to outside pressures, and the lack of a fully formed character. *Id.* at 569–70; *see also* Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that the Eighth Amendment prohibits sentencing a juvenile to life without parole for a non-homicide crime, given a juvenile's reduced moral culpability compared to an adult).

90. *See* Feld, *supra* note 64, at 78. See generally Grisso, *supra* note 83, for an extensive study of juveniles' ability to comprehend *Miranda* rights. Grisso found that juveniles, particularly under the age of fifteen, did not adequately comprehend *Miranda* rights, and while older juveniles exhibited comprehension essentially equivalent to seventeen to twenty-two-year-old adults, overall comprehension for the group, including the adults, was low. *Id.* at 1160.

91. Drizin & Luloff, *supra* note 3, at 269.

that adolescents are "physiologically incapable" of thinking like adults.[92] Capacity to reason is based on "brain development and growth" more than "intellectual development."[93] The frontal cortex of the brain, which is used in making informed decisions, is the last part of the brain to develop and therefore is of decreased ability in juveniles.[94]

Kenneth King finds that "[e]ven if an adolescent has an 'adult-like' capacity to make decisions, the adolescent's sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure will often drive him or her to make very different decisions than an adult would in similar circumstances."[95] The difference becomes more apparent in situations of stress, such as police interrogations or court proceedings.[96] Immaturity can produce the same lack of capacity as mental illness, which means that many juveniles are in fact legally incompetent.[97] This is especially the case in the juvenile justice system, in which children generally have below-average intelligence and the majority have mental disorders.[98]

Juveniles' conditioned behavior may also lead to the mistaken assumption that they have validly waived their rights. Children are raised to be obedient to adults, which makes them highly susceptible to coercion by authority figures, such as police, who may urge them to waive their rights.[99] External showings of understanding by children, such as nodding or not asking questions—which a court may presume indicate valid waiver—may instead be a child's effort to please adults rather than to indicate true comprehension.[100] Further, while the *Michael C.* totality test includes prior experience with law enforcement as a factor, studies have shown that previous involvement with police and the juvenile courts does not enhance understanding of one's rights.[101]

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92. King, *supra* note 77, at 440.

93. *Id.* at 436.

94. *Id.* at 440 ("It is the frontal cortex that gathers input from the various regions of the brain, sorts it out, decides what is important and what is not, and tells the person how to react or what to say. This part of the brain, unarguably critical to making informed decisions with respect to legal rights, is the part of the brain that develops last." (footnote omitted)).

95. *Id.* at 436.

96. *Id.*

97. Feld, *supra* note 64, at 46.

98. *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) (finding that children in detention centers have an average IQ of 85 compared to a nationwide average of 100, and 60 percent of children in detention have mental disorders compared to 18 to 20 percent nationwide).

99. *See* Drizin & Luloff, *supra* note 3, at 269; Feld, *supra* note 64, at 44.

100. Feld, *supra* note 64, at 78; *see also* King, *supra* note 77, at 459. King points out that "[n]o parent merely accepts that their child, particularly a young child, understands an important direction merely because the child says he or she does." *Id.* at 459 n.112.

101. Drizin & Luloff, *supra* note 3, at 269; Grisso, *supra* note 98, at 11.

Although some juveniles may be capable of validly waiving their rights, psychiatric experts have asserted that it is nearly impossible for clinicians to make accurate determinations of an individual juvenile's competence or capacity.[102] This suggests that a juvenile-court judge or police officer would be equally incapable of assessing whether a juvenile is competent to waive his or her rights. Justice Marshall may have implied this in his *Michael C.* dissent when he said, "I do not believe a case-by-case approach [to waiver] provides police sufficient guidance, or affords juveniles adequate protection."[103]

The conclusion to be drawn from this evidence is that age is not simply one of many factors to be considered in determining the validity of a waiver—it is the central issue. If the concern in *Miranda* was protecting individuals' dignity in custodial interrogation from encroachment and coercion by government actors, such protection is not extended to children merely by giving them protections equivalent to adults. Juveniles cannot in many circumstances give a truly valid waiver. It is nearly impossible for psychiatric experts, much less police officers or judges, to distinguish valid waivers by juveniles from invalid ones.[104]

Yet despite this strong evidence, courts and legislatures have been reluctant to extend special protections or accommodations based on age. This was evidenced by *Michael C.*, in which the Court found the waiver valid despite the defendant's age.[105] Perhaps this unwillingness is an inevitable result of an environment both fearful of and hostile towards youth. The dignity arguments of *Miranda* and, by extension, of *Michael C.* are outweighed by concerns for public safety and effective law enforcement.[106]

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102. Grisso, *supra* note 98, at 13–14.

