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The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts

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THE FICTION OF JUVENILE RIGHT TO COUNSEL: WAIVER IN THE JUVENILE COURTS

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I. INTRODUCTION

The scene was familiar. Dad was drunk again. He stormed into the apartment, grabbed twelve-year-old Andrew and threw him against the wall, railing at him for driving the boy's mother away six years ago. This time a

neighbor called the police, and the next morning Andrew woke up in a group home for boys. When he made a dash for the front door, a counselor grabbed him, and Andrew shoved back. Again the police came. This time they carted Andrew off to juvenile detention. When Andrew appeared before the judge the following day, she asked him if he wanted a lawyer. Andrew did not know, so he turned to the caseworker and asked him. The caseworker said he had a right to a lawyer, but he did not need one, not here in juvenile court, not on a simple assault charge. Andrew told the judge “no” and admitted the charge of assault. After a cursory plea colloquy, the judge adjudicated Andrew “delinquent.” With that ruling, Andrew faced the prospect of spending the next six years of his life in a juvenile institution, with no further hearing or charge of misconduct.¹

In another courtroom, sixteen-year-old Thomas stood before a juvenile court judge for the first time in his life, more scared than he had ever been on the streets. Thomas was no angel, but it had not crossed his mind that he could land in court when he and his best friend Joey had set out to boost a car the night before. Thomas could not let Joey go down by himself, even though Thomas had given up and gone home before they found a car they wanted to take. He felt bad about going along with Joey in the first place, so when the judge asked if he wanted a lawyer, he said “no” and admitted the charges. Thomas served his year long probation without a hitch. When he turned eighteen, Thomas decided to follow in the footsteps of his older brother and enlist in the Army. The rejection letter stated simply, “felony record.” Thomas was hurt and angry. Why hadn’t anyone told him about this when he was in juvenile court two years ago?²

One would like to think that Andrew’s and Thomas’s stories are anomalies, but they are not. In juvenile courts across the country, children routinely give up their right to counsel without being given any explanation of what the right means or why they might choose to exercise it. As a result, these children unwittingly forego their right to have a lawyer represent them and, in so doing, expose themselves to the possibility of incarceration for the remainder of their youth, which may amount to many years, and to the loss of other opportunities later in life.³ Meanwhile, federal and state laws declare that the same children lack the legal capacity to enter into a

1. “Andrew” is a fictional character. His story is based on the experience of a child who became a client of the Juvenile Justice Clinic at the William S. Boyd School of Law (Boyd) shortly after the events described here.

2. “Thomas” also is fictional. His story is based on the experience of a family member of a student in the Boyd Juvenile Justice Clinic. See *infra* notes 446-71 and accompanying text for a discussion of the collateral consequences of a delinquency adjudication, including exclusion from the military.

3. See *infra* note 467 and accompanying text for a discussion of, inter alia, the limitations on educational and employment opportunities that can result from a delinquency adjudication.

contract, commit a tort, own property, marry, vote, or serve on a jury.⁴ The stated rationale for these laws and the legal disabilities they impose on children is that they are for the children's own protection. Yet our laws often do not protect a child from waiver of right to counsel even though that waiver imperils the child's constitutionally protected rights.⁵

Studies report that more than one-half of children accused of criminal acts appear in juvenile court without counsel and enter pleas to crimes they may or may not have committed.⁶ Those data are particularly disturbing in light of the long-standing recognition by the United States Supreme Court⁷ and legal scholars⁸ that the right to counsel is fundamental to the exercise of other procedural rights by those accused of criminal acts. As early as 1932, the Court stated that without the "guiding hand of counsel," an accused's "right to be heard would be, in many cases, of little avail."⁹ Without counsel, the accused's right to remain silent, to confront and cross-examine his accusers, and to have the state prove guilt beyond a reasonable doubt are all in jeopardy.¹⁰

The reasons for the absence of counsel in juvenile cases are not entirely clear. Commentators have raised such possible explanations as parental

4. MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 91-120 (1997) (discussing the comprehensive treatment of laws limiting and protecting juveniles); *see also* Willey v. Hudspeth, 178 P.2d 246 (Kan. 1947). In *Willey*, the judge overturned a seventeen-year-old's waiver of counsel and cited a litany of legal disabilities that protected the defendant. *Id.* at 521, 524. He could not have entered into a valid contract obligating himself, he could not have voted, and he could not have married without the consent of his parents; he could not alone, without a guardian or next friend, have said anything in a courtroom in a civil action which would be binding upon him. *Id.* at 521. The court then asked, "Should we say, in such circumstances, that about the only thing he could have done alone, with legal significance, was to have pleaded guilty to a felony in a court of law?" *Id.*

5. Barry C. Feld, *Criminalizing the American Juvenile Court*, in 17 CRIME AND JUSTICE; A REVIEW OF RESEARCH 197, 223 (Michael Tonry ed., 1993).

6. Barry C. Feld, *In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court*, 34 CRIME & DELINQ. 393, 406 (1988). Studies have shown that juveniles were represented in a "lower percentage of cases than were children in abuse and neglect [proceedings]," despite the ruling in *In re Gault*, 387 U.S. 1 (1967), that juveniles charged with delinquent (criminal) acts have a protected constitutional right to counsel. Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?," 64 FORDHAM L. REV. 1917, 1930 (1996) (citing U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION 11-14 (1990)).

7. *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963); *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

8. *See, e.g.*, Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right of an Accused,"* 30 U. CHI. L. REV. 1 (1962).

9. *Powell*, 287 U.S. at 64, 69.

10. *Gault*, 387 U.S. at 41; *Gideon*, 372 U.S. at 344-45; *see also In re Winship*, 397 U.S. 358, 368 (1970) (stating that due process requires proof beyond a reasonable doubt in juvenile delinquency proceedings).

reluctance to retain counsel, judicial ambivalence or even hostility to advocacy in the more treatment-oriented juvenile courts, and inadequate public defender services.¹¹ The most common explanation for the high number of unrepresented children, however, is that they waived their right to counsel at an early stage in the proceedings.¹² Reasons suggested for the high incidence of waiver by juveniles center on juvenile court judges and include judicial encouragement of waiver to ease the administrative burden on the court, cursory judicial advisories of rights that do not convey the importance of legal counsel, and judicial predetermination that counsel is not needed because probation is the anticipated outcome.¹³ This culture of waiver prevails in juvenile courts in many jurisdictions, despite the singular importance of the “guiding hand of counsel” and social-psychological studies showing that most children are developmentally incapable of exercising a valid waiver.¹⁴

Although a number of juvenile justice advocates and scholars have decried the prevalence of juvenile waiver of right to counsel,¹⁵ no one has undertaken a comprehensive study of the problem. This Article attempts to fill that gap. The Article begins with a review of the historical context in which juvenile right to counsel arose and proceeds to a discussion of the landmark *In re Gault*¹⁶ decision and the due process underpinnings of juvenile right to counsel. The Article then chronicles the long-standing practice of permitting juveniles to waive their right to counsel and shows that the vast majority of nearly one hundred post-*Gault* waiver of counsel cases were overturned on appeal, and those that were upheld are largely indistinguishable from those that were overturned. The ninety-nine collected cases may well be just the tip of the iceberg because of the low appeal rate in juvenile cases,¹⁷ but nineteen states are represented, and both Florida and

11. DOUGLAS C. DODGE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DUE PROCESS ADVOCACY, FACT SHEET NO. 49 (1997); *see also* Feld, *supra* note 5, at 223.

12. PATRICIA PURITZ ET AL., A.B.A., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 7-8 (1995) (making the point that under-representation is attributable, in large part, to waiver, and that “[w]aivers of counsel by young people are sometimes induced by suggestions that lawyers are not needed because no serious dispositional consequences are anticipated”); *see also* Tory J. Caeti et al., *Juvenile Right to Counsel: A National Comparison of State Legal Codes*, 23 AM. J. CRIM. L. 611, 617-18 (1996); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1111 (1995).

13. Feld, *supra* note 5, at 223.

14. *See infra* notes 332-67.

15. *See generally* DODGE, *supra* note 11; PURITZ ET AL., *supra* note 12, at 15; Caeti et al., *supra* note 12; Feld, *supra* note 12.

16. 387 U.S. 1 (1967).

17. *See infra* notes 376-79 and accompanying text. For example, based on the personal experience of the author, few appeals are taken in juvenile cases in Nevada, and no Nevada cases are among those reported here.

Ohio report over twenty cases overturning waivers in the juvenile court.¹⁸ The Article next examines the work of developmental psychologists, which reveals that juveniles as a class have limited decisionmaking abilities, lack an adequate understanding of their legal rights, and as a result are incapable of exercising an effective waiver. The Article concludes that permitting juveniles to waive their right to counsel constitutes a denial of that right and, accordingly, that due process prohibits juvenile courts from accepting waivers of counsel by juveniles against whom delinquency petitions have been filed.

II. THE HISTORY OF JUVENILE RIGHTS

The case of fifteen-year-old Gerald Gault reached the United States Supreme Court in 1967, nearly seventy years after the creation of the juvenile court system.¹⁹ Although an able lawyer represented young Gault at the high court, no lawyer had appeared at his side as he stood accused of criminal conduct in an Arizona juvenile court.²⁰ Nor had Gault received the protection of any of the other procedural safeguards available to adult defendants appearing in criminal courtrooms in the same courthouse.²¹ Gault was accused of a crime which put him in jeopardy of incarceration for the next six years of his life, but he had no rights. To understand how this Kafkaesque scene could exist in late twentieth century America requires an understanding of the history of the juvenile justice system in this country and the competing currents of humanitarianism and social control within that system.

A. *Juvenile Delinquency and the Progressive Movement*

The concept of juvenile delinquency dates to the seventeenth century, when it “arose in the wake of economic and political conditions endemic to nascent capitalist societies” in Europe.²² It was not until the late 1800s, however, that an effort was made to create a “coherent *system* of juvenile justice” out of the reforms of the previous two centuries.²³ The birth of the late nineteenth century era of juvenile justice was driven by the massive industrialization and relentless influx of immigrants that gripped the nation’s

18. See *infra* Appendices A & B.

19. See generally *In re Gault*, 387 U.S. 1 (1967).

20. See *id.* at 5-8.

21. *Id.*

22. ANTHONY M. PLATT, *THE CHILD SAVERS* xviii (2d ed., 1977) (quoting Herman Schwendinger & Julia R. Schwendinger, *Delinquency and the Collective Varieties of Youth*, 5 *CRIME & SOC. JUST.* 11 (1976)).

23. *Id.* at xviii (emphasis in original).

largest metropolitan areas at that time.²⁴ Concerns that “social cleavages were becoming so deep that they threatened social stability”²⁵ spawned the Progressive Movement, out of which the juvenile justice system emerged.²⁶

Progressive reformers tackled the full panoply of social problems generated by industrialization and modernization, from economic regulation to political reform and criminal justice.²⁷ Those who took up the cause of systematic juvenile justice reform became known as the “child savers.”²⁸ The child savers viewed themselves as “altruists and humanitarians dedicated to rescuing those who were less fortunately placed in the social order.”²⁹ History has generally perpetuated the humanitarian image of the child savers,³⁰ emphasizing the “noble sentiments and tireless energy of middle-class philanthropists.”³¹ Some historians, however, have seen the motivations of the child savers as a bit more complex. Anthony Platt, for example, observed that the impetus for the child-saving movement “came primarily from the middle and upper classes, who were instrumental in

24. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 6-7 (1978). Juvenile court historian Ellen Ryerson has written that “it was not the sheer size of cities which was alarming; it was also the proportion of their populations which was poor and foreign.” *Id.* at 6. The immigrants during the late 1800s and early 1900s were “more alien in their origins and eventually more threatening in their numbers than the United States had ever encountered.” *Id.* at 6-7. While earlier immigrants had come largely from northern Europe, the percentage of the entering population arriving from southern and eastern Europe amounted to almost twenty percent in the 1880s, rose to fifty-two percent in the 1890s, and to seventy-four percent between 1901 and 1910. *Id.* at 7.

25. *Id.* at 9.

26. PLATT, *supra* note 22, at xix. Platt describes the Progressive Movement as a “movement designed to rescue and regulate capitalism through developing a new political economy, designed on the one hand to stabilize production and fiscal planning, and on the other to co-opt the rising wave of popular militancy” reflected in the growing demands of the working class for changes in social and economic conditions. *Id.*

27. See generally VICTORIA GRETIS, *THE JUVENILE COURT AND THE PROGRESSIVES* 9-27 (2000).

28. As defined by Anthony Platt, the term “child savers” is used to “characterize a group of ‘disinterested’ reformers who regarded their cause as a matter of conscience and morality, serving no particular class or political interests.” PLATT, *supra* note 22, at 3.

29. *Id.*

30. See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE JUSTICE: A CENTURY OF CHANGE* (1999); JOHN C. WATKINS, JR., *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS* 27-28 (1998); Charles L. Chute, *Fifty Years of the Juvenile Court*, NAT'L PROB. & PAROLE ASS'N Y.B. 1 (1949); Charles L. Chute, *The Juvenile Court in Retrospect*, FED. PROBATION 13 (Sept. 1949); Harrison A. Dobbs, *In Defense of Juvenile Courts*, FED. PROBATION 29 (Sept. 1949); Bobby Scott et al., *Juvenile Justice: Reform After One-Hundred Years*, 37 AMER. CRIM. L. REV. 1409 (1999).

31. PLATT, *supra* note 22, at 10.

devising new forms of social control to protect their power and privilege.”³² Platt stated, further:

While the child savers justified their reforms as humanitarian, it is clear that this humanitarianism reflected their class background and elitist conceptions of human potentiality. The child savers shared the view of more conservative professionals that “criminals” were a distinct and dangerous class, indigenous to working-class culture, and a threat to “civilized” society.³³

As a consequence, child savers were often “anti-immigrant, distrustful of the poor, and willing to impose their own cultural standards on others.”³⁴

Platt’s view, however, does not account for or diminish the significance of the work of such progressive child savers as Jane Adams, Lucy Flower, and Julia Lathrop, who primarily were concerned with diverting children from the adult criminal justice system.³⁵ The objective of protecting young delinquents from the destructive and punitive nature of the criminal justice system was the primary motivator for those who first recognized juvenile delinquency and began to conceptualize the juvenile court.³⁶ Illinois Juvenile Court Judge Richard Tuthill would later remark:

No matter how young these children were indicted, prosecuted, and confined, as criminals, just the same as were adults pending and after a hearing, and thus were branded as criminals before they knew what crime was. The State kept these little ones in police cells and jails among the worst men and women to be found in the vilest parts of the city and town. Under such treatment they developed rapidly, and the natural result was that they were thus educated in crime and when discharged were well fitted to become the expert criminals and

32. *Id.* at xx. Platt is quick to point out that the reforms brought about by the child-saving movement were “not achieved without conflict within the ruling class” and represented “a victory for the more ‘enlightened’ wing of corporate leaders who advocated strategic alliances with urban reformers and supported liberal reforms.” *Id.*

33. *Id.* at xxvii-xxviii.

34. GRETIS, *supra* note 27, at 13.

35. Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Practice*, 88 CAL. L. REV. 2477, 2484 (2000). Zimring notes, too, the impetus of the child-savers’ belief in the positive good that a justice system focused on the social welfare and needs of the child could bring. *Id.* at 2482-83. Zimring contends that late twentieth century accounts of the juvenile court, which have emphasized this “interventionist” justification for a separate juvenile justice system, have had the unfortunate consequences of underestimating the paramount importance to the system’s founders of avoiding criminal treatment of children and confounding our present understanding of the developing nature of juvenile justice throughout the twentieth century. *Id.* at 2484.

36. *Id.* at 2482-84.

outlaws who have crowded our penitentiaries and jails. The State had educated innocent children in crime, and the harvest was great.³⁷

Central to achieving the diversion of juvenile delinquents from the criminal justice system were the Progressives' trust in the State as a benevolent being that could be the principal agent for social change and their faith in the ability of science to solve social problems.³⁸ The Progressives' unequivocal trust of state-instituted social control, coupled with a new conception of children as dependent beings, not just small adults, led to protective laws regulating child labor, child welfare, and compulsory education.³⁹ Progressive reformers' faith in science caused them to challenge the traditional view of crime as a product of the free will of bad actors and to turn to the social sciences to identify the underlying causes of criminal behavior. The maturing science of positivist criminology, which the Progressives embraced, moved away from treating the accused as morally responsible individuals capable of exercising their own free will and instead began attributing criminal conduct to forces external to and beyond the control of the individual accused—biological, psychological, sociological, and environmental influences.⁴⁰ Adherents of positivist criminology advocated a system of “individualized justice” in which the personal and social background of the offender became highly relevant, and punishment and deterrence assumed little relevance.⁴¹ This approach reflected a new “rehabilitative ideal” founded on the reformers' belief in the ability of human beings to change for the better.⁴²

B. *The Creation of the Juvenile Court*

Juvenile court is a direct outgrowth of the Progressives' protective and rehabilitative ideals. The creation of the court “marked the height of confidence in the possibility of reclaiming delinquents for an orderly and

37. *Id.* at 2482, quoting Richard S. Tuthill, *History of the Children's Court in Chicago*, in CHILDREN'S COURTS IN THE U.S.: THEIR ORIGIN, DEVELOPMENT, AND RESULTS 1, 1 (Richard H. Ward & Austin Flowers eds., 1973) (1904).

38. *Id.* at 9-27.

39. Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 145-46 (1984).

40. DAVID E. GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES 87 (1985); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 298 (1980); see also CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 26 (1998).

41. MANFREDI, *supra* note 40, at 26.

42. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1986); see also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 335-36 (1999) (hereinafter *Transformation II*).

productive social life.”⁴³ Founded in Chicago in 1899,⁴⁴ the juvenile court combined the new conception of children as vulnerable dependents with the rehabilitative orientation of the child savers to create a “judicial-welfare alternative to criminal justice.”⁴⁵ Until then, the judicial system had treated juveniles much the same as adult offenders.⁴⁶ The concept of *mens rea*—that criminal responsibility can attach only to those capable of knowing right from wrong—had provided the only legal defense at common law for youthful offenders.⁴⁷ The common law infancy doctrine presumed that children under the age of seven lacked the capacity to form criminal intent, treated children fourteen and older as fully responsible adults, and created a rebuttable presumption that children between the ages of seven and fourteen lacked criminal capacity.⁴⁸

In the new juvenile court, however, assessing criminal responsibility became subordinate to assuring the social welfare of the accused child. The juvenile court replicated the historical *parens patriae*⁴⁹ practice of the courts of chancery in England and the United States to “exercise jurisdiction for the protection of the unfortunate child”⁵⁰ when the natural parents had failed in their parental responsibilities. Instead of punishment, children received treatment through a benign court system whose purpose was to identify and implement the appropriate intervention strategy to serve the

43. RYERSON, *supra* note 24, at 14-15.

44. The Cook County Juvenile Court was established pursuant to an 1899 enactment of the Illinois legislature, entitled *An Act to Regulate the Treatment and Control of Dependent Neglected and Delinquent Children*, 1899 ILL. LAWS 131. See DAVID S. TANENHAUS, *POLICING THE CHILD: JUVENILE JUSTICE IN CHICAGO, 1870-1925* (1997) (unpublished Ph.D. dissertation, The University of Chicago) (UMI Dissertation Services copy cataloged in the collection of the Boyd School of Law Library) (providing a comprehensive treatment of the genesis of the juvenile court system in Chicago). Some historians dispute Illinois’ claim to being the first state to create a special court for children. In 1874 and 1892 Massachusetts and New York, respectively, enacted laws for trying juveniles separately from adults; Colorado enacted an educational law in 1899 which, in effect, created a juvenile court. PLATT, *supra* note 22, at 9. However, no one challenges Chicago’s primacy in establishing the first comprehensive system of juvenile justice. *Id.* at 10.

45. *Transformation II*, *supra* note 42, at 337.

46. BARRY C. FELD, *BAD KIDS* 47 (1999).

47. *Id.*

48. 1 BLACKSTONE’S COMMENTARIES ON THE LAWS OF ENGLAND 463-64 (George Sharswood ed., 1871).

49. The doctrine of *parens patriae* was a creature of the English courts of chancery, whose focus was not on deviant behavior, but on property matters. Where parents were absent or otherwise incapable of managing the material affairs of their children, the courts would take over those responsibilities. Thus, chancery provided a basis for juvenile courts to assert jurisdiction over children as wards of the court, to protect and provide guidance in lieu of proper parental support. RYERSON, *supra* note 24, at 63-77 (critiquing use of *parens patriae* to justify authority of juvenile court and keep due process out of juvenile court).

