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Lost Causes

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I went in as a boy
And came out as a man
With a messed up attitude
And a messed up head.
I was taught to hate without pause
And now the people look at me and say,
"You're a lost cause."[1]

This poem was written by an adolescent who was committed to the State Department of Public Safety & Corrections by a Louisiana juvenile court and sent to serve his time in a juvenile institution. The question is fairly raised whether John and other adolescents like him are in fact lost causes, doomed to a *nine-out-of-ten* chance of returning to prison,[2] and a life of lost opportunities. Some critics have expanded the question to ask if the juvenile courts and the entire juvenile justice system of individualized treatment and rehabilitation are lost causes. They seek the abolition of the juvenile courts and a return to trying delinquents in the criminal courts.[3] Some child advocates offer only faint defense of the current system.[4] Others charge that the constitutionalization of the juvenile process that occurred a half-century ago has faded to a mockery of constitutional guarantees and that constitutionalization is itself a lost cause.[5] Is

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1. "John," *Hate Without a Pause*, *in* 2 Ya Heard Me 12 (2001), *available at* http://www.jjpl.org/PDF/YaHeardMe2.pdf. Johns's poem was originally included in the Creative Arts Journal of Incarcerated Youth and describes his experience in the system.

2. Cecile C. Guin, Juvenile to Adult Criminality (1991) (Ph.D. dissertation, The University of Texas at Arlington) (UMI ProQuest Digital Dissertations publication no. AAT 9131745).

3. *See, e.g.*, Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. Crim. L. & Criminology 68 (1998).

4. Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 Wis. L. Rev. 163 (1993).

5. The recent changes in juvenile court jurisdiction, sentencing, and

there any hope that the juvenile justice system can replenish its idealism, that legislators and judges and critics and advocates can find a way to reinvent the juvenile courts?

Rather miraculously a reform movement germinated in Louisiana in 2001. Perhaps the first official signal of change came when Chief Justice Pascal Calogero appealed for "all three branches to examine the issue of the current state of our juvenile justice system and to take bold steps to improve it."[6] Three years later with the prodding of many veteran juvenile justice reformers, backed by some unexpected new allies, as well as the threats of continuing journalistic exposés and federal lawsuits, the legislature responded. (Some might say the legislature capitulated.). Louisiana moved to join the handful of other states that confer an absolute right to counsel for children accused of serious delinquent acts.[7] In addition, the legislature tightened the requirements for demonstrating that a knowing and voluntary waiver of counsel has occurred. The trial court must now explicitly inquire into the child's competency level, taking into account the possibility that the child may be suffering from some developmental disability.[8] Though unheralded by the press, this rather amazing occurrence in the legislature may signal a renewal of the state's commitment to its

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procedures reflect ambivalence about the role of juvenile courts and the control of children. As juvenile courts converge procedurally and substantively with criminal courts, is there any reason to maintain a separate court whose only distinctions are procedures under which no adult would agree to be tried? *See* Barry Feld, *The Transformation of the Juvenile Court*, 75 Minn. L. Rev. 691, 722 (1991).

6. Chief Justice Pascal F. Calogero, Jr., Supreme Court of Louisiana, 2001 State of the Judiciary Address to the Joint Session of the House and Senate of the Louisiana Legislature (April 10, 2001), *available at* www.lasc.org/press_room/press_releases/2001/2001-05.asp. Chief Justice Calogero's address is quoted in H.C.R. 56, 2003 Leg. Reg. Sess. (La. 2003).

7. Louisiana Acts Number 776, section 1 of 2004 amends Children's Code article 810D(2) by providing that a child may not waive the assistance of counsel if she is accused of a felony-grade offense. *See* 2004 La. Acts No. 776, § 1; La. Ch. Code art. 810D(2). The other states that prohibit waiver are Iowa and Texas. It appears that at least eleven states only permit waiver along with the concurrence of some sort of authority figure, including a parent, guardian, attorney, or the court itself, while twenty-five states freely allow juvenile waiver. The law of the remaining eleven states is not clear as to what type of waiver is allowed or prohibited. Robert E. Shepherd, Jr., *Juveniles' Waiver of the Right to Counsel,* ABA Criminal Justice Magazine, Spring 1998. Many reform bodies, however, have long recommended non-waiver. *See infra* note 102 and accompanying text.

8. In separate legislation, again on recommendation of the Louisiana State Law Institute and the Children's Code Advisory Committee, the legislature expanded the definition of competency to stand trial in juvenile court and added greater protections to the competency determination process. *See* La. Ch. Code art. 804 (as amended by 2004 La. Acts No. 485, § 1).

system of juvenile courts and is another manifestation of a larger concern for its juvenile justice system.[9]

In this article we will explore why this reform is so overdue, the arguments for and against juvenile waivers of counsel, the sources of political pressure that finally nudged philosophically resistant legislators to endorse the measure, and address the critical yet unresolved issues emanating from this new entitlement.

II. A SPECIALIZED COURT IN THE SHADOW OF DUE PROCESS

Today's political and social environment that produced the 2004 non-waiver of counsel statute strikingly parallels that of Chicago in 1898 when the statute creating the first juvenile court was enacted.[10] Two widely publicized public concerns coalesced to produce the reform: reports of dangerous conditions of juvenile imprisonment, and scientific findings casting doubt on juvenile decision-making and judgmental competency. The original juvenile court statute did not mention anything about an accused child's right to counsel. Indeed, the court was to be a sui generis institution, if anything modeled more on the practice of medicine than on the practice of law. The original statute called for separate dockets and case files, thus shielding the court's records from public view, and focused on rehabilitation rather than punishment. The heart of the court's operations was the disposition hearing: miscreant children were to be diagnosed and then cured by probation or other individualized rehabilitative treatment ordered by the court. The trial process was not described at all in the statute, though it was clear to all who worked for the bill's passage that this institution would function quite unlike a criminal trial court. Reformers referred to the court as a "parental" court[11] or a "court for children."[12] Within twenty years of the institution of the Chicago

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9. *See* Vicki Ferstel, *Juvenile Reform Bills Clear Committees*, The Advocate (Baton Rouge, La.), May 13, 2004, at 6A; Mark Ballard, *Blanco Quickly Signs Juvenile Justice Bill*, The Advocate (Baton Rouge, La.), May 6, 2004, at 10A; *Lawmakers Move Justice Legislation*, The Advocate (Baton Rouge, La.), April 15, 2004, at 9A.

10. *See An Act To Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children*, Illinois Juvenile Court Act, 1899 Ill. Laws 133 (amended 1907).

11. A characterization coined by Lucy Flower, President of the Chicago Women's Club and influential advocate for the new court. *See* David S. Tanenhaus, Juvenile Justice in the Making 4 (2004).

12. "What we should have, in our systems of criminal justice is an entirely separate system of courts for children, in large cities, who commit offenses which could be criminal in adults." Frederick H. Wines, Address, Fifteenth Biennial Report, Board of State Commissioners of Public Charities (Springfield, Ill.1899) (quoted in Tanenhaus, *supra* note 11). Wines was the Secretary of the Illinois State

juvenile court, every state had enacted similar legislation. The Louisiana statute creating a separate court for juveniles in Orleans Parish was enacted in 1908.[13]

The juvenile court system was born out of the Progressive movement, which emerged around the turn of the twentieth century in response to the social problems caused by rapid industrialization, urbanization, and modernization.[14] Progressivism encompassed many ideologies, but one of its unifying themes was that professionals and experts could develop rational and scientific solutions to social problems that would be administered by the state. Many Progressive legislative programs shared a child-centered focus; these laws came to be known as "child-saving" laws, which included child labor laws, child welfare laws, compulsory school attendance laws, and the juvenile court system.[15] The Progressives' vision of the new court was that the services of the court were more important than its adjudicatory process, that it should be a procedurally lax court with "individualized, offender-oriented dispositional practices," which would help further protective and rehabilitative goals.[16]

Although it was called a "court," the delinquency trials were more similar to the processes of a bureaucratic agency than a criminal tribunal. The court was to be staffed with experts, who would diagnose and then meet the individualized needs of the "child at risk."[17] The juvenile judge on the recommendation of probation staff made discretionary treatment decisions by substituting a scientific and preventative approach for the traditional punitive philosophy of criminal law.[18] Whether the juvenile had actually committed the offense causing him to be haled before the court was important but apparently not essential for intervention. Courts often used a smoke-fire syllogism for justifying an allotment of treatment. If a child was arrested in the company of delinquents known to the court or if he was caught near the scene of a crime or simply idling about a high crime area, some judges might stretch skinny proof of every element

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Board of Charities.

13. *See* 1908 La. Acts No. 83, § 14. Paragraph A explicitly recognized that the right to counsel is in play for the formal adversarial proceedings in the juvenile court. Thus, this statute was one of the first to recognize the right of a child to be represented by retained counsel although it did not impose any public obligation to provide and pay for such assistance.

14. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. Crim. L. & Criminology 471, 474 (1987).

15. Barry C. Feld, Justice for Children: The Right to Counsel and the Juvenile Courts 10 (1993)

16. Feld, *supra* note 14, at 472

17. Feld, *supra* note 15, at 12.

18. *Id.*

of an offense in the name of administering a preventive dose of treatment, thus "saving" him from a future life of crime.