103. Fare v. Michael C., 442 U.S. 707, 731 n.2 (1979) (Marshall, J., dissenting).

104. *See* King, *supra* note 77, at 477–78 ("Given what we know about adolescent cognitive and psychosocial development, when we allow judges to indulge in a case-by-case totality analysis and assign whatever weight they see fit to their chosen totality factors, we create an unacceptable risk that a child who does not understand his or her *Miranda* rights or the relevant circumstances will be found to have made a knowing, intelligent, and voluntary waiver nonetheless.").

105. *Id.* at 450 ("As [the totality of circumstances test is] applied in most state courts . . . there is little examination of a child's capacity to waive rights and little or no deference given to a child's unique vulnerabilities or nascent psychosocial and brain development."). Commentators have pointed out the irony that children are permitted to waive their rights in criminal proceedings when their freedom is at stake, yet state and federal laws limit their ability to enter into contracts, own property, marry, or be held responsible for torts. Drizin & Luloff, *supra* note 3, at 284–85.

106. In this sense, the courts may be following the lead of the dissenting justices in *Miranda*. The dissenters suggested that, on balance, greater protections for criminal suspects lead to a loss for society as a whole, as criminals go free and law enforcement efforts are hampered. Justice White said, "In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets . . . to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity." Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting). Justice Harlan said, referring to police interrogation, "What the Court largely ignores is that its rules impair, if they will not

III. FALSE CONFESSIONS

Michael C. and the resulting jurisprudence and legislation not only ignore *Gault*'s admonition that children should be treated with the greatest care, but also *Gault*'s basis for that admonition. *Gault* was not a *Miranda* case that argued for juveniles' dignity. The majority in *Gault* saw due process as key to ensuring the accuracy of the proceedings and preventing false confessions and wrongful convictions, a concern not mentioned in *Michael C.*

In recent years, studies have shown that false confessions are a real danger, confirming the concerns of the *Gault* Court. In the 1990s, improvements in DNA testing and other investigative technology began to reveal startling numbers of wrongful convictions.[107] Experts concur that wrongful convictions "occur with regular and troubling frequency."[108] Further, various studies have estimated that 14 to 25 percent of erroneous convictions are attributable to false confessions.[109] The statistics are worse for juveniles—one study showed that in juvenile wrongful-conviction cases, 42 percent were attributable to false confessions, and for children between the ages of twelve and fifteen, the percentage leaps to 69 percent.[110]

While it may be hard to fathom how someone might confess to a crime he did not commit, studies have shown that modern police interrogation techniques can compel otherwise intelligent people to confess to criminal acts they did not in fact perform.[111] It must first be understood that the interrogator's goal is not to acquire facts but to obtain a confession.[112] Interrogations begin with the premise that the suspect is guilty, and the purpose of questioning is

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eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it." *Id.* at 516 (Harlan, J., dissenting).

107. *See* Drizin & Luloff, *supra* note 3, at 257.

108. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 905 (2004).

109. *Id.* at 906–07; *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005) ("In fifty-one of the 340 exonerations between 1989 and 2004—15 percent—the defendants confessed to crimes they had not committed.").

110. Gross et al., *supra* note 109, at 545; *see also* Drizin & Leo, *supra* note 108, at 944 (finding that in a study of false confession cases, juveniles are "over-represented").

111. Drizin & Luloff, *supra* note 3, at 272; *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1056 (2010) ("[F]alse confessions do not happen simply by happenstance. They are carefully constructed during an interrogation and then reconstructed during any criminal trial that follows.").