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

“child’s ‘best interests.’”⁵¹ Because Progressives saw the consequences children faced as so benign, they believed that the procedural protections accorded adult criminal defendants were unnecessary.⁵² By 1925, all states except Maine and Wyoming, and more than twenty other nations, including Lenin’s Russia, had established juvenile courts.⁵³

Support for an informal, treatment-oriented approach to juvenile crime, however, was not universal. The doctrine of *parens patriae* recognized only the child’s right to custody, not her right to liberty and, as such, elevated social control over humanitarianism as the operative principle of juvenile justice.⁵⁴ One of the earliest critics of the juvenile court, Edward Lindsey, observed in 1914 that in the juvenile court system, “[t]here is often a very real deprivation of liberty, nor is that fact changed by refusing to call it punishment or because the good of the child is stated to be the object.”⁵⁵ Lindsey and others doubted the wisdom of a system that gave sweeping custodial powers to juvenile court judges, unchecked by any counterbalancing rights of children.⁵⁶ Those critics’ concerns were not surprising, given that “the founding principles of juvenile courts ‘made the personality of the judge, his likes and dislikes, attitudes and prejudices, consistencies and caprices, the decisive element in shaping the character of his courtroom.’”⁵⁷

Moreover, the Progressives’ rhetoric did not always match reality. Thirty years after the birth of the juvenile court, conditions in most juvenile institutions were no more conducive to treatment and positive change than

51. *Transformation II*, *supra* note 42, at 337.

52. *Id.*

53. TANENHAUS, *supra* note 44, at 6.

54. See HARJIT S. SANDHU & C. WAYNE HEASLEY, *IMPROVING JUVENILE JUSTICE: POWER ADVOCACY, DIVERSION, DECRIMINALIZATION, DEINSTITUTIONALIZATION, AND DUE PROCESS JUSTICE* 56 (1981).

55. Edward Lindsey, *The Juvenile Court Movement From a Lawyer’s Standpoint*, *ANNALS AMER. ACAD. POL. & SOC. SCI.* 145 (1914).

56. FELD, *supra* note 46, at 7. Juvenile court judges had expansive powers. They could freely decide to leave children with their parents or other caregivers, put them on probation under the supervision of a probation officer, place them in a suitable family home, or send them to an institution, all without constraint or oversight. *Id.* at 70 (citing JOSEPH HAWES, *CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA* (1971)). They imposed indeterminate and nonproportional dispositions, subjectively and without limits. *See id.*; *see also* ROTHMAN, *supra* note 40, at 268.

57. MANFREDI, *supra* note 40, at 32 (quoting DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 238 (1971)). A German professor who came to the United States in the early 1900s to study the American juvenile justice system observed of proceedings in Judge Julian Mack’s court in Chicago, “They have colossal powers, your judges, colossal!” TANENHAUS, *supra* note 44, at 179 (quoting Henry K. Webster, *The Square Deal with Children*, *AMER. ILLUSTRATED MAG.* 394, 401 (Feb. 1906)).

their adult counterparts.⁵⁸ As one critic observed, “[t]he closer the scrutiny of juvenile confinement, the more inadequate and, indeed, punitive, the programs turned out to be.”⁵⁹ By the mid to late 1930s, prominent critics had become outspoken. Dean Roscoe Pound minced no words when he wrote in 1937 that “[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts.”⁶⁰ Even so, it took three more decades and the “Due Process Revolution” of the Warren Court to bring about any semblance of change.

C. *The Seeds of Change*

The 1964 annual meeting of the National Council of Juvenile Court Judges marked a watershed in the attitude of the United States Supreme Court toward juvenile justice. Chief Justice Earl Warren announced to a “dismayed audience of juvenile court judges still attached to *parens patriae* ideals” that change was afoot in the juvenile justice arena.⁶¹ He made the bold statement that juvenile courts, like adult criminal courts, “‘must function within the framework of law’ and provide juveniles with due process protection against capricious decisionmaking.”⁶² Although the Chief Justice did not elaborate the specific elements of due process to be accorded juveniles, he expressed the Court’s willingness to undertake to define those elements when the “proper cases” came before it.⁶³ To the new breed of reformers who had become disenchanted with the increasingly punitive nature of the juvenile courts and the unrestrained discretion of juvenile court judges, Chief Justice Warren’s statement was a welcome invitation.⁶⁴

The first case to reach the Supreme Court in response to that invitation was *Kent v. United States*.⁶⁵ The issue in *Kent* was whether the sixteen-

58. ROTHMAN, *supra* note 40, at 268. Rothman used the term “conscience and convenience” to describe the judicial decision whether to assign a delinquent youth to probation or commit him to a secure institution. *See generally id.*

59. *Id.* at 268.

60. ROSCOE POUND, *Foreword*, in YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, xxvii (1937), *quoted in In re Gault*, 387 U.S. 1, 18 (1967); *see also* Holmes Appeal, 109 A.2d 523, 528 (Pa. 1954) (Musmanno, J., dissenting) (stating that what a child charged with a crime needs is “justice not . . . *parens patriae*”).

61. MANFREDI, *supra* note 40, at 52.

62. *Id.* (quoting Earl Warren, *Equal Justice for Juveniles*, 15 JUV. CT. JUDGES J. 14 (1964)). Earlier enactments in some states reflected the growing concern that due process enter the juvenile courts. *See* David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 790-91 (1966), *citing* CAL. WELF. & INST. CODE §§ 633, 634, 659, 700 (Supp. 1964) (requirement of counsel as part of 1961 Act); N.Y. FAMILY CT. ACT §§ 241-249, 741 (institution of law guardian system in New York) (1998).

63. MANFREDI, *supra* note 40, at 52.

64. *See id.*

65. 383 U.S. 541, 555 (1966).

year-old defendant was entitled to a hearing at which he was represented by counsel prior to the juvenile court's waiver of its exclusive jurisdiction and transfer of his case to adult criminal court.⁶⁶ The statutory procedure at the time permitted the court to waive jurisdiction after "full investigation" in any case in which a child over sixteen years of age was charged with an offense that would amount to a felony in an adult case.⁶⁷ The Supreme Court surveyed the evidence regarding Morris Kent and other youthful offenders in similar cases and found "grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."⁶⁸ The Court refused to condone such inequities.⁶⁹ The Court acknowledged that the transfer statute gave the juvenile court considerable latitude, but stated, that "latitude is not complete. At the outset, it assumes procedural regularity sufficient . . . to satisfy the basic requirements of due process and fairness It does not confer upon the Juvenile Court a license for arbitrary procedure."⁷⁰

The Court ruled that the applicable statute, read in the context of due process and right to counsel, required a hearing at which Morris Kent was entitled to be represented by a lawyer who had access to the social records and other reports considered by the court.⁷¹ However, the Court stopped short of granting young Kent's request to rule that the constitutional guarantees applicable to adults charged with the same offenses must apply in juvenile court proceedings.⁷² The failure of *Kent* to decide those broader issues set the stage for the Court's landmark *Gault* decision the following year.

D. *Due Process in the Juvenile Court*

Gerald Gault was fifteen when he was adjudicated delinquent for making obscene telephone calls to a female neighbor.⁷³ The Arizona law that Gault had violated was a misdemeanor for which the criminal penalty applicable to an adult was a fine of from \$5 to \$50 or imprisonment for not more than two months.⁷⁴ The Arizona Juvenile Code, however, gave the juvenile court

66. *See generally id.*

67. *Id.* at 547-48.

68. *Id.* at 556.

69. *See id.* at 552-53.

70. *Id.* at 553. The Court further emphasized its condemnation of the juvenile court's arbitrary procedures when it later stated "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness." *Id.* at 555.

71. *Id.* at 557.

72. *See generally id.*

73. *In re Gault*, 387 U.S. 1, 4 (1967).

74. *Id.* at 8-9. The section of the Arizona Criminal Code applicable to Gerald's crime, ARIZ.

broad discretion in assessing the appropriate disposition.⁷⁵ The juvenile court judge took full advantage of this discretion and, after a summary hearing, committed Gault to the State Industrial School “for the period of his minority [that is, until 21], unless sooner discharged by due process of law.”⁷⁶ On appeal to the United States Supreme Court, Gault argued that the Arizona Juvenile Code was invalid on its face or as applied, because it permitted a child to be taken from his parents and committed to a state institution in proceedings in which the court had “virtually unlimited discretion.”⁷⁷

The Supreme Court agreed and thus launched what it termed the “constitutional domestication” of the juvenile court system.⁷⁸ Writing for the majority, Justice Abe Fortas declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁷⁹ The Court held that the Due Process Clause of the Fourteenth Amendment required that children charged with criminal acts enjoy several procedural protections: the right to notice of the charges against them,⁸⁰ the right to counsel to assist in their defense,⁸¹ the right to confront and cross-examine the witnesses against them,⁸² and the privilege against self-incrimination.⁸³

REV. STAT. § 13-377 (1956), provided that a person who “in the presence or hearing of any woman or child . . . uses vulgar, abusive or obscene language, is guilty of a misdemeanor.” *Id.* at 8.

75. *See id.* at 10.

76. *See id.* at 7-8 (quotation marks omitted).

77. *Id.* at 10.

78. *See id.* at 22 (“the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication”).

79. *Id.* at 13.

80. *Id.* at 33-34 (discussing notice of charges).

81. *Id.* at 41 (discussing the right to counsel).

82. *Id.* at 57 (discussing the right to confrontation and cross-examination). The Court did not find a due process violation in the Juvenile Code’s failure to provide a transcript and a mechanism for appeal. *Id.* at 58. However, based on the burdens imposed on the habeas process by the absence of those mechanisms, the Court urged the Arizona Supreme Court to take appropriate actions. *Id.*

83. *Id.* at 55. The Court treated the privilege against self-incrimination differently from the other rights, ruling that the Fifth Amendment privilege, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, extended to children in juvenile court proceedings as well as to adults. *Id.* While the Court could have similarly incorporated the Sixth Amendment rights to notice of charges, counsel, and confrontation and cross-examination into the Due Process Clause, it did not, for reasons which the Court did not articulate. *See generally id.* Justice Harlan dissented from the Fifth Amendment portion of the majority opinion. *Id.* 66-78 (Harlan, J., concurring in part and dissenting in part). His view was that the Court should have limited its ruling to those restrictions which would “later permit the orderly selection of any additional protections.” *Id.* at 72 (Harlan, J., concurring in part and dissenting in part). That approach would permit the Court to “guarantee the fundamental fairness of the proceeding, and yet permit the States to continue development of an effective response to the problems of juvenile crime.” *Id.*

The Court criticized the *parens patriae* approach of the juvenile courts, decrying its meaning as “murky”⁸⁴ and finding the constitutional basis “for this peculiar system . . . to say the least—debatable.”⁸⁵ The Court was particularly troubled by the breadth of juvenile court judges’ discretion—a discretion so broad that a child could lose six years of his freedom for an act which would have cost an adult no more than two months in restraint.⁸⁶ After reviewing the history of the juvenile court, the Supreme Court concluded that “[j]uvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”⁸⁷ The remedy for the individual unfairness and unfortunate dispositions so common in juvenile courts, the Supreme Court concluded, was “the procedural regularity and the exercise of care implied in the phrase ‘due process.’”⁸⁸

The *Gault* Court’s reliance on fundamental fairness⁸⁹ embodied in due process as the touchstone for the constitutional rights it recognized⁹⁰ was

(Harlan, J., concurring in part and dissenting in part). Justice Harlan criticized the majority, asserting that it had “asked the wrong questions: the problem here is to determine what forms of procedural protection are necessary to guarantee the fundamental fairness of juvenile proceedings, and not which of the procedures now employed in criminal trials should be transplanted intact to proceedings in these specialized courts.” *Id.* at 74 (Harlan, J., concurring in part and dissenting in part).

84. *Id.* at 16.

85. *Id.* at 17.

86. *See id.* at 29-30.

87. *Id.* at 18.

88. *Id.* at 27-28. *Gault* was not the first case to recognize juveniles’ right to counsel as a matter of due process. In a 1948 decision concerning a juvenile being tried in adult court, the Supreme Court said that such incapacities as youth or ignorance would require appointment of counsel under the Due Process Clause of the Fourteenth Amendment. *Wade v. Mayo*, 334 U.S. 672, 683 (1948). *See infra* notes 166-69 and accompanying text.

89. The *Gault* majority did not use the term “fundamental fairness,” although both Justice Black and Justice Harlan articulated it to characterize the majority’s constitutional standard. *Gault*, 387 U.S. at 61-62 (Black, J., concurring); *id.* at 72 (Harlan, J., concurring in part and dissenting in part). In addition, subsequent decisions of the Court characterized *Gault* in that manner, beginning with *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). *See also* Schall v. Martin, 467 U.S. 253, 263 (1984); *Breed v. Jones*, 421 U.S. 519, 531 (1975). “Fundamental fairness” was not a newly coined term; Supreme Court decisions had used it for decades to define both those individual rights that are to be deemed “fundamental” and the procedures to be applied in addressing those rights. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 67-73 (1932) (basing recognition of right to appointed counsel on fundamental fairness and due process and limiting right to cases involving situations similar to those in the case before it, the famous “Scottsboro Boys” capital case).

90. Although the *Gault* Court relied on the due process concept of fundamental fairness as the principal constitutional framework for its recognition of juveniles’ rights in delinquency proceedings, it refused to be constrained by it. In determining whether the privilege against self-incrimination was available in juvenile court proceedings, it was not the danger of unreliability of juvenile confessions, a fairness concern, that impelled the Court’s conclusion. Instead, the

significant because it focused the inquiry on the process of juvenile adjudication and the protections necessary to make that process fair, not on whether juveniles' rights should mirror those of adult defendants.⁹¹ The fundamental fairness doctrine permitted the Court to stake out a middle ground that abandoned the former "worst of both worlds" juvenile court regime in which children received neither the constitutional protections afforded adult defendants nor the care and treatment that justified the absence of those protections.⁹² At the same time, the Court ushered in a new system that would accommodate both.

Court said, the

roots of the privilege are . . . far deeper. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability.

Gault, 387 U.S. at 47. Thus, the proper protection against the evils of self-incrimination was the specific protection of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, *id.*, not the fundamental fairness analysis by which the other *Gault* rights were discerned.

91. The Justices were not of one mind in adopting the fundamental fairness analysis for juvenile due process. Justice Black argued in his concurring opinion that the majority should have relied on the Fifth and Sixth Amendments as incorporated into the Fourteenth Amendment by the Due Process Clause, not on the independent "fundamental fairness" doctrine of due process. *Id.* at 61 (Black, J., concurring). He believed that juveniles' constitutional rights are no different than adults and that those rights "are specifically granted by . . . the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States." *Id.* (Black, J., concurring). Black's concurrence was consistent with his view that the Due Process Clauses of the Fifth and Fourteenth Amendments encompass no further rights than those stated in the Bill of Rights, but are limited to assuring enforcement of the "law of the land," which he defined as any duly enacted legislation, unless the particular law is otherwise unconstitutional. *E.g., In re Winship*, 397 U.S. 358, 377-78 (1970) (Black, J., dissenting) (arguing that due process does not require proof beyond a reasonable doubt in juvenile delinquency proceedings). Justice Black reflects the thinking of the legal positivists, who treat the delineation of specific rights in the Bill of Rights as proof that the framers intended protection of those rights, and those rights alone. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 *YALE L.J.* 455, 464 (1986). Redish and Marshall criticize the positivists and cite as support for their critique James Madison's caution that "[n]o language is so copious as to supply words and phrases for every complex idea." *Id.* at 464 n.38. (citing *THE FEDERALIST* No. 37 at 236 (J. Madison) (J. Cooke ed., 1977)). The authors state, further, that it is not unreasonable "to suggest that, notwithstanding the Bill of Rights' enumeration of specific procedures, the framers fashioned an open-ended clause to cover both those procedures that they might have accidentally omitted and those that might prove necessary in future times." *Id.* at 464.

92. *See* *Kent v. United States*, 383 U.S. 541, 547-48 (1966); *see also supra* notes 65-72 and accompanying text.

The Court found in the fundamental fairness guarantee the “jurisprudential basis for affording the essential protections of the adult criminal process while preserving the rehabilitative goals, confidentiality, and other benevolent features of the juvenile court process.”⁹³ While recognizing that due process requires a procedural regularity then lacking in juvenile court proceedings, the *Gault* Court reassured skeptics that it does not “require that the conception of the kindly juvenile judge be replaced by its opposite.”⁹⁴ Nor would any of the due process protections mandated by the Court undermine the beneficial qualities of juvenile court proceedings.⁹⁵ The Court made clear, however, that juveniles’ due process rights would no longer be sacrificed to *parens patriae* notions of judicial beneficence.⁹⁶

In the years following *Gault*, the Court continued to define juveniles’ due process rights.⁹⁷ Three years after *Gault*, the Court issued two decisions that refined the meaning of fundamental fairness in juvenile proceedings. In the first case, *In re Winship*,⁹⁸ the Court held that due process requires proof beyond a reasonable doubt for juvenile defendants as well as for adults.⁹⁹ The Court explained the historical grounding of the reasonable doubt standard as a common law tradition “developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.”¹⁰⁰ The Court reasoned that *parens patriae* intervention may be desirable for dealing with wayward youths, but that such “intervention cannot take the form of subjecting the child to the stigma of a finding that he violated a criminal law and to the possibility of institutional confinement on proof insufficient to convict him were he an adult.”¹⁰¹ The reasonable doubt standard, the Court said, safeguards the

93. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 558 (1998).

94. *Gault*, 387 U.S. at 27-28; see also *id.* at 21 (“the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process”); *id.* at 22 (“the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication. For example, the commendable principles relating to the processing and treatment of juveniles separately from adults are in no way involved or affected by the procedural issues under discussion”); *id.* at 25 (“there is no reason why, consistently with due process, a State cannot continue, if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles”).

95. *Id.* at 25.

96. *Id.* at 17-19.

97. See generally *In re Winship*, 397 U.S. 358 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1970).

98. 397 U.S. 358 (1970).

99. *Id.* at 362.

100. *Id.*

101. *Id.* at 367.

accused by “reducing the risk of convictions resting on factual error,” and thus promotes a fundamentally fair trial process.¹⁰² However, just a few months after *Winship*, the Court used the same analysis to reject a juvenile’s demand for a jury trial.

In *McKeiver v. Pennsylvania*,¹⁰³ the Court held that fundamental fairness does not require jury trials for juveniles.¹⁰⁴ The Court ignored *Gault*’s Fifth Amendment self-incrimination analysis and reasoned simply that trial by jury is not a “necessary component of accurate factfinding.”¹⁰⁵ The Court cited *Gault*’s and *Winship*’s reliance on fundamental fairness and its implicit requirement of accurate factfinding as the applicable due process standard, and noted that the requirements of notice, counsel, confrontation, cross-examination, and the highest standard of proof “naturally flowed” from an emphasis on accurate factfinding.¹⁰⁶ That reasoning, however, did not apply to trial by jury.¹⁰⁷ The Court expressed concern that jury trials would effectively end the “idealistic prospect of an intimate, informal protective” juvenile court proceeding and remake it into a fully adversarial criminal process.¹⁰⁸ The Court concluded that affording jury trials in juvenile court would not contribute positively to the factfinding process engaged in by judge and jury.¹⁰⁹ Therefore, due process did not require trial by jury in juvenile court proceedings.¹¹⁰

The Court later extended another important constitutional right to juveniles in *Breed v. Jones*,¹¹¹ when it held that the double jeopardy bar contained in the Fifth Amendment applies to delinquency adjudications.¹¹² However, two cases in the mid-1980s, like *McKeiver*, limited the rights of

102. *Id.* at 363.

103. 403 U.S. 528 (1970).

104. *Id.* at 543.

105. *Id.* *McKeiver*’s reduction of due process to “accurate factfinding” ignores the deeper individual and societal values represented by fundamental fairness and due process. Of course, had the Court adopted this broader view of due process, it would have been more difficult to support its rejection of jury trials for juveniles.

106. *Id.* at 543.

107. *Id.* at 543-45.

108. *Id.* at 545.

109. *Id.* at 547.

110. *Id.* Professors Martin Guggenheim and Randy Hertz challenge the Court’s conclusions as to the inherent fairness of judges as factfinders and suggest reforms to improve the adjudicatory process in juvenile bench trials. Guggenheim & Hertz, *supra* note 93, at 582-93. They also note that *McKeiver*’s appellate counsel did not emphasize the Court’s fairness analysis sufficiently, nor did counsel make clear why trial by jury is indispensable to fairness. *Id.* at 560.

111. 421 U.S. 519 (1975). Unlike *Winship* and *McKeiver*, the Court relied on the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment, not on the fundamental fairness principle of the Due Process Clause. *Id.* at 530, 541.

112. *Id.* at 531.

juveniles. In *Schall v. Martin*,¹¹³ the Supreme Court ruled that pretrial detention does not deprive juveniles of any liberty right,¹¹⁴ reverting to the pre-*Gault* notion that children are always in some form of custody and, therefore, can be detained for their own good.¹¹⁵ The next year, in *New Jersey v. T.L.O.*,¹¹⁶ the Court ruled that strict Fourth Amendment procedures do not apply in schools, thus affording children and adolescents a lesser right than adults to be free from unreasonable searches and seizures.¹¹⁷

E. Juvenile Right to Counsel

Although in the years since *Gault* the Supreme Court has placed limitations on the rights of juveniles which were not presaged by *Gault*'s sweeping due process analysis, the Court has not retreated from its embracing of right to counsel as the cornerstone of due process. Indeed, in the sole post-*Gault* decision that addresses right to counsel, *Fare v. Michael C.*,¹¹⁸ the Court reinforced the significance of the lawyer, in contrast to other adult advisers, to the preservation of juveniles' rights.¹¹⁹ First, to *Gault*.

