JOINING THE LEGAL SIGNIFICANCE OF ADOLESCENT DEVELOPMENTAL CAPACITIES WITH THE LEGAL RIGHTS PROVIDED BY *IN RE GAULT*

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Almost forty years after the United States Supreme Court decided *In re Gault*,[1] the Court in *Roper v. Simmons* ruled that the death penalty is a disproportionate punishment for persons under the age of eighteen, in violation of the Eighth Amendment's prohibition against cruel and unusual punishments.[2] Perhaps the most compelling reasons the *Rope*r Court offered for its decision were those that drew upon recent scientific insights into the biopsychosocial aspects of adolescent development to corroborate the view that juveniles are less culpable for their crimes than adults.[3] The Court made three bold findings in distinguishing juveniles from adults: (1) "[A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . [T]hese qualities often result in impetuous and ill-considered actions and decisions;"[4] (2) "[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . Youth is . . . a time and condition of life when a person may be most susceptible to influence and to psychological damage[;]"[5] and (3) "[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[6] Although *Roper* will always be best known as the case that abolished the juvenile death penalty in America, the decision is at least equally noteworthy for its endorsement and application of scientific findings relating to adolescent developmental immaturity. This Article considers the implications of *Roper*'s findings for the application of the Fifth and Sixth Amendment rights extended to juveniles in *Gault*.

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1. 387 U.S. 1 (1967).
2. 543 U.S. 551 (2005).
3. *Id.* at 569-70.
4. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
5. *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
6. *Id.* at 570.

Although *Gault* introduced striking and much needed reforms to the juvenile court by its extension of Fifth and Sixth Amendment rights to juveniles, the Court applied a constitutional jurisprudence that views adolescents as sufficiently autonomous and self-determining to exercise their legal rights in an adult manner. Forty years later, the understandings about adolescence that shaped *Gault* and its progeny are ripe for reconsideration. The Court's acceptance of a very different jurisprudence of youth in *Roper* may well chart a new course for due process analysis in the Fifth and Sixth Amendment contexts. This Article aims to join the legal significance of adolescent developmental capacities recognized in *Roper* with the due process rights established in *Gault*.

Our discussion is presented in seven parts. In Part I, we briefly sketch historical conceptions of adolescence and its relationship to foundational principles of the juvenile court, and juvenile court practice from its inception in the late nineteenth century through the mid-1960s. In order to more fully appreciate both the strengths and weaknesses of the *Gault* decision, we pay special attention to the larger social and legal context in which the case was decided. Part II is devoted to a discussion of *Gault*. We argue that although *Gault* represents a valiant attempt to impose the rule of law on a lawless system, the Court's failure to appreciate the uniqueness of childhood and adolescence produced a juvenile justice system characterized by procedural rights that remain, for the most part, empty promises, due to young people's inability to exercise those rights in a meaningful way. In Part III, we analyze the post-*Gault* cases that fleshed out the application of Fifth and Sixth Amendment rights to juveniles, and highlight the limitations of these applications.

In Part IV, we consider *Roper*, and argue that it offers an important corrective to what came before. It creates a new lens through which to conceptualize juveniles in delinquency proceedings, and, as seen in Part V, has great potential to become the basis for a legal paradigm shift that can transform Fifth and Sixth Amendment jurisprudence as applied to juveniles. In Part VI, we ask: What are the implications of the distinguishing features of adolescence for the meaningful exercise of due process rights? To answer this question, we look to empirical studies on adolescents' developmental capacities and their understanding of, and abilities to waive, the right to remain silent and the right to counsel. We argue that the findings stipulated in *Roper,* coupled with the findings of recent empirical research, support a nonwaivable right to counsel at police interrogation and in juvenile delinquency proceedings.

Finally, in Part VII, we discuss how these rights might be implemented to maximize benefits to youth, by integrating knowledge of youth development with recommendations for legal

advocacy. We consider some steps that attorneys can take to ameliorate adolescents' developmental deficiencies and to represent them more effectively. Our goal is to create the image a juvenile justice system that adapts to the realities of children and their needs, in order to safeguard their fundamental right to be treated fairly.

I. CHILDREN AND ADOLESCENTS IN THE EARLY JUVENILE COURT

From its inception in 1899 and throughout most of its hundred-year history, the American juvenile court was firmly rooted in the doctrine of *parens patriae*. This doctrine encompasses two related principles: (1) that the state has an obligation to intervene in the lives of children whose parents fail to provide adequate guidance and supervision or to shield them from harmful community influences; and (2) that when the state intervenes in the place of a parent, it must act—as a loving parent would—in the best interests of the child.[7]

Nineteenth-century ideas about the status and needs of children were especially influential in shaping the juvenile court. Established almost simultaneously with the fledgling discipline of developmental psychology, the juvenile court was premised on fresh insights into differences between young people and adults that grew out of the new science of psychology and the child study movement.[8]

According to Ryerson, two ideas about juveniles that were advanced in the child-study literature were especially influential in animating a separate juvenile court.[9] The first idea focused on childhood innocence, about which there were two views: one suggested that juveniles were not responsible for their actions; the other held that children were naturally pure and virtuous.[10] Darwin's theory of evolution greatly influenced the "lack of responsibility"

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7. First asserted in the United States in a proceeding involving a juvenile in *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839), the *parens patriae* power justifies governmental intervention in the lives of citizens who are unable, by virtue of immaturity, mental illness, or mental retardation, to care for themselves. It is a broadly sweeping authority that was long left unchecked because of the presumption that the state was acting for the good of those on whose behalf it intervened. This authority stands in contrast to the police power, under which the state takes coercive action against those who pose a danger to the public welfare. The police powers of the state have always been carefully circumscribed by law.

8. *See, e.g.,* G. STANLEY HALL, 2 ADOLESCENCE: ITS PSYCHOLOGY AND ITS RELATIONS TO PHYSIOLOGY, ANTHROPOLOGY, SOCIOLOGY, SEX, CRIME, RELIGION AND EDUCATION (1904). For discussions of juvenile court history, see ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978); DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING (2004).

9. RYERSON, *supra* note 8, at 28.

10. *Id.*

camp, which claimed that ontogeny recapitulates phylogeny.[11] According to this view, children were amoral from birth, yet were biologically destined to gradually develop "civilized," altruistic sentiments and to evolve naturally into moral and law-abiding adults.[12] From this perspective, children and adolescents were not responsible for their bad acts; misdeeds were normal and temporary, and would be naturally outgrown in due course (so long as corrupt adults did not bungle natural processes of development). Proponents of this perspective argued that youth should never be placed in environments such as criminal courts and adult correctional institutions, where exposure to depraved adults might derail their natural development.[13]

A second view claimed that children were naturally good and moral.[14] They might occasionally commit bad acts, not out of a desire to do harm, but out of ignorance of the rules that it was incumbent on adults to teach them. If they persistently engaged in antisocial behavior, it was because adults were destroying their innate sensibilities. Judge Benjamin Barr Lindsey, the first judge of the Denver Juvenile Court, espoused this view. He was instrumental in passing the first legislation to impose penalties on parents and guardians for "contributing to the delinquency of any child," which institutionalized the view that juvenile delinquents were largely blameless for their behavior, and deserving of sympathy and guidance rather than punishment.[15]

The second core idea on which the juvenile court was founded is that children are much more malleable than adults.[16] Nathan Oppenheim, a leading pediatrician of the period, explains: "[The child] is in no way really like an adult, since his condition is one of

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11. *Id.* at 28-29.

12. *Id.*

13. On the diversionary rationale for the juvenile court, see Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CAL. L. REV. 2477 (2000). According to Richard Tuthill, the first judge of the first juvenile court (located in Cook County, Illinois), the juvenile court reformers hoped to avoid the twin dangers of "brand[ing] [a child] in the opening years of its life with an indelible stain of criminality" and of placing a child "even temporarily, into the companionship of men and women whose lives are low, vicious, and criminal." Richard S. Tuthill, *History of the Children's Court in Chicago, in* CHILDREN'S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 1-2 (1904). *See also* David S. Tanenhaus, *Degrees of Discretion: The First Juvenile Court and the Problem of Difference in the Early Twentieth Century, in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 105 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005).

14. Ryerson, *supra* note 8, at 29-31.

15. Thomas Le Grand Harris, *Ben B. Lindsey*, *in* FAMOUS LIVING AMERICANS 300, 311 (Mary Griffin Webb & Edna Lenore Webb eds., 1914).

16. RYERSON, *supra* note 8, at 24-27.

continuous change.[17] . . . He is so plastic that his daily surroundings mould him as surely as a warm hand shapes a piece of wax."[18] Malleability, together with immaturity, supported forceful but nonpunitive intervention. It was believed that young delinquents were especially well suited to efforts to shape them in positive ways.[19] With naive optimism, pioneers in the juvenile court movement sought to provide parent-like supervision and guidance to children whose biological parents were perceived to be unequal to the task, and for whose future happiness and productivity they felt responsible.[20]

From the beginning, the juvenile court's delinquency jurisdiction was expansive—it covered those who committed acts that would be crimes if committed by adults, predelinquents, and even *potential* predelinquents (e.g., one who "uses . . . indecent language," "knowingly associates with . . . immoral person," or "wanders about the streets in the night").[21] The founders conceived of the juvenile court as a social welfare institution that could benefit all needy youth, so they did not limit delinquency jurisdiction to those who committed crime: "Better laws make the definition much more inclusive so that the court will not be unable, because of any

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17. NATHAN OPPENHEIM, THE DEVELOPMENT OF THE CHILD 9 (1898).

18. *Id.* at 83.

19. *See, e.g.,* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 142 (1997).

20. As Timothy Hurley, the juvenile court's first chief of probation, averred: "[T]he state is, after all, the first great father, and has a right, in the absence of proper care from the natural parents, to step in and take upon itself the work which the natural parents had proved themselves unable to do." CHICAGO VISITATION AND AID SOC'Y, THE JUVENILE COURT RECORD 1 (1903).

21. For example, the 1899 Revised Laws of Illinois defined delinquents to include anyone who:

> [V]iolates any law of this State; or is incorrigible, or knowingly associates with thieves, vicious or amoral persons; or without just cause and without the consent of its parents, guardian, or custodian absents itself from its home or place of abode, or is growing up in idleness and crime; or knowingly frequents any policy shop or place where any gaming device is operated; or frequents any saloon or dram shop where any intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night time without being on any lawful business or lawful occupation; or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or uses vile, obscene, vulgar, profane or indecent language in any public place or about any schoolhouse; or is guilty of indecent or lascivious conduct.

Juvenile Court Law of Illinois as Amended, *in* ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: WHAT IS ITS SCOPE? HOW TO PROCEED UNDER IT 119-20 (Timothy D. Hurley ed., 1907).

technical lack of jurisdiction, to place a child under the care of the court and its officers, if that seems to be for the best interest of the child."[22]

A naïve optimism—some would say arrogance—prevailed: the founders were confident that the court could save children by intervening on their behalf.[23] The court would serve the best interests of the child by shielding him from the harshness of the criminal process, and more, by "substitut[ing] constructive efforts for the purely negative and destructive effects of the customary punishments."[24] Because the aim of the court was to treat children in need, the offense became secondary to concern for the child and her circumstances. Just how unimportant it became is illustrated in the fact that, from the inception of the court until the late 1960s, social history investigations were routinely completed *prior* to adjudication: the court first determined whether and how it needed to treat the child, and only then decided whether to find him delinquent.[25]

For much of the court's history, juvenile court proceedings were defined as civil proceedings. Proof of the offense—which might be seen as a logical and necessary predicate to an inquiry into the child's needs and circumstances—was often handled in a peremptory way. In many jurisdictions, standards of proof were low, if the court acknowledged any at all.[26] There was little concern about protecting children from erroneous adjudications of delinquency because the upshot of such an error would presumably be the delivery of benign treatment from which the child might profit in any event.

Judge Julian Mack, who became presiding judge of the Cook County Juvenile Court in 1904, set forth the predominant philosophy of the juvenile court in an influential law review article:

> [The criminal court] put but one question, "Has he committed this crime?" It did not inquire, "What is the best thing to do for this lad?" It did not even punish him in a manner that would

22. Grace Abbott, *Abstract of Juvenile Court Laws, in* THE DELINQUENT CHILD AND THE HOME 247, 251 (Sophonisba P. Breckinridge & Edith Abbott eds., 1912).

23. *See* JOHN C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS (1998); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969).

24. THOMAS TRAVIS, THE YOUNG MALEFACTOR: A STUDY IN JUVENILE DELINQUENCY ITS CAUSE AND TREATMENT 187 (1908).

25. Author Donna Bishop served as a juvenile probation officer in a large city on the eastern seaboard during the late 1960s. She reports that, even at the time that *Gault* was decided, it was standard practice for social history investigations to be read by the judge prior to adjudication.

26. *Gault* provides an illustration of the laxity of juvenile court procedure. There the judge was unable to recall under what section of the law (the charge) he had found the boy delinquent, let alone the standard of proof he applied in reaching the adjudicatory decision. *In re* Gault*,* 387 U.S. 1, 8-9 (1967).

> tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act. . . . Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.[27]

The realization of Judge Mack's vision "to understand" and "to uplift" was best served, it was believed, through the establishment of a warm, avuncular relationship between the judge and the child.[28] To facilitate the development of such a relationship and to shield the child from stigma, the juvenile court was closed to the public and the press, and the child met with the judge in a setting that was less formal and threatening than a standard courtroom.[29] Softer language (petition, adjudication, disposition) replaced the stigmatizing lexicon (complaint, indictment, prosecution, conviction, sentencing) of the criminal court.[30] Because the judge needed to understand the child's problems and needs, it was essential that the child be encouraged to

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27. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

28. Grace Abbott, *A Topical Abstract of State Laws Governing the Trial and Disposition of Juvenile Offenders, in* JUVENILE COURT LAWS IN THE UNITED STATES 120, 129 (Hastings H. Hart ed., 1910). Judge Benjamin Lindsey became perhaps the most influential model of the juvenile court judge. He was his own probation officer, made home visits, read books to his wards, played sports with them, and corresponded with and visited youth in institutions. He was a dynamic man who related well to children regardless of race, ethnicity, or social class, and openly discussed with them all variety of sensitive topics (e.g., sex, venereal disease). He was first and foremost a social worker, secondarily a jurist. *See* BENJAMIN B. LINDSEY, THE PROBLEM OF THE CHILDREN AND HOW THE STATE OF COLORADO CARES FOR THEM (1904).

29. Juvenile court proceedings often took place in chambers or around a small table in the courthouse. Judges frequently wore street clothes rather than intimidating black robes, and sat at the table with the youth and his parents. The highly regarded Judge Lindsey was known to sit younger boys on his lap and to place his arm around the shoulder of older boys in gestures of affection. The relaxed environment lent itself to informal conversation, which was believed to be the most effective means of understanding the child, his lifestyle, and his underlying problems. *See* STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920, 124-26 (1977).

30. Mack, *supra* note 27, at 119-20. *See also* Edward L. Thompson, *Juvenile Delinquency: A Judge's View of our Past, Present, and Future*, 46 OKLA. L. REV. 655, 657-58 (1993)

talk freely.[31] A privilege to remain silent was antithetical to that aim. Similarly, defense counsel was seen not only as unhelpful but as impedimentary to the court's purposes.[32] Procedural informality would best serve the objectives of understanding and treatment planning.[33]

In practice, idealistic visions of individualized assessment and benign and effective treatments fell far short of being realized. Tools for evaluation and assessment were crude and unreliable. Probation and institutional corrections programs were chronically understaffed, and their personnel—those responsible for clinical assessments and delivery of services—were poorly paid and poorly trained.[34] Moreover, in juvenile correctional facilities, humanitarian aims gave way, as they most often do in institutional settings, to impulses to control and punish.[35] The secrecy of the juvenile system, its lack of procedural safeguards, and the broad scope of its authority over delinquent and predelinquent youth—all viewed as essential to the child-saving mission—invited arbitrariness and abuses of power.

II. *GAULT* AND ITS HISTORICAL CONTEXT

During the 1950s, under the leadership of Chief Justice Earl Warren, the Supreme Court's view of its role in protecting individual liberties took a remarkable turn. In 1954, concern about the unequal treatment of minority populations at the hands of the majority animated the Court's landmark decision ending school segregation in *Brown v. Board of Education*.[36] By the early 1960s, the same sort of concern about the treatment of minority populations that had motivated the Court's decision in *Brown* was transmuted into a more general concern about abuses of state power and mistreatment of powerless populations in the criminal and juvenile contexts. The

31. *See, e.g.,* Gustav L. Schramm, *The Judge Meets the Boy and His Family, in* SOCIAL CORRECTIVES FOR DELINQUENCY—1945 YEARBOOK, 186-88 (1945).

32. *See, e.g.,* Patricia G. Erickson, *The Defense Lawyer's Role in Juvenile Court: An Empirical Investigation into Judges' and Social Workers' Points of View*, 24 U. TORONTO L.J. 126, 145-48 (1974); David A. Harris, *The Criminal Defense Lawyer in the Juvenile Justice System,* 26 U. TOL. L. REV. 751, 762-64 (1995).

33. Further, because rehabilitation was the goal, dispositions were necessarily open ended rather than time limited. In most jurisdictions, commitments to juvenile corrections departments were indeterminate, extending until the child turned twenty-one, or until the juvenile corrections department made a determination that the youth had been rehabilitated.

34. *See, e.g.,* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967).

35. *See, e.g.,* JEROME G. MILLER, LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS 4 (1991); DAVID STREET, ROBERT D. VINTER & CHARLES PERROW, ORGANIZATION FOR TREATMENT: A COMPARATIVE STUDY OF INSTITUTIONS FOR DELINQUENTS (1966).

36. 347 U.S. 483 (1954).

Supreme Court had not looked seriously at the adult criminal process since *Betts v. Brady* in the early 1940s,[37] but by the 1960s, a "due process revolution" took hold as the Court turned out a series of decisions in some of the most important cases in our nation's history. In 1961, the exclusionary rule was given national application in a case involving a flagrant violation of minority rights.[38] The Sixth Amendment right to counsel was extended to all indigent felony defendants in 1963,[39] while the Fifth Amendment privilege against self-incrimination was made applicable to state trial proceedings in 1964.[40] The Sixth Amendment rights to confront and cross-examine witnesses were made enforceable in the states in 1965.[41] One year later, in *Miranda v. Arizona*[42]—another case involving minority suspects—the Court ruled that custodial interrogation is inherently coercive, and mandated that police advise suspects of their right to remain silent and the right to counsel prior to questioning. Two years later, the Court authored *Duncan v. Louisiana*,[43] which overturned a racially motivated prosecution and conviction, and guaranteed state defendants the right to a trial by jury in nonpetty cases.

In 1966, the Supreme Court decided the first case it had ever decided involving the juvenile court process, signaling the beginning of the end of an era of unbridled discretion. In *Kent v. United States*,[44] the Court ruled that a decision to transfer a boy from juvenile court to criminal court for prosecution and punishment as an adult could not—in light of the consequences at stake—be made without a hearing.[45] In 1967, the United States Supreme Court decided *In re Gault,*[46] which extended many of the same procedural protections to juveniles as apply to adults in criminal proceedings. Three years later, in *In re Winship*,[47] the Court held that the beyond a reasonable doubt standard of proof applicable in adult criminal proceedings must be satisfied in juvenile delinquency proceedings as well. With that decision, the Court granted to juveniles nearly all of the due process guarantees that apply in adult criminal proceedings.[48]

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37. 316 U.S. 455 (1942).
38. Mapp v. Ohio, 367 U.S. 643 (1961).
39. Gideon v. Wainwright, 372 U.S. 335 (1963).
40. Malloy v. Hogan, 378 U.S. 1 (1964).
41. Pointer v. Texas, 380 U.S. 400 (1965).
42. 384 U.S. 436 (1966).
43. 391 U.S. 145 (1968).
44. 383 U.S. 541 (1966).
45. *Id.* at 554.
46. 387 U.S. 1 (1967).
47. 397 U.S. 358 (1970).
48. *Id.* at 369.

In historical context, *Gault* must be viewed as one in a series of cases aimed at extending the same procedural rights that apply to affluent, white adults to poor, oppressed, marginalized, and powerless groups. In the juvenile cases, the Court aimed to put an end to unbridled discretion in the state's handling of powerless young people, just as it would later do in the context of mentally ill and developmentally disabled populations.[49] The Court in *Gault* focused on the comparable liberty interests at stake in delinquency and criminal proceedings, and mandated procedural parity for juveniles and adults.[50] The framing of the issues in this way perhaps explains why *Gault* is basically silent on the differences between children and adults.

In *Gault,* the Court determined that due process rights must be part of the juvenile adjudicatory process.[51] The facts in the case are emblematic of the type of arbitrariness that transpired during the era of *parens patriae.* Gerald Gault was fifteen when police took him into custody without ever notifying his parents.[52] The petition charging his alleged delinquent act was devoid of any factual allegations, and was not served on Mr. and Mrs. Gault.[53] Gerald was not provided a lawyer, nor was he given an opportunity to confront his accuser; furthermore, despite requests from Gerald's mother that the complainant appear, she was never required to come to Court.[54] The entire proceeding was held in the judge's chambers, where Gerald was questioned by the judge without being advised that he did not have to incriminate himself.[55] No recording or transcript of the proceeding was ever made.[56] Gerald Gault was ultimately committed to a state institution until his twenty-first birthday for making lewd remarks over the phone to a neighbor.[57] The same offense, if committed by an adult, would have yielded at most a sentence of two months in jail or a fifty-dollar fine.[58]

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49. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975) (mandating standards for commitment of the mentally ill); Addington v. Texas, 441 U.S. 418 (1979) (raising the standard of proof in involuntary civil commitment).

50. *See Gault*, 387 U.S. at 57.

51. *Id.*

52. *Id.* at 4-5.

53. *Id.* at 5. The petition cited only that Gerald was a delinquent minor in need of protection by the court. Mrs. Gault asked that the complainant, Mrs. Cook, be summoned to court, but the judge denied her request on the grounds that there was no procedure requiring witnesses to come to court. *Id.* at 5-7.

54. *Id.* at 7.

55. *Id.* at 5.

56. *Id.*

57. *Id.* at 7-8.

58. *Id.* at 8-9.

Attuned to the fundamental unfairness of the process, the Court limited its consideration to the importance of procedural rights.[59] Rather than create a set of due process rights tailored to children, the Court turned to an already existing and seemingly workable set of rights—adult rights.[60] The Court imported into juvenile adjudicatory proceedings: (1) a right to notice of the charges;[61] (2) a right to counsel;[62] (3) a right to confrontation and cross-examination of witnesses;[63] and (4) the privilege against self-incrimination.[64]

By turning to the criminal justice system for constitutional protections, the Court's aim was to achieve procedural parity for children in the adjudicatory process.[65] Its effort was largely unsuccessful: *Gault* delivered a "prize" that, for all intents and purposes, was out of the reach of its intended beneficiaries. By failing to consider qualities of children that distinguish them from adults, and by straightforwardly extending to juveniles procedural rights that were created for adults, the Court implicitly assumed that children do not require special protections or special processes on account of their age and immaturity. It would have been appropriate for the Court in *Gault* to inquire about juveniles' immaturity, particularly as it might affect adolescents' ability to exercise those

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59. *Id.* at 27-28 ("[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."). The Court reaffirmed that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *Id.* at 20.

60. *Id.* at 30-31.

61. *Id.* at 33-34.

62. *Id.* at 41.

63. *Id.* at 57.

64. *Id.* at 55.

65. *Id.* at 30-31. The Court contrasted the procedural due process rights that Gerald Gault would have received had he been eighteen years or older with the lack of rights and protections available to him in the instant case. *Id.* at 29. The Court then opined:

> So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide. As Wheeler and Cottrell have put it, "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."

Id. at 29-30. *See also* Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39 (2003) (arguing that the Court created a false dichotomy between the need for procedural protections to ensure fairness and the aims of the juvenile justice system. Buss contends that, rather than revert to adult-like rights to ensure procedural fairness in delinquency proceedings, the Court could easily have created a set of well-designed due process rights for children).

rights to which the Court declared they were entitled.[66] This was a major missed opportunity. In essence, *Gault* placed the expectation on children to access and exercise due process rights in the same way adult criminal defendants are expected to. The Court erred in failing to recognize that procedures that succeed in securing fairness for adults may *not* be sufficient to secure fairness for children.[67] What followed in the ensuing years was a series of cases involving challenges to criminal justice practices as applied to children in which special accommodations appropriate for children were not made.[68] Nowhere is this clearer than in the case law surrounding the Fifth Amendment privilege against self-incrimination.

III. THE IMPACT OF *GAULT* IN THE FIFTH AND SIXTH AMENDMENT CONTEXTS

It is ironic that, prior to *Gault*, the Supreme Court had long recognized that age and immaturity affect a child's ability to protect her interests and to benefit from her constitutional rights, particularly in the face of state interrogation.[69] For example, in *Haley v. Ohio,* the Court showed a great deal of sensitivity to differences between children and adults, and to the consequent dangers of unreliability and unfairness in police-elicited confessions from youth.[70] There, police interrogated a fifteen-year-old boy in the wee hours of the morning, questioning him in relays of officers over a period of nearly five hours.[71] In ruling that the confession was involuntary, the Court admonished that the vulnerability of youth demands that a juvenile's waiver of rights be examined with "special care:"

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a

66. Why the Court did not contemplate creating a set of rights crafted to account for the biological and psychological development of adolescents is uncertain. Certainly the neuroscience that the Court later relied upon in *Roper v. Simmons*, 543 U.S. 551 (2005), was not available or known at that time, but much was known about young people's impressionability and their tendency to make poor judgments.

67. *See infra* Parts IV and V.

68. *See, e.g., infra* cases discussed Part III.

69. *See* Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962).

70. 332 U.S. at 599-601.

71. *Id.* at 598.