The first concern that prompted the creation of the juvenile court was that young children and adolescents were not yet morally accountable for their behavior. The Progressives viewed them as vulnerable and malleable beings whose irrationality and lack of judgment prevented competent decision-making and moral understanding. The creation of the new scientific discipline of developmental psychology which occurred in the 1880s lent "legitimacy to the idea that children were qualitatively different from adults."[19] Interestingly, one of the components of the reformers' design of the Cook County (Chicago) Juvenile Court was a research center that would have access to court files and be able to interview children coming before the court with the purpose of determining the predominant causes of delinquency among recidivists. The Director of what came to be known as the Juvenile Psychopathic Institute later published an influential article, *The Individual Study of the Young Criminal*, which postulated that environmental factors heavily contributed to delinquency; that individualized treatment plans were essential to rehabilitation; and that children's developmental deficits warranted a nonpunitive social response.[20]

The second concern contributing to the climate of reform in turn-of- the-century Chicago was the discovery of dangerous conditions of confinement for children found to have committed a crime. One reformer searching the records of 1882 found that of the 7,566 convicts in the House of Corrections, 263 (3.5%) were fourteen years old or younger, including twenty children who were younger than eleven. Most had been arrested for being homeless or wandering the streets and should never have been imprisoned.[21] Further, the conditions of the House of Corrections were bleak: "There are no healthful influences brought to bear on these youthful offenders, neither physically nor morally.... It is not a house of correction with them–it is a house of perversion, corruption and retrogression for

19. Tanenhaus, *supra* note 11, at 116. Professor G. Stanley Hall is considered the father of child psychology. His seminal book, *Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education*, was published in 1904. *See* G. Stanley Hall, Adolescence: Its Psychology and Its Relations to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education (1904).

20. William Healy, *The Individual Study of the Young Criminal*, 1 J. Crim. L. & Criminology 50 (1910). *See* Tanenhaus, *supra* note 11, at 111–37.

21. John P. Altgeld, Live Questions Including Our Penal Machinery and Its Victims 164 (1890) (quoted in Tanenhaus, *supra* note 11, at 8).

them."[22] Conditions were so bad that several Chicago judges refused to send children to the institution. [23]

After a half-century of operation, the first constitutional challenge to the procedural laxity of the juvenile courts was presented to the United States Supreme Court,[24] but the first full-blown consideration of whether state juvenile courts were subject to constitutional constraints came in 1967 with the famous *Gault* case.[25] The case began with the arrest of fifteen-year-old Gerald Gault in Phoenix, Arizona, for allegedly making an obscene telephone call to a neighbor. He was taken into custody, detained overnight without notification to his parents, and made to appear at a hearing the following day. At no time was Gerald assisted by an attorney or advised of the right to counsel. Furthermore, Gerald was questioned at trial[26] without having been advised of his privilege against self-incrimination. The evidence supporting his adjudication consisted of the hearsay allegations of the neighbor[27] as reported by the probation officer and perhaps Gerald's own admission.[28] The judge committed him as a juvenile delinquent to the state industrial school for the

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22. "Boys Made Criminal by Confinement at the Bridewell," c. 1893 (quoted in Tanenhaus, *supra* note 11, at 9–10).

23. Tanenhaus, *supra* note 11, at 8–9. History does repeat itself. Judge Mark Doherty of the Orleans Parish Juvenile Court ordered the release of five adolescent inmates whom he had previously committed to the custody of the Department of Public Safety & Corrections. The Department, in turn, had placed then in the Swanson Correctional Center for Youth–Madison Parish, widely known simply as "Tallulah" for the community in which it is located. After hearing testimony by the inmates of physical and sexual attacks, the court found that there was evidence of rampant violence and that the prison conditions were unconstitutional. *See* State ex rel. S.D., 2002-0672 (La. App. 4th Cir. 2002), 832 So. 2d 415; *Teen Inmate Testifies of Beatings at Tallulah Prison*, Southwest Daily News, Apr. 15, 2003, at 2; *see also* Fox Butterfield, *Hard Time: A Special Report: Profits at Juvenile Prison Come with a Chilling Cost*, N.Y. Times, July 15, 1998, at A14.

24. *See* Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045 (1966) (challenging the adequacy of a District of Columbia statute authorizing the trial of a juvenile in adult criminal court and finding the statute deficient under the Due Process Clause).

25. In re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967).

26. Apparently, Gerald was not interrogated before trial. For a discussion of this issue, *see supra* Part II.

27. *See* Charles E. Springer, *Rehabilitating the Juvenile Court,* 5 Notre Dame J.L. Ethics & Pub. Pol'y 397, 405 n. 36 (1991) ("Gault involved the notorious Jerry Gault, who was accused of making an obscene phone call. ('Have you got big bombers?') He denied it.").

28. There was a dispute concerning whether Gerald admitted the charges. The probation officer and judge testified at the later habeas corpus hearing that Gerald did admit to making at least some of the alleged statements. In contrast, his mother recalled that he had admitted simply dialing the number while another teenager actually spoke to the neighbor. *Gault*, 387 U.S. at 6, 87 S. Ct. at 1432.

remainder of his minority, then set at age twenty-one.[29] Under Arizona law, an adult's use of "vulgar, abusive or obscene language" in the presence of a woman or a child constituted a misdemeanor and was punishable by a fine not exceeding fifty dollars or imprisonment for not more than two months.[30]

Although the state argued that Gerald was amply represented by the court, the probation officer and his parents–all of whom had his best interests in mind–the Supreme Court expressly rejected those counsel-substitutes. All of those actors had conflicts of interest.[31] More broadly in what is surely Justice Fortas' most famous writing, the Court required the appointment of counsel as a matter of due process of law:

> 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 and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'
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> . . .
>
> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect to proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[32]

The Court's opinion makes it clear that the justices were discouraged by failure of the juvenile courts' lack of institutional promise. If the trade-off for the lack of adversarial trial regularity was an enhanced environmental opportunity for rehabilitating young offenders, then children had paid far too great a price over the past half-century. The Court noted the relentlessly high crime rates among juveniles as well as high recidivism rates (nationwide found to be

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29. *See id.* at 3, 87 S. Ct. at 1431.

30. *See Gault*, 387 U.S. at 8–9, 87 S. Ct. at 1434; *see also* Ariz. Rev. Stat. § 13-377 (1964) (repealed).

31. *See Gault*, 387 U.S. 1, 87 S. Ct. 1428.

32. *Id.* at 36, 41, 87 S. Ct. at 1448, 1451. In addition to the requirement of counsel, the Court went on to hold that due process required that accused juveniles in the juvenile courts also must be given notice of charges, respect for the privilege against self-incrimination, the right to confrontation and cross-examination, and the right to summon witnesses in his or her own behalf. *Id.* at 42–57, 87 S. Ct. at 1451–59.

sixty-six percent).[33] The Court also noted that the lenient treatment model of the early court had been replaced by lengthy institutional confinement, possibly for a child's entire minority as was the case with Gerald Gault's dispositional order.

> In view of this, it 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.[34]

III. STATE STATUTES GOVERNING WAIVER OF COUNSEL

In the immediate aftermath of *Gault,* states that had not previously provided for counsel in juvenile court proceedings amended their statutes to do so. Providing for the assistance of counsel if a family requested it and, perhaps more importantly, paying for such assistance for needy families, was an important obligation for states to acknowledge. Yet the heart of the right to counsel turned out to be the answer to the question, how easy was it to lose it? Was the right to counsel waivable? Did the rather minimal rules of criminal procedure govern waivability or was more ceremony required before a court accepted a child's waiver? Was the right personally possessed by the child or could a parent or caretaker waive it on his behalf? Today in many states, fewer than half of the accused juveniles are represented by counsel at trial because the others have waived representation.[35] The Louisiana experience with waivers of counsel mirrors national ambivalence.[36]

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33. *Id.* at 22, 87 S. Ct. at 1441.

34. *Id.* at 27–28, 87 S. Ct. at 1443–44. There has been only one juvenile right to counsel decision by the Supreme Court since *Gault, Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560 (1979). *See infra* text accompanying note 110. In all other claims of constitutional rights in juvenile court proceedings, the court has stopped short of imposing the criminal justice procedural paradigm upon the juvenile courts and was subsequently emboldened to analyze every child's claim to a constitutional trial right guaranteed to an adult accused on a case by case basis, invariably taking into account the special institutional structure of the juvenile court. *See* In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970) (holding that state's burden is the same in both a delinquency and criminal proceeding: beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779 (1975) (holding that accused delinquent possesses the same protection against double jeopardy as does a criminally accused adult); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976 (1971) (holding that unlike a criminal court, a juvenile court could try accused juveniles without a jury).

35. Tory J. Caeti, et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 Am. J. Crim. L. 611, 617 (1995).

36. Gabriella Celeste & Patricia Puritz, The Children Left Behind: An

There are four broad approaches to waivers of counsel taken by American jurisdictions, with some significant variations within categories. The first position is that the general rule governing the acceptance of waivers from accused adults should be applied to juveniles: the court makes a determination of knowing and voluntary decision-making on a case-by-case or totality of the circumstances basis. This "adult rule" view is the probable majority view today.[37] The second "adult consultation" approach is a special juvenile waiver rule exemplified by Louisiana's former statute; it requires consultation with either a concerned adult (usually a parent) or attorney before any decision is made and presented by the juvenile to the court for acceptance. The third possibility is that while juvenile waivers deserve special scrutiny, no *a priori* test can be devised that will take into account all of the potential pressures that might coalesce to make counsel a necessity in a particular case. This approach is the "juvenile totality of circumstances" rule. Finally, the "no waiver" rule takes a *per se* stance: waiver of counsel is such a serious decision that it should be prohibited altogether when a child is charged with an offense carrying the possibility of a loss of liberty rule. [38]

The trial court's independent inquiry confirming that the waiver of counsel is made knowingly and voluntarily is constitutionally required[39] and thus is universally binding on states. Arguably, the same standards governing waivability of constitutional rights ought to govern both criminal and delinquency proceedings. [40] According to Supreme Court precedent, the prerequisites for a valid waiver of

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Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana 2 (2001), *available at* http://www.njdc.info/pdf/LAreport.pdf.