112. *See* Drizin & Luloff, *supra* note 3, at 271 ("The purpose of interrogation is not a factfinding expedition; rather it is to elicit incriminating statements." (citing NATHAN GORDON & WILLIAM FLEISHER, EFFECTIVE INTERVIEWING AND INTERROGATION TECHNIQUES 27 (C. Donald Weinberg ed., 2002))).

to confirm that guilt.[113] With children, the risk of an incorrect presumption of guilt is exacerbated because their natural, nervous behavior in stressful situations may appear as evasiveness or dishonesty to interrogators.[114] Further, police officers have no greater ability to spot deception than the average person: In fact, police may be more likely to presume deception where none exists.[115] Thus, there should be considerable concern that police will interrogate a child as if he were guilty, even if that child has done nothing wrong.

Once guilt is assumed, the interrogator has every incentive to push the suspect to incriminate himself. The interrogator may lie, claiming that there is incriminating evidence in order to make the suspect believe that he has no choice but to confess or make things worse for himself.[116] In some cases, questioners intentionally or inadvertently contaminate the interrogation by letting slip details of the crime not known to the general public; the suspect may later recite these, giving rise to an incorrect assumption that he is guilty based on his knowledge of these facts.[117] An interrogator might even be able to convince a suspect that he indeed committed the crime and has merely forgotten it or repressed the memory.[118]

Children are particularly vulnerable to falsely confessing when interrogated using these techniques.[119] According to David Krajicek, a former police bureau chief for the New York Daily News, "A good cop can get a fifteen-year-old to say basically anything he wants."[120] Psychological studies reveal that age is a major influence in false confessions.[121] John E. Reid & Associates, prominent instructors in police interrogation techniques,[122] caution that interrogators "must exercise extreme caution and care when interviewing or interrogating a juvenile" and "should exercise extreme diligence in establishing the accuracy of [a confession] through subsequent corroboration."[123] Coercive and leading interviews can cause children to adopt false beliefs that they cannot distinguish

113. *See id.* at 271; *see also* Miranda v. Arizona, 384 U.S. 436, 450 (1966) ("The guilt of the subject is to be posited as a fact.").

114. Birckhead, *supra* note 89, at 417.

115. *Id.* at 410–11.

116. *See* Drizin & Leo, *supra* note 108, at 918. It is legal for police to use deception as part of an interrogation. Johnson, *supra* note 54, at 733.

117. *See* Garrett, *supra* note 111, at 1054.

118. *See* Drizin & Leo, *supra* note 108, at 918.

119. *See id.* at 944–45 (concluding that a "suspect's age is strongly correlated with the likelihood of eliciting a false confession").

120. Hancock, *supra* note 88, at 42.

121. *See* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 59–61 (2007).

122. Drizin & Luloff, *supra* note 3, at 274.

123. *Investigator Tips: False Confession Cases*, JOHN E. REID & ASSOCIATES, INC. (Apr. 1, 2004), http://www.reid.com/educational_info/r_tips.html?serial=10808394384739 36&print=[print].

from the truth.[124] Some juveniles simply do not understand the consequences of confessing and believe that by confessing, the interrogation will end, and they can go home.[125]

But of course, they cannot go home. Confessions, false or not, are damning evidence. False confessions lead the criminal justice system to naturally presume a defendant is guilty, which results in further errors.[126] Judges will be less sympathetic, police will cease further investigation, and defense attorneys may plead out rather than risk going to trial.[127]

False confessions are also extremely difficult to overcome. Even if a defendant recants and provides exculpatory evidence, statistics show that most juries will convict based on a false confession.[128] Indeed, in one study, 81 percent of false confessors who went to trial were convicted, although there was no corroborating evidence.[129] For example, the five teens erroneously charged with raping a jogger in New York City's Central Park (infamously known as the Central Park Jogger case) were convicted almost entirely because of their false confessions, although none had a violent history, nor did any evidence link them to the crime.[130] Even if a false confession does not lead to a conviction, the exonerated defendant still suffers from stigma and possible incarceration during the proceedings.[131] Incarceration is a particular hardship on juveniles, which makes even temporary imprisonment based on a false confession especially tragic.[132]

IV. PROPOSED METHODS OF ADDRESSING THE ISSUE OF FALSE CONFESSIONS

The reality of false confessions strongly supports *Gault*'s emphasis on procedural due process to guarantee the trustworthiness and accuracy of juvenile proceedings. Although arguments for added constitutional protections for juveniles find little traction in the principles of dignity outlined in *Miranda*, a push