> match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.[72]

Likewise, in *Gallegos v. Colorado,* the Court underscored the vulnerability of a child during interactions with the police.[73] In that case, police obtained a stationhouse confession from a boy of fourteen in the absence of his parents.[74] Finding the confession involuntary, the Court was especially concerned with the boy's inability, on account of his age, to fully appreciate the consequences of a confession or to marshal the wherewithal to invoke the right not to incriminate himself, even after having been apprised of it.[75]

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights . . . He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.[76]

A. Right Against Self-Incrimination

Post-*Gault,* the analysis of challenges to the constitutionality of juvenile confessions shifted. Case law pertaining to the Fifth

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72. *Id.* at 599-600.

73. Gallegos, 370 U.S. at 53-54.

74. *Id.* at 50. The boy made initial admissions almost immediately in response to questioning at the crime scene, and was thereafter held in detention for five days before "formalizing" his confession at juvenile hall. *Id.* He had no contact with his parents over this period. *Id.* at 54. Prior to the stationhouse questioning, he was advised that he could be charged with murder, that he did not have to make a statement, and that he could have an attorney or his parents present if he chose. *Id.* at 59 (Clark, J., dissenting). At the stationhouse, and without his parents present, he confessed. *Id.* In deciding the case, it mattered little to the Court that the second confession was made after warnings had been given, or that the second confession merely confirmed the first. *Id.* at 54-55 (majority opinion).

75. *Id.* at 50-51.

76. *Id.* at 54.

Amendment privilege has been devoid of legal recognition that children are different from adults, with different capacities that demand or justify a different set of rules.[77] A few years after *Gault* was decided, the Court granted certiorari in the case of *Fare v. Michael C.*[78] In *Fare*, a sixteen-year-old boy under investigation for murder asked to see his probation officer upon being read the *Miranda* warnings.[79] The police denied his request, whereupon the

77. *See generally* 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, 453-62 (examining several state cases that evaluate a juvenile's *Miranda* waiver and concluding that there is uniformly little or no accommodation for the age of the suspect). *See also* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of Atkins for Executing and Sentencing Adolescents,* 32 HOFSTRA L. REV. 463 (2003).

78. 442 U.S. 707 (1979). *Compare id.* at 717 n.4 (demonstrating that, although *Gault* had not explicitly stated that *Miranda* applies to juvenile proceedings, the Court in *Fare* "assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceedings"), *with In re* Gault, 387 U.S. 1, 55 (1967) ("[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.").

79. The following is the exchange between respondent Michael C. and the officers:

Q. . . . do you understand all of these rights as I have explained them to you?
A. Yeah.
Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
A. What murder? I don't know about no murder.
Q. I'll explain to you which one it is if you want to talk to us about it.
A. Yeah, I might talk to you.
Q. Do you want to give up your right to have an attorney present here while we talk about it?
A. *Can I have my probation officer here?*
Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.
A. How I know you guys won't pull no police officer in and tell me he's an attorney?
Q. Huh?
A. [How I know you guys won't pull no police officer in and tell me he's an attorney?]
Q. Your probation officer is Mr. Christiansen.
A. Yeah.
Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?
A. Yeah.
Q. Okay, will you talk to us without an attorney present?
A. Yeah I want to talk to you.

Fare, 442 U.S. at 710-11.

boy signed the standard *Miranda* waiver form and made inculpatory statements.[80] At issue in the case was whether the boy had knowingly and intelligently waived his Fifth Amendment rights under *Miranda*.[81] The Court applied a totality of the circumstances approach, which requires consideration of all of the circumstances surrounding the interrogation—including, inter alia, the suspect's age, education, and experience.[82] The Court considered Michael's age—especially in light of his extensive history with police and probation—and inferred from these that he understood his rights and the consequences of waiver.[83]

In holding that the waiver was valid, the Court also ruled that Michael's request to see his probation officer was not tantamount to a request for a lawyer—viz. probation officers and lawyers serve different functions—nor did it constitute an invocation of the right to remain silent.[84] Despite its assertion that a juvenile needs only to indicate in "any manner" the desire to invoke the Fifth Amendment privilege, the Court opined, "there is nothing inherent in the request for a probation officer that requires us to find that a juvenile's request to see one *necessarily* constitutes an expression of the juvenile's right to remain silent."[85] In *Fare*, the Court applied a legal analysis to a juvenile custodial interrogation that is wholly inconsistent with pre-*Gault* recognition of children as different from adults. The Court's ruling shows a remarkable insensitivity to the awareness and intentions of a juvenile. From the exchange between Michael C. and the officer, it seems reasonably clear that the boy wanted guidance from his probation officer—whom he knew and trusted, and who had directed him to call should he ever get into

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80. *Id.*

81. *Id.* at 724.

82. *Id.* at 725.

83. *Id.* at 726. The connection between prior experience with the legal system and understanding one's rights and the consequences of waiving one's rights, is much less straightforward than the Court seems to recognize. *See infra* Part V.

84. *Id.* at 722-24. In his dissent, Justice Marshall argued that:

> *[M]iranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests. Such a request, in my judgment, constitutes both an attempt to obtain advice and a general invocation of the right to silence. . . . Requiring a strict verbal formula to invoke the protections of *Miranda* would "protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the . . . person he trusts."

Id. at 729-30. (Marshall, J., dissenting) (quoting Chaney v. Wainwright, 561 F.2d 1129, 1134 (5th Cir. 1977)).

85. *Id.* at 724 (majority opinion) (emphasis added). More consistent with its finding on this issue, the Court would subsequently rule that interrogation is barred only after suspects "unambiguously request counsel." Davis v. United States, 512 U.S. 450, 459 (1994).

trouble—before talking to the police. The Justices did not consider what the boy intended or hoped to achieve by requesting his probation officer.[86] Rather than following its own admonition in *Gault,*[87] and acknowledging the significance of a sixteen-year-old boy's request for the assistance of a trusted and authoritative adult in the face of state interrogation, the Court applied a rigid framework, thereby rejecting the idea that developmental differences between juveniles and adults require different rules or special procedural protections.

Although *Fare* contemplates that, in applying the "totality of the circumstances" test, trial courts will attend to the child's age, his capacity to understand the *Miranda* rights, and his capacity to appreciate the consequences of waiver, in practice these matters receive little consideration.[88] Waivers from preteens, youth of very limited intelligence, and emotionally disturbed youth have been upheld in several states. Lower courts have ruled that the comprehension requirement is satisfied if a child merely understands the words used in the *Miranda* warnings, can paraphrase each right after it is read, or says that he understands his rights (notwithstanding the fact that, to save embarrassment, children frequently claim to understand things that they do not).[89]

The question of when a person is in custody for purposes of *Miranda* was presented in 2005, in *Yarborough v. Alvarado*.[90] There,

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86. The only time the Court ever referenced Michael's minority status was when the Court opined that, in the lower court's estimation, Michael was *not* a "young, naïve minor who lacked experience with the courts." *Fare*, 442 U.S. at 713.

87. There the Court stated:

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

In re Gault*,* 387 U.S. 1, 55 (1967).

88. *Fare*, 442 U.S. at 725.

89. *See, e.g.,* State v. Dutchie, 969 P. 2d 422, 429 (Utah 1998) (finding a waiver where fifteen-year old was able to "parrot back portions of the warnings"); Ingram v. State, 918 S.W.2d 724, 728 (Ark. Ct. App. 1996) (finding valid waiver where a twelve-year old represented that he understood each right); State v. Gray, 100 S.W.3d 881, 886-87 (Mo. Ct. App. 2003) (upholding waiver of a sixteen-year-old, mentally retarded boy who suffered from anxiety and depression and who was questioned alone); W.M. v. State, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) (upholding waiver of a mentally retarded ten-year-old boy who was crying when taken into custody and who was held alone by the police for nearly six hours); *In re* W.C., 657 N.E.2d 908, 925-26 (Ill. 1995) (upholding waiver of a thirteen-year old who was illiterate, had an IQ of forty-eight, and who was developmentally the equivalent of a six- or seven-year old); *see also* Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose,* 64 FORDHAM L. REV. 1873 (1996).

90. 541 U.S. 652 (2004).

a seventeen-year-old juvenile who had no prior contacts with law enforcement was brought to the police station by his parents at the request of the police.[91] He was questioned for two hours in a small room from which his parents were excluded.[92] The boy was not advised of his *Miranda* rights, was never told he was free to leave, and was confronted with claims that there was strong evidence of his participation in a carjacking and murder.[93] He confessed and his confession was admitted at trial.[94] The United States Supreme Court granted habeas relief to address whether the lower court had unreasonably applied clearly established federal law with respect to whether age and inexperience are relevant to the *Miranda* custody inquiry.[95]

The applicable standard, developed in cases involving adults, is whether, in light of the police conduct, a "reasonable person" in the suspect's position would have felt "at liberty to terminate the interrogation and leave."[96] Such an inquiry requires courts to examine objective factors present during the interrogation.[97] Prior to *Alvarado*, the Court had not addressed the issue in a case involving a juvenile suspect.[98] When the Ninth Circuit considered the custody issue presented in *Alvarado*, it endorsed a reasonable juvenile standard, which took account of the suspect's age.[99] It reasoned that if a youth, by virtue of age and immaturity, is more susceptible to police coercion during a custodial interrogation, she is also more likely to believe that she is in custody in the first place.[100] In reversing the Ninth Circuit, the Supreme Court held that consideration of age, which is applicable in a claim of involuntariness

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91. *Id.* at 656, 660.

92. *Id.*

93. *See id.* at 656-57.

94. *Id.* at 658.

95. *See id.* at 663.

96. Thompson v. Keohane, 516 U.S. 99, 112 (1995).

97. These include:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during the questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official request to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990).

98. *Alvarado*, 541 U.S. at 666.

99. *Id.* at 660.

100. *Id.*

under the Due Process Clause and *Miranda*-waiver contexts, is inapplicable in the *Miranda* custody analysis.[101] The majority held that age and inexperience are not relevant considerations under the "reasonable person" test.[102] The Court explained that age and inexperience are not objective factors, but involve subjective inquiries that would place an undue burden on law enforcement to apply.[103]

Fare and *Alvarado* demonstrate the Court's post-*Gault* intransigence when it comes to applying a "sensitive to children" due process analysis in situations where characteristics specific to youth may have a profound impact on their perceptions and choices.[104]

B. Right to Counsel

The touchstone to exercising one's due process rights in a meaningful way begins with representation by counsel.[105] Many constitutional and procedural due process rights can and do go

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101. *Id.* at 667-68.

102. *See id.* at 667. In her concurrence, Justice O'Connor stated that age *may* be relevant to the custody inquiry under *Miranda*. However, because the defendant here was seventeen and a half ("so close to the age of majority"), in this case age was all but irrelevant. *Id.* at 669 (O'Connor, J., concurring).

103. *Id.* at 667 (majority opinion).

104. The irony is that in *Gault* itself, the Court drew upon the language of *Haley* and *Gallegos* in admonishing that "admissions and confessions of juveniles require special caution." *In re* Gault, 387 U.S. 1, 45 (1967). The Court also observed that:

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

Id. at 55.

105. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967), http://www.ncjrs.gov/pdffiles1/nij/42.pdf: [hereinafter PRESIDENT'S COMM'N: CRIME].

> The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot. Papers are drawn and charges expressed in legal language. Events follow one another in a manner that appears arbitrary and confusing to the uninitiated. Decisions, unexplained, appear too official to challenge. But with lawyers come records of proceedings; records make possible appeals which, even if they do not occur, impart by their possibility a healthy atmosphere of accountability.

Id.; *see also* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding that the Fourteenth Amendment gives indigent criminal defendants the right to state-appointed counsel); Faretta v. California, 422 U.S. 806 (1975) (rejecting counsel being forced upon defendant who voluntarily and intelligently elects to represent himself); Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.").

unrealized in the absence of legal counsel; with the expertise of counsel, an accused evaluates which tactics to employ and which rights to invoke.[106] This could not be more clear than in a delinquency proceeding.[107] In 1955, one scholar wrote:

> To say that trials without counsel can be fair is to assume either that the defense which counsel might have presented would not have changed the result in the case or that in certain types of cases counsel serves no useful function. The first assumption is hindsight and unprovable. The second, if true, would convict a portion of the bar of taking money under false pretenses in all those "simple" cases where counsel accepts a retainer but apparently cannot influence the result.[108]

More recently, we have witnessed some highly notable trials involving pro se defendants who sabotaged their own legal defense by refusing the assistance of counsel.[109]

The facts of *Gault* highlight the importance of counsel in delinquency proceedings. The Court noted that there is no significant difference between the right to counsel in adult criminal proceedings versus juvenile delinquency proceedings, since both contexts involve the potential loss of liberty.[110] The Court opined that defense counsel serves an unparalleled role in an adjudicatory hearing. Anyone other than defense counsel, such as the prosecutor, probation officer, and judge, either has interests adverse to the juvenile or must remain impartial in the proceedings.[111] It is solely the responsibility of defense counsel to identify and prepare possible defenses, interpret

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106. Whether it is a facial challenge to the validity of the charging document, disputing the validity of a *Miranda* waiver, or electing the witnesses who will testify, the expertise of a lawyer is central to the fair administration of justice.

107. "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare to submit it." *Gault*, 387 U.S. at 36 (footnote omitted); *see also* Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 597 (2002).

108. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 234-35 (1955).

109. Ted Kaczynski asserted his right to represent himself on several occasions despite the urging of the trial judge to allow his highly competent and respected attorneys to represent him. Adam Liptak, *Legal Analysis; Rights, and Wrongs*, N.Y. Times, Oct. 21, 2003, at A24. He is currently serving a life sentence. *Id.* Colin Ferguson refused assistance of counsel and represented himself against murder charges in a 1995 Long Island railroad shooting. *Id.* He was convicted. *Id.* John Muhammed, "the Washington Sniper," represented himself in one of his state murder prosecutions. Rona Marech, *Advancing the Issue: Self-Representation*, DAILY PRESS (Newport News, Va.), May 9, 2006, at A3. He is currently on death row. *Id.*

110. *Gault*, 387 U.S. at 36. The Court compared a juvenile proceeding in which the child is subject to loss of liberty for years with a felony prosecution, and observed that both adjudications were equally serious. *Id.*

111. *Id.*

statutes, gather relevant factual information, and insist upon regularity in the proceedings.[112]

Perhaps to a large degree, the intent of *Gault* would be realized if in fact granting children the right to counsel actually resulted in children being represented by counsel. An astonishing number of children charged with crimes to this day appear in delinquency proceedings unrepresented. In 1993, as part of the federal government's attempt to improve access to due process for children in the juvenile justice system, the American Bar Association Juvenile Justice Center, in partnership with the Youth Law Center and Juvenile Law Center, conducted a national assessment to examine the problems and issues relating to access to counsel and quality of representation for juveniles. The results were published in *A Call for Justice: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*.[113] *A Call for Justice* found that one-third of the public defender offices surveyed reported that, as early as the detention hearing, some "youth in the juvenile courts in which they work waive their right to counsel."[114] Court-appointed counsel for juveniles reported similar findings.[115] The study also found that youth in rural areas waive their right to counsel more frequently.[116] In early 2005, the Florida Supreme Court reported that seventy-five percent of youth in Florida's twelfth circuit[117] waive their right to counsel, and over fifty percent of youth in Florida's sixth circuit[118] do so as well.[119]

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112. *Id.* "The child requires the guiding hand of counsel at every step in the proceedings against him." *Id.*

113. *See* AM. BAR ASS'N JUV. JUST. CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (1995), available at www.njdc.info/pdf/cfjfull.pdf [hereinafter A CALL FOR JUSTICE].

114. *Id.* at 44-45. "45% of public defenders [said] the [waiver] colloquy is only 'sometimes' or 'rarely' as thorough as [that] given to adult defendants." *Id.* at 45.

115. *Id.*

116. *Id.*

117. The Twelfth Judicial Circuit of Florida consists of DeSoto, Manatee, and Sarasota counties. State of Florida Twelfth Judicial Circuit, http://12circuit.state.fl.us (last visited Nov. 16, 2007).

118. The Sixth Judicial Circuit of Florida serves Pasco and Pinellas counties. State of Florida Sixth Judicial Circuit, http://www.jud6.org (last visited Nov. 16, 2007).

119. PATRICIA PURITZ & CATHRYN CRAWFORD, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 27, 28 (2006). Similar findings were made in other states during NJDC-sponsored assessments. In a 2002 assessment in Virginia, experts estimated that in one county fifty percent of youth waived counsel regardless of the seriousness of the offense. *See* AM. BAR ASS'N ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 23, 23-24 (2002) [hereinafter VIRGINIA ASSSESSMENT].

The 1996 study confirmed that children are often induced to waive the right to counsel by the suggestion "that lawyers are not needed because no serious dispositional consequences are anticipated," or "[because of] parental concern[] that they will have to pay for" legal services that are provided.[120] In a 2006 National Juvenile Defender Center-sponsored assessment of the adequacy of Florida's juvenile justice system, it was determined that in many Florida counties half or more of the youth who appear in delinquency court waive the right to counsel.[121] Assessment observers in Florida found that it was commonplace for judges to "engage in a subjective analysis of whether each youth 'needs' a lawyer."[122] "This informal analysis then determined whether and when the court informed the youth of his right to counsel."[123] "In one large county, judges routinely failed to apprise youth of their right to counsel and many times the word 'lawyer' or 'attorney' was not even uttered."[124] In Florida, "probation officers frequently advise youth on whether they need an attorney or not."[125] The Florida assessment showed that a youth's ability to access counsel often depended "upon what various actors within the system *perceived his need* for counsel to be."[126]

Reasons for waiver are wide ranging, but almost all are imprudent when one considers the importance of this constitutionally based right. Appointment practices vary across jurisdictions: whether counsel appears at the arraignment or is appointed postarraignment has a distinct effect on the frequency with which juveniles waive counsel. As evidenced in Florida, waiver of counsel is often a response to external pressures, most often by parents and court personnel.[127] The Florida study "concluded that judges and parents in Florida courts engage in practices and procedures that pressure youth, directly or indirectly, to waive the right to counsel."[128]

> [I]n most of the counties visited for this assessment, youth [we]re not afforded an opportunity to consult with a lawyer prior to [making the] waiver [decision]. In some counties and

120. A CALL FOR JUSTICE, *supra* note 113, at 7-8.

121. PURITZ & CRAWFORD, *supra* note 119, at 28.

122. *Id.*

123. *Id.*

124. *Id.* at 29.

125. *Id.*

> One court observer in the Virginia assessment overheard a bailiff tell a father, who was found by the court not to be indigent, that the court would not be further inconvenienced with his son's case and would proceed the next time he came to court even if his child did not have a lawyer.

See VIRGINIA ASSSESSMENT, *supra* note 119 at 23, 24.

126. PURITZ & CRAWFORD, *supra* note 119, at 29.

127. *Id. See also* VIRGINIA ASSESSMENT, *supra* note 119, at 24.

128. PURITZ & CRAWFORD, *supra* note 119, at 28.

> courtrooms, youth [we]re not informed of the right to an attorney or asked whether they want[ed] an attorney until after the court had asked whether the youth [would] plead guilty, no contest, or not guilty.[129]

The study reported that it was not uncommon for "the judge to question the youth about the offense before mentioning the right to counsel."[130]

Parental perceptions are another reason why a substantial proportion of children waive counsel. First, misconceptions as to the lack of seriousness of the legal matter cause some parents to feel that an attorney is not necessary.[131] Second, some states require indigent defendants to reimburse the state for all or a portion of attorney's fees.[132] The potential of incurring financial cost in conjunction with the belief that the situation is not severe causes parents to waive counsel.[133] Where a conflict of interest exists between parent and child over the need for counsel, the child will typically defer to the parent.[134]

In light of the direct correlation between the number of children who waive their right to counsel and the lack of meaningful access to and exercise of due process rights in juvenile courts, the President's Crime Commission adopted the position that all children accused of a crime should automatically have counsel appointed for them:

> The Commission believes that no single action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought

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129. *Id.* at 31.

130. PURITZ & CRAWFORD, *supra* note 119, at 29.

131. *See* A CALL FOR JUSTICE, *supra* note 113, at 45.

132. Many states have statutes requiring parents or guardians to reimburse the state for the cost of the minor's appointed attorney's fees. *See, e.g.,* N.H. REV. STAT. ANN. 169-B:40 (2003) (reimbursement statute for cost of defense attorney for juvenile in a delinquency proceeding).

133. *See* A CALL FOR JUSTICE, *supra* note 113, at 45.

134. *See infra* Part VI; *see also* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1291-98 (2004) (identifying various conflicts of interest parents or guardians may face, which interfere with decisions about whether invoking right to counsel in an interrogation setting is in the child's best legal interest).

> before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively.[135]

If adopted, this mechanism would significantly reduce, if not eliminate, waiver of counsel by the child and parent.

The findings from research studies and state assessments of juvenile delinquency proceedings evidence a failure on the part of *Gault* to instill norms and standards readily accessible to the affected population. The degree to which kids waive their right to counsel and protection against self-incrimination indicates a disconnection between kids and their ability to recognize the value in, and to exercise, these rights. *Roper v. Simmons* is a potential turning point in this due process quagmire.

IV. *ROPER V. SIMMONS*: A NEW PARADIGM?

In *Roper v. Simmons*, the Supreme Court held that the imposition of the death penalty on juveniles under the age of eighteen constitutes a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[136] The Court evaluated the death penalty for juveniles in light of evolving standards of decency, and looked to state statutes, jury practices, and international views and practices as guides to contemporary notions of morality.[137] In addition to finding capital punishment incompatible with contemporary standards of decency, the Court was persuaded by empirical research in the natural and behavioral sciences—where significant advances in understanding adolescent development have been made in the last two decades—showing that adolescents lag behind adults in cognitive and psychosocial maturity.[138] Based in part on this empirical evidence, the Court concluded that juveniles under eighteen lack sufficient culpability to be subject to capital punishment.[139]

In adopting this view, the Court made three specific findings. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are

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135. PRESIDENT'S COMM'N: CRIME, *supra* note 105, at 86-87.

136. 543 U.S. 551 (2005). The facts of *Roper* are particularly heinous. They involve the execution of a chilling plan instigated by Christopher Simmons, then seventeen, who, with two friends ages fifteen and sixteen, broke into the home of an elderly woman at two o'clock in the morning to commit burglary and murder. *Id.* at 556-57. They found the victim awake in her bedroom, tied her up with duct tape and electrical wire, then drove her to a state park, where they threw her from a bridge into a river below, where she drowned. *Id.*

137. *See id.*

138. *See id.* at 569-74.

139. *Id.* at 573-74. *See also* Thompson v. Oklahoma, 487 U.S. 815, 833-38 (1988) (noting the importance of these characteristics with respect to youth under sixteen).

more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[140] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[141] Third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[142] The Court reasoned that, by virtue of these characteristics, juvenile offenders—even those who commit heinous acts of murder—are significantly less culpable than adults.[143] The Court felt so strongly about this conclusion that, when pressed to reject a per se rule in favor of a case-by-case assessment of an individual defendant's psychological and social maturity, it responded that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[144]

This Article contends that the qualities that distinguish juveniles from adults have legal import well beyond the issue that was presented in *Roper*. These qualities do not disappear when we shift from Eighth Amendment questions to Fifth and Sixth Amendment ones. *Roper* demonstrates the Court's acceptance of significant biologically and experientially based cognitive and psychosocial differences between juveniles and adults that could and should provide the basis for a new legal paradigm, one that is applicable to juveniles in delinquency proceedings no less than in criminal ones. We argue that the same qualities that render youth less culpable than adults, such that they cannot be put to death, also render them less capable of meaningfully exercising rights granted to them under the Fifth and Sixth Amendments. We maintain that youthfulness supports a per se rule prohibiting juveniles from waiving either the Fifth Amendment privilege against self-incrimination in the interrogation room or the Sixth Amendment right to counsel in delinquency proceedings. In both contexts, the assistance of an attorney should be mandatory. Otherwise, the Fifth and Sixth Amendment rights granted in *Gault* may be reduced to a mere form of words on account of youths' deficient capacities to exercise them.

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140. *Roper*, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

141. *Id.* (citation omitted). *See also* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence . . . .").

142. *Roper*, 543 U.S. at 570.

143. *Id.* at 571-73.

144. *Id.* at 572-73.

In the section that follows, we discuss research on adolescent decision making, then consider its implications for juveniles' capacities to understand and then to invoke or waive constitutional rights.

V. ADOLESCENT DECISION MAKING: EVIDENCE FROM PSYCHOLOGY AND NEUROSCIENCE

In the past twenty years, significant advances have been made in our understanding of adolescence. Especially relevant is the body of research on teen development and what it tells us about change in qualities of decision making and judgment as youth make their way from early adolescence to the early adult years. Breakthroughs have been made in our understanding of cognitive differences (differences in reasoning and understanding) between adolescents and adults, and psychosocial differences (differences in social and emotional functioning) that affect the exercise of cognitive capacities in the process of making judgments.[145] Although, to be sure, there is wide variation among individuals, adolescents as a class tend to process information differently than adults, and their judgments reflect preferences and orientations that tend to be characteristic of this developmental period.[146]

The teen years are a period of rapid and pervasive change in children's cognitive, emotional, and social capacities. Although in most states youth between the ages of ten and seventeen fall within the purview of the juvenile law, are subject to the same rules, and are presumed to have the same capacities, research indicates a broad spectrum of competencies within this age range.[147] There is "good reason to believe that individuals at the point of entry into adolescence are very different than are individuals who are making the transition out of adolescence."[148]

A. Cognitive Development

There are significant differences in the cognitive capacities of preteens and early teens, compared to older teens and adults.[149] Developmental theory and research indicate that the capacity to utilize logical reasoning skills in decision making—that is, to

145. Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 325, 326-27 (Thomas Grisso & Robert G. Schwartz eds., 2000).

146. Scott & Grisso, *supra* note 19, at 160-64.

147. *See id.* at 160.