37. Shepherd, *supra* note 7. *See also* Robert E. Shepherd, Jr., *Still Seeking the Promise of* Gault*: Juveniles and the Right to Counsel*, ABA Criminal Justice Magazine, Summer 2003.

38. Variations include differentiating between younger and older children: for example, forbidding waivers by children under the age of twelve but using a totality test for waivers offered by older children or differentiating between rules depending on the severity of the offense, as exemplified by the legislative compromise resulting in the 2004 amendments of Louisiana Children's Code article 810.

39. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). For further discussion, see *State in the Interest of J.G.*, 96-718 (La. App. 3d Cir. 1996), 684 So.2d 563.

40. Arguably, relinquishing consultation with counsel before entering a guilty plea should entail the most stringent precautions since the defendant is waiving both counsel and the right to a trial. In *Von Moltke v. Gillies*, 332 U.S. 708 (1948), a plurality of the court held that the court should employ a "penetrating and comprehensive examination of all the circumstances," including lesser included offenses, potential punishments, possible defenses to the changes and mitigating circumstances.

counsel by an adult vary depending upon the stage of the criminal proceeding. Clearly, less is required when a defendant foregoes the assistance of counsel during interrogation[41] than when he refuses counsel at trial. In *Boykin v. Alabama* the Court likened a waiver of trial counsel to an entry of a guilty plea by adopting the same test for both determinations.[42] Just as the Sixth Amendment and Fourteenth Amendments guarantee a right to counsel in all criminal proceedings, so an accused adult criminal can waive representation and insist upon the correlative right to proceed to trial *pro se*.[43] Reasoning that the Sixth Amendment implied a right of self-representation and that historically, "assistance" of counsel was an option to be exercised or not by an accused, the Supreme Court held that a state cannot impose counsel upon an unwilling defendant.[44] Nonetheless, it ringed this recognition with several caveats. The trial court must warn of the dangers and disadvantages of self-representation; the accused must be literate, competent, understanding and capable of exercising informed free will; and the accused must be competent enough to be said to act voluntarily; and the court may be well advised to appoint advisory counsel as a stand-by resource for a defendant who becomes confused by trial procedure.[45]

Thus, some have questioned whether prohibiting waiver by a juvenile is a violation of the juvenile's rights under the Sixth Amendment. In *Faretta*, the court found that the founders had placed higher value on the right of free choice than on assurance of a fair trial.[46] Unlike the adult accused patriots whom the founders were

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41. A waiver of counsel during pretrial interrogation must be voluntary and knowing. The voluntariness requirement is met by a showing of an absence of police coercion. Colorado v. Connally, 479 U.S. 157 (1986). The knowledge requirement is satisfied by an understanding of the *Miranda* rights. Miranda v. Arizona, 384 U.S. 436 (1966). After receiving the Miranda warnings, a defendant must invoke his right to counsel in order to be fully protected until counsel is retained or appointed. Edwards v. Arizona, 451 U.S. 477 (1981).

42. Justice Douglas warned:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction.

Boykin v. Alabama, 395 U.S. at 242, 89 S. Ct. at 1712 (quoting Carnley v. Cochran, 369 U.S. 506, 516, 82 S. Ct. 884, 890 (1962)).

43. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975).

44. *Id.* at 832–36, 95 S. Ct. at 2539–41.

45. *Id.* at 834–36 & n. 46, 95 S. Ct. at 2541 & n. 46. *See also* Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938).

46. 422 U.S. at 833–34, 95 S. Ct. at 2540.

concerned about, however, children have never been accorded the right of free choice in either the common law or civilian tradition.[47] As the West Virginia Supreme Court put it: It would be a "contradiction that an infant might waive his constitutional right to counsel in proceedings wherein his very liberty interest is threatened, but not do so if someone is about to force sale of a piece of land in which he owns even a $1.00 interest."[48] From Rome forward, civilized peoples have refused to permit a child to possess, in the words of one Louisiana juvenile judge, the "adult right of making risky decisions."[49]

Florida is an example of a jurisdiction that simply codified the adult standard by requiring the court to offer counsel and make a "thorough inquiry" to ensure that the "choice intelligently and understandingly has been made."[50] Without specific guidelines, however, such a statute does not ensure that only competent, fully informed juveniles relinquish their right to counsel.[51] In *J.R.V. v. State*,[52] a juvenile waived counsel and entered a guilty plea. At a later hearing to withdraw his plea, the juvenile consistently responded "not really" when asked if he understood what was happening at the hearing.[53] Evidence was introduced that the juvenile was impaired by a learning deficit due to brain damage and emotional, mental and physical disabilities resulting from a car accident six years before. Nevertheless, the trial court found that the juvenile "answered all of the appropriate questions in the [plea] colloquy satisfactorily."[54] The Florida Supreme Court reversed.[55] The standard adopted by the New York juvenile waiver of counsel statute is somewhat more protective in that it requires clear and convincing evidence of waiver, and the court must find that acceptance of the waiver is in the child's best interests.[56]

But no matter how phrased, the guidelines for any exchange between the court and the child are likely to serve as ineffective

47. *See, e.g.*, Penelope Alysse Brobst, *The Court Giveth and the Court Taketh Away: State v. Fernandez—Returning Louisiana's Children to an Adult Standard*, 60 La.L.Rev. 605, 628 (2000).

48. State ex rel. J.M. v. Taylor, 276 S.E.2d 199 (W. Va. 1981).

49. Testimony submitted by Judge Paul Young, Caddo Parish Juvenile Court, to the Commission on Juvenile Justice (February 3, 2003) (on file with the Commission and with the first author).

50. Fla. R. Juv. P. 8.165 (West 2003).

51. Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002).

52. J.R.V. v. State, 715 So. 2d 1135 (Fla. App. 5th Dist. 1998).

53. *Id.* at 1138.

54. *Id.*

55. *Id.* at 1139.

56. N.Y. Fam. Ct. Act § 249-a (West 2003).

means of discovering whether the child truly understands the magnitude of his risk when counsel is waived. Developmental scientists concur that children display accommodation and commonly may acquiesce in what they perceive as the desired answer when asked by an adult, perhaps especially when the adult is a commanding figure swathed in robes and surrounded by other regal trappings.[57] Furthermore, on busy trial days when pleas are scheduled, rarely is enough time set aside for questions in a thorough, unhurried effort to instruct the child as well as probe answers for any hints of misunderstanding or ignorance.[58] While undoubtedly it is important that the waiver instructions are reinforced by the court, the real teaching through to understanding is more efficiently achieved in a one-on-one session between the child and a knowledgeable adult who knows the facts of the accusation and can counsel and weigh options with the child.

The "adult consultation" rule provides some additional protection for accused children. It was the approach adopted by the Louisiana Supreme Court and codified by the Louisiana Children's Code which became effective in 1992.[59] Article 810 permitted waiver of counsel by most accused delinquents if three prerequisites were met: (1) the child has consulted with either an attorney "or other adult interested in the child's welfare," (2) both the child and the adult advisor have been instructed by the court about the child's rights and the possible consequences of waiver, and (3) the court finds that the child's waiver

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57. Although there is a developmental trend with younger children displaying more social conformity than older children, even adolescents are likely to be swayed by authoritative adults. *See* Lucy S. McGough, Fragile Voices 68–73 (1994) (summarizing the social science research literature).

58. This statement was taken from an observer of a Louisiana district court hearing regarding juvenile delinquency:

> In chambers the judge would review the waiver form with the parent and ask the parent if the child wished to waive. . . . It was clear that the ADA and the judge wanted the children to waive counsel and admit the offenses. . . . The process of waiver and admission often took less than five minutes.

Celeste, *supra* note 36 at 60.

59. The rights identified in the *Gault* decision were recognized by Art. 95 of the Louisiana Code of Juvenile Procedure of 1978. Article 96 permitted a child to waive counsel with consent of the court and his parent. That same year the Louisiana Supreme Court decided *State in the Interest of Dino*, 359 So.2d 586 (La. 1978), a case involving a juvenile's waiver of counsel during an interrogation. The Court reversed a conviction based on the use of the child's confession, holding that consultation with a parent or other adult interested in the child's welfare before such a waiver of counsel at interrogation would be effective. Article 810 of the Children's Code imported that rule for all waivers of counsel, even a waiver of counsel at trial. That choice has caused much mischief.

is voluntary, free from physical or mental coercion.[60] The heart of the consultation requirement is the identification of which adult can best play this advisory role: the child's parent, a nonlawyer guardian, a special lawyer appointed for this limited purpose or trial counsel? In states that have required a showing of consultation as the *sine qua non* for waiver, there is variance of choice.

The counseling requirement suggests that this adult should be both knowledgeable (about the legal processes and the facts of the child's particular accusation) and concerned about the child's fate. But if only those two characteristics were met, one might expect that the ideal advisor would be the child's parent/custodian/family member who is a lawyer and has some familiarity with the juvenile courts in his or her practice. Yet most lawyers confess that they would be disastrous as counsel for their children because they lack professional objectivity and might have difficulty extracting a true account from their offspring. Their personal relationship is likely to get in the way of their professional relationship as counsel. Consequently, the characterization of the ideal representative is a knowledgeable lawyer, concerned yet objective about the child's predicament.