Gault's rejection of *parens patriae* is nowhere more profound than in its ruling that juveniles in delinquency proceedings have a right to counsel. Until *Gault*, the Supreme Court had not addressed the question whether minors facing delinquency charges in juvenile court had the right to counsel.¹²⁰ Given the opportunity, the Court's answer was emphatic and unequivocal:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of 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

113. 467 U.S. 253 (1984).

114. *Id.* at 268.

115. *Id.* at 265.

116. 469 U.S. 325 (1985).

117. *Id.* at 341-44.

118. 442 U.S. 707 (1979).

119. *Id.* at 719.

120. A year before *Gault*, the *Harvard Law Review* published a study that criticized traditional juvenile court practices and provided empirical support for the legal arguments being advanced by the court's critics. Barrett et al., *supra* note 62, at 775-810. The study reported two astonishing facts: that counsel appeared on behalf of juveniles in no more than five percent of the cases examined and that juvenile court judges actively discouraged juveniles from obtaining lawyers. *Id.* (citing Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775-810 (1966)).

represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.¹²¹

The Court rejected the Arizona Supreme Court's position that due process did not require a right to counsel in juvenile proceedings because the probation officer and judge were fully able to protect the child's interests.¹²² The court noted that probation officers' primary responsibilities conflicted with the duties a lawyer owes a client.¹²³ Under Arizona law, the duties of probation officers included initiating delinquency proceedings by filing and verifying petitions alleging delinquency,¹²⁴ and testifying in court against the child alleged to be delinquent.¹²⁵ Having dispensed with the state's probation officer argument, the Court then delivered the death blow to *parens patriae*: "Nor can the judge represent the child. There is no material difference in this respect between adult and juvenile proceedings of the sort here involved."¹²⁶

The Court relied on the seminal right to counsel cases, *Powell v. Alabama*¹²⁷ and *Gideon v. Wainwright*,¹²⁸ in extending right to counsel to children in delinquency proceedings.¹²⁹ In *Powell*, the famous "Scottsboro Boys" case, the Court ruled that capital defendants are entitled to counsel, and in so doing emphasized the essential role played by lawyers for the criminally accused: "The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel."¹³⁰ *Powell* recognized the disadvantages faced by *pro se* defendants and said that

[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even

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

122. *Id.* at 35. The Arizona Supreme Court supported its opinion by reference to a provision of the Arizona Juvenile Code that required the probation officer to "'look after the interests of neglected, delinquent and dependent children,' including representing their interests in court." *Id.* (citing ARIZ. REV. STAT. § 8-204(c) (1956)).

123. *Id.* at 35-36.

124. *Id.* at 36. Delinquency proceedings are initiated by the filing of a petition alleging criminal conduct by a juvenile and asking the court to adjudicate the juvenile "delinquent." *See id.*

125. *Id.*

126. *Id.*

127. 287 U.S. 45 (1932).

128. 372 U.S. 335 (1963).

129. *Gault*, 387 U.S. at 38-39, 38 n.57.

130. *Powell*, 287 U.S. at 68-69.

though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.¹³¹

Thirty years later, *Gideon* repeated *Powell*'s admonition that, without counsel, defendants cannot receive a fair trial. Ruling that all adult felony defendants have a right to counsel, *Gideon* said that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."¹³² The *Gideon* Court further explained that because ours is an adversarial system of justice, provision of counsel to the accused is a fundamental right:

The right of one charged with crime to counsel may not be deemed fundamental and essential . . . in some countries, but it is in ours. From the . . . beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to assure fair trials This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without [counsel] to assist him.¹³³

In assessing whether the right to counsel applied to juveniles, the *Gault* Court employed the same reasoning as had its predecessors in *Powell* and *Gideon*. The Court saw no difference in seriousness between the juvenile proceeding which subjected Gerald Gault to "the loss of his liberty for years" and an adult felony prosecution.¹³⁴ Thus, like his adult counterparts, young Gault was entitled to

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."¹³⁵

131. *Id.* at 68-69.

132. *Gideon*, 372 U.S. at 344; see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Argersinger* extended the right to appointed counsel to any "person [who] may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony." *Id.* at 37. *Scott v. Illinois*, 440 U.S. 367 (1979), later limited the right to cases in which the court *actually imposed* a term of incarceration. *Id.* at 373-74.

133. *Gideon*, 372 U.S. at 344.

134. *Gault*, 387 U.S. at 36.

135. *Id.* (citing *Powell*, 287 U.S. at 69).

Gault also quoted extensively from, and endorsed the recommendations of, the Report of the President's Commission on Law Enforcement and the Administration of Justice, which had been published earlier the same year:

The Commission believes that no . . . action holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.¹³⁶

Gault's unequivocal endorsement of a right to counsel for juveniles that parallels its adult counterpart established juvenile right to counsel as the foundation for all of the other due process rights recognized in juvenile court.

Twelve years after *Gault*, the Supreme Court decided *Fare v. Michael C.*, which upheld a teenager's waiver of his right to counsel at a pretrial custodial police interrogation.¹³⁷ After being picked up, taken to the police station, and there advised of his *Miranda* rights, sixteen year old Michael asked to speak to his probation officer.¹³⁸ The interrogating officers refused his request,¹³⁹ so Michael agreed to talk. He then proceeded to make

136. *Id.* at 38 n:65 (quoting PRESIDENT'S CRIME COMM'N NAT'L CRIME COMM'N REP. 86-87 (1967)).

137. *Fare v. Michael C.*, 442 U.S. 707, 728 (1979).

138. *Id.* at 710.

139. *Id.* at 710-11. One of the two police officers first told Michael, "Well I can't get a hold of your probation officer right now. You have the right to an attorney." *Id.* at 710. After more discussion, the officer said,

Well I'm not going to call [your probation officer] tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to . . . That's your right. You understand that right?

Id. at 711. After Michael said "Yeah," the officer continued, "Okay, will you talk to us without an attorney present?" *Id.*

statements that implicated himself in a murder.¹⁴⁰ On the State's appeal from an adverse ruling in the California courts, the Supreme Court held that Michael's request to speak with his probation officer did not constitute a *per se* invocation of his right to remain silent and, therefore, that Michael's statements to the police should not have been suppressed.¹⁴¹

Fare's holding is disturbing, particularly in light of *Gault's* explicit recognition that "special problems may arise with respect to [the] waiver of the privilege [against self-incrimination] by or on behalf of children,"¹⁴² and its statement that the "participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege."¹⁴³ The *Gault* Court had gone even further, sounding a caution:

If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance or adolescent fantasy, fright or despair.¹⁴⁴

Fare's insistence, however, that Michael C's request to speak with his probation officer was not the functional equivalent of a request for a lawyer is a telling statement about the Court's assessment of the significance of counsel for one accused of criminal conduct. In explaining its ruling, the Court emphasized

the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.¹⁴⁵

In contrast, the Court said, a probation officer's duty to his employer, the State, "in many, if not most, cases would conflict sharply with the interests of the juvenile."¹⁴⁶ Thus, a probation officer could not be expected to give the accused the type of independent advice and protection that an accused

140. *Id.*

141. *Id.* at 724.

142. *Gault*, 387 U.S. at 55.

143. *Id.*

144. *Id.*

145. *Fare*, 442 U.S. at 719.

146. *Id.* at 721.

would receive from his lawyer.¹⁴⁷ “It is this pivotal role of . . . counsel . . . that distinguishes the request for counsel from the request for a probation officer, a clergyman, or a close friend.”¹⁴⁸

Against this recognition of the significance of legal representation, one would expect some expression of concern about juvenile waiver of right to counsel, if not an outright prohibition. But even *Gault* had intimated in dictum that Gerald and his mother¹⁴⁹ could have chosen to waive his right to counsel, if only they had been properly informed of the right:

They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of *whether they did or did not choose to waive the right*. If they were unable to afford to employ counsel, they were entitled . . . to appointed counsel, *unless they chose waiver*.¹⁵⁰

The Court did not explain these statements, but merely cited without discussion *Johnson v. Zerbst*,¹⁵¹ its own 1938 decision establishing the right of an adult criminal defendant to waive right to counsel upon proof that the accused had made the waiver “competently and intelligently.”¹⁵² The

147. *Id.*

148. *Id.* at 722.

149. Given the facts of the case—*i.e.*, that Gerald Gault’s mother appeared in court with him—we do not know what the Court would have said about waiver if he had appeared alone. This Article assumes for purposes of discussion that the Court’s comments would have been the same. Mrs. Gault’s presence does not so alter consideration of the rights of her son as to suggest the opposite conclusion, for reasons of conflict of interest between parent and child, particularly when the parent is the complainant or does not want to incur the expense of retaining counsel. *See, e.g., In re Manuel R.*, 543 A.2d 719, 720-21 (Conn. 1988) (discussing a mother who essentially waived right to counsel so that she did not have to deal with her son at home; after public defender withdrew, the hearing would be continued, and mother wanted to get the matter resolved that day and have her son sent away); *In re K.S.*, 216 S.E.2d 679 (Ga. App. 1975) (discussing how a mother, as complainant, could not waive counsel on behalf of her child); *In re Nation*, 573 N.E.2d 1155, 1157 (Ohio App. 3d 1989) (discussing how a mother was complainant; therefore waiver was deficient); *see also PURITZ ET AL.*, *supra* note 12, at 45 (explaining results of study, reporting that some parents pressure their child into waiving because of fears they will have to pay for counsel, and others believe that waiving counsel will “lessen the blow” for their child).

150. *Gault*, 387 U.S. at 42 (emphasis added).

151. 304 U.S. 458 (1938).

152. *Gault*, 387 U.S. at 42 n.71; *see also Johnson*, 304 U.S. at 467-68. In *Johnson*, the defendant had been unable to employ counsel for trial and was not entitled to appointed counsel on the federal counterfeiting charges brought against him because the State of Georgia, where Johnson was tried, appointed counsel for indigent defendants only in capital cases. *Id.* at 459-60. When Johnson appeared in court and told the judge that he had no lawyer, the judge asked if he was ready for trial. *Id.* at 60. Johnson responded affirmatively and was tried, convicted, and sentenced without the assistance of counsel. *Id.* On appeal from the lower court’s denial of Johnson’s habeas corpus petition, the Supreme Court reversed and stated, “[the right to counsel]

Court's tacit acceptance of the possibility that Gerald Gault, a juvenile, could meet *Johnson's* "competent and intelligent" standard for waiver of right to counsel is perplexing when read in conjunction with the Court's emphasis on representation by counsel as the cornerstone of fundamental fairness in juvenile court proceedings.¹⁵³ Yet, juveniles' waiver of their right to counsel has both a long and robust history and a pervasive continuing presence in many juvenile courtrooms across the country.

III. JUVENILE WAIVER OF RIGHT TO COUNSEL

A. *Waiver Defined*

In *Johnson v. Zerbst*, the Supreme Court stated the commonly recognized test for waiver of any right: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."¹⁵⁴ Thus, any inquiry into the validity of a waiver must focus on the holder of the right and must determine the *knowledge* and *intent* of that person.¹⁵⁵ The rights holder first must know of the right and then make an intentional choice to relinquish it. Otherwise, there is no waiver.

The history of juvenile waiver of right to counsel, however, shows that what has passed for waiver often manifests neither knowledge nor intent. Instead, juveniles have been systematically denied their right to counsel without even knowing they had such a right. What is most disturbing is that those practices are not simply a historical footnote; to the contrary, a startling culture of waiver prevails in many courtrooms across the country today.

embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Id.* at 462-63. The Court held that a person accused of committing a crime could waive the right to counsel only upon proof that the accused had made the waiver "competently and intelligently," based on the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." *Id.* at 464, 467-68. Because the record contained insufficient evidence to prove that the defendant's waiver was competent and intelligent, the Court reversed the denial of the habeas petition. *Id.* at 469.

153. Of course, in *Gault*, both the boy and his mother were present in court, and it was the mother on whom the Court seemed to rely for the waiver decision. *Id.* at 42. However, permitting parents to waive their child's right to counsel is not the answer. To the contrary, it has its own set of problems. See *supra* note 149.

154. *Johnson*, 304 U.S. at 464.

155. See *id.*

B. *Pre-Gault Waiver*

1. Waiver by Juveniles in Criminal Court Proceedings

Reported decisions upholding waiver of right to counsel by teenagers in adult criminal court date to the 1920s.¹⁵⁶ The earliest cases acknowledge the criminally accused's constitutional right to counsel, but imply waiver of the right from a defendant's failure to appear in court with or to request a lawyer. A 1926 Minnesota decision upholding an implied waiver by a seventeen year old accused of grand larceny exemplifies the early cases.¹⁵⁷ At the arraignment, the trial judge asked the defendant, "Do you wish to have [an attorney], or are you ready to enter a plea?"¹⁵⁸ The boy responded with a guilty plea.¹⁵⁹ In upholding the boy's waiver, the Minnesota Supreme Court held that the trial court did not abuse its discretion when it proceeded to judgment and sentencing without advising the boy of his rights, because the evidence showed that the boy had a prior conviction for a similar crime and had appeared in court on his latest charges without counsel, even after a ten day lapse between filing of the charges and arraignment.¹⁶⁰

While some state courts required appointment of counsel for juveniles facing murder charges as early as the 1920s,¹⁶¹ the first case in which the court extended the right to those accused of lesser charges appeared in

156. See W.M. Moldoff, Annotation, *What Constitutes Waiver of Right to Counsel by Minor Accused*, 71 A.L.R.2d 1160 (1960) (superseded by Christopher Bello, Annotation, *Validity and Efficacy of Minor's Waiver of Right to Counsel—Modern Cases*, 25 A.L.R. 4th 1072 (1983)).

157. *State v. McDonnell*, 206 N.W. 952, 952-53 (Minn. 1926) (upholding conviction based on guilty plea to grand larceny in the first degree); see also *State v. Bafaro*, 262 P. 964 (Wash. 1928) (upholding seventeen-year-old's guilty plea to uttering a forged check, even though not represented by counsel, where he was aware of the consequences of the plea).

158. *McDonnell*, 206 N.W. at 952.

159. *Id.*

160. *Id.* at 952-53. Similarly, in a 1935 Michigan case, a fifteen year old was removed from school, charged with murder, convicted, and sentenced to life imprisonment, all in one day and all without benefit of counsel. *People v. Crandell*, 258 N.W. 224, 224-25 (Mich. 1935). On appeal, the state supreme court acknowledged that the law afforded the boy the benefit of counsel, but held that because the boy had not requested a lawyer, the trial court was under no obligation to provide counsel for him. *Id.* at 225-26.

161. *E.g.*, *State v. Oberst*, 273 P. 490, 490-94, 496 (Kan. 1928) (reversing judgment and life sentence entered on seventeen-year-old's guilty plea to murder of all seven members of his family, where defendant alleged he was "wholly ignorant" of his rights and court procedures and language; "[t]he one thing this youngster needed more than anything else before pleading guilty to such a horrifying accusation was consultation with and advice of a good lawyer"); *Howington v. State*, 235 P. 931, 932-35 (Okla. 1925) (reversing judgment and death sentence imposed two days after homicide and one day after defendant's arrest, where defendant was orphaned by the age of two, had never gone to school, and had pled guilty without being advised of his right to appointed counsel, and where nothing in the record showed that the defendant had waived the right).

1932. In *Harris v. State*,¹⁶² an Indiana trial judge accepted the guilty pleas of two minors and sentenced them to life imprisonment for robbery and aggravated assault without advising them of their rights or asking them if they had or desired counsel.¹⁶³ On the boys' appeal, through appointed counsel, the Indiana Supreme Court summed up the problem:

The appellants were prevented from asserting and enjoying the right of a legal defense by reason of their ignorance of their rights under the Constitution. Being ignorant of their rights, they cannot be held to have been negligent in not asserting the same. The court, by proper inquiry, could have learned of their ignorance, but it did not.¹⁶⁴

The remedy for the trial judge's error, the supreme court ruled, was to reverse the judgment and remand the case for a new trial at which defendants were accorded their basic constitutional rights—to have counsel before, as well as at trial, and to be fully advised of their rights and of the consequences of entering a guilty plea.¹⁶⁵

In the late 1940s, a decade after *Johnson v. Zerbst*, a number of teenage waiver cases reached the United States Supreme Court. The Court issued a series of decisions overturning the state court convictions of teenage defendants who had entered guilty pleas or who had gone to trial without counsel.¹⁶⁶ The Court did not explicitly apply *Johnson v. Zerbst's* "competent and intelligent" standard, although it focused in each case on the defendants' inability to comprehend the legal proceedings because of their age, mental state, ignorance of their rights, and unfamiliarity with court procedures.¹⁶⁷ The Court's statement in one of those cases, *Wade v.*

162. 181 N.E. 33 (Ind. 1932) (reversing trial court's denial of petitions for writs of coram nobis and ordering new trial).

163. *Id.* at 33-34.

164. *Id.* at 35.

165. *See id.*

166. The Court overturned three convictions entered on guilty pleas: *Uveges v. Pennsylvania*, 335 U.S. 437, 442 (1948); *Marino v. Ragen*, 332 U.S. 561, 562-63 (1947); *DeMeerleer v. Michigan*, 329 U.S. 663, 665 (1947); and in a fourth case overturned a conviction based on the trial court's denial of the defendant's request for counsel, *Wade v. Mayo*, 334 U.S. 672, 675, 684 (1948).

167. In *DeMeerleer v. Michigan*, the trial court had accepted the seventeen-year-old defendant's guilty plea to first degree murder and sentenced him to life imprisonment. *DeMeerleer*, 329 U.S. at 664-65. The Supreme Court reversed, based on a record that showed "considerable confusion in [the boy's] mind at the time of the arraignment as to the effect of [the] plea" and that he "was hurried through unfamiliar legal proceedings without a word being said in his defense" or any offer of counsel. *Id.* In *Marino v. Ragen*, the Court overturned the guilty plea of an eighteen-year-old who had been in this country only two years and did not understand English, but only after he had served twenty-two years in prison on his murder conviction. *Marino*,

Mayo,¹⁶⁸ is illustrative of its concerns: “There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.”¹⁶⁹

The Supreme Court finally addressed *Johnson v. Zerbst* directly in a 1957 criminal case involving a teenage defendant. In *Moore v. Michigan*,¹⁷⁰ the Court extended to state court proceedings the “competent and intelligent” standard that it had established for waiver of right to counsel in federal criminal cases two decades earlier in *Johnson*.¹⁷¹ Willie B. Moore was a seventeen-year-old black youth with a seventh grade education when he pled guilty to the murder of an elderly white woman and was sentenced to “solitary confinement at hard labor for life without possibility of parole,” the maximum penalty allowable under Michigan law.¹⁷² Moore had served nearly twenty years in prison when the Supreme Court reversed and remanded the case for a new trial after concluding that Moore had not intelligently and understandingly waived his right to counsel.¹⁷³ The Court’s conclusion was based on Moore’s youth, limited education, and diminished

332 U.S. at 562. The seventeen-year-old defendant in *Uveges v. Pennsylvania* had pled guilty to multiple burglaries and was given a twenty to forty year sentence. *Uveges*, 335 U.S. at 438-39. The Supreme Court reversed the conviction, stating that Uveges was “young and inexperienced in the intricacies of criminal procedure when he pleaded guilty.” *Id.* at 442. In the fourth case, *Wade v. Mayo*, the trial court had denied defendant’s request for counsel based on an absence of state law requiring appointment of counsel in non-capital cases. *Wade*, 334 U.S. at 675. The Supreme Court reversed, holding that right to counsel “stems directly from the Fourteenth Amendment and not from state statutes.” *Id.* at 684.

168. 334 U.S. 672 (1948).

169. *Id.* at 684. The Court was not unified on the waiver issue, however. During the same time period, the Court held in two cases that the teenage defendants had waived their right to counsel at trial by appearing without counsel at sentencing and failing to raise the issue then. *Gayes v. New York*, 332 U.S. 145, 146-49 (1947) (relying on *Canizio v. New York*, 327 U.S. 82 (1946), to reject defendant’s claim that he was improperly sentenced based on the inclusion of a prior sentence imposed when he was sixteen and incapable of intelligently and competently waiving his rights); *Canizio*, 327 U.S. at 85-87 (holding that defendant had the benefit of counsel even though the trial court had not informed him of his right). Dissenters in both cases decried the Court’s implied waiver rationale, citing the defendants’ youth, indigence, and ignorance of their rights and echoing the caution sounded by *Gayes*, 322 U.S. at 150, 151 (Rutledge, J., dissenting) (noting that defendant was a sixteen-year-old boy who was “indigent and alone,” and stating “I am unwilling to subscribe to such a doctrine of forfeitures concerning constitutional rights . . .”). *Wade*, 334 U.S. at 684 (Reed, J., dissenting); *Canizio*, 327 U.S. at 88 (Murphy, J., dissenting) (stating that a defendant who was nineteen, indigent, poorly educated, orphaned, and ignorant of his right to counsel could not competently and intelligently waive his right to counsel).

170. 355 U.S. 155 (1957).

171. *Id.* at 161-62; see also *supra* notes 151-54 and accompanying text.

172. *Id.* at 160.