148. Laurence Steinberg & Elizabeth Cauffman*, A Developmental Perspective on Jurisdictional Boundary, in* THE CHANGING BORDERS OF JUVENILE JUSTICE 379, 383 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

149. Scott & Grisso, *supra* note 19, at 160.

envision alternative behavioral choices, identify the consequences associated with each, assess the likelihood of these consequences, and weigh the alternatives and their consequences in terms of one's values and preferences—emerges in early adolescence.[150] Although there is much individual variability in the age at which these abilities emerge, there is general agreement that few acquire them before age twelve, while most have them by age fourteen or fifteen.[151]

A considerable amount of experimental research conducted in laboratory settings indicates that, by mid-adolescence, most youths have capacities for reasoning and understanding that are roughly equivalent to those of adults.[152] So one might be tempted to conclude that, by age fifteen, teens are capable of understanding and invoking their Fifth and Sixth Amendment rights, or, alternatively, of making an intelligent (that is, understanding the right) and knowing (understanding the consequences) waiver. But the laboratory setting is artificial. In the laboratory, cognitive capacities are typically assessed by presenting subjects with hypothetical scenarios to which they are asked to respond by making and explaining decisions. All subjects have the benefit of the same relevant information, which is supplied by the researcher, and the research setting is most often relaxed, unhurried, quiet, and free of distractions. Although experimental research using hypothetical vignettes continues, the limitations of this methodology are increasingly clear: it depicts cognitive performance under ideal conditions, which may bear little relation to decision making in the real world. As Elizabeth Scott and Laurence Steinberg explain, "findings from laboratory studies are only modestly useful . . . in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decisionmakers must rely on personal experience and knowledge."[153]

In the real world, people base decisions and judgments on the information they possess. Unlike the laboratory, where all subjects

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150. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y. & L. 3, 17-18 (1997).

151. *Id*. at 18. *See also* Shawn L. Ward & Willis F. Overton*, Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, 26 DEVELOPMENTAL PSYCHOL. 488, 488 (1990) (stating that experiments demonstrate a lack of deductive competence prior to the eighth grade).

152. *See, e.g*., James P. Byrnes & Harry Beilin, *The Cognitive Basis of Uncertainty*, 34 HUM. DEV. 189 (1991); Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 PSYCHOL. REV. 674 (1989); Willis F. Overton, *Competence and Procedures: Constraints on the Development of Logical Reasoning, in* REASONING, NECESSITY, AND LOGIC: DEVELOPMENTAL PERSPECTIVES 1 (Willis F. Overton ed., 1990).

153. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth,* 81 TEX. L. REV. 799, 812-13 (2003).

have the same information, people in the real world have acquired, through education and experience, different amounts of information about what options are available to them, the nature of those options, and their consequences. Decision making is generally better if we have the benefit of previous experience in making decisions, particularly if the kind of decision we are called on to make is one that we have made before. Decision making is a skill that, like most skills, is learned, and we cannot learn to do well without practice.[154] Thus, despite the fact that their capacities for understanding and reasoning may be equal to adults, the decision making of even mid- to late-adolescents is likely to be impaired. Simply by virtue of their relative lack of education and experience, teens are less likely than adults to be cognizant of all of their options, to recognize or appreciate all of the ramifications of behavioral alternatives, and to weigh the alternatives in a way that does not produce outcomes that may be unfavorable or even injurious to them.[155]

Psychosocial factors play an important role in decision making. They are often referred to as "judgment" factors[156] because they refer to things like risk perceptions, self-perceptions, emotions, motivations, time perspective, and responsiveness to others, which influence our preferences and, ultimately, the judgments that we make. Researchers have identified multiple psychosocial factors that are especially salient during the teen years, and which contribute to the adolescent characteristics of immaturity, impetuosity, and vulnerability noted by the Court in *Roper*.[157] Psychosocial development lags behind cognitive development—it continues to develop throughout adolescence and into the early adult years—and it appears to have a biological base.[158] Before turning to a discussion

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154. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 17 (2005) ("Being mature takes practice.").

155. *See, e.g.,* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 552-54 (2000).

156. This perspective was initially presented in Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 222-23 (1995). *See also* Scott & Grisso, *supra* note 19. The "judgment" factors were modified somewhat by Laurence Steinberg and Elizabeth Cauffman. *See* Laurence Steinberg & Elizabeth Cauffman*, Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996); Cauffman & Steinberg*, supra* note 145, at 325*;* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625 (2005).

157. *See* Scott et al., *supra* note 156, at 229-32.

158. *See, e.g.*, B. J. Casey, Nim Tottenham, Conor Liston & Sarah Durston, *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104, 108 (2005); *see also* Beatriz Luna et al., *Maturation of Widely Distributed Brain Function Subserves Cognitive Development*, 13 NEUROIMAGE

of those psychosocial factors believed to be most important to the adolescent years, we take a brief excursion into the biological roots of psychosocial development.

B. Neuropsychological Research

Advances in neuroscience have produced a new body of knowledge showing that fundamental differences in the psychosocial maturity of adolescents and adults are rooted in biochemical changes in the structures and processes of the brain. Research has focused especially on two areas of the brain. The first involves the limbic and paralimbic regions. These are sensation- and reward-seeking areas of the brain, which are activated by external stimuli, including social and emotional stimuli.[159] They are responsible for the almost spontaneous gut reactions and impulses that we have when we are exposed to things provocative.[160] The other region of the brain that is especially important to judgment and decision making involves the prefrontal and parietal cortices.[161] The region where these are located is often described as the "executive" or "cognitive control" center, because this is the thinking portion of the brain responsible for foresight, planning, strategic thinking, and self-regulation.[162] Importantly, the frontal regions regulate the expression of impulses emanating from the limbic region.[163]

The executive center of the brain develops gradually, and its development is generally not complete until people reach their early twenties.[164] Therefore, although they may have developed adult-like

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786 (2001); Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 55 (2007).

159. Shannon Brownlee, *Inside the Teen Brain,* U.S. NEWS & WORLD REPORT, Aug. 9, 1999, at 45.

160. *Id.*

161. Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes*, *in* CLINICAL NEUROPSYCHOLOGY 404, 433 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003).

162. *See, e.g.*, *id.* at 434; *see also* ELKHONON GOLDBERG, THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND (2001); M. Marsel Mesulam, *Behavioral Neuroanatomy: Large-Scale Networks, Association Cortex, Frontal Syndromes, the Limbic System, and Hemispheric Specializations*, *in* PRINCIPLES OF BEHAVIORAL AND COGNITIVE NEUROLOGY 1, 42-48 (M. Marsel Mesulam ed., 2d ed. 2000).

163. *Id.*

164. Longitudinal research using magnetic resonance imaging (MRI) and other sophisticated scanning techniques (e.g., PET scans, MRS) have provided images of brain functioning at rest and during various tasks, during regular intervals through adolescence and into adulthood. Using these technologies, Dr. Elizabeth Sowell, Dr. Jay Giedd, and others, have shown that the prefrontal cortex undergoes dramatic changes during the adolescent years, and is one of the last areas of the brain to reach maturity. The gray matter thins in a "pruning" process that tightens the connections among neurons. In the same areas where gray matter thins, white matter increases

capacities for understanding and reasoning by mid-adolescence, youth do not acquire adult-like capacities for behavioral self-regulation until much later.

For reasons that are not entirely clear, with the onset of puberty the limbic regions become more sensitive (i.e., more easily aroused) and more active.[165] Both the intensity and lability of mood that we associate with adolescence are presumably manifestations of this change in the functioning of the limbic system.[166] While the limbic system of adolescents is often bursting with emotions and impulses, the frontal lobes do not keep pace, but continue to develop at a much slower rate.[167] Consequently, during the period between the onset of puberty and the maturation of the frontal cortices some eight to ten years later, individuals may have considerable difficulty modulating their emotions. When a teen is emotionally aroused (e.g., in the company of friends, out on dates, in situations of stress or excitement or danger), the executive center of his or her brain is not able to effectively rein in inclinations emanating from the limbic regions.[168] This may account for teens' greater tendency to drive after drinking, engage in unprotected sex, ride motorcycles without a helmet, jump out of airplanes, and engage in other risky behaviors. Teens may understand the risks;[169] however, as neuroscientist Deborah Yergulon-Todd explains, "[g]ood judgment is learned, . . . [and] you can't learn it if you don't have the necessary hardware."[170] Adolescent brains are not equipped to respond to emotional situations in the same ways as adult brains.[171] "At-risk" adolescents see fewer options, their time perspective is shortened, and their ability to foresee more

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through a process called "myelination." The accumulation of myelin around brain cell axons forms an insulating sheath, which increases communication among cells and allows the executive center to process information more efficiently and accurately. Significantly, the myelination process eventually completes the circuitry that integrates the executive center with other regions of the brain, so that greater control is exerted over the social and emotional impulses originating in the limbic region. *See* Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826-29 (2001); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (1999).

165. *See* Steinberg, *supra* note 158, at 56-57.

166. *See id.*

167. *Id.*

168. *Id.*

169. *See, e.g.*, Ruth Beyth-Marom et al., *Perceived Consequences of Risky Behaviors: Adults and Adolescents*, 29 DEVELOPMENTAL PSYCHOL. 549, 558-60 (1993).

170. Brownlee, *supra* note 159, at 48 (evaluating the effects that brain development has on teenage behavior).

171. *See id.* at 48-49.

distal consequences is constrained.[172] At other times, when they are not in a state of emotional arousal or stress—conditions more akin to the experimental laboratory setting—the reasoning and planning capacities of the brain can work more effectively.[173] It is only in the early twenties, when the frontal lobe matures, that individuals reach psychological adulthood and are better able to check emotions and impulses. It is at this time that individuals become less likely to act without thinking or to engage in risky and thrill-seeking behaviors, and more capable of exercising foresight (delaying gratification), resisting external pressures (developing autonomy), and channeling negative emotions in constructive ways.[174]

C. Psychosocial Factors Affecting Adolescent Judgment

Several psychosocial factors have been identified as essential to an understanding of the distinctive character of adolescent decision making. Although different scholars assign somewhat different labels, the following four categories capture the factors fairly well: (1) susceptibility to external influence; (2) orientation toward risk; (3) temporal orientation; and (4) capacity for self-regulation.[175] Below, we briefly discuss these factors and the research that supports each of them.

1. Susceptibility to External Influence

Scientific research confirms popular wisdom that adolescents are very much influenced by their peers, and less capable than adults of making autonomous decisions.[176] Adolescence is a life period in which youth become increasingly less dependent on parents and increasingly more oriented toward peers. Most spend a great deal of time in the company of peers, and much of their behavior is group behavior.[177] Adolescence is also a time of identity formation, and peer groups often provide the context in which teens experiment with new identities outside of their families: "In the process of loosening emotional ties to the family of origin, the adolescent is vulnerable, since he does not yet have a sufficiently developed identity or

172. *See, e.g.,* Edward P. Mulvey & Faith L. Peeples, *Are Disturbed and Normal Adolescents Equally Competent to Make Decisions About Mental Health Treatments?*, 20 LAW & HUM. BEHAV. 273, 273-75 (1996).

173. *See* Steinberg, *supra* note 158, at 56.

174. *See id.* at 56-57.

175. *See, e.g.,* Scott & Steinberg, *supra* note 153, at 813.

176. *See, e.g.,* Gardner & Steinberg, *supra* note 156, at 632; Dana L. Haynie & Danielle C. Payne, *Race, Friendship Networks, and Violent Delinquency,* 44 CRIMINOLOGY 775 (2006); DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH: PROBLEMS & SOLUTIONS (Kenneth A. Dodge et al. eds., 2006).

177. *See, e.g.,* MARK WARR, COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT 22-29 (2002).

autonomy of his own. To fill the void, a new dependency frequently emerges, a dependency on his peer group."[178] The attitudes and behaviors of adolescents' friends become influential in a number of ways. Teens frequently compare themselves to their peers and model their behavior (e.g., speech, clothing, hairstyles, and demeanor) after them, both as a sign of belonging or "fitting in" and to gain acceptance and approval.[179] Peers also influence one another more directly, often pressing each other to engage in risky behaviors. In the company of peers, the probability of engaging in risky behaviors is amplified; adolescents' desire for peer approval and fear of ridicule and rejection cause them to engage in acts that they would not otherwise commit.[180]

The presence of peers greatly increases the probability of risk taking among teens. Most juvenile crime—but not most adult crime—is committed in groups;[181] in the context of the peer group, dares and challenges often precipitate the commission of illegal acts.[182] Participation in group behaviors that may even be at odds with one's personal value system can carry important social benefits and avoid painful social costs.[183] It demonstrates loyalty to the group, solidifies friendships, and serves as a means of acquiring status.[184] Failure to participate, on the other hand, brings the prospect of ridicule and fear of rejection by the group on whom one has come to depend, or to which one hopes to belong.[185] The desire to avoid

178. ADOLESCENT BEHAVIOR AND SOCIETY: A BOOK OF READINGS 175 (Rolf E. Muuss ed., 3d ed. 1980).

179. *See, e.g.*, Thomas J. Berndt, *Friendship and Friends' Influence in Adolescence*, 1 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 156 (1992); Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615-16 (1979); Joseph P. Allen, Mary-Frances R. Porter & F. Christy McFarland, *Leaders and Followers in Adolescent Close Friendships: Susceptibility to Peer Influence as a Predictor of Risky, Behavior, Friendship Instability, and Depression*, 18 DEV. & PSYCHOPATHOLOGY 155, 167-71 (2006); Thomas J. Dishion, Francois Poulin & Bert Burraston, *Peer Group Dynamics Associated with Iatrogenic Effects in Group Interventions with High-Risk Young Adolescents*, *in* THE ROLE OF FRIENDSHIP IN PSYCHOLOGICAL ADJUSTMENT: NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 79, 87-90 (D.W. Nangle & C.A. Erdley eds., 2001); Darcy A. Santor, Deanna Messervey & Vivek Kusumakar, *Measuring Peer Pressure, Popularity, and Conformity in Adolescent Boys and Girls: Predicting School Performance, Sexual Attitudes, and Substance Abuse*, 29 J. OF YOUTH & ADOLESCENCE 163, 173-76 (2000).