With this template in hand, we should discard the choice of both a nonlawyer guardian[61] and a lawyer appointed for the limited purpose of advising a juvenile whether to waive counsel at trial. The guardian would lack the training in the elements of a crime and other knowledge essential to the child's successful defense to the accusation. Consequently, the value of the assistance of counsel would be lost. Special counsel might well successfully play the limited role of advising a child about his of her trial rights, but is unlikely to have investigated the accusation or evaluated possible dispositional alternatives to the extent necessary to make an educated choice about trial strategy. Alternatively of course, a conscientious professional might well believe that the only ethical stance would be to instruct the child about the consequences of waiver and advise every child to demand counsel. However, costs and efficient scheduling are likely to induce the appointment of special counsel who is a court-attached functionary, required to conduct many waiver conferences each day, with little commitment or continuing

60. La. Ch. Code art. 810(A). A child who may be mentally ill could not waive counsel. La. Ch.Code art. 810(D). As discussed below, if the court found a conflict in interests between the child and adult advisor, the court was required to reject the proffered waiver and make the appointment.

61. In *Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560 (1979), the Supreme Court analyzed the unique relationship between lawyer and client and isolated three elements that made advice critical to an accused: a knowledge of the law; the duty of exclusive fidelity; and a relationship of trust and confidence.

responsibility for any one of those children. Furthermore, the presence of a special advisory counselor would probably confuse the child if the relationship ended with the initial conference and thereafter, a different trial lawyer was appointed for subsequent hearings.

The choice distills to one between an instructed family member or trial counsel. The former Louisiana provision clearly confined the counseling appointment option to either defense counsel or, in most cases, a family member: "other adult interested in the child's welfare."[62] The characterization "other adult interested in the child's welfare" perhaps captures the element of a concerned adult,[63] but it completely fails to ensure that such an adult is fully knowledgeable and also may not ensure objectivity. The former Louisiana provision sought to ensure a knowledgeable adult by requiring the court to give the minimal *Boykin* instructions to both the child and the adult advisor. Without full knowledge of the law and legal processes, however, the adult cannot adequately advise the child whether to waive or demand counsel. The West Virginia Supreme Court struggled with whether to embrace an "interested adult" consultation requirement and identified these objections:

> [A] parent or other adult, even one intensely involved in and interested in a child's welfare, may not be sufficiently knowledgeable, educated or informed about constitutional law to competently waive protections. Sometimes parents' interests may even be opposite a child's . . . .[64]

The question of the adequacy of parental assistance during waiver decision-making is indeed troublesome. Certainly a parent may be a trusted confident, but there are all sorts of potential conflicts of interests. There may be moral conflicts as when the parent instigated or aided the child in the commission of the alleged delinquent act, or the child's defense exposes the parent to prosecution or to civil suit or surfaces family secrets.[65] Less obvious conflicts can also arise

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62. La. Ch. Code art. 810 (repealed 2004).

63. Certainly it could be argued that a probation officer or other person who would have divided loyalties might meet the vague requirement of the former statute, and thus the statutory test was even more pernicious than indicated in the discussion of the text. As the West Virginia Supreme Court observed trenchantly, "Courts have often had difficulty defining an 'interested adult.' Is a probation officer an interested adult? Is a grandparent? Is a parent who initiated the complaint? Or is drunk? Or is apathetic?" State ex rel. J.M. v. Taylor, 276 S.E.2d 199, 203 (1981).

64. *Id.* at 203.

65. Louisiana Children's Code article 810(C) rather easily responds to this concern by prohibiting waiver of counsel if the interests of the child and parent conflict "or appointment of counsel is otherwise required in the interests of justice."

from the parent's obligation to pay for any counsel appointed for the child if the parent is found to be financially able.[66] Aside from expense, the parent may desire to avoid losing further time off from work or other obligations in order to attend for the hearings required to resolve the child's delinquency case. The parent may miscalculate the child's exposure to harsh punishment. Even absent special conflicts, there is an abiding fundamental conflict of interest between the parental role and the legal advisor role. A Louisiana case, *State v. Hudson*,[67] illustrates this problem. There when parental consultation was provided, the parents urged their son to tell the truth about the murder of which he was accused. They did not and probably could not fully alert him about the consequences of a confession in legal proceedings. They spoke in their role as moral guardians rather than as legal counselors. The child dutifully confessed, the confession was introduced at the hearing, and the court found the murder allegation supported by the evidence. The adjudication was affirmed on appeal.[68]

Most states have adopted a "juvenile totality of the circumstances" rule that authorizes the trial court to consider all factors that may be relevant to the determination of whether the waiver is knowingly and voluntarily made. Thus, there need be no documentation that any conference occurred between the child and an adult, much less any assessment of the quality of the advice given by the adult. The gains of an all inclusive factor rule are offset by the loss of guidance to a trial court and, more importantly, there is little to suggest that current court processes can capture even the most critical factors affecting the child's need for counsel. The system itself feeds on waivers. As one Louisiana juvenile court judge testified before the Juvenile Justice Commission:

> [C]ourts cannot realistically assess whether the parent has forced the child to agree to waive counsel in the proverbial "night before court" family meeting. Sometimes the parent's motive will be to help assure that the child will "get what he deserves." The parent may, on the other hand, more benignly adopt a "go along to get along" approach in the often

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La. Ch. Code art. 810(C).

66. La. Ch. Code art. 809(C)..

67. 404 So. 2d 460 (La. 1981). 1).

68. Faced with a criminal accusation against their child, parents can experience explosive emotions—anger, guilt, frustration, and shame—and those emotions may override the parent's conflicting desire to protect the child. In *Oregon v. Elstad*, 470 U.S. 298, 301, 105 S. Ct. 1285, 1289 (1985), when told of his son's burglary arrest, the father "became quite agitated, opened the rear door of the car [in which the police were transporting his son to jail] and admonished his son: 'I told you that you were going to get into trouble. You wouldn't listen to me. You never learn.'"

> mistaken hope that the child will thereby receive a more lenient sentence. In many cases the child and the parent may both be intimidated by the Court system and personnel so that they will agree to almost anything to "put an end" to the whole ordeal. Unfortunately, of course, this is only the beginning of the ordeal for the child.
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> Too often, the decision to waive counsel is not the child's or the parent's. The System encourages or intimidates the family and child to waive counsel. The system participants do so because it is more convenient for the System. It is easier for the Judge, District Attorney and probation officer to have their way if the System is not burdened with the child having an attorney.... The System promotes the child's "right" to waive counsel because it is in the prosecutor's best interest, not because it promotes the child's legal interests. The best interest of the child never requires waiver of his right to counsel.[69]

IV. THE LEGISLATIVE BATTLE

In retrospect, *Gault* was the highwater mark of political rhetoric calling for greater protection of children who had gone astray. The social contrast between 1964 and 2004 is mirrored by the two juvenile constitutional cases then pending before the Supreme Court in those years. In 1964 Gerald Gault was accused of silly, adolescent prankish behavior; forty years later, the Court contemplated whether a state could execute Tommy Simmons who was accused of murder.[70] The "war on crime" burst on the political scene, bringing with it a deluge of "get tough" legislation about crime, much of which was aimed at juveniles and the juvenile court in response to fears of an adolescent criminal insurrection.[71]

In 1993, for the first time in the history of the juvenile courts, the Louisiana Legislature mandated the imposition of a fixed sentence for juveniles found to have committed certain serious offenses.[72] Juvenile court judges were thus stripped of their dispositional

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69. Testimony of Judge Paul Young, *see supra* note 49.

70. Roper v. Simmons, 125 S. Ct. 1183 (2005). The issue before the court was whether one convicted of a capital crime committed before he was seventeen years old can be put to death. By a 5-4 decision, the United States Supreme Court determined that capital punishment for those under the age of eighteen is unconstitutional.

71. Thomas J. Bernard, The Cycle of Juvenile Justice 146–47 (1992).

72. La. Ch. Code art. 897.1 (added by 1993 La. Acts No. 430, § 2). The offenses were first or second degree murder, aggravated rape, aggravated kidnaping, armed robbery, or treason. *Id.*

prerogative and required to impose a "juvenile life" term of incarceration (until age twenty-one) in a "secure detention facility" which, in reality, was an institution with banks of cells, centered in a compound surrounded by patrolled barbed wire fences, a prison by another name. In 1995, Human Rights Watch charged that Tallulah, the most notorious juvenile facility located in Tallulah in the northeast corner of the state, and other state juvenile institutions violated international human rights standards.[73] Solitary confinement, euphemistically known as "individual rooms" or "isolation rooms," was rather routinely used: more than forty percent of Tallulah's youth had been locked up in these cells at some point during their incarceration, some for as long as twenty-three and a half hours at a time.[74] While the public might tolerate some "get tough" sanctions for juvenile offenders, accounts of violence and abusive practices at secure juvenile institutions began to leak out and shocked many citizens who began to call for official accountability. In 1996 and 1997, the United States Department of Justice charged that the conditions at Tallulah violated the United States Constitution;[75] it filed suit on July 9, 1998, against all four of Louisiana's youth prisons, charging sexual abuse and assault at all four of Louisiana's youth facilities. The Juvenile Justice Project of Louisiana filed its own class action challenging confinement conditions.[76]

The "juvenile lifers" were not the only juveniles placed by the Department of Public Safety & Corrections in a secure institution.[77]

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73. David Utter, *Youth Prison Carries on a Legacy of Corruption*, The Times-Picayune, Nov. 4, 2002.

74. David Utter, *Tallulah's Luxuries Nothing to Brag About*, The Times-Picayune, Jan. 27, 2003.

75. Carl Ginsberg & Helen Demeranville, *Sticks and Stones: The Jailing of Mentally Ill Kids*, The Nation, Dec. 20, 1999, at 17, 18.