173. *Id.* at 164-65.

mental capacity,¹⁷⁴ along with evidence that he was emotionally disturbed.¹⁷⁵ Finally, and perhaps most tellingly, the Court focused on evidence that the Sheriff had planted fears of mob violence in Moore's mind by telling him that "if I didn't plead guilty to this crime, they couldn't protect me, under those conditions, they says, during the riot."¹⁷⁶ The Court concluded by stating, "[a] rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver."¹⁷⁷

With *Moore*, the constitutional standard for a juvenile's waiver of right to counsel in criminal court was made uniform, whether the defendant found himself in federal or state court. No court could deny right to counsel to any criminal defendant, adult or child, unless the evidence showed, based on the circumstances of the case, that the defendant had waived the right "competently and intelligently." As the wide disparity in later rulings discussed below shows, however, any expectation that the rule would have a broad prophylactic effect in juvenile court proceedings was misguided at best. Indeed, the caution urged by the Supreme Court in *Wade v. Mayo*, that some individuals, "by reason of age . . . are incapable of representing themselves,"¹⁷⁸ appears to have been lost on juvenile court judges.

2. Waiver in Juvenile Court Proceedings

Unlike adult criminal courts, few juvenile courts accorded juveniles the right to counsel in delinquency proceedings before *Gault*. The common rationale for rejection of the right to counsel for juveniles was the judicial position that a proceeding under the delinquency statutes was not criminal, but civil, its purpose being not punishment or retribution, but the care, custody, and control that the child's parents had failed to provide.¹⁷⁹ Among

174. *Id.* at 164.

175. *Id.* at 158-59 (discussing how the trial transcript reflected judge's statement that defendant "insists that there is something wrong with his head; that he has had something akin to queer sensations before this").

176. *Id.* at 163-64 (quotation marks omitted) (discussing how defendant testified that after the Sheriff told him he couldn't protect him "then there wasn't nothing I could do. I was mostly scared than anything else").

177. *Id.* at 164.

178. *Wade v. Mayo*, 334 U.S. 672, 684 (1948).

179. *See, e.g., White v. Reid*, 125 F. Supp. 647, 649 (D.C. Cir. 1954) (stating that since juvenile court proceedings are not "criminal and penal in character, but are an adjudication [of] the status of a child in the nature of a guardianship by the state as *parens patriae* . . . , [c]onstitutional safeguards guaranteed one accused of crime . . . are not applicable"); *State v. Dotson*, 299 P.2d 875, 877 (Cal. 1956) (stating that the denial of right to counsel in juvenile court was not a denial of due process; such proceedings are "in the nature of guardianship proceedings in which the state as *parens patriae* seeks to relieve the minor of the stigma of a criminal conviction and to give him corrective care, supervision and training"); *People ex rel. Weber v. Fifield*, 289 P.2d 303, 304 (Cal. Dist. Ct. App. 1955) (stating that duty to advise an accused of

the pre-*Gault* reported decisions in which juvenile courts recognized juveniles' right to counsel, only two, both in the District of Columbia, explicitly required a "competent and intelligent" waiver of the right.

In the first of the cases, *Shioutakon v. District of Columbia*,¹⁸⁰ a fifteen-year-old admitted the charge of using an automobile without the owner's consent and was committed to a training school without being advised of his right to counsel.¹⁸¹ The appeals court first construed the juvenile code to require "the effective assistance of counsel in a juvenile court quite as much as it does in a criminal court."¹⁸² The court then held that "where that right exists, the court must be assured that any waiver of it is intelligent and competent," as determined by the child's "age, education, and information, and all other pertinent facts."¹⁸³

In the second case, *McBride v. Jacobs*,¹⁸⁴ the juvenile court committed a seventeen-year-old to a training school after the boy's mother declined counsel and the boy admitted committing "an unlawful act."¹⁸⁵ The court had informed the boy's mother of his right to counsel, but had not informed the boy.¹⁸⁶ Based on the juvenile court's failure to advise the boy of his right to counsel, the D.C. Circuit reversed and repeated *Shioutakon's* ruling that any waiver, by parent or child, must be "an intelligent, knowing act."¹⁸⁷

During this period, no court appears to have challenged the efficacy of the waiver of right to counsel by juveniles, in either criminal or juvenile court. The most a juvenile could hope for on appeal from a misguided waiver decision was that the court would consider the *Johnson v. Zerbst* standard for adult waiver in determining the validity of his waiver of right to counsel. As long as the waiver met the "competent and intelligent" test, it would be valid. How *Gault's* constitutionalization of juveniles' right to counsel would affect waiver is the subject of the following discussion.

right to counsel applies only to criminal prosecutions, and juvenile delinquency proceedings are not criminal); *Robinson v. State*, 204 S.W.2d 981, 981-82 (Tex. Civ. App. 1947) (stating that because delinquency proceeding was civil rather than criminal, whether confession was made during illegal arrest was immaterial).

180. 236 F.2d 666 (D.C. Cir. 1956).

181. *Id.* at 667.

182. *Id.* at 669.

183. *Id.* at 670 & n.26 (quoting *Williams v. Huff*, 142 F.2d 91, 92 (D.C. Cir. 1944)) (quotation marks omitted).

184. 247 F.2d 595 (D.C. Cir. 1957).

185. *Id.* at 595.

186. *Id.* at 596.

187. *Id.*

C. *Post-Gault Waiver in the Juvenile Courts*

1. Introduction

The tension between an accused's constitutional right to a fundamentally fair adjudication process and waiver of the right to counsel goes to the heart of post-*Gault* juvenile court proceedings. *Gault's* due process guarantee of fundamental fairness is empty if it does not ensure that a juvenile accused of committing a crime receives a fair trial. But even the *Gault* Court failed to question whether juvenile waiver of right to counsel might contravene the fair trial rights it had just announced. Nor has any subsequent court questioned *Gault's* tacit acceptance of the constitutional viability of juvenile waiver. Indeed, the Supreme Court has appeared reluctant to make any definitive statement, beyond the general language of *Johnson v. Zerbst*, concerning the extent of inquiry necessary for a valid waiver of counsel even by an adult, despite a split in the circuits on the issue.¹⁸⁸

2. *Gault's* Reception in the Juvenile Courts

From the beginning, many juvenile court judges were resistant to the procedural formality imposed by *Gault*. They agreed with Justice Stewart, who dissented in *Gault*, that the Court was wrong to extend criminal due process protections to the juvenile courts.¹⁸⁹ As a result, they refused to apply the *Gault* protections in their courtrooms.¹⁹⁰

Studies conducted within a few years of *Gault* confirm juvenile courts' "poor compliance with many of [*Gault's*] procedural requirements."¹⁹¹ One study of three urban juvenile courts found that the highest rate of compliance with *Gault's* right to counsel directive was only fifty-six percent in one court, and the rates in the other courts were dismal.¹⁹² One judge complied just three percent of the time, and the other *never* informed

188. See *McDowell v. United States*, 484 U.S. 980, 980-81 (1987) (White and Brennan, JJ., dissenting from denial of petition for certiorari) (citing conflict among circuit courts concerning the proper application and interpretation of *Faretta v. California*, 422 U.S. 806 (1975), as reason for granting certiorari in present case).

189. MANFREDI, *supra* note 40, at 175.

190. *Id.*

191. *Id.* at 157 (citing Norman Lefstein et al., *In Search of Juvenile Justice: Gault and its Application*, 3 LAW & SOC'Y REV. 491-562 (1969); Elyce Ferster et al., *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375-412 (1971); B.C. Canon & K.L. Kolson, *Rural Compliance with Gault: Kentucky, A Case Study*, 10 J. FAM. L. 300-26 (1971)).

192. Lefstein et al., *supra* note 191, at 510.

juveniles of their right to counsel.¹⁹³ Other researchers reported that in rural areas, juveniles were advised only sporadically even two years after *Gault*,¹⁹⁴ and very few juveniles anywhere “received complete and unprejudiced advice of their right to counsel.”¹⁹⁵ One study reported such prejudicial advisories of right to counsel as:

- ▶ “I certainly hope you don’t want an attorney.”¹⁹⁶
- ▶ “Do you want a lawyer or do you want to speak for yourself?”¹⁹⁷
- ▶ “I notice you are not here with an attorney and I assume that you do not wish an attorney. You may have one but it is not required.”¹⁹⁸
- ▶ “Most people charged with a minor charge don’t have a lawyer. We could go ahead. Then if you feel you need one you could ask for one.”¹⁹⁹

Later studies confirm that the courts’ noncompliance did not abate as judges became familiar with and adjusted to the new legal requirements produced by the due process revolution in the juvenile courts. A study in 1988 revealed that many juveniles still were not being adequately informed of their right to counsel and were appearing in court unrepresented.²⁰⁰ A 1993 study of juvenile right to counsel in Minnesota found that more than one-half of children against whom delinquency petitions had been filed were not represented by counsel,²⁰¹ and in some rural counties, over eighty percent of twelve and thirteen-year-old children appeared without counsel.²⁰² Other studies reported similar results.²⁰³

193. *Id.*

194. *See* Canon & Kolson, *supra* note 191, at 316.

195. MANFREDI, *supra* note 40, at 157 (citing Ferster et al., *supra* note 191, at 379) (quotation marks omitted).

196. Ferster et al., *supra* note 191, at 379. The judicial attitude reflected by the quoted statement may account for the mixed results reported in studies of the impact of legal representation on the disposition ordered by the court. Ferster et al.’s 1970 study found that there were fewer commitments to juvenile institutions and more findings of “not involved” when the child was represented by counsel. *Id.* at 402. However, later research reported that children with counsel often receive more severe treatment by the court than those without counsel. Feld, *supra* note 5, at 227. Although the latter result is surprising, it may be explained by juvenile judges’ resistance to, and even resentment of, lawyers (other than prosecutors) in their courtrooms.

197. Ferster et al., *supra* note 191, at 379.

198. *Id.*

199. *Id.*

200. Feld, *supra* note 6, at 416.

201. BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 46 (1993) (hereinafter JUSTICE FOR CHILDREN).

202. *Id.* at 244. Feld also studied rates of legal representation in the juvenile courts of California, Minnesota, Nebraska, New York, North Dakota, and Pennsylvania. *Id.* at 51.

3. Juvenile Waiver of Right to Counsel: Reported Decisions

a. Overview

Reported decisions in appeals challenging a juvenile's waiver of counsel are as unsettling as the studies discussed above. Research for this Article revealed ninety-nine post-*Gault* appellate decisions that addressed the validity of a juvenile's waiver of right to counsel after a delinquency petition had been filed.²⁰⁴ In an overwhelming majority of the cases, eighty of the ninety-nine, the waivers were overturned on appeal.²⁰⁵ In those cases, children as young as nine had been permitted to waive right to counsel, while a waiver by an eleven-year-old boy was among those upheld on appeal.²⁰⁶

Analysis of the cases showed that in all but two of the nineteen in which the waivers were upheld, the accused child had admitted the charges after waiving counsel.²⁰⁷ Similarly, fifty-one of the eighty juveniles whose waivers were overturned on appeal had entered admissions or pleas of *nolo contendere*.²⁰⁸ More often than not, the delinquency petitions alleged serious felony charges.²⁰⁹ Only a handful were status offenses (runaways,

Representation ranged from a low of 37.5% in North Dakota to a high of 95.9% in New York State. *Id.* at 54-55; see also Barry C. Feld, *Justice by Geography: Urban, Suburban, and Rural Variations in Juvenile Justice Administration*, 82 J. CRIM. L. & CRIMINOLOGY 156, 192-94 (1991) (hereinafter *Justice by Geography*).

203. PURITZ ET AL., *supra* note 12, at 7; U.S. GENERAL ACCOUNTING OFFICE, JUVENILE JUSTICE: REPRESENTATION RATE VARIED AS DID COUNSEL'S IMPACT ON COURT OUTCOMES 15 (1995); A.B.A., AMERICA'S CHILDREN AT RISK 60 (1993); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185 (1989) (hereinafter *Empirical Study*).

204. See generally *infra* Appendices A-D. Data from the cases is organized into two sets of tables, produced as Appendices to the text of this Article. Appendices A and C collect the cases overturning waiver and present, respectively, background information (age, charges, plea, and disposition) and legal analysis (the juvenile courts' advisories regarding right to counsel, the appellate courts' reasons for invalidating the waiver, and the statute and/or rule governing right to counsel and/or waiver in the respective states). See generally *infra* Appendices A & C. Appendices B and D collect the cases upholding waiver. See generally *infra* Appendices B & D. Like Appendix A, Appendix B presents background information on each case, including age, charges, plea, and disposition. See generally *infra* Appendix B. Appendix D summarizes the courts' legal analysis, describing what each court said about right to counsel, the appellate courts' reasons for upholding the waiver, and the statute and/or rule governing right to counsel and/or waiver in the respective states. See generally *infra* Appendix D.

205. See *infra* Appendix A.

206. See *infra* Appendices A & B.

207. See *infra* Appendix B.

208. See *infra* Appendix A.

209. See *infra* Appendices A & B.

truancies, curfew violations), and all were in cases overturned on appeal.²¹⁰ Most of the juveniles whose waivers were upheld were committed to the custody of the state agency responsible for delinquent youth; the remaining youths were put on intensive probation.²¹¹ Nearly three-quarters of the juveniles in the overturned cases had been committed to state custody.²¹² The courts had specifically ordered most of those children to be confined in a state “training school” or other institution, many for an indefinite period of time, others ranging from five months to a maximum of eight years.²¹³

Juvenile court judges’ advisories to accused juveniles concerning their right to counsel were consistent with the results of the studies reported above concerning judicial noncompliance with *Gault*. Over thirty percent of the juveniles were not advised at all.²¹⁴ In several cases, the juvenile court record was silent regarding the rights advisories or waiver proceedings.²¹⁵ In others, the docket sheet or court minutes reflected only that the juvenile had been informed of his right to counsel and had waived it.²¹⁶ In many cases, the judge informed the accused of his right to counsel and then simply asked if he wanted a lawyer.²¹⁷ In three other cases, the judge merged the right to counsel inquiry with the entry of a plea.²¹⁸

210. See *infra* Appendix A. Nine cases did not report the nature of the charges. See *id.*

211. See *infra* Appendix B.

212. See *infra* Appendix A.

213. See *id.*

214. See *infra* Appendix C.

215. See *infra* Appendix C (citing *In re Navajo County Juvenile Action No. JV-94000086*, 898 P.2d 517 (Ariz. Ct. App. 1995); *N.R.L. v. State*, 684 So. 2d 299 (Fla. 5th DCA 1996); *J.H. v. State*, 679 So. 2d 67 (Fla. 5th DCA 1996); *In re D.L.A.*, 667 So. 2d 330 (Fla. 1st DCA 1995); *N.E.R. v. State*, 588 So. 2d 289 (Fla. 2d DCA 1991); *In re Lytle*, 1997 Ohio App. LEXIS 5028 (Ohio Ct. App. Nov. 7, 1997); *In re Anzaldua*, 820 P.2d 869 (Or. Ct. App. 1991)).

216. See *infra* Appendix C (citing *C.G.H. v. State*, 404 So. 2d 400 (Fla. 5th DCA 1981) (discussing the minutes); *R.V.P. v. State*, 395 So. 2d 291 (Fla. 5th DCA 1981) (discussing the docket sheet); *In re Mason*, 2000 WL 968800 (Ohio Ct. App. July 13, 2000) (discussing magistrate’s notes); *In re Solis*, 706 N.E.2d 839 (Ohio Ct. App. 1997) (discussing a journal entry); *In re Ward*, 1997 Ohio App. LEXIS 1567 (Ohio Ct. App. July 12, 1997) (discussing magistrate’s notes); *In re Montgomery*, 691 N.E.2d 349 (Ohio Ct. App. 1997) (discussing journal entry); *In re Rohm*, 1996 WL 183032 (Ohio Ct. App. Apr. 17, 1996) (discussing a referee’s report)).

217. See *infra* Appendix C.

218. *Id.* (citing *K.M. v. State*, 448 So. 2d 1124, 1124-25 (Fla. 2d DCA 1984) (stating that K.M. did not explicitly waive his right to counsel, just pled guilty, and was adjudicated delinquent, all in a matter of minutes); *In re Appeal No. 544*, 332 A.2d 680, 684-85 (Md. Ct. Spec. App. 1975) (noting that a pre-filed answer indicated boy’s waiver of right to counsel and admission to the charges; court confirmed admission first; then said: “And also you are willing to proceed here this morning without a lawyer,” to which the boy nodded); *In re Caruso*, 1991 Ohio App. LEXIS 2292, at *5 (Ohio Ct. App. May 17, 1991) (noting that the court advised juvenile of right to counsel and right to remain silent; then said, “Now, with all that information, I’m going to allow you to either admit or deny this crime”)).

In the few cases in which the explanation of rights was relatively complete, the courts conducted no waiver colloquy, simply concluding that the waiver was valid from the juvenile's indication that he understood his rights.²¹⁹ Other cases so clearly reveal the involuntariness of the juvenile's waiver that the judge's acceptance of it is shocking. One such case is *G.L.D. v State*,²²⁰ where the judge ordered the juvenile to surrender his guitar and amplifier to the court in partial payment of the public defender's fee.²²¹ After a brief recess, the juvenile told the judge he did not want a lawyer.²²² The judge asked no questions, ignored the juvenile counselor's attempt to interject the reason for the boy's change of mind—that he did not want to lose his guitar—and proceeded to have the juvenile execute a written waiver.²²³

Even setting aside such blatant cases as *G.L.D.*, the cases, viewed together, present a bleak picture of juveniles' access to counsel. Many juvenile courts do little, if anything, to assure that juveniles waiving their right to counsel understand what they are doing. More specifically, the cases compel two deeply disturbing conclusions: neither the presumption against waiver nor the enactment of detailed statutory waiver procedures have been effective constraints against juvenile court judges' continued exercise of their "discretion" to deny juveniles their right to counsel.

b. Juvenile Courts' Disregard for the Presumption Against Waiver

The Supreme Court has often warned that trial court judges should indulge "every reasonable presumption" against waiver of constitutional rights by criminal defendants.²²⁴ Yet juvenile court practices as revealed in the reported cases demonstrate a total disregard for the presumption. Not a single court in nearly one hundred waiver cases conducted a thorough inquiry into the circumstances to determine whether the juvenile's waiver was knowing, voluntary and intelligent, and few courts acknowledged that they were bound by a legal standard.²²⁵ Most courts either said nothing or

219. See, e.g., *J.G.S. v. State*, 435 So. 2d 942 (Fla. 2d DCA 1983); *In re Jane Doe*, 881 P.2d 533 (Haw. 1994); *In re Clements*, 770 P.2d 937 (Or. Ct. App. 1989).

220. 442 So. 2d 401 (Fla. 2d DCA 1983).

221. *Id.* at 403.

222. *Id.*

223. *Id.* The judge did not even have the authority under Florida law to order the boy to turn over his guitar and amplifier. *Id.* at 404. The judge should have inquired into the mother's willingness and ability to pay, and if she could not afford a lawyer, a lien could be placed against her property to secure payment of the public defender's fee. *Id.* at 403-04.

224. E.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Boyd v. Dutton*, 405 U.S. 1 (1972); *Emspak v. U.S.*, 349 U.S. 190 (1955).

225. See *infra* Appendices C & D.

simply recited the adult waiver standard.²²⁶ Only a handful of cases went further, some suggesting that the standard for juvenile waiver was “at least equal to” that accorded adults,²²⁷ and others stating that the court needed to be even more careful or “particularly solicitous” of the juvenile’s rights.²²⁸

In fact, in several cases that were overturned on appeal, the juvenile court judges found “waiver by inaction.”²²⁹ When the juvenile showed up for the adjudication hearing without counsel, the court inferred waiver and proceeded directly to the adjudicatory hearing.²³⁰ In the most recent of those cases, *In re Christopher T.*,²³¹ the boy’s mother told the judge that she did not realize the gravity of the situation or she would have obtained

226. *Id.* A few courts that found the juvenile’s waiver insufficient merely recited the adult standard and cited a case or two, but made no express statement about the standard’s applicability to juveniles. *J.G.S. v. State*, 435 So. 2d 942 (Fla. 2d DCA 1983); *In re Caruso*, 1991 Ohio App. LEXIS 2292 (Ohio Ct. App. May 17, 1991); *In re Nation*, 573 N.E.2d 1155 (Ohio Ct. App. 1989); *In re Anzaldua*, 820 P.2d 869 (Or. Ct. App. 1991); *In re R.S.B.*, 498 N.W.2d 646 (S.D. 1993). The Ohio Court of Appeals stated in three cases overturning waiver and two cases upholding it that because there was “no material difference” between the constitutional requirements for juvenile and adult right to counsel, case law regarding adult waiver was applicable to juvenile waiver. *In re Lytle*, 1997 Ohio App. LEXIS 5028 (Ohio Ct. App. Nov. 7, 1997) (overturning waiver); *In re Montgomery*, 691 N.E.2d 349 (Ohio Ct. App. 1997) (overturning waiver); *In re Ward*, 1997 Ohio App. LEXIS 2567 (Ohio Ct. App. June 12, 1997) (overturning waiver); *In re East*, 663 N.E.2d 983 (Ohio Ct. App. 1995) (upholding waiver); *In re Peggy L.*, 1995 Ohio App. LEXIS 5330 (Ohio Ct. App. Dec. 8, 1995) (upholding waiver). Three courts said generally that the standard for juveniles was “no less than” for adults. *In re Appeal No. 544*, 332 A.2d 680, 688 (Md. Ct. Spec. App. 1975) (noting “no less is required” than for an adult in a criminal proceeding); *In re D.L.*, 999 S.W.2d 291, 295 (Mo. Ct. App. 1999) (“no less than”); *In re John D.*, 479 A.2d 1173, 1178 (R.I. 1984) (stating that court must scrutinize waiver admonitions “with the utmost exactitude and care to be certain that they meet the requirements for adults”).