180. *See* ZIMRING, *supra* note 154, at 73-90.

181. *See, e.g.,* WARR, *supra* note 177, at 39-44.

182. *See id.* at 45-89.

183. *See id.* at 45-58.

184. *See id.*

185. *See id.*

ridicule is a powerful motivator.[186] In a recent laboratory study involving a video driving game ("Chicken"), which adolescent participants played alone and with friends, Margo Gardner and Laurence Steinberg found that the presence of peers more than doubled the risks that teenagers took.[187] Peers had a lesser effect on college students, and no effect on slightly older adults.[188] Consistent with what we have observed about the changing capacity of the brain's executive center to regulate impulses emanating from the limbic region, a number of studies show that vulnerability to peer pressure increases from the preteen to mid-adolescent years, and declines thereafter.[189]

While mid-adolescents are more responsive than either younger children or adults to behavioral cues from peers, there is some suggestion that younger juveniles—children and preteens—may be especially vulnerable to behavioral cues from adult authority figures, including police and judges.[190] We all know how easily children can be enticed—even after good parental training about the dangers involved—to speak to strangers and to respond to the ruses of child molesters. When placed in situations, especially stressful ones that are new to them, young people look to adults—as they look to their parents—to help them to navigate unfamiliar terrain. Children are dependent on adults and look to them for assistance and approval. Yet, they overestimate adults' power, and therefore may be especially deferential and compliant with requests, commands, and suggestions from teachers, clergy, police, judges, and other authority figures.[191] It has been reported that children and younger teens, especially, often feel that they must respond truthfully to questions posed by adults and to comply with adult requests.[192] This has obvious implications

186. *See id.*; Beyth-Marom et al., *supra* note 169, at 560-61. This study showed the reaction of peers was the most cited consequence for declining to engage in risky behaviors, and much less salient for *performing* risky behaviors. Furthermore, avoiding ridicule and rejection by adolescent peers was a more powerful motivator than desire for approval.

187. Gardner & Steinberg, *supra* note 156, at 629-30.

188. *Id.*

189. *See, e.g.,* Steinberg, *supra* note 158, at 57.

190. *See, e.g.,* Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question,* CRIM. JUST., Fall 2003, at 20, 23 (2003); Karyn J. Saywitz & Thomas D. Lyon, *Coming to Grips with Children's Suggestiblity*, *in* MEMORY AND SUGGESTIBILITY IN THE FORENSIC INTERVIEW 85 (M.L. Eisen, J.A. Quas & G.G. Goodman eds., 2002).

191. John C. Coleman, *The Focal Theory of Adolescence: A Psychological Perspective*, *in* THE SOCIAL WORLD OF ADOLESCENTS: INTERNATIONAL PERSPECTIVES 44, 44-46 *(*Klaus Hurrelmann & Uwe Engel eds., 1989); John C. Coleman, *Friendship and the Peer Group in Adolescence*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 408, 425-28 (Joseph Adelson ed., 1980).

192. *See, e.g.,* Steinberg, *supra* note 158.

for waiver of constitutional rights, a matter to which we will turn shortly.[193]

2. Orientation Toward Risk

Perhaps in part because of the hyperactivity of their limbic systems,[194] adolescents are more likely than adults to engage in risky behaviors (e.g., criminal behavior, unprotected sex, smoking, drinking),[195] and, as we have seen, the probability of engaging in risky behaviors is magnified when young people are in the company of peers.[196] Lita Furby and Ruth Beyth-Marom suggest that, compared with adults, youths may be more likely to engage in risky behaviors because they fail to give sufficient consideration to the consequences, because they value the consequences differently, or because they have perceptions of invulnerability (the "personal fable"—it may happen to others, but it won't happen to me).[197] Steinberg suggests that "when presented with risky situations that have both potential rewards and potential costs, adolescents may be more sensitive than adults to variation in rewards but comparably sensitive (or perhaps even less sensitive) to variation in costs."[198] A considerable body of research supports the view that, when considering the consequences of their actions, adolescents more than adults differentially attend and give greater weight to anticipated benefits or gains and less to potential losses or risks. For example, Thomas Grisso's research with delinquents is consistent with this view and, in addition, he suggests that selective focus on rewards is especially likely to occur when costs are delayed.[199] He reports that when delinquents are asked to consider the consequences of waiving their *Miranda* rights, the most frequently mentioned consequence was that if they talked, they could go home.[200]

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193. *See infra* Part VI.

194. *See* Brownlee, *supra* note 159, at 47-48.

195. *See, e.g.,* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-making Perspective*, 12 DEVELOPMENTAL REV. 1, 1-3, 38 (1992).

196. *See, e.g.,* Gardner & Steinberg, *supra* note 156.

197. Furby & Beyth-Marom, *supra* note 195, at 9-23. *See also* Amy Alberts, David Elkind & Stephen Ginsberg, *The Personal Fable and Risk-Taking in Early Adolescence*, 36 J. OF YOUTH & ADOLESCENCE 71, 71-75 (2007) (regarding notions of invulnerability).

198. Steinberg, *supra* note 158, at 57. *See also* Alida Benthin, Paul Slovic & Herbert Severson, *A Psychometric Study of Adolescent Risk Perception*, 16 J. OF ADOLESCENCE 153, 153-56, 163-67 (1993); Furby & Beyth-Marom, *supra*, note 195, at 1-9; William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66, 66-70 (Nancy J. Bell & Robert W. Bell eds., 1993).

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

200. *Id.*

3. Temporal Orientation

Faced with a situation in which a decision regarding some behavioral alternative must be made, adolescents tend to give more consideration to short-term consequences, and less to long-term ones. Compared with adults, they have limited time perspective. Furthermore, in the analysis of costs and benefits, they tend to discount whatever long-term consequences they do see. As a result, they tend, more than adults, to opt for immediate gratification—postponing their homework to hang out with friends, or spending their money now on things that they will forget about in a week instead of saving for something they really want. As most every parent who has weathered the teen years knows, adolescents tend to need things "this minute" and with urgency—"I've simply got to have it."

The foreshortened time perspective of youth, compared to adults, also relates to their involvement in crime. Before committing crime, delinquent youths seldom consider the prospect of being caught and incarcerated, or the length of time they might be incarcerated. When they are sentenced to a term of years, it is difficult for them to project what incarceration will mean in terms of life opportunities and life experiences forgone. The perceived difference between a sentence of five years and ten years is a lot less meaningful to a teen than to an adult. Temporal perspective, then, may have important implications for juvenile decision making with respect to the exercise of trial rights and their participation in plea negotiations.

The teen's inability to project consequences into the distant future and to accord them much weight is also linked to social class. Poor urban children and adolescents tend to be more present-oriented than their middle-class suburban counterparts.[201] This may be a function of high rates of violence in poor inner-city neighborhoods: when people are dying at an early age, one doesn't think about life far into the future.

4. Capacity for Self-Regulation

Compared to adults, young people have lesser ability to restrain their impulses—what psychologists call "response inhibition." For reasons undoubtedly related in part to limbic system arousal, they experience emotional urges more intensely, and the underdevelopment of the frontal lobes means that they have lesser

201. *See, e.g.,* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants,* 27 LAW & HUM. BEHAV. 333 (2003); Carolyn M. Brown & Richard Segal**,** *Ethnic Differences in Temporal Orientation and Its Implications for Hypertension Management,* 37 J. OF HEALTH & SOC. BEHAV. 350, 350 (1996).

capacity to hold these urges in check, or channel them into more appropriate outlets. There are additional psychosocial reasons for youths' impetuosity. They lack experience that would help them to think before acting, they are subject to pressures to act from peers, and their identities are still forming and are fragile. Consider, for example, that for young boys, adolescence is the stage when there is a major focus on masculine identity.[202] It should not be surprising that challenges to that identity—insults, slurs on a boy's reputation for toughness—are often the triggers for episodes of impulsive violence.[203] When situations are stressful and emotions are high ("hot cognitions"), adolescent judgment is severely impaired relative to the situation of "cold cognitions," where emotions are calm and consequences are more readily apparent and considered.[204] In situations of "hot cognitions," adolescents are less sensitive to contextual cues that might temper their decisions. Compared to adults, they have lesser capacity for self-regulation of both impulses and emotions.[205]

These observations are borne out by a recent national study that compared nearly 1000 adolescents and several hundred adults. It was found that sixteen-year-old adolescents were less responsible, had less perspective (ability to consider different viewpoints and broader contexts of decisions), and were less temperate (able to limit impulses and evaluate situations before acting) than the average adult. It was not until age nineteen that improvements in "judgment" reached adult levels.[206]

VI. IMPLICATIONS OF ADOLESCENT DEVELOPMENT FOR THE EXERCISE OF FIFTH AND SIXTH AMENDMENT RIGHTS

Several studies have been conducted with the aim of determining whether juveniles are able to comprehend the right to remain silent and the right to counsel that are prerequisite to police custodial interrogation, and whether juveniles have the capacities to meet the legal standards for waiver—which include not only comprehension of the right, but also understanding of the consequences of

202. *See, e.g.,* ADOLESCENT BOYS: EXPLORING DIVERSE CULTURES OF BOYHOOD (Niobe Way & Judy Y. Chu eds., 2004).

203. *See, e.g.,* Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity,* 24 CRIME & JUST. 105 (1998). DEANNA L. WILKINSON, GUNS, VIOLENCE, AND IDENTITY AMONG AFRICAN AMERICAN AND LATINO YOUTH (2003).

204. *See, e.g.,* ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 211 (1999).

205. *See* Steinberg, *supra* note 158, at 56.

206. *See* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741 (2000).

relinquishing the right.[207] The third prong of the criteria for a valid waiver—that waiver be made voluntarily—cannot be reliably assessed in laboratory settings; rather, it requires evaluation of actual police interrogation sessions with an eye toward their impact on juvenile arrestees. To date, only one such assessment has been carried out, and it is only modestly helpful because it involves analysis of police-generated audiotapes of interrogation sessions.[208] Much information of potential relevance to assessments of voluntariness is not captured in the spoken word—e.g., gestures and facial expressions of officers conducting the interrogation, number of officers in the room, or physical proximity of officers to the juvenile suspect.

Assessments of youth's understanding of the Fifth Amendment privilege as it relates to guilty pleas, and the right to counsel in the Sixth Amendment context, have also been conducted. Most often, these assessments have been conducted in studies carried out for the broader purpose of evaluating juveniles' competence to stand trial. Our discussion in this section is restricted to research on understanding of rights, and knowing and understanding waiver of rights. Given space constraints, we do not include a discussion of the broader competency literature. The questions we address here involve juveniles' capacities to understand, to invoke, and to relinquish legal rights, as well as factors (such as IQ and prior record) that are relevant to "totality of the circumstance" analysis and may impinge on these capacities.

A number of studies of youths' understanding of the *Miranda* warnings have been conducted, and most have produced findings that challenge the assumption that adolescents—especially preteens and early- to mid-adolescents—are capable of meaningful comprehension of their rights. In an early study, Bruce Ferguson and Alan Charles Douglas found that an astonishing ninety-four percent of a sample group of juveniles questioned by police after waiving their *Miranda r*ights did not understand the rights they had waived.[209] A later study conducted with a group of juveniles who had just been adjudicated delinquent found that most had only a partial and limited understanding of the *Miranda* warnings.[210] Nearly

207. *See, e.g.,* sources cited *infra* notes 209-247.

208. Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice,* 91 MINN. L. REV. 26 (2006). The study is also of limited usefulness because the sample does not include subjects under sixteen years of age. *Id.* at 62-63.

209. A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (finding that eighty-one out of eighty-six juveniles did not consciously and fully understand their rights).