124. Drizin & Luloff, *supra* note 3, at 283.
125. Drizin & Leo, *supra* note 108, at 969.
126. *See* H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11, 20.
127. *Id.*
128. Drizin & Luloff, *supra* note 3, at 272–73.
129. Drizin & Leo, *supra* note 108, at 960.
130. Hancock, *supra* note 88.
131. *See* Drizin & Leo, *supra* note 108, at 949–50.
132. *See* Feld, *supra* note 17, at 120 ("Because juveniles depend upon their families more than do adults, removal from home constitutes a more severe punishment. Because of differences in 'subjective time,' youths experience the duration of imprisonment more acutely than do adults. Because of the rapidity of developmental change, sentences of incarceration are more disruptive for youths than for adults.").

for enhanced procedures to protect truth and accuracy may be more politically viable.[133] If public safety is the primary concern, it is not served by convicting innocents while allowing the true culprits to remain at large.[134] Thus, this issue should rise above the debate over the correct balance between personal freedom and societal self-preservation.[135] Indeed, some states and localities have already taken action to reduce the number of wrongful convictions and false confessions.[136] A number of methods have been proposed or adopted to improve children's ability to exercise their constitutional protections. This Part discusses two general approaches: improving minors' ability to avail themselves of legal counsel and mandating electronic recording of juvenile interrogations.

A. The Importance of Attorneys

One solution endorsed in *Gault* is to ensure that juveniles have access to attorneys.[137] "The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege [against self-incrimination]."[138] *Miranda*, which did not otherwise put much emphasis on the importance of accuracy in proceedings, said "[t]he presence of a lawyer can . . . help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial."[139] Moreover, the Department of Justice has stated that "[m]ounting an adequate defense in juvenile or criminal court, avoiding self-incrimination, and ensuring that rights are upheld *require* the assistance of competent legal counsel."[140] Presence of counsel is also the preferred solution of scholars who have studied the issue of juvenile waivers of *Miranda* protections.[141]

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133. *See* Drizin & Luloff, *supra* note 3, at 261 ("[W]e . . . suggest that juvenile justice advocates and juvenile court apologists might be wise to reframe or broaden their reform efforts by focusing on the risk of wrongful convictions rather than amorphous concepts like 'due process' or 'fundamental fairness.'").

134. *See* King, *supra* note 77, at 476.

135. *See* Furman, *supra* note 126, at 11 ("Wrongful convictions are a concern of prosecutors and defense lawyers, liberals and conservatives, lawyers and non-lawyers. The issue involves the accuracy in the justice system, and accuracy is a goal that is shared by everyone. It concerns anyone who cares about law enforcement and public safety.").

136. Drizin & Luloff, *supra* note 3, at 260–61 (discussing reforms in Arizona, Illinois, New Jersey, North Carolina, and other states).

137. *In re* Gault, 387 U.S. 1, 41 (1967).

138. *Id.* at 55.

139. Miranda v. Arizona, 384 U.S. 436, 470 (1966).

140. Drizin & Luloff, *supra* note 3, at 285 (citing JUDITH B. JONES, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NCJ 204063, ACCESS TO COUNSEL (2004)) (emphasis added).

141. *See* Feld, *supra* note 17, at 89 ("Procedural justice hinges on access to and the assistance of counsel."); Grisso, *supra* note 83, at 1161–62 (recommending a requirement that counsel be present for children under the age of fifteen).

Juveniles already have the right to counsel, granted to them in *Gault*; *Michael C.* did nothing to change that. Presumably had the defendant in *Michael C.* requested a lawyer instead of his probation officer, the interrogation would have ceased, or, had it not, a court would have suppressed his incriminating statements. Yet despite being entitled to counsel, many juveniles do not have legal representation when interrogated.[142] This lack of representation is primarily because they are deemed to have waived that right, and this waiver is later upheld as valid under the highly discretionary totality of the circumstances test.[143] Thus, the issue for juvenile advocates is how to prevent waiver or at least ensure that the waiver is truly made "voluntarily, knowingly and intelligently," as *Miranda* requires.[144]