227. *See infra* Appendix C (citing *In re Manuel R.*, 543 A.2d 719, 725 (Conn. 1988) (“[T]hese constitutional and procedural guidelines apply with equal, if not greater, force in the context of a delinquency proceeding . . . [O]ur general policy of indulging every presumption against the waiver of fundamental rights . . . has special application in the context of juvenile waiver.”) (citation omitted); *K.M. v. State*, 448 So. 2d 1124, 1125 (Fla. 2d DCA 1984) (stating that “the ‘inquiry’ for a juvenile must be at least equal to that accorded an adult; nevertheless we have intimated that a trial court should be even more careful when accepting a waiver of counsel from a juvenile”)).

228. *See infra* Appendix C (citing *In re B.M.H.*, 339 S.E.2d 757, 758 (Ga. Ct. App. 1986) (making the defendant aware of danger of proceeding without counsel “particularly true in juvenile cases as ‘the state has a heavy burden’”); *In re Paul H.*, 365 N.Y.S.2d 900, 903 (N.Y. App. Div. 1975) (“When dealing with an infant, courts should be particularly solicitous to protect his rights and, in such cases, a ‘heavy burden’ rests upon the state to show a genuine waiver”)).

229. *See infra* Appendix C (citing *In re Christopher T.*, 740 A.2d 69 (Md. Ct. Spec. App. 1999); *In re Kimble*, 682 N.E.2d 1066 (Ohio Ct. App. 1996); *State v. Afanasiev*, 674 P.2d 1199 (Or. Ct. App. 1984); *In re R.S.B.*, 498 N.W.2d 646 (S.D. 1993)).

230. *See generally id.*

231. 740 A.2d 69 (Md. Ct. Spec. App. 1999).

counsel for the hearing.²³² Her pleas were unavailing.²³³ The judge found that she lacked “any good reason” for failing to obtain counsel, and rather than “inconvenience” the victim, who was present, the court proceeded with the adjudication.²³⁴ In *In re R.S.B.*,²³⁵ the juvenile told the judge he did not want to proceed without a lawyer.²³⁶ The boy’s father catalogued for the court his unsuccessful efforts to obtain counsel and stated his hope that they would be able to get help from the public defender’s office.²³⁷ The father’s and son’s pleas fell on deaf ears.²³⁸ The judge proceeded with a full evidentiary hearing without counsel for the boy and, at the conclusion of the hearing, adjudicated him delinquent.²³⁹ The court of appeals reversed and chastised the trial court for assuming that “R.S.B. had waived his right to counsel by appearing without an attorney.”²⁴⁰

Even in juvenile courts which did not so blatantly disregard juveniles’ right to counsel, the waiver proceedings did not reflect the thorough-going inquiry contemplated by the “knowing, voluntary and intelligent” standard and the “totality of the circumstances” test. That test, first articulated by the United States Supreme Court in *Johnson v. Zerbst*, requires an examination of a multiplicity of factors to determine the validity of a waiver, including the person’s age, intellectual ability, educational level, emotional or mental problems, and prior experience with the court system.²⁴¹

Few of the waiver decisions discussed any of those factors. The courts did not generally consider age to be a factor affecting the validity of the waiver decision, even when the child was as young as nine.²⁴² Only seven cases discussed more than one factor, and in three cases, the juvenile’s prior experience with the court²⁴³ appeared to trump evidence concerning his

232. *Id.* at 71.

233. *See id.*

234. *Id.*

235. 498 N.W.2d 646 (S.D. 1993).

236. *Id.* at 647.

237. *Id.*

238. *See id.*

239. *Id.* The court proceeded to conduct the hearing, with R.S.B. and his father attempting to question the state’s witnesses. *Id.* At the conclusion, the court (as trier of fact) found R.S.B. guilty of third degree burglary and committed him to the State Training School. *Id.*

240. *Id.*

241. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

242. *See infra* Appendix C (citing *In re Christopher T.*, 740 A.2d 69 (Md. Ct. Spec. App. 1999) (acknowledging no consideration of circumstances; instead finding “waiver by inaction”—appearing without counsel for a hearing where state’s witnesses were present; judge did not want to “inconvenience” witnesses)).

243. Psychologist Thomas Grisso’s studies of juvenile waiver of right to counsel, discussed in some detail *infra* at notes 352-63 and accompanying text, reports results that undermine one of the principal bases relied upon by courts in upholding juvenile waivers under the totality of circumstances measure. Grisso found that “prior court experience (for example, number of prior

mental, emotional or medical problems.²⁴⁴ In the remaining four cases, the judges concluded that the juvenile's waiver was valid despite evidence of the child's educational deficiencies or emotional and behavioral problems.²⁴⁵

Even in the most extreme cases, the totality of the circumstances test did not protect the child from an ill-advised waiver. In *D.L. v. State*,²⁴⁶ a fourteen year old was charged with aggravated assault with a deadly weapon, a third degree felony.²⁴⁷ In a method apparently favored by some judges in Orange County, Florida, the judge spoke to all the juveniles in the courtroom at once, lecturing them *en masse* about their right to counsel (court-appointed if they were financially eligible), their other constitutional rights, procedures for waiving and entering pleas, and other details.²⁴⁸ At D.L.'s individual hearing following the rights lecture, the judge asked him if he wished to give up his right to a lawyer.²⁴⁹ D.L. said "Yes," and immediately entered a guilty plea.²⁵⁰ During the plea canvass, the judge asked D.L. if he had "any mental or emotional disabilities," to which D.L. responded "No."²⁵¹ The judge then accepted his plea. At a subsequent hearing on D.L.'s motion to withdraw the plea (after he had obtained counsel), D.L.'s mother and caseworker testified that D.L. suffered from

felony referrals) bears no direct relationship" to juveniles' understanding of their rights. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 194 (1981).

244. *K.E.S. v. State*, 216 S.E.2d 670, 671 (Ga. Ct. App. 1975) (discussing a juvenile that was in a hospital psychiatric ward at the time of the charge, was "strung out" on marijuana, and living with an older man, but it was her third juvenile court appearance); *In re Appeal No. 544*, 332 A.2d 680, 685 (Md. Ct. Spec. App. 1975) (discussing a juvenile who had possible undisclosed medical problems, but also had prior delinquency); *In re Ward*, 1997 WL 321492, at *1 (Ohio Ct. App. June 12, 1997) (discussing a juvenile who had psychiatric problems, was under a doctor's care, and was taking psychotropic drugs, appeared in court alone; was on parole for prior delinquency).

245. *J.R.V. v. State*, 715 So. 2d 1135, 1137 (Fla. 5th DCA 1998) (stating that the child's intelligence was "borderline at the very best"; he had undergone psychotherapy since car accident at age eleven, and was diagnosed with dysthymic brain disorder, dyslexia, and lack of impulse control); *D.L. v. State*, 719 So. 2d 931, 933-34 (Fla. 5th DCA 1998) (noting that the child had multiple mental health and emotional disorders and attended special school); *In re D.L.*, 999 S.W.2d 291, 295 (Mo. Ct. App. 1999) (noting that the child was only thirteen, had an IQ of 95, could not read, was diagnosed with attention deficit hyperactivity disorder (ADHD), and attended special classes at school); *In re Paul H.*, 365 N.Y.S.2d 900, 903-05 (N.Y. App. Div. 1975) (noting that the fourteen-year-old read at a third grade level and was subjected to a neglectful home environment when brought to court on PINS charges for being beyond his father's control).

246. 719 So. 2d 931 (Fla. 5th DCA 1998).

247. *Id.*

248. *See id.* at 932. This "group rights" advisory, which goes on for several lengthy, mind-numbing paragraphs, appears to be popular with a certain Judge Donald E. Grincewicz in Florida's Fifth District. *See also B.F. v. State*, 747 So. 2d 1061, 1062-63 (Fla. 5th DCA 2000); *J.R.V.*, 715 So. 2d at 1136-37.

249. *D.L.*, 719 So. 2d at 933.

250. *Id.*

251. *Id.*

mental health and emotional problems, was on medication for the problems, and attended a special “behavioral school.”²⁵² The caseworker further stated that he did not believe D.L. could understand the nature of his plea, and the mother concurred.²⁵³ In spite of that information, the judge denied the motion.²⁵⁴ The appeals court summarily reversed, stating that the information from the child’s mother and caseworker should have cast “some doubt” on D.L.’s ability to intelligently waive his right to counsel.²⁵⁵

Similarly, cases in which the juvenile’s waiver was upheld showed little attention to the circumstances under which the waiver was made, and none conducted a thorough analysis of the “totality” factors. Only four of the nineteen cases considered two or more factors.²⁵⁶ Like the cases overturning waiver, prior juvenile court experience appeared to be the most significant factor in determining the validity of waiver, as reflected in four cases.²⁵⁷ It is hard to draw any conclusions from so small a sample, but the cases suggest the disturbing conclusion that even appellate courts are given to random and inconsistent application of the “knowing, voluntary and intelligent” standard for waiver and the totality of the circumstances test. Two Ohio Court of Appeals cases illustrate the basis for this conclusion.

In *In re Mark B.*,²⁵⁸ the court upheld the waiver of counsel by an eleven-year old who had a history of physical and sexual abuse by parents and foster parents beginning when he was seven, and now was charged with

252. *Id.* at 933-34.

253. *Id.*

254. *See id.*

255. *Id.* at 934.

256. *In re* Maricopa County Juvenile Action No. JV-108721 & F-327521, 798 P.2d 364, 366, 368 (Ariz. 1990) (noting that the juvenile completed school through ninth grade and was referred to juvenile court twice before for theft and burglary); *In re* R.M., 252 A.2d 237, 240 (N.J. Super. 1969) (noting that “While he was a slow learner, he had been consistently promoted in school and had completed the ninth grade”; “no evidence that he was mentally incompetent. He had been employed on various jobs after leaving school”; had two prior court referrals and was represented by counsel only one time); *In re* R.D.B., 575 N.W.2d 420, 423 (N.D. 1998) (noting that the sixteen-year-old was an average to above-average student who had several prior referrals to the juvenile court); *In re* Mark B., 2000 WL 145130, at *1,3 (Ohio Ct. App. Feb. 11, 2000) (upholding the eleven year old child’s waiver, even though he was “of tender years” and in special education classes for behavioral problems, had been removed from his birth home at age seven due to physical and sexual abuse, which were repeated by foster parents and other family members, and was charged with a sex crime).

257. *In re* Maricopa County Juvenile Action No. JV-108721, 798 P.2d at 368 (discussing referral twice before, for theft in 1986 and burglary in 1988); *Bennett v. Bennett*, 355 N.W.2d 277, 280 (Mich. Ct. App. 1984) (noting “extensive experience in the [juvenile] court system”); *In re* R.M., 252 A.2d at 240 (noting a rape in 1966, driving without a license in 1967; had counsel one time); *In re* Peggy L., WL 803443, *2 (Ohio Ct. App. Dec. 8, 1995) (discussing unspecified “prior experience”).

258. 2000 WL 145130 (Ohio Ct. App. Feb. 11, 2000).

inappropriately touching a ten-year-old's penis.²⁵⁹ After the judge advised the boy of his right to counsel, the boy consulted briefly with his father (who told the judge his son should not return to the family home) and then waived both his right to counsel and his rights to remain silent and to have a trial.²⁶⁰ The judge disposed of the case by committing the boy to the custody of the state youth services department, "to impress upon [him] the wrongfulness of his acts and to protect others from [his] sexually predatory behavior."²⁶¹ The appeals court did not flinch; instead, it found this eleven year old boy's intelligence to be "unquestioned" and discounted his attendance at special education classes because they were for children with "behavioral problems, not a lack of intellectual capacity."²⁶² Without further examination, the court of appeals concluded that, even though the accused "was of tender years during these hearings,"²⁶³ the waiver of rights was "knowing, voluntary, and intelligently given."²⁶⁴

The second Ohio case, *In re Peggy L.*,²⁶⁵ presents an entirely different picture; in fact, little picture at all. The record showed that the juvenile referee advised the accused teenager of her right to counsel and of her likely commitment to the state juvenile facility for a minimum of six months and a maximum up to age twenty-one; that the girl said she did not want a lawyer; that the referee then asked if she understood what she was doing; and that when she said she did, the referee accepted her statement as a "waiver."²⁶⁶ On this record, the appeals court concluded that the waiver was "voluntarily, knowingly and intelligently" made.²⁶⁷

These cases demonstrate a disturbingly cavalier attitude by the juvenile courts toward a child's waiver of the right to counsel. Neither right to counsel nor any other constitutional right can be relegated to the luck of the draw, whether at the juvenile or appellate court level. When even the courts assigned responsibility for correcting the lower courts' errors cannot be relied upon to protect this most basic right, the conclusion that something must change is inescapable.

259. *Id.* at *1.

260. *See id.*

261. *Id.* at *4 (as stated by the court of appeals).

262. *Id.* at *3.

263. *Id.*

264. *Id.*

265. 1995 WL 8003443 (Ohio Ct. App. Dec. 8, 1995).

266. *Id.* at *1.

267. *Id.* at *2. The appellate court decisions in *Mark B.* and *Peggy L.*, see *infra* Appendix D, are all the more disturbing because they are indistinguishable from other Ohio decisions overturning waiver. See *infra* Appendix C.

c. Juvenile Courts' Resistance to Limits on Their Discretion

Since *Gault*, most states have enacted statutes codifying juveniles' right to counsel, and many have promulgated court rules defining the procedures to be followed in securing that right.²⁶⁸ The statutes vary widely. Some contain no more than a cursory statement that juveniles have a right to counsel;²⁶⁹ others apply the right to "all stages" or "every stage" of the proceedings;²⁷⁰ and some go beyond *Gault* and establish a right to counsel for appeals, intake and detention proceedings, and "child in need of supervision" hearings.²⁷¹ Very few states flatly prohibit waiver of counsel by juveniles,²⁷² although a substantial minority of states have established requirements, some quite stringent, for juvenile waiver of the right.²⁷³

The decisions in more than two-thirds of the collected cases were based in whole or in part on juvenile court judges' failure to follow the mandates of state statutes or court rules.²⁷⁴ In sixty-six of the eighty cases overturning waivers, the reviewing courts cited such noncompliance by the lower courts.²⁷⁵ The ineffectiveness of duly enacted statutes and court rules in ensuring the validity of juvenile waivers demonstrates the resistance of juvenile court judges to externally imposed limits on their discretion. Even in states with the most specific and detailed directives for the acceptance of juvenile waiver, judges often fail to provide juveniles with the most basic reading of their rights. A review of the Florida cases illustrates this latter finding.

268. See Caeti et al., *supra* note 12, at 622-23 (reporting that only six states—Delaware, Hawaii, Michigan, Missouri, Mississippi, and New Hampshire—do not have statutory provisions governing juvenile right to counsel; most of those states apply the general criminal right to counsel statute to juveniles). Research for this Article indicates that the classifications and numbers reported in that study are not entirely reliable. Thus, the study is cited here only for its more general statements concerning the substance of the statutes and their wide variance, not for the accuracy of the classification of each state's statute.

269. *Id.* at 627 (reporting seventeen states and the District of Columbia).

270. *Id.* at 628 (reporting nineteen states).

271. *Id.* at 626, 629-30 (reporting nineteen states with various requirements in excess of the *Gault* standard). A number of the states included here also appear in the prior count. Thus, the total in the three categories is more than fifty.

272. See Robert E. Shepherd, Jr., *Juveniles' Waiver of the Right to Counsel*, 13 AM. J. CRIM. JUST. 38, 38 (Spring 1998) (citing IOWA CODE ANN. § 232.11(2) (1994); TEXAS FAM. CODE ANN. § 51.10(b) (1996)).

273. Caeti et al., *supra* note 12, at 623-24 (reporting that seventeen states have adopted either a *per se* rule making right to counsel unwaivable by minors or other strict waiver requirements); see also Shepherd, *supra* note 272, at 38-39 (citing New York Family Court Act § 249-a (1987), and court rules in Minnesota and Virginia).

274. See *infra* Appendix C.

275. See Appendix C.

Florida has one of the clearest and most explicit waiver rules of any state.²⁷⁶ Rule 8.165 of the Florida Rules of Juvenile Procedure²⁷⁷ requires the court to advise the child of his or her right to counsel and to appoint counsel “unless waived by the child at each stage of the proceedings.”²⁷⁸ Further, no child may be deemed to have waived counsel until the court has completed “the entire process of offering counsel” and made a “thorough inquiry” into the child’s comprehension of her rights and her capacity to waive counsel.²⁷⁹ The rule expressly prohibits acceptance of waiver “where it appears that the party is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors.”²⁸⁰

Notwithstanding the specificity of the rule, cases from Florida comprise a significant proportion (twenty-seven) of the appellate decisions overturning juvenile waiver of right to counsel,²⁸¹ and the lower courts’ errors were not merely matters of “technical” noncompliance. In several cases, the lower court appeared oblivious to the existence of any governing authority and did not even fully advise the juveniles of their right to

276. See FLA. R. JUV. P. 8.165.

277. FLA. R. JUV. P. 8.165. The full text of Rule 8.165, entitled “Providing Counsel to Parties,” provides:

(a) Duty of the Court. The court shall advise the child of the child’s right to counsel. The court shall appoint counsel as provided by law unless waived by the child at each stage of the proceeding. This waiver shall be in writing if made at the time of a plea of guilty or no contest or at the adjudicatory hearing.

(b) Waiver of Counsel.

(1) The failure of a child to request appointment of counsel at a particular stage in the proceedings or the child’s announced intention to plead guilty shall not, in itself, constitute a waiver of counsel at any subsequent stage of the proceedings.

(2) A child shall not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the child’s comprehension of that offer and the capacity to make that choice intelligently and understandingly has been made.

(3) No waiver shall be accepted where it appears that the party is unable to make an intelligent and understanding choice because of mental condition, age, education, experience, the nature or complexity of the case, or other factors.

(4) If a waiver is accepted at any stage of the proceedings, the offer of assistance of counsel shall be renewed at each subsequent stage of the proceedings at which the party appears without counsel.

Id.

278. *Id.* 8.165(a).

279. *Id.* 8.165(b)(2).

280. *Id.* 8.165(b)(3).

281. See *infra* Appendix A.

counsel.²⁸² The judge in one case denied without explanation the juvenile's request for counsel at the hearing, but then provided counsel for purposes of appeal.²⁸³ In many cases, the juvenile judge conducted little, if any, inquiry to determine that the juvenile's waiver was made "intelligently and understandingly," as required by Rule 8.165(b)(2).²⁸⁴ In other cases, the court appeared to ignore evidence that the juvenile lacked the capacity to waive.²⁸⁵

Because few cases contain a well-developed record of the proceedings below, reversal often was based on the insufficiency of the record to support the juvenile court's acceptance of waiver. *J.R.V. v. State*²⁸⁶ is a

282. See *infra* Appendix C (citing *T.S. v. State*, 773 So. 2d 635, 636 (Fla. 5th DCA 2000) (noting that no advice was given regarding right to counsel); *T.G. v. State*, 741 So. 2d 517, 518 (Fla. 5th DCA 1999) (noting that no advice was given regarding right to counsel; the judge just asked if the child wanted a lawyer, and the child said "no"); *A.G. v. State*, 737 So. 2d 1244, 1246-47 (Fla. 5th DCA 1999) (noting no explanation of rights; no inquiry into waiver; judge instead became angry with A.G., venting her anger at cocaine peddlers and "ratchet[ing] up" A.G.'s commitment from the probation officer's sentencing recommendation); *A.P. v. State*, 730 So. 2d 425, 426 (Fla. 5th DCA 1999) (noting no explanation of right to an attorney appointed by the court); *J.O. v. State*, 717 So. 2d 185, 186 (Fla. 5th DCA 1998) (noting no mention by trial judge of right to counsel or appointment of counsel); *J.G.S. v. State*, 435 So. 2d 942, 943 (Fla. 5th DCA 1983) (noting no explanation of right to counsel; judge simply asked J.G.S. if he "felt he needed an attorney," to which he replied "No").

283. See *infra* Appendix C (citing *N.E.R. v. State*, 588 So. 2d 289, 289 (Fla. 2d DCA 1991) (ruling under predecessor Rule 8.290)).