210. Richard A. Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of Their Rights*, JUV. & FAM. CT. J., Winter 1983–1984, at 41, 52.

ninety percent had difficulty with the meaning of a "right," eighty percent had only a marginal understanding of what it meant to consult an attorney for legal advice, and ninety percent had a fair or poor understanding of what an attorney is or does.[211]

Thomas Grisso, the leading researcher in this area, has developed, refined, and validated instruments for assessing youths' understanding of the *Miranda* warnings and youths' competence to stand trial.[212] The test most often utilized to assess comprehension of *Miranda* warnings approaches the matter in three different ways: (1) youth are asked to paraphrase the four statements contained in the warnings; (2) define six keywords contained in the warnings ("right," "interrogation," "entitled," "attorney," "consult," and "appoint"); and (3) to recognize sentences that have the same meanings as those in the warnings.[213] Grisso and others have compared performance on these measures for different age groups of delinquent and nondelinquent adolescents, criminal and noncriminal adults, and groups with various mental handicaps that limit their understanding (e.g., the mentally retarded, those with low IQ, or those suffering from major mental illness).[214]

Findings from Grisso's 1980 research are fairly typical. He reported that only 20.9% of juveniles, compared to 42.3% of adults, demonstrated adequate understanding of all four statements contained in the *Miranda* warnings.[215] More than half of the juveniles, but less than a quarter of the adults, demonstrated "inadequate . . . understanding of at least one of the warnings."[216] Grisso also reported that "understanding . . . was significantly poorer among juveniles who were fourteen years of age or younger than among 15 or 16 year-old juveniles or adult offenders . . . ."[217] The vast majority of those aged fourteen and under misunderstood at least one

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211. *Id.* at 52-53.

212. THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING & APPRECIATION OF *MIRANDA* RIGHTS (1998).

213. *Id.* at 9-11.

214. *Id. See also* Rona Abramovitch, Michele Peterson-Badali & Meg Rohan, *Young People's Understanding and Assertion of Their Rights to Silence and Legal Counsel,* 36 CANADIAN J. CRIMINOLOGY 1 (1995); Naumi E. Sevin et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359 (2003); Allison D. Redlich, Melissa Silverman & Hans Steiner, *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults,* 21 BEHAV. SCI. & L. 393 (2003).

215. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis,* 68 CAL. L. REV. 1134, 1153 (1980).

216. *Id.* at 1153-54.

217. JUVENILES' WAIVER, *supra* note 199, at 192. *See also* Grisso, *supra* note 150, at 12.

of the warnings.[218] Impairments in understanding were especially pronounced in the lowest age group: youths age ten to twelve performed only at the level of mentally retarded adults.[219] Impairments in understanding were also pronounced among juveniles with low IQs, including those who were fifteen and sixteen years of age.[220] This finding is especially important when it is recognized that most official delinquents score approximately ten IQ points lower than the norm for youths in the general population.[221] Youths sixteen and over without IQ, learning, or mental health deficits generally show an understanding of the *Miranda* warnings at the same level as the average adult.[222] It is worth noting, however, that because this type of study is almost always undertaken in a research setting without the emotional stresses and situational constraints associated with being arrested and interrogated by the police, these studies almost certainly underestimate the proportions of youth who understand the *Miranda* warnings and meet the criteria for waiver.

In a more recent study that involved a sample of juvenile defendants held at a detention facility in the State of Washington, researchers calculated rates of impairment in comprehension of the *Miranda* warnings under two different standards.[223] The first standard involved a "basic understanding" of the words and meaning of the warnings.[224] Because simply understanding the words may not enable a person to exercise the rights effectively, the second standard also required an appreciation of the rights, including the possible consequences of failure to invoke them.[225] On the "basic understanding" measure, juvenile defendants scored more poorly than those in Grisso's earlier research.[226] On the higher

218. JUVENILES' WAIVER, *supra* note 199, at 192.

219. *Id.* at 182.

220. *Id.*

221. *See, e.g.,* Travis Hirschi & Michael J. Hindelang, *Intelligence and Delinquency: A Revisionist Review*, 42 AM. SOC. REV. 571, 573-75 (1977) (discussing importance of IQ as a variable in delinquency); David A. Ward & Charles Tittle, *IQ and Delinquency: A Test of Two Competing Explanations,* 10 J. QUANT. CRIM. 189, 191 (1994) (noting delinquents score eight percentage points lower than nondelinquents on IQ tests).

222. *See generally* Grisso et al., *supra* note 201; Abramovitch et al., *supra* note 214. *See also* Ferguson & Douglas, *supra* note 209; JUVENILES' WAIVER, *supra* note 199.

223. Jodi L. Viljoen, Patricia A. Zapf & Ronald Roesch, *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants: A Comparison of Legal Standards,* 25 BEHAV. SCI. & L. 1 (2007).

224. *Id.* at 9.

225. *Id.*

226. *Id.* On the basic understanding measure, fifty-eight percent of defendants ages eleven to thirteen, thirty-three percent of defendants ages fourteen to fifteen, and eight percent of defendants ages sixteen to seventeen were impaired. *Id.* Although Viljoen and her colleagues hypothesized that today's youth would have more legal

"understanding and appreciation" standard, seventy-eight percent of defendants aged eleven to thirteen, 62.7% of those fourteen to fifteen, and thirty-five percent of those sixteen to seventeen were found to be "significantly impaired."[227] Other studies of juveniles' comprehension of Miranda warnings report very similar results.[228]

The rates and levels of impairment that have been reported are all the more disturbing when it is recognized that the vast majority (eighty to ninety percent) of juvenile suspects brought in for questioning waive their *Miranda* rights,[229] and that those who are least able to understand their rights are the ones most likely to waive them.[230]

Several studies have found that prior experience with the legal system is unrelated to level of understanding of Fifth and Sixth Amendment rights.[231] Juveniles who have been referred to court on multiple occasions do not demonstrate significantly better comprehension than those who are in court for the first time.[232] This is an especially important finding in light of the fact that, in assessing the validity of a waiver in terms of the totality of the circumstances test, courts routinely consider youths' prior experience with the legal system as a factor, and typically assume that understanding is enhanced by prior experience in the system.[233]

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awareness and understanding than those of twenty to thirty years ago, when Grisso's early research was conducted, they found that this was not the case. *Id.* at 14.

227. *Id.* at 9.

228. *See, e.g.,* Sevin, *supra* note 214.

229. *See, e.g.,* Ferguson & Douglas, *supra* note 209, at 54 (reporting that ninety-six percent of subjects waived their *Miranda* rights); J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights of Waiver,* 1 L. & HUM. BEHAV. 321, 334 (1977) (searching juvenile court records showed that ninety percent of juvenile defendants chose to talk, although it was not clear whether *Miranda* rights were waived); Jodi L. Viljoen, Jessica Klaver & Ronald Roesch, *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals,* 29 L. & HUM. BEHAV. 253, 261, 263 (2005) (reporting that eighty-seven percent of defendants eleven to seventeen years of age in Washington juvenile detention facility had waived their right to remain silent, and that only 9.65% requested an attorney).

230. *See* Grisso, *supra* note 215, at 1160-161; Viljoen et al., *supra* note 223, at 16-17; Abramovitch et al., *supra* note 214, at 4.

231. *See* JUVENILE'S WAIVER, *supra* note 199, at 59; Lawrence, *supra* note 210, at 49; Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms,* 29 L. & HUM. BEHAV. 723, 733 (2005); Grisso et al., *supra* note 201, at 347.

232. *See* Grisso et al., *supra* note 201, at 356-57; *see* Lawrence, *supra* note 210, at 53.

233. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979); Matthews v. State, 991 S.W.2d 639, 643 (Ark. Ct. App. 1999) (noting that the fact that the child had one prior charge of "fleeing" supported finding that she understood the situation when

Several additional findings stand out from the laboratory research on youths' understanding of the *Miranda* warnings. First, juveniles frequently do not understand that a "right" is an unconditional legal entitlement.[234] Consistent with what we know about juveniles' compliance with adult authority, youth tend to think a right is something that adults can grant, and then take away, especially if they do not say what they believe adults want them to say.[235] Grisso reported that when adolescents were asked "what should happen" if a judge at a hearing learns that a youth "wouldn't talk to police," nearly two-thirds did not recognize that the defendant should not be punished.[236] The research evidence also suggests that ethnic minorities, children from backgrounds of poverty, those with below-average IQ, and those with learning disabilities and attention deficits are more apt to believe that they will be punished if they exercise their rights.[237]

Second, younger adolescents are especially likely to misinterpret the right to remain silent. They frequently think it means "that they should remain silent until they" are told to talk.[238]

Third, of the four statements in the *Miranda* warnings, juveniles most often misunderstand the right to counsel. Young people frequently have mistaken beliefs about who counsel is or what she does. They tend to believe that defense attorneys—especially public defenders—work for the court.[239] They also frequently believe that

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interrogated on murder and attempted murder charges); State v. Gray, 100 S.W.3d 881, 887 (Mo. Ct. App. 2003) (noting that prior relevant experience consisted of school resource officers intervening when the child became disruptive in school on numerous occasions, although only two interventions resulted in his being placed in "custody" while he was taken to speak with his mother, and that the child had been interrogated on one prior occasion a little over a year earlier); State *ex rel.* Juvenile Dep't v. Deford, 34 P.3d 673, 676, 685 (Or. Ct. App. 2001). Here, the court explained that some of the relevant "experience" that supported a finding that an eleven-year old understood the consequences of the waiver was that he watched *Cops* on television and "kind of figured out [he] was going to get arrested. The cops don't read you your rights for no reasons [sic]." *Id.* at 685. *See also* Rone v. Wyrick, 764 F.2d 532, 535 (8th Cir. 1985) (unusually bright and mature juvenile with vast experience with the law made valid waiver without parent present); State v. Jones, 628 P.2d 472, 478 (Wash. 1981) (holding a waiver valid where fifteen-year-old Canadian defendant had experience with police in Canada, and circumstances indicated a full understanding of rights).

234. *See* JUVENILES' WAIVER, *supra* note 199, at 111; Lawrence, *supra* note 210, at 49-51.

235. Gary B. Melton, *Children's Concepts of Their Rights,* 9 J. CLINICAL CHILD PSYCHOL. 186, 186 (1980).

236. JUVENILES' WAIVER, *supra* note 199, at 129-30.

237. *Id. See also* Melton, *supra* note 235, at 186-87.

238. Grisso, *supra* note 212, at 11.

239. JUVENILES' WAIVER, *supra* note 199, at 115-120;

the attorney's job is to defend only the innocent,[240] and that the attorney should turn in a client if he learns that the client is guilty.[241] This is consistent with the finding that, in response to hypothetical vignettes, younger adolescents were significantly less likely to assert the right to counsel when the story character was guilty then when the character was innocent.[242] Among adults, the opposite was true: they were more likely to invoke the right to counsel when the character was guilty than when she was innocent.[243] Of great interest, Ferguson and Douglas, who interviewed ninety delinquent subjects, reported that many explained that they had not retained counsel because they were guilty.[244]

Another study reported that most younger adolescents, and a substantial proportion of fifteen-year olds, believed that attorneys are authorized to tell judges and police what was discussed in their confidential conversations.[245] In yet another study, juvenile offenders were asked why they must be truthful with their attorneys. Nearly one-third reported that it was so the lawyer could decide whether to advocate for them, report their guilt to the court, or decide whether to release them or send them up.[246]

Three studies have addressed the question of whether juveniles' understanding of *Miranda* warnings can be improved by providing the warnings in simplified words and phrases. None found a significant increase in understanding compared with the standard *Miranda* warnings.[247]

Using vignettes, recent research has also inquired specifically about the connection between psychosocial characteristics and young

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240. Rona Abramovitch & Meg Rohan, *Young's People's Understanding and Assertion of Their Rights to Silence and Legal Counsel,* 37 CAN. J. CRIMINOLOGY 1, 5 (1995).

241. *Id.*

242. *Id.* at 11.

243. *Id.* at 13.

244. Ferguson & Douglas, *supra* note 209, at 53.

245. *See* Michele Peterson-Badali & Rona Abramovitch, *Children's Knowledge of the Legal System: Are They Competent to Instruct Legal Counsel?* 34 CAN. J. CRIMINOLOGY 139, 150-51 (1992).

246. *See* JUVENILES' WAIVER, *supra* note 199, at 119. In related research, it was reported that a majority of high school students believe that attorneys and the police are dishonest. *See* David M. Rafkey & Ronald W. Sealey, *The Adolescent & The Law: A Survey,* 21 CRIME & DELINQ. 131, 133-34 (1975). Also, there is evidence that, like Michael C., juvenile offenders tend to trust their probation officers more than their attorneys. *See* W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH (1972).