76. Brian B. v. Stalder, CA No. 98-886-B-M1 (M.D. La. 1998), consolidated with Williams v. McKeithen, No. 71-98-B (M.D. La. 1971) (a preexisting consent decree involving the conditions of the confinement at all adult and juvenile institutions in the state) and United States v. Louisiana, No. 98-947-B1 (M.D. La. 1998) (filed by the Department of Justice).

77. The juvenile courts are authorized to impose any of a range of dispositions for juvenile offenders, for an indeterminate period of time, though short of the maximum term which a similarly convicted adult would serve or age twenty-one, whichever occurs first. La. Ch. Code arts. 898 (duration of disposition based on a felony-grade adjudication) & 900 (duration of disposition based on a misdemeanor-grade adjudication). In ascending order of severity, the courts' placement options include probation supervision, day programs offering education and group therapy, specialized foster homes for mentally ill delinquents, community group residential homes and finally, commitment to the Department of Public Safety & Corrections. La. Ch. Code arts. 897 (disposition after adjudication of a felony-grade delinquent act) & 899 (disposition after adjudication of a misdemeanor-grade delinquent act). If the court decides to commit a child to the department's custody, the department

More than seventy percent of Tallulah's youth had been sent there for non-violent offenses, such as joy-riding or drug addiction.[78] Even though the Children's Code still admonished the court to impose "the least restrictive disposition" authorized by the Code,[79] by 2000, sixty percent of the 1,743 juveniles who were imprisoned in a juvenile secure facility were incarcerated for non-violent offenses.[80] Charges of racism further charged the movement for reform. Over-representation of African American juveniles in the prison population is clear. Looking only at children in secure state custody, eighty-one percent (1,425) were African-American.[81]

Finally, a juvenile judge in New Orleans refused to send any more delinquents to Tallulah, and the hearings to modify their commitment orders revealed brutality by prison guards, extensive abuse of inmates and nothing that remotely resembled the "treatment" and "rehabilitation" promised by the law.[82] The drumbeat began to close Tallulah, the most notorious prison in the state. The Department of Justice opened an investigation as part of the prison conditions suit still pending after many years in the federal district court.[83] The Tallulah scandal brought many critics, including powerful legislators like Senators Donald Cravins and Mitch Landrieu, to an investigation of the entire juvenile justice system that spawned places like Tallulah.

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assumes decision-making authority and responsibility for deciding whether to place the child in a secure institution, nonsecure facility, or some specialized program offered by a private organization under contract with the department. The court may recommend alternative care other than institutionalization, but the department may reject its recommendation. La. Ch. Code art. 908. *See also* State in re Sapia, 397 So. 2d 469 (La. 1981).

78. Utter, *supra* note 74.

79. La. Ch. Code art. 901(B)..

80. Celeste, *supra* note 36, at 38

81. Utter, *supra* note 74. At least on this issue, Louisiana is not aberrant. National research confirms that African-American youth are shockingly over-represented among both detained and incarcerated youth. In 1997, minority youth represented almost two-thirds (63%) of detained or committed juveniles although they represented only about one-third of the total adolescent population in the country. *Id. See* Celeste, *supra* note 36.

82. *See supra* note 23. The Fourth Circuit Court of Appeals and the Louisiana Supreme Court affirmed Judge Doherty's ruling, and the Department then sought an injunction from the federal district court, claiming that the juvenile court was attempting to relitigate claims that were part of the settlement in federal litigation between the State and the Department of Justice. The federal court declined to intervene. *See Judge Refuses to Intervene in La. Juvenile Prison Case*, American Press, March 23, 2003, at 2A; Kevin McGill, *Court Upholds Teen's Release*, The Advocate (Baton Rouge, La.), Nov. 9, 2002, at 9B; Joe Gyan, Jr., *Judge Frees Youth, Blasts Prison*, The Advocate (Baton Rouge, La.), Dec. 20, 2001, at 6B.

83. *See* Utter, *supra* note 74. *See also* Vicki Ferstel, "State to settle prison suits," The Advcoate, Baton Rouge, La., September 8, 2000, at 1A.

In 2001, the American Bar Associations's Juvenile Justice Center published an empirical study documenting the plight of children in the Louisiana juvenile justice system that expanded the scope of public concern beyond conditions of confinement at the states's juvenile institutions. As part of a nationwide study, the Louisiana report concluded that the right to counsel appointment process in many juvenile courts was a charade.[84] Investigators found that waivers of counsel by accused delinquents or their families occurred in one-third to two-thirds of the cases, depending upon the judicial district. In some districts, waivers occurred in ninety to ninety-five percent of the cases.

In his address before the 2001 legislature, Chief Justice Calogero called for legislative reform of the juvenile justice system.[85] The legislature responded by creating the Juvenile Justice Commission which over the course of the next sixteen months held twenty-one public meetings in communities throughout the state.[86]

While the Commission was hearing public testimony, the MacArthur Study was published which discovered substantial cognitive impairment of juveniles found to be delinquent in four scattered sites: Philadelphia, Los Angeles, Florida and Virginia.[87] In matters regarding trial-related understanding and reasoning about important information, researchers found that significant numbers of adolescents were only able to perform at a level of adults found mentally incompetent to stand trial. If Due Process forbids the trial of an incompetent adult,[88] how can proceedings with similar consequences be faced by incompetent children? Compounding the incompetencies of many juveniles who are arrested and face trial are the universal, physiological handicaps of adolescents. In a neurological mapping study conducted by the National Institute of

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84. Celeste, *supra* note 36 at 59–60.

85. *See supra* note 6; *see also Juvenile Justice Reforms Urged*, The Advocate (Baton Rouge, La.), Apr. 16, 2003, at 17A.

86. *Id.* at 3.

87. The MacArthur Report is so named because it was a study funded by the MacArthur Foundation. It was an impeccably designed nationwide empirical study comparing the decision-making of juvenile delinquents with comparison groups of uncharged juveniles living in the community at large, adults in prison and uncharged adults living in the community at large. In all, there were 1,350 subjects. In matters of trial-related understanding and reasoning about important information only thirty percent of eleven to thirteen-year-olds, nineteen percent of fourteen to fifteen-year-olds, and twelve percent of sixteen to seventeen-year-olds were incompetent using the legal test for competency. *See* Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333 (2003).

88. Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788 (1960). *See* Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680 (1993) (holding that the same standards govern competency to waive trial counsel).

Mental Health, involving one thousand healthy children and adolescents, researchers used M.R.I. technology to study the developmental stages of the human brain and found that the maturation process does not end until the mid-twenties.[89] Higher brain functions, including empathy, analysis, judgment and the related ability to assimilate information from various parts of the brain are the work of the prefrontal cortex which is the last part of the brain to develop.[90] As one researcher succinctly put it, "[I]t doesn't make sense to ask the average adolescent to think or act like the average adult, because he or she can't—anymore than a six-year-old child can learn calculus."[91] As a recent brief filed by the American Medical Association summed up these data, "Normal adolescents cannot be expected to operate with the level of maturity, judgment, risk version or impulse control of an adult."[92]

Not surprisingly, researchers at Louisiana State University found that a large percentage of incarcerated juveniles in Louisiana suffered from mental illness or from a learning disability. One-third of all adjudicated juvenile offenders who are committed to the state have a diagnosis of serious mental illness, and an additional six percent are diagnosed with mental retardation. Sixty-four percent of these floundering in the deepest end of the juvenile justice system have a substance abuse or dependence diagnosis.[93] These data reinforced

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89. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 Amer. Psychologist 1009 (2003); Paul Raeburn, *Too Immature for the Death Penalty?*, The New York Times Magazine, Oct. 17, 2004 (summarizing studies); Shannon Brownlee, *Inside the Teen Brain*, U.S. News & World Report, Aug. 9, 1999.

90. Elizabeth Sowell, et al., In Vivo Evidence for Post Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neuroscience 10 (1999). (The frontal lobe is likened to the CEO of the body, enabling a mature individual to prioritize thoughts, imagine, think in the abstract, anticipate consequences, plan and control impulses.)

91. Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question*, ABA Criminal Justice Magazine 20, 22, Fall 2003.

92. Brief of Amici Curiae, American Medical Association et al., Roper v. Simmons, 125 S. Ct. 1183 (2005). Similar findings were reported by Louisiana State University researchers.

93. Debra K. DePrato, *Characteristics of Youth in Secure Care* (Admits between Jan. 1, 2004 - Dec. 31, 2004), LSU Health Sciences Center, School of Public Health (2005). Despite these diagnoses, treatment was rare in the juvenile institutions. The Department of Justice found that at Tallulah, juveniles with extensive psychiatric histories who self-mutilate or threaten suicide had never been referred to a psychiatrist. *Id.* at 18. Celeste, *supra* note 36 at 38. *See also* David Utter, "Youth Prison Carries on a Legacy of Corruption," The Times-Picayune, November 4, 2002. The Department of Justice estimates that 60 percent of incarcerated youth across the nation have a recognizable mental disorder and that as many as 200,00 are seriously mentally ill. Carl Ginsberg & Helen Demeranville,

concerns not only about the maltreatment of mentally compromised children in prison but also their protection by counsel in juvenile court. Because the Louisiana Children's Code unequivocally states that a child who may be mentally ill cannot waive counsel,[94] the high incidence of mentally ill children adjudicated in juvenile court coupled with a high incidence of counsel waivers clearly signaled that the fact-finding component of the counsel waiver process was badly awry in many juvenile courts.