284. See *infra* Appendix C (citing *B.F. v. State*, 747 So. 2d 1061 (Fla. 5th DCA 2000) ("trial court failed to adequately explain his right to counsel and to determine that he knowingly and intelligently waiv[ed] that right"); *A.P. v. State*, 740 So. 2d 1241, 1241 (Fla. 5th DCA 1999) ("no thorough inquiry into [juvenile's] comprehension of the offer of counsel or [his] capacity to . . . waive"); *P.L.S. v. State*, 745 So. 2d 555, 557 (Fla. 4th DCA 1999) (noting no thorough inquiry, under predecessor Rule 8.290, where judge's only question beyond asking P.L.S. whether he was aware of his right to a lawyer free of charge was to ask his age); *J.H. v. State*, 679 So. 2d 67, 67 (Fla. 5th DCA 1996) (noting no thorough inquiry or renewal of offer of counsel, under predecessor Rule 8.290); *D.L.A. v. State*, 667 So. 2d 330, 331 (Fla. 1st DCA 1995) (noting no thorough inquiry regarding waiver and no renewal of offer of counsel at each stage of proceedings); *K.M. v. State*, 448 So. 2d 1124, 1125 (Fla. 2d DCA 1984) (noting no thorough inquiry, under predecessor Rule 8.290); *G.L.D. v. State*, 442 So. 2d 401, 402-04 (Fla. 2d DCA 1983) (noting that G.L.D. had first indicated that he wanted a lawyer, then withdrew his request after the judge ordered him to deliver his guitar and amplifier to the court in partial payment of the public defender's fee; no inquiry regarding waiver despite the obvious reason for the flip-flop, under predecessor Rule 8.290); *R.V.P. v. State*, 395 So. 2d 291, 291-92 (Fla. 5th DCA 1981) (noting no inquiry re waiver or renewal of offer of counsel, under predecessor Rule 8.290, despite R.V.P.'s appearing at his adjudication hearing without counsel after stating at arraignment that his mother intended to retain counsel); *C.G.H. v. State*, 404 So. 2d 400, 401 (Fla. 5th DCA 1981) (noting no circumstances of waiver in the record and failure to renew offer of counsel at later stages of proceedings under predecessor Rule 8.290)).

285. See *infra* Appendix C (citing *J.R.V. v. State*, 715 So. 2d 1135, 1138 (Fla. 5th DCA 1998)).

286. 715 So. 2d 1135 (Fla. 5th DCA 1998).

notable exception. The evidence reported on the record in *J.R.V.* makes the judge's ruling all the more troubling. The circumstances were similar to those described in *D.L.* above.²⁸⁷ In *J.R.V.*, the accused had diminished mental capacity, borderline intelligence, and could not read or write.²⁸⁸ As in *D.L.*, the court read the juveniles their rights *en masse*, informing them of their right to counsel and to court-appointed counsel if they were financially eligible.²⁸⁹ After the extended lecture, the judge spoke briefly with each juvenile.²⁹⁰ He asked J.R.V. if he understood his rights, and J.R.V. responded that he did.²⁹¹ After a series of questions to which J.R.V. responded simply "yes" or "no," the judge announced, "Court finds that you're alert and intelligent," and concluded that J.R.V. had given up his right to counsel.²⁹² After J.R.V. pled guilty to several felony charges of aggravated assault with a deadly weapon and then obtained counsel on his own, he sought to withdraw his plea.²⁹³

Evidence in the record before the juvenile court at the hearing on the motion to withdraw the plea, including expert testimony, showed that J.R.V. suffered from dyslexia and lack of impulse control, and that he had never fully recovered from a serious auto accident that had left him in a coma for over a week a few years earlier.²⁹⁴ His intelligence was "borderline at the very best," and he had only first or second grade language skills.²⁹⁵ In addition, J.R.V. repeatedly testified that he pled guilty because he thought he would get out of detention and get to go home.²⁹⁶ The child development expert confirmed J.R.V.'s testimony and concluded that he did not enter his plea "freely and intelligently"; instead, the plea was based on his faulty expectations.²⁹⁷ Nevertheless, the court denied the motion. The appeals court reversed, citing Rule 8.165.²⁹⁸ The court of appeals stated that, at the motion hearing, "appellant's confusion and basic lack of understanding regarding the nature of the criminal charges against him and

287. See *supra* notes 246-55 and accompanying text.

288. *J.R.V.*, 715 So. 2d at 1137.

289. *Id.* at 1136.

290. See *id.*

291. *Id.* at 1137.

292. *Id.*

293. *Id.* at 1137-38.

294. *Id.*

295. *Id.* at 1137.

296. *Id.* at 1138. J.R.V.'s behavior reflects what child development studies have identified as a difference between children and adults regarding temporal perspective. The studies demonstrate that children and adolescents generally focus more on short-term consequences, whereas adults are more oriented to consider the long-term consequences of a decision such as the one in *J.R.V.* See Elizabeth S. Scott, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 J. LAW & HUM. BEHAV. 221, 231 (1995).

297. *J.R.V.*, 715 So. 2d at 1138.

298. *Id.* at 1139.

the consequences for entering a plea are readily apparent.²⁹⁹ The appeals court remanded with instructions to the juvenile court to conduct the “thorough inquiry” mandated by Rule 8.165.³⁰⁰

If the *J.R.V.* court’s complete disregard of the governing rules represents one end of the spectrum, two decisions upholding waivers in other jurisdictions represent the other. The juvenile court in each case relied exclusively on the juvenile court rules, to the exclusion of other legal principles, notably burden of proof, in finding waiver.³⁰¹ To make matters worse, the courts of appeals upheld those decisions.

In *Bennett v. Bennett*³⁰² and *In re East*,³⁰³ the Michigan and Ohio Courts of Appeals upheld waivers based on the absence of a rule requiring the juvenile court to do what the appellant argued it should have done.³⁰⁴ In each case, the juvenile argued that his waiver should be overturned on two grounds: first, because the juvenile court had failed to make a record of the waiver proceedings, making it impossible for the state to establish that it had met its burden of proving a knowing, voluntary and intelligent waiver; and second, because the judge had failed to renew the offer of counsel at later proceedings when the juvenile had waived his right to counsel earlier in the case.³⁰⁵ Those arguments failed, the courts of appeals concluded, because the juvenile court rules were silent as to any requirement that the juvenile court make a record of the waiver proceedings or renew the right to counsel advisory at later proceedings after an initial waiver.³⁰⁶

While the ruling on the “renewal” issue is arguably sustainable, the courts’ confusion of the state’s burden of proof with a technical rule requirement certainly is insupportable. It strains credulity for a reviewing court to conclude that the state had sustained its burden when there is no record whatsoever upon which to make the required determination that the juvenile’s waiver was knowing, voluntary, and intelligent. Tellingly, neither state’s rule endured. Shortly after the court of appeals ruling in *East*, Ohio amended its juvenile court rules to require a record of all waiver

299. *Id.*

300. *Id.* (quotation marks omitted).

301. *See generally In re East*, 663 N.E.2d 983 (Ohio Ct. App. 1995); *Bennett v. Bennett*, 355 N.W.2d 279 (Mich. Ct. App. 1984).

302. 355 N.W.2d 279 (Mich. Ct. App. 1984).

303. 663 N.E.2d 983 (Ohio Ct. App. 1995).

304. *Bennett*, 355 N.W.2d at 280; *East*, 663 N.E.2d at 985.

305. *Bennett*, 355 N.W.2d at 279, 280; *East*, 663 N.E.2d at 985-86.

306. *Bennett*, 355 N.W.2d at 279-80 (finding compliance with applicable rules, which required neither renewal of offer of counsel after the first hearing nor a record of the waiver proceedings); *East*, 663 N.E.2d at 985-86 (declining to impose record requirement, where rule provided for making a transcript only “upon request” and lacked any requirement for advising of right to counsel at all stages of proceedings once the right was waived).

proceedings.³⁰⁷ Although Michigan was not as prompt as Ohio, its court rules soon established a record requirement as well.³⁰⁸ For those juveniles whose rights were abused because of the courts' misplaced reliance on the absence of a record requirement, however, the rule change offers no relief.

d. Conclusion

The eighty children and youths whose waivers were reversed on appeal received the law's protection of their rights, even if belatedly. The law, however, failed the children in most of the remaining cases. The outcome of those cases does not bode well for juveniles in many jurisdictions. Although many states were not among the cases reviewed here or were represented by a single case from the 1970s or early 1980s, what that means is unclear. It may mean that the absent state has a very good waiver standard which is well administered in the juvenile courts, or it may mean simply that no appeals are being filed.³⁰⁹

The resistance of many juvenile court judges to providing counsel to the children appearing before them is just one of the challenges facing children who appear in juvenile court without retained counsel. Precisely because they are children, those against whom delinquency petitions are filed are least able to execute a valid waiver of their right to counsel or to represent themselves.

IV. JUVENILES' CAPACITY TO WAIVE RIGHT TO COUNSEL

A. *The Law's Approach to Juvenile Capacity*

The Supreme Court has long recognized that "the status of minors under the law is unique in many respects."³¹⁰ The Court's jurisprudence has

307. See OHIO R. JUV. P. 37(A). Ohio wasted no time. The amendment went into effect July 1, 1996, less than one year after *East*, which was decided July 17, 1995. See *id.*; see also *East*, 663 N.E.2d at 983. Ohio Juvenile Rule 37(A) provides:

The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates. In all other proceedings governed by these rules, a record shall be made upon request of a party or upon motion of the court.

OHIO R. JUV. P. 37(A).

308. MICH. R. PROB. CT. 5.925. Michigan amended its court rules in 1988, stating: "A record of the proceedings on the formal calendar must be made and preserved by stenographic recording or by mechanical or electronic recording . . ." *Id.* 5.925(B).

309. See *infra* notes 376-78 and accompanying text.

310. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion).

tended to exhibit a certain protectionism toward children.³¹¹ This protective approach has led almost invariably to according children fewer rights under the law, based on children's presumed lack of capacity to exercise good judgment.³¹²

The Court has ruled that because of their immaturity, children are incapable of making decisions concerning certain significant matters in their lives.³¹³ For example, the Court concluded in *Parham v. J.R.*³¹⁴ that minors have no due process right to notice and a hearing before being committed by their parents to a mental institution.³¹⁵ While it acknowledged that its ruling implicated the liberty interest of minors,³¹⁶ the Court focused instead on the parent-child relationship:

The law's concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.³¹⁷

Justice Stewart's concurrence in *Ginsberg v. New York*³¹⁸ demonstrates the same reasoning in the First Amendment context: "I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full

311. *But see generally* Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65 (1999) (discussing recent expansion of minors' autonomy in decision-making in civil matters and persistence of paternalistic approach in juvenile delinquency/criminal matters).

312. *See generally* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547-55 (2000).

313. *See id.*; *see also* Lee E. Teitelbaum & James W. Ellis, *The Liberty Interests of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 161 (1978). Teitelbaum and Ellis point out, however, that "[t]he fact of minority does not, of itself, always imply that the young person lacks a constitutionally recognized ambit of choice." *Id.* at 164.

314. 442 U.S. 584 (1979).

315. The Georgia procedures at issue required that designated mental health professionals at the hospital agree with the parent or guardian that hospitalization was appropriate in the particular circumstances. *Id.* at 590-91.

316. *Id.* at 600-01.

317. *Id.* at 602-03.

318. 390 U.S. 29 (1968) (upholding New York statute prohibiting sale of obscene materials to those under age seventeen; state could rationally conclude that exposure to proscribed materials was harmful to well-being of young people).

capacity for individual choice which is the presupposition of First Amendment guarantees."³¹⁹

In *Bellotti v. Baird*,³²⁰ the Court articulated a general framework for determining when the State may impinge upon the constitutional rights of minors in ways that would be impermissible for adults.³²¹ *Belotti* specified "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."³²² The Court's explanation of the grounds for its first two reasons is relevant to the discussion here. In discussing the first reason, the Court adverted to the acceptance of juvenile courts as distinct from adult criminal courts to support the State's entitlement "to adjust its legal system to account for children's vulnerability."³²³ As for the second reason, the Court stated that in certain situations, the State may "limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences" because juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."³²⁴

In spite of those words of caution about adolescent decisionmaking, the Court generally³²⁵ has employed a reverse presumption of "decisional competence"³²⁶ in the delinquency and criminal law settings, even with

319. *Id.* at 649-50. In his concurring and dissenting opinion in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), Justice Stevens detailed further existing legal protections against a child's bad judgment: "Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent." *Id.* at 101-02.

320. 443 U.S. 622 (1979) (plurality opinion) (concluding that court may authorize abortion for a minor without parental notification if court determines abortion is in a minor's best interests).

321. *Id.* at 634.

322. *Id.*

323. *Id.* at 635.

324. *Id.*

325. The one notable exception is *Schall v. Martin*, 467 U.S. 253 (1984), in which the Supreme Court cited the *Belotti* rationale in upholding pretrial detention of juveniles against a due process challenge. *Id.* at 265-66. The Court quoted the state supreme court's decision in stressing the "desirability of protecting the juvenile from his own folly"—the commission of more crimes if not detained. *Id.* at 26 (quotation marks omitted).

326. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 298 (1992). Professor Bonnie, one of the leading scholars on the insanity defense, has described the concept of "decisional competence" as one of two broad types of abilities needed for defendants' effective participation in criminal proceedings, the other being the capacity to assist counsel in developing and pursuing the defense. *Id.* at 298-99. "Decisional competence," therefore, is a term not limited to juveniles, but refers generally to

regard to applying the death penalty to juveniles. In *Stanford v. Kentucky*,³²⁷ the Court ruled that two boys aged sixteen and seventeen at the time the crime was committed could be sentenced to death without offending the Eighth Amendment's proscription against cruel and unusual punishment.³²⁸ Paradoxically, under state law neither boy had the legal capacity to refuse life-sustaining medical treatment.³²⁹ Under the Court's ruling, the boys could not choose to end their lives, but the State could. State courts and legislatures evince this selective recognition of adolescent decisional capacity as well, with incongruous and inconsistent results, exemplified by laws in many states which allow a ten-year-old accused of a crime to be tried as an adult,³³⁰ but withhold his ability to contract with a lawyer to represent him.³³¹

B. *The Social Science Evidence Concerning Juvenile Capacity*

Research by child development experts supports the Supreme Court's solicitude for children and the protections the Court has erected for their lack of decision making ability in non-criminal areas of the law. However, nothing in the social science research suggests that juveniles encountering criminal or delinquency proceedings should receive less protection. To the contrary, empirical studies underscore the need for courts to rethink the presumption of capacity that has dominated the delinquency system. Juveniles' limited decisionmaking ability, coupled with their lack of

defendants' capacities for reasoning and judgment that are needed to make decisions in proceedings affecting them, including decisions regarding waiver of right to counsel. *Id.*

327. 492 U.S. 361 (1989).

328. *Id.* at 380. *But see Thompson v. Oklahoma*, 487 U.S. 815 (1988), where the United States Supreme Court held that a state statute which permitted the execution of a man who was fifteen at the time of the crime violated the Eighth Amendment's prohibition of "cruel and unusual" punishment. *Id.* at 838. Explaining its decision, the Court said, "there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults." *Id.* at 823. The Court noted "the experience of mankind, as well as the long history of our law, that the normal fifteen-year-old is not prepared to assume the full responsibilities of an adult." *Id.* at 825. Further, the Court went on to say, "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct." *Id.* at 835. If this rationale applies to a child's ability to evaluate the consequences of criminal conduct, *a fortiori*, it must apply to a child's ability to evaluate the consequences of waiving right to counsel.

329. See Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1267 (2000).

330. See, e.g., Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 503-07 (1987).

331. See MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 91-120 (1997) (comprehensive treatment of laws limiting and/or protecting juveniles); Hartman, *supra* note 329, at 1267; see generally Beschle, *supra* note 311.

understanding of their legal rights, undermine current practice in the juvenile courts.

1. The Limits of Juvenile Decisionmaking

Like most other activities in life, decisionmaking and judgment are learned skills. Wally Mlyniec, a clinical law professor who has represented juveniles for many years, has observed that, “most people, subject to hereditary limits, improve a skill each time they use it. Improvement of skills upon repeated use applies to making judgments and decisions as well. Decisionmaking involves, after all, a process of making choices among competing courses of action.”³³² Compared to adults, children and adolescents have less knowledge and experience to aid them in making decisions.³³³ Thus, “[i]n situations where adults see several choices, adolescents may see only one.”³³⁴

Elizabeth Scott and Thomas Grisso describe differences in decisionmaking ability as the developmental basis for the distinction between juvenile and adult culpability:

The criminal law posits that the offender is a rational actor, autonomously choosing ‘to do the bad thing’ on the basis of personal values and preferences. The legitimacy of punishment is undermined if criminal choices depart substantially from this autonomy model. If youthful choices to offend are based on diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened.³³⁵

Scientific evidence of the long maturation process of the brain now buttresses the work of developmental psychologists who have long known that juveniles’ thought processes are immature.³³⁶ For example, children who carry guns often do not anticipate using the gun or injuring anyone; rather, the typical youthful gun toter just wants to scare someone or “look

332. Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1885 (1996).

333. Scott, *supra* note 312, at 591; Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 291, 293-94 (Thomas Grisso & Robert G. Schwartz eds., 2000).

334. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 *CRIM. JUSTICE* 26, 27 (Summer 2000).

335. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 *J. CRIM. L. & CRIMINOLOGY* 137, 172-73 (1997).

336. Beyer, *supra* note 334, at 27.

bigger.”³³⁷ In addition, while lack of impulse control is normal in adolescents, it “does not predict poor judgment or psychopathology” in adulthood.³³⁸ A desire to please both peers and adults, a high moral sense, and intolerance of “anything that seems unfair” can lead to offenses that appear to be calculated revenge but may, in fact, be impulsive and moralistic in origin.³³⁹

Peer conformity also plays a powerful role in adolescent decision-making, rendering youths less able than adults to make decisions that are a product of their own independent thinking.³⁴⁰ Simply sitting in a courtroom and hearing others waive their right to counsel and enter guilty pleas, one after another, can suggest to a teenager that he should do the same or he will look foolish to his peers. This incapacity for independent judgment influences adolescents to do what they think will make a judge or their lawyer like them,³⁴¹ not necessarily what is in their best interests. In addition, adolescents do not think ahead³⁴² and are prone to mistakes based on their preference for short-term results,³⁴³ like getting to go home if they just admit the charges, rather than looking ahead to the longer term effects of a delinquency adjudication.³⁴⁴ Moreover, adolescent experiences can have a tremendous cumulative impact, with the result that bad decisions can “have long-term consequences that are difficult to reverse.”³⁴⁵ Limiting the legal consequences of juveniles’ own ill-formed decisions, therefore, represents sound judicial policy, which should inform the law’s approach to all youth, not just those in non-criminal, non-delinquency legal fora.

Determining the specific measures that will afford the necessary protections against poor decision making is complicated by the fact that, compared to non-delinquent youth or adolescents in general, delinquent youth have a much higher rate of mental disorders,³⁴⁶ such as substance

337. *Id.* Beyer also noted that all of the children in her study who were involved in shootings said that “the gun ‘went off,’” and they had no memory of pulling the trigger. *Id.*

338. *Id.*

339. *Id.* at 33.

340. *Id.*; see also Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (describing adolescence as “a period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development”).

341. Beyer, *supra* note 334, at 32-33.

342. *Id.* at 33.

343. *Id.*; see also Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children’s Rights*, 16 *NOVA L. REV.* 711, 716 (1992).

344. See *infra* notes 352-62 and accompanying text. This was one of Thomas Grisso’s findings in his study discussed more fully at notes 300-10 and accompanying text.

345. Steinberg & Schwartz, *supra* note 340, at 23.

346. The term “mental disorder” is used by the American Psychiatric Association to refer to

abuse and dependence, psychosis, autism, conduct and attention deficit disorders, mood and anxiety disorders, learning and academic disabilities, and post-traumatic stress disorder.³⁴⁷ All of these disorders directly impair decisionmaking and signal other personal and external influences that may generate bad decisions.³⁴⁸ In a comprehensive study of over 1200 delinquent detainees aged twelve to seventeen in Cook County, Illinois, nearly eighty percent of the youth demonstrated at least one mental disorder, compared to approximately twenty percent of youths in general.³⁴⁹ Because psychosis, autism, and learning disabilities were not included in the disorders identified in the study,³⁵⁰ the percentage of mentally disturbed delinquents may be even higher.

a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or a disability (i.e., an impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* xxi (4th ed., 1994).

347. Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 33, 34, 39 (Thomas Grisso & Robert G. Schwartz eds., 2000).

348. *Id.* at 40-41.