247. *See* Ferguson & Douglas, *supra* note 209, at 39; S. Manoogian, Factors Affecting Juveniles' Comprehension of Miranda Rights (1978) (unpublished Ph.D. dissertation, St. Louis University).

people's legal decision making. Grisso and his colleagues found, for example, that juveniles fifteen and under were significantly more compliant with authority (i.e., they confessed to police, provided full disclosure to counsel, and accepted a plea agreement) than youths aged sixteen to seventeen, or adults.[248] Younger juveniles were much less able than older ones to recognize risks associated with waiving their rights or to think in terms of long-term consequences, and they significantly underestimated how unpleasant the negative consequences would be.[249] Moreover, compared to adults, all subjects under eighteen significantly underestimated the likelihood of negative consequences flowing from their legal decisions.[250] Finally, on measures of resistance to peer influence, young juveniles who said they would remain silent at interrogation were much more likely than older youths to change their minds and confess when they were told that a peer had recommended that they confess.[251] Among those who initially confessed, however, young juveniles were more likely to stick with that choice than older youths when told that a peer had recommended that they remain silent.[252] In other words, among young adolescents, there was a bias toward compliance with adult authority that was reinforced by peers.[253]

The high rates of impairment in juveniles' understanding of, appreciation of, and ability to exercise their right to counsel in either the interrogation setting or the courtroom indicates to us that special protections are required to insure that these constitutionally guaranteed rights are accessible to kids. The research literature tells us that juveniles under fifteen are significantly impaired in their cognitive functioning.[254] While most research indicates that adolescents aged fifteen and older have cognitive understanding that is closer to that of an adult, the judgment of older youths is nonetheless impaired because they tend to discount risks, fail to appreciate the negative consequences of alternatives, fail to consider long-term consequences, and are susceptible to external pressures to make decisions that may not be in their best interests.[255] Moreover, the research reported here has almost certainly underestimated juveniles' impairments, as research has not been carried out under real-world conditions of stress. In light of all these considerations, we believe that fairness requires that juveniles have the benefit of a

248. *See* Grisso et al., *supra* note 201, at 353.
249. *Id.* at 353-54.
250. *Id.* at 354.
251. *Id.* at 355-56.
252. *Id.*
253. *Id.*
254. *Id.* at 350-56.
255. *See id.* at 350-57.

nonwaivable right to counsel at every step in delinquency proceedings in order to fulfill the promise of *Gault*.

VII. HOW TO MAKE FIFTH AND SIXTH AMENDMENT RIGHTS MEANINGFUL TO KIDS

The developmental characteristics of preadolescent and adolescent clients have implications for the lawyer-client relationship and for the degree to which, with the assistance of counsel, juveniles can meaningfully exercise their constitutional rights.[256] Although a full treatment of these issues is beyond the scope of this Article, we offer a few suggestions regarding ways that counsel can incorporate knowledge about adolescent development to enhance the abilities of their juvenile clients.

We have seen that adolescents, especially younger ones, often have a partial and sometimes mistaken understanding of their legal rights.[257] For some, abstract reasoning skills have not yet developed, and there is little that an attorney can do to facilitate their development. For older juveniles, the issue is more often a matter of misunderstanding that can be corrected with instruction. We have also seen that juvenile defendants have misconceptions regarding participants and processes in the juvenile justice system.[258] Especially problematic are misconceptions about defense attorneys; many juveniles believe that attorneys work for the state, that they only defend the innocent, and that they will share attorney-client communications with judges and law enforcement officials.[259] As a result, it is imperative that attorneys anticipate a lack of understanding and confusion about these matters, and plan very carefully to educate their client in a manner that is developmentally appropriate.

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256. There is considerable research on juveniles' capacities as trial defendants, especially with regard to psychosocial and neuropsychological factors that may impair an adolescent's competence. *See, e.g.,* Grisso et al., *supra* note 201. We have intentionally avoided discussion of competence to stand trial, not because it is irrelevant to the *Roper* decision, but because the breadth of the topic is beyond the scope of this Article. Much, if not all, of the discussion of adolescent development and its implications for youths' exercise of Fifth and Sixth Amendment rights is applicable to juveniles' trial competency as well.

257. Delinquents tend to have more difficulty understanding their legal rights than their nondelinquent peers because they are of below-average intelligence and lag behind in grade level. In addition, many have mental disorders and learning disabilities (e.g., attention deficit disorder) that interfere with their ability to attend and concentrate for more than brief periods of time. *See, e.g.,* Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention,* 59 ARCHIVES OF GEN. PSYCHIATRY 1081, 1133-43 (2002).

258. Grisso, *supra* note 212, at 9-16; Rafkey & Sealey, *supra* note 246, at 133-34.

259. Grisso, *supra* note 212, at 15-16.

We have also seen that adolescent judgment is frequently impaired. Even older teens tend to be impulsive (especially when under stress). They are less able to envision all the possible choices that lie before them. When considering the consequences of their options, they tend to emphasize rewards more than costs, and they tend to focus on short-term consequences rather than long-term ones. Their narrow time perspective means that they may not be able fully to appreciate long-term consequences and effects, and clients' judgments are likely to be affected by external pressures, especially from peers.[260] What can attorneys do to engage their clients, to build their trust, and to facilitate good decision making?

Professor Emily Buss observes that lawyers can influence their child clients in two ways—through instruction and through the development of a relationship—but she appropriately cautions about the "limited usefulness of instruction, applied in isolation, as a tool to foster enhanced competence of any sort."[261] Children benefit most from instruction when it occurs "in the course of natural interactions with adult models who play an important role in their lives."[262] To be most effective, then, lawyers must direct their efforts toward building a significant relationship with a child client before they can realistically expect to have much of an impact on the client's understanding or the quality of the child's decision making.

Relationship building takes time and a commitment to engaging the child on her own level, but it yields big dividends. Research shows a direct correlation between the amount of time an attorney spends with a juvenile client and the youth's understanding and appreciation of *Miranda* rights; understanding of the legal process and the roles of key participants; understanding of the consequences of proceedings; appreciation of penalties, available legal defenses, and likely outcomes; and the ability to communicate relevant facts, plan strategy, participate in the defense, and manage courtroom behavior.[263]

A juvenile does not easily build a relationship of trust and openness with a lawyer, especially when misconceptions abound

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260. What co-defendants do when taken to the stationhouse for questioning may influence the client to want to do likewise. If the client is held in detention, he is likely to be exposed to volumes of information and advice from more experienced peers, who may well be viewed as "experts" who are more credible than his attorney. Mistrust of attorneys is reinforced among peers in institutional settings. *See, e.g.,* Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 227 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

261. Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 243, 254 (Thomas Grisso & Robert G. Schwartz eds., 2000).

262. *Id.*

263. Viljoen & Roesch, *supra* note 231, at 733-34.

about who attorneys are ("agents of the state") and what they do ("represent the innocent, turn in the guilty"). The attorney must communicate that he is the child's advocate, and that he is unconditionally loyal, which is not an easy task when there may be few if any models of unconditional support in the child's life.[264] Attorneys can communicate what it means to be a loyal advocate by what they say (both verbally and nonverbally) and by what they do.[265]

Perhaps the most appropriate model for the attorney representing a minor is the client-therapist relationship. The effective therapist is warm, interested, empathetic, and succeeds in creating an environment in which the client feels valued, safe, and understood. He does not encourage dependency, but aims to help the client to reflect on problems, consider alternative solutions, and make decisions consistent with the client's values. Essential to building this sort of relationship are time, patience, and attentive listening.

Before turning to substantive matters of problem solving and legal strategy, it is important for the attorney to be aware of fears, anxieties, and other emotional stresses that the client may be experiencing. Initial meetings between lawyer and client are very important in setting the tone for relationship building, and they often take place under very stressful conditions (e.g., the client may have been arrested the night before, may have had little sleep, and may be in unfamiliar and frightening surroundings). The attorney's thoughts are likely to be on information gathering and preparation for the impending hearing, but it is imperative that he also tend to the client's emotional state. The executive center of the child's brain—the part the attorney wants to engage—is most effective when the social-emotional region is not competing for time.[266]

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264. Substantial numbers of delinquent youth do not understand that the defense lawyer is bound by duty to advocate on the client's behalf. *See, e.g.,* Grisso, *supra* note 212, at 15-16.

265. Buss recommends two strategies to communicate loyalty to the child: (1) demonstrating "a commitment to confidentiality . . . in the face of . . . pressure . . . to reveal information," and (2) "willingness to exclude the minor's parents from the . . . lawyer-client relationship." Buss, *supra* note 261, at 257.

> [T]hese two demonstrations may be most effective when combined: in all likelihood, the minor will experience the keeping of secrets from parents as particularly extraordinary. . . . To help the minor understand the special relationship between client and lawyer, the minor must be made to understand the counterintuitive lesson that the lawyer will do the minor client's bidding regardless of the parents' wishes. Parental inclusion in the relationship should come, if at all . . . because the child has expressly chosen to value that involvement.

Id. at 257-58.

266. *See* Steinberg, *supra* note 158, at 58.

Look for both verbal and nonverbal cues, as children and adolescents often communicate a great deal nonverbally. Encourage the client to discuss what is on her mind. Individuals under stress frequently have tunnel vision, and they may need to repeat their concerns several times before they feel understood. Paraphrasing what the client says is a very effective way of communicating caring and understanding. If the client sees that the attorney is available to her (open to listening), the attorney may succeed in setting the foundation for a relationship of trust in which the child's voice, concerns, and interests take on paramount importance.

Legal information is highly technical and often difficult to translate into terms that even adults can understand. Discussing legal issues with a juvenile client poses an extra layer of difficulty.[267] Juveniles also process and use language differently than adults: linguistic ambiguities, lengthy questions, and long narratives can be difficult for children to process.[268] Legal advocates must be mindful to choose their words carefully and to consider ahead of time how to communicate information most effectively.

Some of the general and specific precepts with respect to communicating with children include being alert for possible miscommunication and becoming familiar with a child's use of language.[269] When a child uses language with which the attorney is not familiar, the attorney should not hesitate to acknowledge his ignorance and to ask the client to explain. In conversations with the client, it is helpful to phrase language and concepts in the simplest way possible, and to avoid compound questions or statements.

Repeating ideas and information in a conversation with a child, and presenting the same concepts phrased in slightly different ways, improves understanding. This is especially important with preteens and those with learning impairments, as they may be very literal in their interpretations. Comprehension is improved by explaining things in more than one way. Understanding is also improved by limiting the number of issues discussed in a single sitting to what the minor can absorb. Too much information and too many questions generate confusion and anxiety. It is important that attorneys be attuned to their clients' capacities, and that they adjust their time

267. *See, e.g.*, Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm For Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466 (2007).

268. ELIZABETH CALVIN ET AL., NAT'L JUV. DEFENDER CTR.: JUVENILE DEFENDER DELINQUENCY NOTEBOOK 17-19 (2d ed. 2006), *available at* http://njdc.info/delinquency_notebook/ interface.swf.

269. *See, e.g.*, ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE (1994).

and approaches to accommodate the wide variability in clients' levels of developmental maturity.

Because juvenile clients tend to be more impulsive decision makers who underestimate long-term consequences for short-term benefits,[270] legal advocates should be cautious when discussing plea offers and risk factors in terms of proceeding to trial. A lawyer is well advised to graphically present each potential choice, and to brainstorm the risks and benefits of each with the client. Use of charts, lists, and other visual aids can be useful in communicating information in a developmentally appropriate fashion. Multiple discussions spaced out over time, pertaining to the decisions the client must make, help to facilitate better decision making.

As noted earlier, children and preteens are especially dependent on adults and are inclined to defer to authority figures regarding decision making.[271] Nevertheless, juveniles are endowed with the same autonomy as adult criminal defendants when it comes to determining the objectives of their case, and lawyers have the same ethical responsibilities to their juvenile clients as they do toward their adult clients: to achieve the *client's* objectives through legal strategy.[272] Therefore, it is particularly important that lawyers be aware of the potential for deference on the part of their juvenile clients, and use caution not to unduly influence client decision making. The goal of the attorney should be to help the child to understand the nature of each decision that needs to be made, to understand and weigh all her options, to articulate her choices, and to work with the child enough to insure that he understands what the child means to communicate, so that he can faithfully represent her interests.

VIII. CONCLUSION

In its day, *Gault* was of great moment to the improvement of juvenile justice. It catapulted juvenile delinquency proceedings from an arbitrary and informal setting into a procedural system that offered process and predictability. That was the positive part. What followed after *Gault* was a proliferation of cases that shaped a new paradigm, one that borrowed heavily from the adult rights of our criminal justice system. As this Article discussed, what may have been overlooked throughout the development of this burgeoning procedural case law was the appreciation for the uniqueness of

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270. *See* Grisso et al., *supra* note 201, at 335. *See generally* Steinberg, *supra* note 158.

271. *See infra* Part V.

272. *See* MODEL RULES OF PROF. CONDUCT RR. 1.14, 1.3 (2006); IJA-ABA, JOINT COMM'N ON JUV. JUST. STANDARDS, JUVENILE JUSTICE STANDARDS: STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES 3.1 (1980).

adolescence. *Roper* is conclusive on the point that we cannot treat children and adults alike in assigning criminal responsibility because, by virtue of their immaturity, juvenile offenders are less culpable than adults. *Roper* acknowledges that the "uniqueness" of being an adolescent carries with it a separate set of responses and explanations rooted in biopsychosocial development.

This Article broadens *Roper's* application to due process protections. Some of the most defining characteristics of adolescence—impetuosity, susceptibility, and immaturity, which *Roper* explains make children less culpable than adults—are significant impediments to a juvenile's ability to appreciate and exercise his right to counsel and his right not to incriminate himself. The broader application of *Roper* starts by transforming the meaning of this Eighth Amendment case into a due process paradigm that measures children's abilities and limitations by a developmentally appropriate yardstick. Where *Gault*, understood for its time and place in our jurisprudence, inexorably linked adults and juveniles for procedural purposes, *Roper* disaggregates children and adults based upon their psychological and neurological differences. As the science of brain development advances and we learn more about psychosocial differences between children and adults, the impact of these discoveries on attaining meaningful rights for children in our juvenile justice system can be tremendous.