One proposal is to simplify the *Miranda* warnings police are required to give, making them more comprehensible to children.[145] Ideally, if juveniles understood their rights better, they would be less likely to waive them. But merely understanding one's *Miranda* rights does not mean that they will be invoked. Despite initial fears that the *Miranda* ruling would impede effective law enforcement, it in fact had little effect on police ability to obtain confessions, primarily because most suspects waive their protections.[146] As mentioned earlier, over 90 percent of juveniles waive their rights, but adults, who are presumed to understand their rights, also waive 80 to 85 percent of the time.[147] Thus, even if the *Miranda* warnings were changed such that juveniles had the same comprehension rate as adults, waiver would still occur very frequently, and children would continue to be left without legal representation. Therefore, commentators have argued that simplified *Miranda* warnings alone are insufficient to address the risk of false confessions.[148]

Some states have a so-called per se rule requiring that a parent or other legal guardian be present before the juvenile is permitted to waive *Miranda*

142. Feld, *supra* note 17, at 89–90.

143. *Id.* at 90 (citing Fare v. Michael C., 442 U.S. 707, 725 (1979)).

144. *Miranda*, 384 U.S. at 444.

145. *See* Richard Rogers et al., Miranda *Rights . . . and Wrongs*, CRIM. JUST., Summer 2008, at 4, 7–8.

146. Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 260 (1996). Leo's article describes how police convince suspects to waive their rights and deliver incriminating statements, comparing interrogation tactics to a confidence game.

147. Drizin & Luloff, *supra* note 3, at 266 ("*Miranda* . . . is little more than a speed-bump for police officers when questioning adults and even less of an obstacle when interrogating juveniles.").

148. *See* Grisso, *supra* note 83, at 1162 (arguing that it would be difficult to create warnings simple enough for a child to understand not only the vocabulary but also the significance of the *Miranda* rights, and even comprehensible warnings would not change the intimidating atmosphere of a police interrogation without further safeguards).

protections.[149] The hope, presumably, is that the parent will better understand the rights and their significance and ensure that any waiver is valid.[150] Indeed, waiver in the presence of a parent almost always passes the *Michael C.* totality test, whatever the other factors.[151]

But this reliance on parents may be a hollow assurance. Although parents are adults, most are not lawyers. Parents are no better at advising a child of his legal rights than the probation officer who was rejected as the equivalent to an attorney in *Michael C.*[152] Research has shown that many parents do not think their children should withhold information from the police, and parents often do not request an attorney or advise their children during interrogations.[153]

For example, all of the teens in the Central Park Jogger case had a parent present during interrogation, as required by statute, yet all waived their *Miranda* protections and gave false confessions.[154] One of the boys falsely confessed after his father threw a chair across the room and demanded the boy tell the police "what they want to hear."[155] In other cases, the parent reports the child to the police in the first place, making it unlikely that the parent will want to prevent the child from talking with interrogators.[156] Thus, while some jurisdictions may believe requiring a parent's presence gives extra protection to juveniles, the parent may be no help at all and may even be a hindrance.

A preferable solution would be to require that a lawyer be appointed to the juvenile without any affirmative act on the child's part. This was in fact a recommendation by the President's Crime Commission cited in *Gault*: "[I]t is necessary that 'Counsel . . . be appointed . . . without requiring any affirmative choice by child or parent.'"[157] However, the *Gault* Court did not go this far, requiring only that "the child and his parents must be notified of the child's right to be represented by counsel."[158] Given the importance attributed to the role of lawyers in *Miranda* and *Gault*, it would not be too much of a leap for courts to say that the attorney's role is important enough to be non-waivable for juveniles.

In fact, once again the distinction between *Miranda* and *Gault* may permit a non-waiver rule for juveniles that might not be permissible for adults. One

149. Feld, *supra* note 64, at 36.
150. King, *supra* note 77, at 462.
151. *See id.* at 462–63.
152. *See id.* at 467.
153. Grisso, *supra* note 83, at 1163; *see also* Hancock, *supra* note 88, at 42.
154. Scott-Hayward, *supra* note 121, at 70.
155. Hancock, *supra* note 88, at 42.
156. King, *supra* note 77, at 467–68.
157. *In re* Gault, 387 U.S. 1, 38 (1967) (citing a National Crime Commission Report) (first alteration in original).
158. *Id.* at 41.

might argue that *Miranda*'s focus on individual dignity compels a conclusion that a person must also have the individual authority to choose whether to waive his rights. However, the emphasis on accuracy over dignity in *Gault* (and even more so in *Winship* and *McKeiver*) might allow a different conclusion for children. If dignity is not a concern, then it is no great infringement on juveniles' personal freedom to deny them the ability to waive their rights.[159] And that denial, leading to the appointment of an attorney, would serve the accuracy interests central to pre–*Michael C.* Supreme Court juvenile jurisprudence.