349. *Id.* at 40 (citing L.A. Teplin et al., *Psychiatric Disorders Among Juvenile Detainees*, Paper presented at the Annual Conference on Criminal Justice Research and Evaluation, at the Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C. (July 1998)). Other studies have shown similarly high rates of prevalence of mental disorders. See, e.g., *id.* (citing S.P. Cuffe et al., *Prevalence of PTSD in a Community Sample of Older Adolescents*, 37 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 147 (1998); R. McGee et al., *DSM-III Disorders from Age 11 to Age 15 Years*, 31 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 50 (1992); McGee et al., *DSM-III Disorders in a Large Sample of Adolescents*, 29 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 611 (1990); R.K. Otto et al., *Prevalence of Mental Disorders in the Juvenile Justice System*, in *RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTHS IN THE JUVENILE JUSTICE SYSTEM* (J.J. Cocozza ed., 1992); H. Steiner et al., *Posttraumatic Stress Disorder in Incarcerated Juvenile Delinquents*, 36 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 357 (1997); UNITED STATES CONGRESS: OFFICE OF TECHNOLOGY ASSESSMENT, *ADOLESCENT HEALTH* (1991); N.Z. Weinberg et al., *Adolescent Substance Abuse: A Review of the Past Ten Years*, 37 J. AMER. ACAD. CHILD & ADOLESCENT PSYCHIATRY 252 (1998)). The Cook County study is particularly significant because it was the first to employ the diagnostic interview, the standard method for systematically evaluating the existence of mental disorders. See Kazdin, *supra* note 347, at 40. The particular measure used by the Cook County researchers was the Diagnostic Interview Schedule for Children. *Id.*

350. *Id.*

2. Juveniles' Lack of Understanding of Their Legal Rights

Juveniles' limited decision making ability is compounded by their general lack of comprehension of their legal rights. A 1970 study of juveniles' understanding of their *Miranda* rights concluded that only five of eighty-six juveniles understood their rights to counsel and to remain silent.³⁵¹ In the most frequently cited studies of juveniles' legal and psychological competence to waive their rights, Thomas Grisso found that juveniles are unlikely to understand either the rights they are being asked to waive or the consequences of waiving them.³⁵² Grisso's studies examined the psychological capacity of juveniles to understand and effectively waive their *Miranda* rights.³⁵³ He studied the juvenile suspects' ability to understand the words and phrases used in the *Miranda* warning and their cognitive capacity to perceive the function and significance of the rights conveyed by the warning.³⁵⁴ Grisso reached the following conclusions: First, juveniles of ages 14 and below demonstrate incompetence³⁵⁵ to waive their rights to silence and legal counsel;³⁵⁶ second, juveniles of ages 15 and 16 who have IQ scores of 80 or below lack the requisite competence to waive their rights to silence and counsel;³⁵⁷ and third, between one-third and one-half of

351. A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SANDIEGO L. REV. 39, 53 (1970) (concluding that only 5 of 86 juveniles understood their *Miranda* rights before waiving them); see also Beyer, *supra* note 334, at 28 (noting that 10 out of 17 adolescents did not understand *Miranda* warnings); see generally Norman Lefstein et al., *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491 (1969) (discussing an empirical study of juvenile waiver demonstrating the difficulty of obtaining waivers with confidence that they are knowing and voluntary).

352. GRISSO, *supra* note 243, at 193-94 (discussing series of studies); see generally Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) (discussing one study, which compared juveniles' understanding of their rights with adults' understanding) (hereinafter *Juveniles' Capacity*).

353. See generally GRISSO, *supra* note 243; *Juveniles' Capacity*, *supra* note 352.

354. GRISSO, *supra* note 243, at 131-32; *Juveniles' Capacity*, *supra* note 352, at 1143.

355. As used in Grisso's studies and the conclusions reported here, "competence" and "incompetence" are defined in both psychological and legal terms. In a psychological sense, "incompetence" means "that a juvenile *did not demonstrate a sufficient level of performance* on a criterion measure of understanding or perception of the rights. Specifically, we do not assume that a juvenile's inadequate performance is related to a trait, a maturational 'given,' an intellectual limitation, or any other unalterable characteristic. We refer merely to the juvenile's condition of deficient understanding or perception, both of which might be alterable." GRISSO, *supra* note 243, at 194-95 (emphasis in original). "Competence," in a legal sense, refers to "those characteristics of the juvenile which would address whether or not he or she was capable of providing a knowing, intelligent, and voluntary waiver." *Id.* at 195.

356. *Id.* at 193-94; *Juveniles' Capacity*, *supra* note 352, at 1160.

357. GRISSO, *supra* note 243, at 193-94; *Juveniles' Capacity*, *supra* note 352, at 1160.

juveniles 15 and 16 years of age with IQ scores above 80 lack the requisite competence to waive their rights.³⁵⁸

In conclusion, Grisso recommended a *per se* exclusionary rule for all juvenile waivers.³⁵⁹ Compared with adults, younger juveniles' comprehension of their legal rights was so deficient that their waivers could not be considered to be knowing, voluntary, and intelligent.³⁶⁰ The exclusion should extend to 15 and 16 year olds, based on their inadequate understanding of their legal rights, as demonstrated in the study.³⁶¹ Although older juveniles tended to understand their rights as well as adults, Grisso recommended consideration of a *per se* exclusionary rule for them as well, because the study results indicated that adult levels of understanding were "an imperfect standard for determining the adequacy of older juveniles' comprehension."³⁶²

Grisso's findings are particularly disturbing when viewed in light of the disproportionate number of juveniles adjudicated delinquent who have been diagnosed as learning disabled.³⁶³ "Learning disabilities are often the manifestation of cognitive problems . . ." related to awareness and judgment,³⁶⁴ and "learning disabled juveniles usually have deficient language and communication skills."³⁶⁵ They do not, however, tend to exhibit low IQ scores, but are generally "average or above average in intelligence."³⁶⁶ While learning disabilities can have a profound negative impact on juveniles' abilities to understand and effectively exercise their rights, those individuals may have escaped inclusion in Grisso's conclusions.³⁶⁷ Thus, like the Cook County study of mental disorders among adolescents,³⁶⁸ the numbers Grisso reports may be under-inclusive.

358. GRISSE, *supra* note 243, at 193-94; *Juveniles' Capacity*, *supra* note 352, at 1160.

359. *Juveniles' Capacity*, *supra* note 352, at 1166.

360. *Id.*

361. *Id.* at 1165.

362. *Id.* at 1166.

363. See Steven A. Greenburg, *Learning Disabled Juveniles and Miranda Rights—What Constitutes Voluntary, Knowing, & Intelligent Waiver*, 21 GOLDEN GATE U. L. REV. 487, 490 (1991).

364. *Id.* at 504.

365. *Id.* at 490.

366. *Id.* at 503.

367. The same may be true of those who are developmentally delayed due to childhood physical or sexual abuse, substance abuse, or other traumas. See Beyer, *supra* note 334, at 26 (discussing developmental delay). Beyer's study noted that twelve out of seventeen delinquent youth exhibited signs of developmental delay, which she describes as "comparatively mature thinking or moral reasoning combined with emotional childishness." *Id.* at 35. Although Beyer's study did not correlate developmental delay with the inability to comprehend *Miranda* rights found among twelve of the seventeen youth, further research might show such a relationship. In that event, Grisso's conclusions perhaps would be even more startling.

368. See *supra* note 349 and accompanying text.

The findings of Grisso and other developmental psychologists regarding juveniles' limited ability to reason and make good judgments are uncontroverted. Many juvenile courts, however, have continued to ignore the message in those findings, as the cases analyzed in Part III demonstrate.

V. RECONSIDERING JUVENILE WAIVER OF RIGHT TO COUNSEL

A. *The Inadequacy of the Judicial Remedy for Invalid Waiver of Right to Counsel*

As reported in Part III, eighty percent of the reported waiver cases were reversed on appeal based on the reviewing court's determination that the waivers were invalid. Although none of the cases explained the legal basis for reversal of the delinquency adjudications, federal cases involving invalid adult waivers of right to counsel have articulated the legal principles underlying their decisions. Those cases establish that when a court accepts a defendant's waiver of counsel without establishing that it was knowing, voluntary and intelligent, the court effectively denies the defendant his right to counsel.³⁶⁹ Moreover, right to counsel is so essential to a fair trial that deprivation of the right constitutes a constitutional error that can never be deemed harmless.³⁷⁰ Rather, a substantive violation of the right to counsel gives rise to structural error which so undermines the integrity of the trial process that it requires automatic reversal without a showing of prejudice to the defendant.³⁷¹

369. *E.g.*, *Henderson v. Frank*, 155 F.3d 159, 169 (3d Cir. 1998) (noting that the defendant was deprived of his Sixth Amendment right to counsel when the court accepted an invalid waiver of counsel at suppression hearing); *United States v. Balough*, 820 F.2d 1485, 1489-90 (9th Cir. 1987) (noting defendant's waiver of right to counsel at the hearing on his motion to withdraw his guilty plea was not knowing and intelligent and constituted an unconstitutional denial of his right to counsel).

370. *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993) ("existence of [structural] defects—deprivation of the right to counsel, for example—requires automatic reversal of the conviction because they infect the entire trial process"); *Penson v. Ohio*, 488 U.S. 75, 88 (1988) ("right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error'" (alteration in original)); see also Bruce A. McGovern, *Invalid Waivers of Counsel As Harmless Errors: Judicial Economy or a Return to Betts v. Brady?*, 56 FORDHAM L. REV. 431, 443 (1987) (citing *Chapman v. California*, 386 U.S. 18, 23 & n.8 (1967)) (noting certain constitutional rights, such as right to counsel, are so basic to a fair trial, that their denial is error that can never be harmless); *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice"); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) ("when a defendant is deprived of the presence and assistance of his attorney . . . reversal is automatic").

371. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (stating that a total deprivation of right to counsel required reversal); see also McGovern, *supra* note 370, at 451 ("[h]armless-error analysis . . . presupposes a trial, at which the defendant, represented by counsel, may present

Although the Supreme Court has not specifically addressed the question whether an invalid waiver of right to counsel constitutes a structural defect requiring automatic reversal, nearly all of the federal courts of appeals that have considered the question have ruled that a trial judge's failure to assure that a waiver of right to counsel is valid requires automatic reversal of the defendant's conviction. For example, in *Henderson v. Frank*,³⁷² the Third Circuit Court of Appeals ruled that the district court's acceptance of the defendant's invalid waiver of right to counsel at his suppression hearing was a structural defect defying harmless error analysis and requiring reversal without a showing of prejudice.³⁷³ The court of appeals reasoned that the defendant "lost much more than [the] opportunity to have his confession suppressed" when he was deprived of his right to counsel; that deprivation "may have had repercussions in plea bargaining, discovery and trial strategy that would not be cured by a new suppression hearing alone."³⁷⁴ The only remedy for a defect that had so infected the entire trial process, the court concluded, was automatic reversal of the defendant's conviction.³⁷⁵

The same analysis must govern juvenile waiver cases. For juveniles, as for adults, right to counsel is the key to their ability to receive a fair trial that accords them their due process rights. When the juvenile court permits a juvenile to waive right to counsel without establishing that the waiver was knowing, voluntary, and intelligent, the juvenile is deprived of his right to

evidence and argument before an impartial judge or jury" (alteration in original) (citing *Rose v. Clark*, 478 U.S. 570, 578 (1986)). Cf. *Sullivan v. Louisiana*, 508 U.S. 275 (1993) ("giving of a constitutionally deficient reasonable-doubt instruction . . . requir[ed] reversal"); *Arizona v. Fulminante*, 499 U.S. 279, 302 (1986) (finding admission of coerced confession required reversal); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (finding trial by a biased judge required reversal).

372. 155 F.3d 159 (3d Cir. 1998).

373. *Id.* at 170.

374. *Id.* at 169-70.

375. *Id.* at 171. *Accord* *French v. Jones*, 282 F.3d 893, 902 (6th Cir. 2002) (finding defendant's invalid waiver of counsel during the court's supplemental instructions was a structural defect requiring reversal); *United States v. Stubbs*, 281 F.3d 109, 121 (3d Cir. 2002) (stating that the trial court's failure to establish that defendant's waiver of counsel was knowing and intelligent could not be subjected to harmless error analysis); *United States v. Cash*, 47 F.3d 1083, 1089-90 (11th Cir. 1995) (stating the same, in the context of a defendant with documented mental problems that brought into question his ability to make a knowing, voluntary, and intelligent waiver); *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990) (finding trial court's complete failure to conduct a pretrial inquiry into defendant's waiver when defendant appeared without counsel rendered his purported waiver invalid and because it left him "entirely without the assistance of counsel" could not constitute harmless error); *United States v. Balough*, 820 F.2d 1485, 1490 (9th Cir. 1987) (finding defendant's waiver of right to counsel at the hearing on his motion to withdraw his guilty plea was invalid and was a denial of his right to counsel, which required automatic reversal). *But see* *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984) (applying harmless error rule to uphold conviction, despite finding that defendant's waiver of right to counsel was invalid).

counsel. That deprivation so contaminates the entire trial process that it can never constitute harmless error. Instead, as in adult waiver cases, the juvenile court's acceptance of an invalid waiver is a structural error that requires automatic reversal without a showing of prejudice.

However, correction at the appellate level provides faint hope for most juveniles who waive their right to counsel.³⁷⁶ The sheer enormity of the problem is reflected in the low appeal rate for juvenile adjudications and dispositions. A 1996 study by the ABA Juvenile Justice Center found that the practice of taking appeals in juvenile court is "lacking in most jurisdictions."³⁷⁷ Nearly one-half of juvenile public defenders and more than three quarters of appointed lawyers authorized to file appeals reported that they had taken no appeals in the preceding year.³⁷⁸ Add to those numbers the one-third of public defenders and one-quarter of appointed lawyers who were not authorized to appeal,³⁷⁹ and the prospects for review of a juvenile court's decision are dim, even for those who were provided counsel in the first instance. For all those who waived their right to counsel, the opportunities are rare indeed. Relying on the wisdom of the appellate courts to remedy the injustice visited upon youth by the juvenile court's acquiescence in invalid waivers of right to counsel, therefore, is an inadequate remedy for such a significant problem.

B. *The Need to Guarantee That Every Child Has Counsel*

Eighty of the ninety-nine reported juvenile waiver cases discussed above were reversed on appeal. To be sure, each reversal was based on the appellate court's determination that the child's waiver of right to counsel was invalid, not on a review of the merits of the delinquency adjudication.³⁸⁰ But in the absence of counsel, few cases are determined on the merits. Instead, most of the accused juveniles simply plead to the charges as brought.³⁸¹ Without counsel, juveniles do not have even the benefit of a plea negotiation, much less a full blown evidentiary hearing. Those few who go to trial without counsel are no match for the powers of the State, which never appears in court, even juvenile court, without legal representation.

Even in a case involving only misdemeanor charges, having a lawyer can make the difference between an adjudication of delinquency and dismissal

376. Juveniles have no appeal of right as a constitutional matter. *Gault* refused to address the issue, stating only that the Court had never held that the Constitution requires the states to provide a right to appellate review. *In re Gault*, 387 U.S. 1, 58 (1967).

377. Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, 15 CRIM. JUST. 22, 23 (Spring 2000).

378. *Id.* (noting 46% of public defenders and 79% of appointed lawyers).

379. *Id.*

380. *See infra* Appendices A & B.

381. *See infra* Appendices A & B.

of the charges. The first case that came into the Boyd School of Law Juvenile Justice Clinic dramatically illustrates the impact of legal representation. The clinic client was one of three twelve-year-olds who were charged with damaging the complainant's trailer by pushing it into a ravine. Two of the boys waived their right to counsel and admitted the charges. There was no way to refute that what had started off as a joy ride had concluded with the trailer damaged and at the bottom of a deep ravine. Upon acceptance of the two boys' pleas, the juvenile hearing master adjudicated them delinquent and placed them on probation. The third boy asked for a lawyer and was referred to the law school clinic. After minimal investigation, the student lawyer assigned to represent the boy discovered that the complainant did not even own the trailer; the boy's father did, and he had no interest in pressing charges. The state's attorney willingly dropped the charges upon receiving proof of ownership, and the court dismissed the petition. Two boys with delinquency records, one without, and the difference was the legal representation.³⁸²

The patent inequity in the outcomes for the three boys undermines both the authority of the juvenile court and its rehabilitative aims. Whether a child is adjudicated delinquent should not hinge on the child or his parent's independent knowledge of the importance of counsel. It is the court's responsibility to guard against the kind of inequity that occurred in this case. As the cases discussed in Part III demonstrated with painful clarity, the juvenile courts do not uniformly provide the protections required by law. An external limitation on juvenile courts' discretion, in the form of either legislative enactment or court rule, is essential to preserve juveniles' right to counsel and the fundamental guarantees of due process.

One proposal, which criminal justice experts have long called for, is automatic appointment of counsel in juvenile delinquency proceedings. In 1967, the National Report of the President's Crime Commission recommended that, to achieve procedural justice for children, counsel must be appointed "as a matter of course whenever coercive action is a possibility, *without requiring any affirmative choice by child or parent.*"³⁸³ The Commission emphasized the importance of the right to counsel in juvenile court proceedings and stated that "no single action holds more potential for achieving procedural justice for the child in the juvenile court

382. The student attorney was elated at the outcome for her client, but could not help being troubled about the unfairness to the other boys. If our client was entitled to a lawyer, so were they. The difference was not that our client was so much wiser than the other boys, but that his father knew from prior experience with the client's older brother in juvenile court to tell him to ask for a lawyer, whereas the other boys did not receive that advice from anyone.

383. *In re Gault*, 387 U.S. 1, 38 n.65 (1967) (emphasis added) (quoting PRESIDENT'S CRIME COMM'N NAT'L CRIME COMM'N REP. 86-87 (1967)).

than provision of counsel.”³⁸⁴ The Commission considered the presence of legal counsel the “keystone of the whole structure of guarantees that a minimum system of procedural justice requires.”³⁸⁵

The Commission acknowledged fears that lawyers would make juvenile court proceedings more adversarial and even defeat the therapeutic aims of the court,³⁸⁶ but did not agree with the naysayers. History had not shown any necessary connection between the informality of the traditional juvenile court and its treatment goals, nor did the Commission view the relative formality which lawyers would bring to the proceedings as inconsistent with the court’s therapeutic mission.³⁸⁷ The Commission even suggested the possibility that lawyers, “for all their commitment to formality, could do more to further therapy for their clients than can small, overworked social [services] staffs of the courts.”³⁸⁸

At least three states reflect the Commission’s recommendation and require, by statute,³⁸⁹ court rule,³⁹⁰ or case law,³⁹¹ that juveniles be provided counsel before permitting a waiver of their right to counsel, and other jurisdictions follow the same practice, even though not required by law.³⁹² Additionally, in spring 2001, an ABA task force issued a white paper which concluded that no youth being tried as an adult should be permitted to waive the right to counsel without consultation with a lawyer and without

384. *Id.*

385. *Id.*

386. *Id.*

387. *See id.*

388. *Id.*

389. N.Y. Family Ct. Act 29-a; *see also* WIS. STAT. ANN. § 48.23 (West 1984) (accepting no waiver by anyone under fifteen; no out-of-home placement unless child had assistance of counsel). Note that a complete analysis of the waiver provisions of state statutes was beyond the scope of this Article.

390. NEW MEX. R. ANN. CHILD. CT. R. 10-205 (2001); *see also In re D.S.S.*, 506 N.W.2d 650, 653-54 (Minn. Ct. App. 1993) (noting the juvenile court rule requiring court or counsel who is not the county attorney to advise juvenile regarding right to counsel).

391. *State ex rel. J.M. v. Taylor*, 276 S.E.2d 199, 202-04 (W. Va. 1981).

392. A story related by psychologist and juvenile justice researcher Thomas Grisso is a particularly poignant example of such voluntary practices. Thomas Grisso, *Juveniles’ Consent in Delinquency Proceedings*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 131, 146 (Thomas Grisso & Robert G. Schwartz eds., 2000). Grisso had heard of a court in a small Tennessee town which was reputed to be a model of juvenile justice, and decided to pay the town a visit. Once there, Grisso learned that the local practice was to have a member of the court’s youth services staff (of two) explain the right to counsel and other rights and then quiz the juvenile about his understanding of the rights. If the juvenile indicated that he understood, the court worker would refer the boy to a defense lawyer and tell him that he could not waive his right to counsel until he had talked with the lawyer. Only if the child returned with a form signed by the lawyer acknowledging that the child had consulted him would the child be permitted to waive his right to counsel. When Grisso commented that this went way beyond what Tennessee law required, the response was, “We think it’s fair.” *Id.*

a full inquiry into the youth's understanding of the right and the ability to make the waiver decision intelligently, voluntarily and understandingly.³⁹³ In the rare case in which a waiver might occur, the task force urged that standby counsel always be appointed.³⁹⁴

Others have gone a step further and advocated the need for a nonwaivable juvenile right to counsel. In 1980, a joint commission of the Institute for Judicial Administration and the American Bar Association (IJA-ABA) completed a comprehensive re-examination of the premises on which juvenile right to counsel and waiver were based.³⁹⁵ The IJA-ABA concluded that minors can never validly waive their right to counsel³⁹⁶ and adopted standards which declare that "[a] juvenile's right to counsel may not be waived" either pretrial or in a subsequent adjudication proceeding.³⁹⁷ Brenda Flicker, one of the principal participants in the Juvenile Justice Standards Project, has written elsewhere that "[p]roviding accused juveniles with a nonwaivable right-to-counsel is probably the most fundamental of the hundreds of standards in juvenile justice."³⁹⁸

393. See Robert E. Shepherd, Jr., *Juvenile Justice: Task Force Report for Practitioners, Policymakers*, 16 CRIM. JUST. 66, 66-67 (Spring 2001) (citing A.B.A. Task Force, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001)). This Article's proposed prohibition on waiver in juvenile court is not inconsistent with the ABA's recommended consultation-before-waiver rule in adult court. Although the waiver prohibition could, and perhaps should, be extended to adult court, this Article focuses specifically on the problems endemic to the juvenile court system, where judges have unbridled discretion and delinquency adjudication has traditionally been viewed as inconsequential, at least in the long term.