Perhaps emboldened by Chief Justice Calogero but a stunning stance regardless of the cause, the state's juvenile judges refused to defend the status quo of the courts' operations. The Louisiana Council of Juvenile & Family Court Judges and the Louisiana City Judges Association unanimously voted to send a Resolution of Support to the Juvenile Justice Commission urging, among other reforms, that "all judges with juvenile jurisdiction to, first, ensure that youth are adequately represented at every critical stage of the process and, second, prohibit the routine waiver of counsel."[95] This defection of their strongest allies left the district attorneys politically weakened as they struggled to convince the public and reform leaders that all was well in the juvenile justice system. The prosecutors disclaimed all culpability. In their minority report dissenting from the recommendation of the Juvenile Justice Advisory Board calling for non-waiver of counsel, the District Attorneys Association argued that occasional "abuses of discretion" by trial court judges in allowing children to waive their right to counsel "should be directly addressed,"[96] rather than forcing systemic change through legislation. But as one judge responded, their stance

> . . . implies that children should seek appeals or writ applications from the appellate courts. However, when a court allows a child to waive counsel, there is no attorney available to the child to file appeals or writ applications on this or any other issue. There is no effective way to "directly address" the improper allowance of waiver of counsel.[97]

An updated 2002 survey conducted by the ABA confirmed that abuse of the waiver process was far from occasional. It found that

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Sticks and Stones: The Jailing of Mentally Ill Kids, The Nation 17, 17 (Dec. 20, 1999).

94. La. Ch. Code art. 810(D).

95. This Resolution of Support for the Juvenile Justice Commission's Efforts to Reform the Louisiana Juvenile Justice System was adopted by each group in their annual joint meeting in New Orleans on January 10, 2002. A copy of the Resolution is on file with the first author.

96. Testimony of Judge Paul Young, *supra* note 49.

97. *Id.*

"an extremely high incidence of waiver" by children in Louisiana juvenile courts continued and noted further that "many of [these accused delinquents] waive without speaking to a lawyer or understanding the critical consequences of their decision,"[98] despite the unambiguous obligation of the juvenile court judge to conduct a searching inquiry into both voluntariness and understanding. In addition, the report found that there was an extremely high use of pleas to handle cases of juvenile delinquency, even those of a serious nature, and frequently the pleas were entered without consultation with counsel.[99]

The Juvenile Justice Project of Louisiana, a private non-profit organization in New Orleans, played a pivotal role in generating support for reform. It provided case studies from its files to put flesh and blood on the abstraction of a lack of counsel. Two examples may suffice here.

> T.F., male, 14 years old at the time of disposition, Madison Parish. T.F. was adjudicated ungovernable and placed under FINS[100] custody at age 13. He was sent to Christian Acres, a group home in Tallulah. While at Christian Acres, at age 14, T.F. was charged with aggravated arson after he accidentally caused a fire by smoking in a closet. T.F. was brought to court on these charges in Tallulah, far from his home in Morgan City. He had no family members present and did not have an attorney. T.F. did not understand what was happening in court; he just remembers that the judge asked him if he did "it" and he responded "yes." T.F. was adjudicated delinquent of aggravated arson and sentenced to two years in secure custody.
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> Had T.F. had an attorney appointed to represent him, the lawyer could have advised him regarding the implications of pleading guilty and of his chances of being acquitted at trial for the accident. Since T.F. had no family present, an attorney could also have provided him with support and understanding of his situation. In addition to actually representing him at trial, given the facts, an attorney may have secured a plea for a lesser charge. An attorney also could have presented

98. ABA Juvenile Justice Center, The Children Left Behind: A Review of the Status of Defense for Louisiana's Children and Youth in Delinquency Proceedings (Annual Update, 2002).

99. *Id.*

100. "FINS" is the acronym for a Families in Need of Services proceeding, Title VII of the Louisiana Children's Code. It is the less serious, status offense category of juvenile court jurisdiction that includes running away, truancy, and other age-limited offenses as well as ungovernability.

> information about T.F.'s family and background and advocated for a more appropriate sentence.
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> S.K., female, 14 years old at time of disposition, Evangeline Parish. At age 14, S.K. was adjudicated delinquent for unauthorized use and careless operation of a motor vehicle. These charges were her first offenses; S.K. had never served time, been on probation or been offered any rehabilitative care services before this case. S.K. cannot recall formally waiving counsel; she says simply that the court proceedings were very brief. S.K. was committed to secure-care custody for a period of two years and served her full time, despite efforts to secure an early release. An attorney at the adjudication stage of S.K.'s case could have advocated for probation and other court services for S.K. since the offense was her first.[101]

Ultimately, the Commission recommended that waiver of counsel be further studied and reformed, if necessary. After receiving the Commission's report, the 2003 legislature acknowledged as one of many principles that "certain changes in law concerning waiver of counsel . . . are necessary,"[102] though it referred the fashioning of the critical elements of that reform to the Children's Code Advisory Committee of the Louisiana State Law Institute for recommendations.[103]

While changes were being debated, a stunning event occurred bringing a new reform ally. In February, 2004, the Civil Rights Division of the United States Department of Justice formally notified the Governor that the Department was opening an investigation "into whether juveniles with cognitive impairments are waiving their right to counsel in delinquency proceedings in violation of the United States Constitution and federal law."[104]

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101. "Individual Youth Betrayed by Counsel Waiver," case studies presented by the Post-Disposition Project of the Juvenile Justice Project of Louisiana to the House Committee on Administration of Criminal Justice, May 12, 2004. Copy on file with the first author.

102. H.C.R. 56 at 5, Reg. Sess. (La. 2003). *See supra* note 6.

103. *Id.* at 12.

104. Letter from Ralph F. Boyd, Jr., Assistant Attorney General to Gov. Mike Foster (Feb. 27, 2003) (on file with the first author). An agreement settling the investigation was finally achieved June 8, 2004. Memorandum from Chief Justice Pascal F. Calogero, Jr. to Judges of the District Courts, City Courts, Parish Courts and Juvenile Courts (June 18, 2004). The Supreme Court agreed to develop training materials and training sessions on the conduct of appropriate waiver inquiries for all judges exercising juvenile jurisdiction within nine months and to provide instructional materials to newly elected trial judges within ninety days of their taking office. In addition, the Court agreed to design and implement a

The following year, the Institute's proposal was presented as House Bill 1508. It sought recognition of an absolute, nonwaivable right to counsel for all accused delinquents, regardless of the grade of the offense. The idea of an unwaivable professional representative was not new.[105] Anyone untrained in the law is at risk in appearing without counsel at trial, but an uncounseled child is even more vulnerable. A half-century ago, the President's Crime Commission recommended that "Counsel be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[106] The reform bill moved smoothly through the Louisiana House of Representatives, but then reached the fortifications of the prosecutors. The district attorneys demanded a compromise while the measure was pending in the Senate. The compromise was to recognize an absolute right to counsel in three categories of cases: when the child is charged with a felony-grade offense; when there is a recommendation in a pending case that the child be placed in a mental institution or substance abuse facility or a modification of such a previous disposition; or when the child is confronted with probation or parole revocation.[107] In all other delinquency proceedings, that is misdemeanor-grade offenses, an adult consultation rule would be used, requiring a showing before acceptance of any waiver of counsel that the child has consulted with either an attorney, parent or caretaker.[108] The troublesome former language permitting consultation with "an adult interested in the child's welfare" would be repealed. Finally, both the child and consulting adult must have been instructed by the court about the child's rights and the consequences of a waiver of counsel. The compromise was accepted, the amended bill was approved by the Senate, confirmed by the House-Senate Conference Committee, and signed by the Governor on July 6, 2004.

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monitoring and accountability program that would collect data concerning waivers of counsel and report to the Department on a semi-annual basis.

105. That an immature minor cannot and should not speak for himself or bear responsibility for making unadvised judgments, even those affecting his own well being or property, is as old as Roman law. For a recitation of many modern instances in which a child cannot make choices or be bound by his agreements, *see* Brobst, *supra* note 47.

106. National Crime Commission Report (quoted in *In re Gault*, 387 U.S. 1, 38, 87 S. Ct. 1428 (1967)).

107. La. Ch. Code art. 810(D), revised by Acts 2004, No. 776.

108. "Caretaker" is a word of art defined elsewhere in the Children's Code as "any person providing a residence for the child or any person legally obligated to provide or secure adequate care for a child, including a parent, tutor, guardian or legal custodian." La. Ch. Code art. 728(1).

V. UNANSWERED QUESTIONS: COUNSEL AT THE POLICE STATION

In public presentations of the Law Institute proposal of an absolute, unwaivable right to counsel, the question inevitably was asked whether the sponsors envisioned that pretrial interrogations would be affected by the proposed change.[109] Would this statutory change mean that, in assessing the admissibility of a juvenile's confession, the Louisiana Supreme Court would be required to abandon the totality of the circumstances rule that it announced in *Fernandez*, and instead, require counsel during any interrogation concerning a felony-grade offense? [110] The questioners were quite right that the courts will soon have to address such a claim, and sensible, yet conflicting, arguments can be advanced. If a child cannot waive the assistance of counsel at trial, should she be able to waive such assistance at pretrial confrontations, such as interrogation? Aside from issues of consistent public policy, consideration of legislative intent may turn on the meaning of "every stage of proceedings" as used in article 809(A) and "at any stage in the proceedings" as used in Children's Code article 810(B). One could argue that "every stage of the proceeding" refers to judicial proceedings—formal proceedings in the juvenile court—and not pretrial processes.[111]

On the other hand, another could assert that, as a constitutional term of art, the right to counsel attaches at "critical *stages of the prosecution*" and thus applies to interrogations in the *Miranda* sense that a caution about the right to counsel must be given before any custodial interrogation. As the Supreme Court finally recognized in the 1960s, the fifth and sixth amendment guarantees, though certainly trial-rooted by language and history, can be meaningless protections if police are free to exploit pretrial vulnerabilities of citizens and use uncounseled, unknowing confessions taken in pretrial interrogations as evidence to support a conviction. Yet in none of the dozens of confession cases decided from 1930 to 1960 did the Supreme Court base a confession decision on the privilege against self-

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109. Other less important issues also arise with the recognition of an absolute, unwaivable right to counsel. After appointment of and consultation with counsel, does the child retain the right to disagree with counsel's advice? Contrary to counsel's advice, could the child give an admissible confession or testify at trial? Could the child enter a guilty plea against counsel's advice? Could a child dismiss assigned counsel?