But a non-waivable right to counsel may not be politically feasible. Undoubtedly, some judges and legislators continue to hold to Justice Harlan's dissent in *Miranda*, which warned that the presence of a lawyer would not lead to accurate confessions but to an end to confessions altogether.[160] This might be seen as an excessive burden on law enforcement. In the juvenile system particularly, many judges cling to the old best-interests model and resent attorneys who appear to be impeding the proceedings by advocating for their client rather than reaching consensus with the judge and prosecutor.[161] Judges in some cases go so far as to punish juveniles more harshly if they choose to appear with an attorney.[162] Thus, there may be considerable resistance to a proposal granting a non-waivable right to counsel for juveniles.

B. Recording Interrogations

A more practical (and politically feasible) solution, endorsed by many commentators, is mandatory recording of interrogations.[163] This provides an accurate record of all that goes on during an interrogation, including waiver and confession.[164] When applying the totality test, for example, a judge watching videotape could better assess whether waiver was voluntary and whether the

159. *Cf.* Ellen Marrus, Gault, *40 Years Later: Are We There Yet?*, 44 CRIM. L. BULL. 413 (2008). Marrus argues that the adult right to counsel is based on the Sixth Amendment, whereas the juvenile's right to counsel comes from the Fourteenth (as stated in *Gault*). *Id.* at 421. Marrus concludes: "Since the right to counsel is different for juveniles so should the waiver of this right." *Id.* at 427.

160. 384 U.S. 436, 516 n.12 (1966) (Harlan, J., dissenting). Justice Harlan believed defense attorneys would always advise their clients to remain silent. *See id.*

161. Drizin & Luloff, *supra* note 3, at 291.

162. Feld, *supra* note 22, at 1114–15.

163. *See, e.g.*, THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 27–28 (2004); Drizin & Leo, *supra* note 108, at 997; Feld, *supra* note 64, at 92–93; Furman, *supra* note 126, at 20; Scott-Hayward, *supra* note 121, at 73.

164. *See* Feld, *supra* note 64, at 93 ("[Recording] creates an objective record that all parties—police, prosecutors and defense lawyers, judges and juries—can review and thereby increases the transparency of the interrogation process and the accuracy of the ensuing evidence.").

police legitimately obtained the confession.[165] Courts would no longer have to render voluntariness decisions based on conflicting testimony as to what occurred in an interrogation room.[166]

Partly due to the rise in the discovery of false confessions, states have increasingly begun to require recording of interrogations. This suggests it is a politically feasible policy.[167] For example, a number of dramatic false confession cases in Chicago led to statewide legislation requiring taping of police interrogations.[168] Further, law enforcement agencies that currently record interrogations are very much in favor of the practice, finding that it does not impede confessions[169] and that recording reduces the number of defense motions alleging improper interrogation procedures.[170] Thus, mandatory recording is favored by both defense attorneys and the law enforcement community.[171]

Mandatory recording is admittedly not a cure-all for the problems of juvenile waiver and false confessions. Even with the added information from recorded confessions, judges are still free to apply the totality test and disregard the suspect's youth when evaluating whether waiver was voluntary. Further, it is very difficult for even trained clinicians to evaluate whether a particular child is truly capable of giving a voluntary waiver; this is complicated by the fact that some children's natural desire to please adults leads to behavior that superficially indicates a voluntary waiver.[172] One could expect that even when looking at videotaped confessions, a judge would not necessarily be capable of assessing whether the child had given a voluntary waiver. Thus, either because of judicial indifference to youth or a lack of competence to evaluate a valid waiver, mandatory videotaping can still leave juveniles in the position of facing the justice system unaccompanied by counsel.