110. State v. Fernandez, 1996–2719 (La. 1998), 712 So. 2d 485.

111. A similar argument was made that a right to counsel "at all stages of any proceedings" guaranteed by the Uniform Juvenile Court Act was limited only to courtroom proceedings. That interpretation was rejected in *In the Interest of J.D.Z.*, 431 N.W.2d 272 (N.D. 1988).

incrimination.[112] Instead, the Court used the Due Process Clause or increasingly, the sixth amendment. In the two years before *Miranda*, the Court appeared to be inexorably moving toward a requirement that counsel be provided before trial if the police wanted to interrogate a suspect.[113] However, after wrestling with an issue so fraught with social divisiveness and practical difficulties, the Court finally resisted requiring that counsel must be appointed and present at any interrogation of an adult accused. Instead, it sought a middle course in *Miranda*, requiring only that warnings be given to a questioned suspect. Warnings were thought to be an adequate proxy for the advice and protection that counsel would offer if at the side of the defendant during the interrogation.[114] Is the same approach warranted for juveniles?

The analysis begins with whether the *Miranda* warnings are even required for accused juveniles. Remarkably, the Supreme Court has never explicitly ruled on the issue. Indeed, in a footnote in a later case, the court cautioned that it had reserved the question of whether *Miranda* applies "with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings."[115] However, under the Louisiana Constitution and the Children's Code, *Miranda* warnings are clearly required before a juvenile is interrogated in pretrial custody.[116] In *State ex rel. Dino*, the Court noted that the state must prove that the juvenile "was

112. Jerold H. Israel, et al., Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text 332 (2002).

113. In *Massiah v. United States*, 377 U.S. 210, 84 S. Ct. 1199 (1964), the Court ruled that a confession was inadmissible because it had been procured in violation of the defendant's sixth amendment rights. An informant wired with a transmitter had engaged the defendant in an incriminating conversation after the defendant had been indicted and thus, his right to counsel had attached. Five weeks later, in *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964), the Court again held that the confession, though clearly voluntary in the absence of coercion sense, was inadmissible because procured in violation of the defendant's asserted right to counsel. Escobedo had retained counsel, though he had not yet been indicted nor otherwise formally charged and was interrogated over his protests that he wanted to consult with his lawyer.

114. Miranda v. Arizona, 396 U.S. 868, 90 S. Ct. 140 (1966).

115. Fare v. Michael C., 442 U.S. 707, 717 n.4, 99 S. Ct. 2560, 2567 n.4 (1979).

116. To reach this conclusion requires a a two-step analysis. Article 1, sec. 13 of the Constitution explicitly requires the warnings be given to a criminally accused upon either arrest or detention. In *State ex rel. Dino*, 359 So. 2d 586 (La. 1978), the Louisiana Supreme Court held that the state constitution "enhanced and incorporated the prophylactic rules of Miranda v. Arizona" which apply equally to criminal as well as delinquency proceedings. Article 808 of the Louisiana Children's Code confirms this analysis: "All rights guaranteed to criminal defendants by the Constitution of the United States or the Constitution of Louisiana, except the right to jury trial, shall be applicable in juvenile court proceedings brought under this Title." La. Ch. Code art. 808.

informed of his right against self-incrimination and to have an attorney present at the interrogation; that he fully understood the consequences of waiving those rights; and that he did in fact waive those rights voluntarily and without physical or mental coercion."[117]

The giving of *Miranda* warnings contributes to an assurance that a confession is both knowing and voluntary. In the latest articulation of voluntariness as the only required predicate for admissibility of an adult's confession,[118] the Supreme Court held that the defendant must show the use of coercive police activity.[119] As Chief Justice Rehnquist elaborated in *Colorado v. Connelly*,[120] significantly a case involving the proffered confession of a mentally compromised adult:

> While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. . . . [A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. ... But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official. coercion, should ever dispose of the inquiry into constitutional "voluntariness." [121]

Connelly might seem to foreclose the use of any categorical requirement like age to justify requiring special rules. Certainly it would foreclose any claim that a child *per se* was incapable of giving a voluntary confession. Nevertheless, special scrutiny of a child's confession, or even requiring the presence of counsel during any interrogation of a child, might be a rule that could survive *Connelly*. Furthermore, the mental incapacity of a particular accused child if exploited by the police should surely invalidate his confession taken during an interrogation.[122]

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117. *Dino*, 359 So.2d at 589 (La. 1978).

118. Of course, the defendant's waiver after receiving Miranda warnings must be proved if the confession resulted from custodial interrogation.

119. In *Connelly*, the Court shifted from a test of whether a confession was the product of a "rational intellect and free will" to the oppressiveness of police conduct. Colorado v. Connelly, 479 U.S. 157, 159, 107 S. Ct. 515, 518 (1986). The prosecution must prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972).

120. *Id.*

121. *Id.* at 163–164 (citations omitted).

122. In *Miller v. Fenton*, 474 U.S. 104, 105 (1985) (cited with apparent approval in *Connelly*), the Court had observed: Due process commands that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of

In its early confession cases, the Court seemed to embrace the use of extraordinary scrutiny in determining the voluntariness of a juvenile's confession. In 1948, the Supreme Court warned that admissions and confessions of juveniles must be voluntary and require special caution. In *Haley v. Ohio*,[123] the court reversed a conviction of a fifteen-year-old for murder and observed:

> [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. . . . [The youth] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.[124]

Though the *Miranda* warnings provide scant protection even for a rational adult against police overreaching, they provide nothing to an incompetent adult or child, especially a developmentally impaired child whose mechanism for self-preservation is distorted or nonexistent. Yet their comprehension of the *Miranda* warnings' is essential to their serving as a caution.[125] Giving the warnings to an individual with impaired comprehension is as effective as pouring water into a bucket that has holes in it. Thus, traditionally the Supreme Court has held that in order for any waiver of the Fifth Amendment to be accepted, the trial court must find that it is not only voluntarily given but knowingly given as well.[126] In *Gault*,[127] the Court held that the constitutional privilege against self-incrimination is applicable in juvenile proceedings "as it is with adults" and required clear and unequivocal evidence that the admission was made with knowledge that the juvenile was not required to speak, nor would he or she be penalized for maintaining silence. Citing *Haley*, the Court noted "formidable doubt" about the reliability and trustworthiness of children's confessions.

Is it possible that today's children are more sophisticated and mature than were the children of the 1960s? Certainly the MacArthur

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justice that they must be condemned." Cited in Connelly at 163.

123. Haley v. Ohio, 332 U.S. 598(1948).

124. *Id.* at 599–600. *See also* Gallegos v. Colorado, 370 U.S. 49 (1962) (reversing the conviction, finding a fourteen-year-old's confession inadmissible using a rule of special scrutiny).

125. In *Connelly*, the court did not reach the issue of whether the mentally compromised defendant could "knowingly" waive his Fifth Amendment rights. The dissenting opinion of Justice Brennan emphasizes that an intelligent waiver cannot be sustained when the suspect is mentally ill or developmentally disabled. Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, (1986).

126. Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938).

127. In re Gault, 387 U.S. 1, 55, 87 S. Ct. 1428, 1458 (1967).

Report would suggest not. While environmental factors such as greater mobility, experience, education and the wider world of television may contribute to a veneer of sophistication, the physiology is unchanged: the mental wiring of adolescents is no more complete now than it was forty years ago. This conclusion was reached in an empirical study specially focused on the ability of juveniles to understand their *Miranda* rights. Grisso and his co-authors found age-related developmental disabilities: juveniles under the age of fifteen demonstrate incompetence to waive their rights to silence and legal counsel; juveniles aged fifteen and sixteen who have IQ scores of eighty or below display similar incompetence and one-third of those with higher IQs were incompetent. [128] Other reports confirm the lack of understanding. For example, asked to explain what "you have the right to remain silent" meant, one fourteen year old adolescent responded with "Don't make noise."[129] The special vulnerabilities of children and adolescents, even without further disabilities due to mental retardation or illness, make them especially susceptible to interrogation techniques that are coercive or deceptive.[130] The IJA-ABA Juvenile Justice Standards consequently require consultation with counsel before a juvenile is questioned after arrest.[131]

In 1998, mirroring the public shift toward treating juveniles with greater accountability, the Louisiana Supreme Court removed its rather modest safeguard for the admissibility of a juvenile's pretrial confession, that "the child engaged in a meaningful consultation with an attorney or an informed [132] parent, guardian, or other adult

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128. Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134 (1980). See also National Association of Counsel for Children, Access to Justice for Children: Child's Law Manual Series 36 (2003) (citing studies).

129. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, ABA Criminal Justice Magazine, Summer 2000, at 27, 28.

130. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004) (analyzing, among others, seven demonstrably false confessions from juveniles).