Mandatory videotaping is still defensible on the ground that, at the very least, it provides more information for judges to use when assessing the

165. *See* Drizin & Leo, *supra* note 108, at 998. A judge reviewing a recording of an interrogation could also assess whether the questioners contaminated the proceedings by letting slip confidential details that the suspect later repeated as if he knew them firsthand. *See* Garrett, *supra* note 111, at 1113.

166. *Id.* at 997.

167. *See* Scott-Hayward, *supra* note 121, at 74–75 (reporting that five states and the District of Columbia currently require recording of interrogations, and twenty-two states considered it during the 2004–2005 legislative session).

168. Drizin & Leo, *supra* note 108, at 999–1001. The governor at the time, Rod Blagojevich, formerly a prosecutor, initially resisted the legislation but then changed his mind, stating that the measure would ensure more reliable evidence. *Id.* at 1000–01.

169. This is primarily because most states allow a suspect to be recorded without his knowledge or consent. SULLIVAN, *supra* note 163, at 20.

170. *Id.* at 8.

171. *See* Drizin & Leo, *supra* note 108, at 997 ("[Recording] favors neither the defense nor the prosecution, but only the pursuit of reliable and accurate fact-finding.").

172. *See supra* Part II.

voluntariness of waivers. Also, because mandatory recording is favored by both law enforcement and defense attorneys, it may be more easily implemented than potentially controversial solutions such as a non-waivable right to an attorney. But recording has another advantage, albeit more indirect: It creates valuable evidence for future research on the phenomenon of false confessions and the effectiveness of interrogations.[173] In *Miranda*, both the majority and the dissent acknowledged the importance of empirical information in forming law enforcement policy. The majority said, "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms."[174] In dissent, Justice Clark worried that the Court's decision went "too far too fast" given the "paucity of information and an almost total lack of empirical knowledge" on the potential effects of the Court's ruling.[175] Justice Harlan's dissent suggested that the legislature, not the courts, should decide law enforcement policy because the legislature "would have the vast advantage of empirical data and comprehensive study" when making reforms.[176] Electronic recording would close the *Miranda* majority's knowledge gap and provide the empirical data that the dissenters desired.

The impact of this data on public policy and future court decisions could be very significant. Whereas individual judges might currently overlook the suspect's age when evaluating waiver, it would be far more difficult for them to do so in the face of substantial empirical evidence—derived from the study of recorded interrogations—detailing the phenomena of involuntary waivers and false confessions of juveniles. With more evidence of abuse, legislatures might be inclined to revisit the subject of juvenile rights and enact greater protections. Further evidence that courts are ill-suited to evaluate the validity of a juvenile's waiver of his rights might lead the Supreme Court to reconsider whether *Michael C.* underestimated the role of age in voluntariness assessments. However recordings are used, greater amounts of detailed information on juvenile confessions, especially those recorded on videotape, will increase the chances of protecting vulnerable children.

173. Feld, *supra* note 64, at 94–95.
174. Miranda v. Arizona, 384 U.S. 436, 448 (1996).
175. *Id.* at 501 (Clark, J., dissenting).
176. *Id.* at 524 (Harlan, J., dissenting).

CONCLUSION

The majority in *Gault* was concerned that juveniles were getting "'the worst of both worlds,'"[177] lacking both the full constitutional protections of adults and the specialized therapeutic attention promised by juvenile courts. Today, that concern remains mostly unaddressed. While children ostensibly have greater procedural rights than they did before *Gault*, the current application of the *Michael C.* totality test results in waiver of those rights over 90 percent of the time, effectively leaving juveniles without meaningful constitutional protections. At the same time, states have eschewed the rehabilitative ideal of juvenile courts, resulting in harsher treatment of minors suspected of crimes and a general unwillingness to extend any special protections to children beyond the pro forma *Miranda* warnings.

Yet whatever one's position on the dangers of youth violence and the proper balance of public safety and individual rights, it is clear that wrongfully convicting the innocent advances no one's interest except that of the true perpetrator. Until recently, it could be said that the false confessions leading to wrongful convictions were only hypothetical. But as more research reveals the reality of false confessions, the need to return to *Gault*'s principles becomes more pressing. Juveniles need greater procedural protections, not to burden law enforcement and coddle criminals, but to ensure that when society applies its potent authority to strip individuals of their freedom, it does so accurately.

177. *In re* Gault, 387 U.S. 1, 18 n.23 (1967) (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).