131. IJA-ABA Juvenile Justice Standards Relating to Police Handling of Juvenile Problems Standard 3.2(b) and (c).

132. In State ex rel. Dino, 359 So. 2d 586 (La. 1978), the Louisiana Supreme Court led by Justice Dennis rejected the totality of circumstances test whereby a juvenile might be sufficiently mature to unilaterally waive his or her rights. Instead, it required that the state must affirmatively show that the juvenile "engaged in a meaningful consultation with an attorney or an informed parent guardian or other adult interested in his welfare." *Id.* at 594. Both the parents and the juvenile must be given the Miranda warnings, and the juvenile must be permitted to consult privately with the adult about waiver decision-making. This stance would appear to be in accord with the dictum of the Supreme Court in *Gault*. *See supra* note 32 and accompanying text.

interested in his welfare."[133] In its place the court in *State v. Fernandez* [134] substituted the always vague juvenile totality of circumstances test, which it termed the "majority" American view.[135]

The opinion hints that the totality standard used to evaluate the voluntariness of adult confessions is to be supplemented by some additional inquiry:

> A confession by a juvenile given without a knowing and voluntary waiver can be, and should be, suppressed under the totality of circumstances standard applicable to adults, supplemented by consideration of other very significant factors relevant to the juvenile status of the accused.[136]

The court did not elaborate nor otherwise identify factors unique to juvenile offenders. Nevertheless, the caution to consider any special juvenile vulnerabilities in assessing admissibility takes on added force in light of the MacArthur report and similar studies reinforcing the real and very troubling mental and psychological vulnerabilities of children and adolescents.[137]

In its juvenile cases, the United States Supreme Court consistently has used a three-pronged analysis in determining the constitutional rights of accused delinquents: What is the adult rule? Is there any adequate substitute for a procedural protection that is unique to the juvenile court? Is there any distinction between the status of a child or adult[138] or the context of a case, such as a school environment,[139] that would make the extension of adult protections inappropriate? If not, then the guarantee is extended. Aside from the imposition of capital punishment,[140] the Court has never addressed, except

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133. *Dino*, 359 So.2d at 594.

134. 1996–2719 (La. 1998), 712 So. 2d 485.

135. *Id.* at 989–90. What may have been the majority view at the time of *Fernandez*, before the release of the MacArthur Report, may not still exist today as courts become more aware of the universal mental deficits of young adolescents.

136. *Id.* at 489.

137. For persuasive criticism of the *Fernandez* decision, see Brobst, *supra* note 47.

138. *See* Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403 (1984) (approving preventive detention for a juvenile due to the child's lack of full liberty of movement). *But see also* United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2094 (1987) (where the court subsequently embraced the same policy for adults, finding that due process was not offended in either case).

139. *See* Tinker v. Des Moines, 393 U.S. 503, 89 S. Ct. 733 (1989) (finding a lesser set of first amendment rights of school children); New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733 (1985) (permitting searches by school officials on reasonable suspicion due to the officials' need to maintain discipline and provide protection to all students).

140. Roper v. Simmons, 125 S. Ct. 1183 (2005). The issue before the court was

obliquely in its early confessions cases, whether an accused child is ever entitled to *greater* protection under the Constitution than an accused adult. There is some evidence that a majority of the current court might find commonly shared adolescent characteristics enough to justify greater protection when the purpose of the law is to make reasonable inferences about understanding of rights and their waiver.[141]

The extension of the policy of an absolute right to counsel in felony-grade cases to pretrial interrogations is not the only new issue raised by the 2004 revision of article 810, but it is by far the most important.[142] The impact of requiring counsel when police interrogate a child held in custody would send aftershocks into every police station in the state. Alternatively, a court might find that adequate protection would be afforded by lesser measures such as requiring actual consultation with counsel before interrogation or requiring that the child be formally advised of his rights by the court before any interrogation occurs outside the presence of counsel.[143]

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whether one convicted of a capital crime committed before he was seventeen years old can be put to death. By a 5-4 decision, the United States Supreme Court determined that capital punishment for those under the age of eighteen is unconstitutional.

141. In *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140 (2004), the Court considered whether the adult standard for determining "custody" for purposes of triggering *Miranda* rights was applicable to a seventeen-year-old who was questioned by police. Four members of the Court refused to use a special rule but instead said the proper test was whether a "reasonable person" would have felt he or she was at liberty to terminate the interrogation. Justice O'Connor specially noted in her concurrence that the juvenile here was only months away from the age of majority. The four dissenters suggest that age is relevant to a determination of one's freedom of action. In clearer examples of differences in adult and juvenile capabilities, such as waiver decisions, the dissenters might be more forceful in insisting upon greater protection for less competent persons.

142. An ambiguity exists concerning when the absolute right to counsel is triggered. Louisiana Children's Code article 810(D) prohibits waiver when the child is "charged with" a felony-grade delinquent act. La. Ch. Code art. 810(D). Usually, the provisions of the delinquency title of the Children's Code refer to "alleging" a delinquent act or that a child is "accused of" some delinquent act; "charging" is less frequently used, though it does appear in Article 845(C), "Contents of petition." Counsel is clearly required as long as a pending petition asserts a felony-grade offense, but what if the child is charged with a felony but is willing to enter an admission to a lesser-included misdemeanor? Will counsel be required? The proper answer is that counsel should be required because technically, the formal charge remains a felony-grade offense. More importantly, counsel should be appointed to consult with any child before the critical decision is made to enter an admission. To do otherwise would subvert the policy of enhanced respect for the child's need of representation.

143. For all the reasons previously advanced, consultation with a parent or caretaker is an inadequate precaution for a child facing pre-trial interrogation.

VI. CONCLUSION

Many believe that "the only possible way to protect juveniles' constitutional right to the assistance of counsel is through [legislation or jurisprudence] that define[s]an absolute unwaivable right to counsel . . . ."[144] Most blue ribbon commissions have endorsed the reform: The President's Commission on Law Enforcement and Administration of Justice,[145] the National Advisory Committee on Criminal Justice Standards and Goals,[146] The American Bar Association-Institute of Judicial Administration,[147] and the Juvenile Justice Center of the American Bar Association,[148] to name just a few. In recognizing an absolute right to counsel in felony-grade offenses, the Louisiana Legislature entered the vanguard of the reform movement.

In a poor state with a juvenile justice system starved for resources, any allocation of public funds for lawyers to represent accused delinquents may seem to be a frivolous policy—a policy that only lines the pockets of greedy lawyers, or worse, a policy that wastes precious public resources. Surely it is wiser to use those funds for additional services for community alternatives to lock-ups for children, or for additional mental health treatment for children, or for preventive delinquency programs to salvage as many as possible of the delinquents who are victims of dysfunctional families? All those lost causes and lost children might be found. But the simple truth seems to be that, without child advocates, the funds for lawyers would never be reallocated–the system would never change. A lawyer representing a particular child in the juvenile court is the best catalyst for reform. Legislators, legislation drafters, judges, probation officers, social workers and other child advocates certainly contribute to reform, but the most important ombudsmen for accused delinquent children are all those conscientious lawyers, most of whom serve with little or no pay, who agree to accept an appointment and faithfully represent children.[149] The public is excluded from most

144. Shepherd, *supra* note 7.

145. The Challenge of Crime in a Free Society 87 (1967).

146. Report of the Task Force on Juvenile Justice and Delinquency Prevention 212 (O.J.J.D.P., Washington, D.C. 1976).

147. Juvenile Justice Standards Relating to Pretrial Court Proceedings 89 (1980).

148. A Call for Justice (1995).

149. Securing adequate funding for indigent juvenile defense remains an unsolved need although at its last two sessions, the legislature assigned a special Task Force on Indigent Defense Services. S.R. 112 and H.R. 151 (2003 Reg. Sess.); S.C.R. 136 (2004 Reg. Sess.) The House of Delegates of the Louisiana State

juvenile court proceedings.[150] A lawyer for an accused child serves many important functions, perhaps the most important of which is to ensure that any trial is fairly and constitutionally conducted. Without representation for a particular set of charges, the child's needs may not be known until after he or she is incarcerated and thus, the holes in the community's services and resources that might have rehabilitated the child will never be perceived. Counsel can ensure that a child who appears to be incompetent to stand trial is adequately evaluated or that the mental or physical disabilities of the child are diagnosed. Counsel can negotiate for diversion from a formal trial, for less severe charges or a less severe disposition. Counsel can insist that the appropriate disposition is matched to the child's needs, if the child is found "guilty."

Requiring counsel in serious delinquency cases is a reform step that must precede even critical issues of how the state is to fund its indigent defender services or otherwise underwrite the expenses of appointed counsel in private practice.[151] As Justice Kennedy observed in the majority opinion in *Roper v. Simmons*, children who commit crimes are constitutionally distinguishable from adults: "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[152] Although the role of the juvenile court is to serve as a "protecting parent rather than a prosecutor,"[153] in actuality children have been made victims of the very system that was created to *de*crimininalize them. Requiring counsel is the keystone in salvaging the integrity of Louisiana's juvenile courts, the safety of its juvenile institutions, the expansion of treatment alternatives and community resources, and to recovering all the children who might otherwise grow up as "lost causes."

Bar Association adopted a similar resolution urging the appointment of a Blue Ribbon Commission to develop a strategic plan for indigent defense reform and a timetable for implementation (June 12, 2003, cited in S.C.R. No. 136). More important is the acknowledgement in the latest resolution creating the task force that quality of representation is essential to a creditable system and can only be achieved through the allocation of sufficient resources to provide competitive salaries, continuing professional education, limited caseloads, adequate supervision and other quality control monitoring. S.C.R. 136 (2004 Reg.Sess.).

150. La. Ch. Code art. 407(A) (the public is excluded from all delinquency trials except charges of crimes of violence or second or subsequent felony-grade offenses).

151. *See supra* note 149.

152. Roper v. Simmons, 125 S. Ct. 1183, 1195 (2005) (citing Johnson v. Texas, 509 U.S. 350, 367 (1993).

153. Application of Gault, 99 Ariz. 181, 407 P.2d 760, 765 (1965).