394. *Id.* at 67.

395. I.J.A. & A.B.A., *JUVENILE JUSTICE STANDARDS* (hereinafter *IJA-ABA STANDARDS*), *STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS* (1980).

396. *Id.* Standard 5.1, Commentary (1980).

397. *Id.* Standard 6.1(A) (1980) ("[a] juvenile's right to counsel may not be waived," even though other rights may be waived in particular circumstances); *IJA-ABA STANDARDS, STANDARDS RELATING TO ADJUDICATION*, Standard 1.2 & Commentary (1980) (explaining that standard insisting that "court should not begin adjudication proceedings unless the respondent is represented by an attorney who is present in court" means that "the right to counsel [is] nonwaivable"). Working together, the IJA and ABA designed standards that would increase the fairness of juvenile law by eliminating "inconsistencies in a juvenile's rights and liabilities that are caused by the accident of geography." BARBARA D. FLICKER, *STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS* 3-4 (1977); see also MANFREDI, *supra* note 40, at 161-62.

398. BRENDA FLICKER, *PROVIDING COUNSEL FOR ACCUSED JUVENILES* i (1983). The IJA-ABA Standards for Juvenile Justice emphasize the significance of the role of the lawyer, stating that the activities in which a lawyer must engage on behalf of a client

At least two states have followed the lead of the IJA-ABA and made juvenile right to counsel nonwaivable.³⁹⁹ Professor Barry Feld has similarly advocated the automatic and nonwaivable appointment of counsel at the earliest possible stage of delinquency proceedings.⁴⁰⁰ Feld bases his argument for nonwaivable counsel on the adversarial nature of juvenile court proceedings after *Gault*.⁴⁰¹ In support of that argument, he states: “[I]n an adversarial process, only lawyers can effectively invoke the procedural safeguards that are the right of every citizen, including children, as a condition precedent to unsolicited state intervention.”⁴⁰²

These recommendations reflect a recognition of the fact that juveniles are different from adults in ways which suggest that juveniles need protections not accorded adults. Children and adolescents are developmentally different from adults, and those developmental differences need to be taken into account at all stages and in all aspects of the justice system, and most particularly, in the provision of counsel. Automatic appointment of counsel, without an affirmative request for a lawyer, would go a long way toward compensating for the disabilities of youth. However, because neither the juvenile court’s track record in advising juveniles of the right to counsel nor juveniles’ attempted waiver of counsel assure that any waiver is knowing, voluntary, and intelligent, the only way to assure juvenile access to counsel and the full protections of due process is to

require a sense of professional responsibility to the client, the skill to present the client’s position in legal and administrative forums, and the ability both to investigate that which seems good for the client and to distinguish the attorney’s opinion from the position that the client is entitled by law to take. These, among others, are functions for which lawyers are or should be specially qualified and which, as experience has amply demonstrated, are not readily assumed by other available representatives for juvenile court clientele.

I.J.A. & A.B.A STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, Standard I.1, Commentary (1980).

399. See IOWA CODE ANN. § 232.11(2) (West 2002); TEX. FAM. CODE ANN. § 51.10(b) (2002).

400. *Empirical Study*, *supra* note 203, at 1326-29.

401. *Id.* at 1327-28.

402. *Id.* at 1328.

prohibit juvenile waiver of right to counsel.⁴⁰³ A juvenile waiver prohibition will both survive constitutional scrutiny and establish sound public policy.

C. *The Constitutional Viability of a Prohibition Against Waiver*

A juvenile waiver prohibition will have to overcome *Faretta v. California*,⁴⁰⁴ to establish its constitutionality. In *Faretta*, the United States Supreme Court declared that the Sixth Amendment right to counsel “necessarily implies the right to self-representation,”⁴⁰⁵ and held that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself.”⁴⁰⁶ The question, then, is whether juveniles have a right to self representation equivalent to that announced for adults in *Faretta*. Put another way, would a prohibition against juvenile waiver of right to counsel unconstitutionally deny juveniles their “right” to exercise waiver? As the following analysis shows, the answer is “No,” because juveniles can claim no such right.

In *Faretta*, the Court found the right of self representation in the language of the Sixth Amendment, which grants to the defendant, not his counsel, the right to be “informed of the nature and cause of the accusation, . . . confronted with the witnesses against him,” and “accorded compulsory process for obtaining witnesses in his favor.”⁴⁰⁷ Even the right to counsel provision, the Court noted, speaks of the “assistance of counsel,” making the defendant the master of his own defense.⁴⁰⁸ The trial record established that *Faretta* was “literate, competent, and understanding”

403. Some commentators may disagree with this conclusion. See generally Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000) (advocating a shift in thinking about adolescence that approaches adolescent behavior from the standpoint of decisional competence). Hartman argues that the time has come to “establish explicitly what the law has been embracing implicitly—adolescent decisional ability.” *Id.* at 1359. Although Hartman advocates decisional autonomy in the juvenile delinquency setting as well as in various civil law contexts, she presumes the presence of counsel in delinquency proceedings. See *id.* at 1297-98. This presumption of juvenile representation is reflected in Hartman’s conclusion that “[f]orthright recognition of decisional capability, coupled with attention to constitutional safeguards and effective legal representation for adolescent defendants, would enhance fairness and uniformity, yet provide defense counsel the opportunity to proffer mitigating evidence, such as diminished capacity, when appropriate.” *Id.* at 1301. Cf. Beschle, *supra* note 311. Beschle does not decide in favor of or against a consistent approach to laws governing juvenile autonomy. He argues, instead, that both sides of the debate about the future of the juvenile justice system should consider the possibility that support for autonomy in a wide range of civil contexts clashes with a continued commitment to a paternalistic, rehabilitative response to juvenile crime. *Id.* at 66.

404. 422 U.S. 806 (1975).

405. *Id.* at 832.

406. *Id.* at 817.

407. *Id.* at 819 (quotation marks omitted).

408. *Id.* at 820 (emphasis added) (quotation marks omitted).

and “voluntarily exercising his informed free will” when he “clearly and unequivocally declared to the trial judge that he wanted to represent himself,” even after the judge had warned Faretta that he was making a mistake.⁴⁰⁹ Therefore, the Supreme Court concluded that the trial judge’s requirement that appointed counsel conduct Faretta’s defense denied Faretta his Sixth Amendment right to conduct his own defense.⁴¹⁰

The United States Supreme Court has recognized that “the constitutional rights of children cannot be equated with those of adults.”⁴¹¹ The rationale traditionally cited for this inequality is factually based on “the peculiar vulnerability of children; [and] their inability to make critical decisions in an informed, mature manner.”⁴¹² However, there is a purely legal basis for the distinction as well. The constitutional source for juveniles’ right to counsel is the Due Process Clause of the Fourteenth Amendment,⁴¹³ not the Sixth Amendment. The *Faretta* right of self representation is based on the express language of the Sixth Amendment, language which does not appear in the Fourteenth Amendment.⁴¹⁴

Moreover, a nonwaivability rule is consistent with *Gault* and its progeny. *Gault* recognized juvenile right to counsel not because it was a right specifically guaranteed by the Bill of Rights, as was the Fifth Amendment privilege against self-incrimination,⁴¹⁵ but because right to counsel was essential to the due process required of all court proceedings.⁴¹⁶ The *Gault* Court rejected an approach in which juvenile rights would mirror those of adult defendants and grounded juveniles’ rights on due process.⁴¹⁷ That substantive choice focused future decision makers on the protections necessary to make juvenile delinquency proceedings fundamentally fair, not on what the law required for adults.⁴¹⁸ Considering the data reported in Part III, continued recognition of a juvenile “right” to waiver of counsel is so fundamentally unfair that juveniles who waive

409. *Id.* at 835.

410. *Id.* at 835-36.

411. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion) (discussing abortion rights of pregnant minor).

412. *Id.* Typically, courts have used juveniles’ vulnerability and immaturity to justify diminished recognition of constitutional rights, in such areas as privacy, see *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976) (discussing abortion rights of pregnant minor), and procedural due process, see *Parham v. J.R.*, 442 U.S. 584, 603-04 (1979) (discussing parents’ right to commit their children to mental institutions “voluntarily”).

413. U.S. CONST. amend. XIV.

414. See generally *Faretta*, 422 U.S. 806. See also U.S. CONST. amends. VI, XIV.

415. See *supra* notes 83, 90.

416. See *supra* Part II.E.

417. See *supra* notes 89-93 and accompanying text.

418. See *supra* notes 98-117 and accompanying text (discussing post-*Gault* Supreme Court decisions, which both expanded and limited recognition of juvenile rights, based on the Court’s assessment of due process and fairness implications).

counsel are systematically denied due process. Not only do juveniles have no *Faretta* right to represent themselves,⁴¹⁹ the courts have a responsibility to institute measures that will assure the fundamental fairness of juvenile proceedings. Thus, a prohibition against waiver will withstand constitutional scrutiny.

D. *The Public Policy Implications of a Nonwaivability Rule*

1. Collateral Benefits of Providing a Lawyer to Every Child

Society too has an interest in assuring that the trial process is fair and in keeping with the commands of due process. Juvenile waiver of right to counsel impairs the fairness of delinquency proceedings because lawyers are themselves the means of securing a fair trial and maintaining due process throughout the proceedings. Moreover, courts which freely permit juveniles to waive their right to counsel undermine their own “institutional interest in the rendition of just verdicts.”⁴²⁰ Due process guarantees every juvenile facing a delinquency adjudication a fundamental, absolute right to a fair trial,⁴²¹ just as it does adult criminal defendants.⁴²² “Where, for one reason

419. See Robert E. Shepard, Jr., *Juveniles' Waiver of the Right to Counsel*, 13 CRIM. JUST. 38 (Spring 1998) (noting the commentary to Standard 1.2 of the IJA-ABA Standards Relating to Adjudication, which distinguishes *Faretta* for juveniles based on the different constitutional bases for juvenile and adult right to counsel). The commentary states that the standard also draws support for its conclusion from the Supreme Court's holding in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), that “the [S]ixth [A]mendment right of trial by jury is not applicable in state juvenile proceedings,” because the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment, governs those proceedings. I.J.A. & A.B.A. STANDARDS, JUVENILE JUSTICE STANDARDS RELATING TO ADJUDICATION, Standard 1.2, Commentary (1980). The Supreme Court further confirmed the correctness of this analysis when it declined in one of its first decisions of the twenty-first century, to extend the *Faretta* right to appeals. *Martinez v. California*, 528 U.S. 152, 163 (2000). In *Martinez*, the Court held that criminal defendants have no constitutional right to waive counsel and represent themselves on appeal. The Court adverted to the Sixth Amendment and its specification of the basic rights of the accused in “all criminal prosecutions.” *Id.* at 159-60 (quotation marks omitted). Because a defendant's appeal occurs after the prosecution has concluded, the Court held that any right to self-representation on appeal could not arise from the Sixth Amendment, but would have to derive from the Due Process Clause and its guarantee of fundamental fairness. *Id.* at 161. The Court did not believe, however, that the right to represent oneself is essential to a fundamentally fair appellate procedure, and so it rejected the defendant's claim. *Id.*

420. *Wheat v. United States*, 486 U.S. 153, 160, 164 (1988) (refusing criminal defendant's waiver of defense lawyer's conflict of interest and recognizing that individual Sixth Amendment rights are subordinate to society's interest in assuring fair trials).

421. *In re Gault*, 387 U.S. 1, 36 (1967).

422. *Strickland v. Washington*, 466 U.S. 668, 683 (1984); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967); *In re Murchison et al.*, 349 U.S. 133, 136 (1955), cited in *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring specially), cert. denied 2000 WL

or another, the proceedings fall short of the standard the Constitution imposes, and a defendant does not receive a fair trial, he is deprived of due process of law."⁴²³ Thus, it is "not only the defendant who 'suffers the consequences' when a fair trial is denied, but the justice system itself. Put another way, the state has a compelling interest, related to its own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials"⁴²⁴ The same reasoning applies to juveniles facing delinquency adjudication and possible confinement to a juvenile institution.

Juvenile courts that sacrifice right to counsel for judicial expediency unduly jeopardize both the accused juvenile's rights and their own and the public's interest in a fair trial. The state has no legitimate interest⁴²⁵ in the perpetuation of procedures which place juveniles' substantial liberty interests at risk of deprivation when those same procedures violate the most basic right of all Americans accused of criminal acts to a fair trial. To the contrary, the state has a paramount interest in ensuring a fair system of juvenile justice,⁴²⁶ just as the juvenile defendant has a paramount interest in minimizing the risk of an unwarranted loss of his liberty.

286750 (March 20, 2000).

423. *Farhad*, 190 F.3d at 1105 (Reinhardt, J., concurring specially) (urging the United States Supreme Court to "reconsider *Faretta* and the line of cases implementing it").

424. *Id.* at 1107 (Reinhardt, J., concurring specially).

425. Some would argue that the state has legitimate interests, including fiscal and administrative considerations, particularly in rural areas where resources may be limited, in maintaining the status quo. The short answer to those arguments, however, is that fiscal and administrative concerns cannot override constitutional rights and the effective implementation of procedures necessary to assure that those rights are not impinged upon. Since *Gault*, all courts have been required to offer counsel to juveniles in delinquency proceedings, and that simply is not happening in some places, although many jurisdictions have been able to implement *Gault* effectively and provide counsel to every juvenile in delinquency proceedings. The author has had conversations with lawyers in Phoenix, Arizona, and in Washoe County (Reno), Nevada, as well as with clinical law professors in many other jurisdictions, where provision of counsel to juveniles is automatic and has been for some time. In addition, during the course of writing this article, the author and her clinic students were able to improve the Nevada statute regarding juvenile waiver (though not to prohibit it, unfortunately, yet). The result of the change is that all juveniles facing felony charges in Clark County (Las Vegas), Nevada are automatically referred to counsel at the plea hearing. In the past, juveniles were not given counsel until after the entry of plea, with the result that many admitted the charges and were adjudicated delinquent without ever talking with a lawyer.

426. Though of less significance than the interests discussed in the text, the state also has a fiscal interest in assuring that only guilty juveniles are committed to state custody. The costs of unwarranted institutionalization are both immediate, in terms of the day to day expenses of institutional care, and permanent, in terms of the drain on state resources brought about by incarceration's proven tendency to create lifelong criminals who accomplish nothing productive and keep returning to the state's care. See Teitelbaum & Ellis, *supra* note 313, at 200 (making similar comments in the context of institutionalization of developmentally disabled children).

Mandatory appointment of counsel also may overcome the sometimes prejudicial effects of selective appointment of counsel. Although a 1970 study showed that providing counsel to juveniles resulted in fewer dismissals and commitments to juvenile institutions,⁴²⁷ later research reported the opposite result in connection with dispositions.⁴²⁸ Represented juveniles often received more severe treatment than those who were not represented.⁴²⁹ Juvenile court judges' resistance to and even resentment of, defense lawyers may explain the latter result.⁴³⁰ However, if all children receive representation by counsel, judges will no longer be able to penalize those who appear before them with counsel, for to do so would mean penalizing everyone. As bad as some juvenile courts are, they are unlikely to divorce themselves completely from the rehabilitative aims of the juvenile court. If some judges remain recalcitrant, voters and appointing bodies will have to exercise their will and refuse to retain them.

Moreover, the benefits of providing counsel to every child extend to both the accused child and the entire juvenile justice system. The IJA-ABA Juvenile Justice Standards Project recognized this mutuality of benefits in Section 1.1 of its standards for counsel for private parties.⁴³¹ Section 1.1 states: "The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings."⁴³² The commentary to section 1.1 emphasizes the importance of counsel to the integrity of the process: "In addition to providing critical assistance in the conduct of a specific proceeding, the presence of counsel contributes significantly to the integrity of the judicial system and to its perceived legitimacy for those who come before it and for the public in general."⁴³³

In sum, the automatic appointment of nonwaivable counsel furthers the interests of everyone: the juvenile facing delinquency charges, the juvenile court, the juvenile justice system, and the public at large.

The analysis here would be incomplete, however, if it did not address the concerns of some that a *per se* rule of nonwaivability would contradict important principles of developmental psychology, juvenile justice, and due process.⁴³⁴ One commentator has cited the Supreme Court's adoption of

427. Ferster et al., *supra* note 191, at 402.

428. Feld, *supra* note 5, at 227.

429. *Id.*

430. See *supra* notes 189-203 and accompanying text.

431. I.J.A. & A.B.A. STANDARDS, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, § 1.1 (1980).

432. *Id.*

433. *Id.*

434. See, e.g., *In re Manuel R.*, 543 A.2d 719, 723 (Conn. 1988) (rejecting arguments for a *per se* rule of nonwaivability so as to allow a "child to make an informed and deliberate choice

due process as the constitutional basis for juvenile rights to buttress her arguments in favor of adolescent autonomy, stating “the Court reminds us of the law’s intrinsic respect for the dignity of persons, whether children, adolescents, or adults. Though not explicitly addressed by the Court, implicit in its rulings affording constitutional rights to adolescents is the corollary ability to exercise or waive those rights”⁴³⁵ Moreover, studies have shown that youthful offenders are more likely to respond positively to court intervention when they are active participants in the process than when the process is simply imposed upon them.⁴³⁶ Social scientists have further observed that

[w]hen young people are helped to take responsibility for their actions in programs designed to foster positive development in the way they think, how they define themselves in their families and with peers, their view of right and wrong, and their recovery from abuse, they are unlikely to be dangerous once they become adults.⁴³⁷

These principles form the basis for opposition to a prohibition against juvenile waiver of right to counsel.

Such an all-or-nothing approach, however, is not essential to gain the benefits of juveniles’ participation in the judicial process. Franklin Zimring has described adolescence as a “learner’s permit” for adulthood,⁴³⁸ and has said that in our society, “part of the process of becoming mature is learning to make independent decisions.”⁴³⁹ Taking Zimring’s analogy one step further, the requirement that a juvenile appear in court only with a licensed lawyer is equivalent to the learner’s permit requirement that an underage driver always be accompanied by a licensed adult driver. Even after appointment of counsel, the judicial system affords juveniles many opportunities to make independent choices in keeping with the “learner’s permit” of adolescence.

about legal representation”); Hartman, *supra* note 403, at 1298 (advocating adolescent autonomy in decision making).

435. Hartman, *supra* note 403, at 1282.

436. *E.g.*, Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile Court in Massachusetts: Issues of Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321, 326 (1994); *see also* *Manuel R.*, 543 A.2d at 723 (basing rejection of a *per se* rule of nonwaivability on concerns that such a rule “might actually frustrate a principal goal of juvenile law of encouraging children to accept responsibility for their transgressions and take an active role in their rehabilitation”).

437. Beyer, *supra* note 334, at 35; *see also* Hartman, *supra* note 403, at 1268 (“individual autonomy fosters self-determination and self-confidence by cultivating an important sense of responsibility and accountability, not only to oneself but to others”).

438. FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 89-90 (1982).

439. *Id.* at 91.

Under Rule 1.14 of the Model Rules of Professional Responsibility,⁴⁴⁰ even when a lawyer is representing a minor whose “ability to make adequately considered decisions in connection with the representation is impaired [by his youth],” the lawyer still is required “as far as possible, [to] maintain a normal client-lawyer relationship with the client.”⁴⁴¹ Model Rule 1.2 explains the decisionmaking parameters of such a “normal” relationship:

A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.⁴⁴²

The same ethical constraints apply in juvenile delinquency proceedings. The National Advisory Commission for Juvenile Justice and Delinquency Prevention has stated unambiguously that the principal duty of a lawyer representing a juvenile is “to represent zealously [the client’s] legitimate interests. Determination of the client’s interests under the law should ordinarily remain the responsibility of the client.”⁴⁴³ Similarly, Martin Guggenheim has written: “Lawyers representing children in [delinquency] proceedings, like lawyers representing adults in criminal proceedings, are ethically obligated to seek the objectives as defined by their clients, whether or not [they] think those objectives are sound for the client or for society.”⁴⁴⁴ As these commentaries make clear, the ethical rules governing lawyers require that a juvenile client retain substantial decisional control, exercised in consultation with his lawyer, over important aspects of the representation.

Thus, mandating representation by counsel does not deny juveniles the opportunity to exercise their individual autonomy. As clients, juveniles maintain the ability to actively participate in the judicial process and to accept personal responsibility for their decisions concerning, *inter alia*,

440. Most states have adopted the Rules in substantial part. See A.B.A. & BUREAU OF NAT’L AFFAIRS, LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT, LMPC 1:11 (1998) (documenting variations from the Model Rules in each state except Maine, Nebraska, and Ohio; and counting only ten states with substantial differences: Alabama, Alaska, Colorado, Georgia, Hawaii, Massachusetts, New York, North Carolina, Vermont, and Virginia).

441. A.B.A., ANNOTATED RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (2000).

442. *Id.* Rule 1.2(a).

443. *Id.* (citing U.S. DEP’T OF JUSTICE, NAT’L ADVISORY COMM. FOR JUVENILE JUSTICE & DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 3.134 (1980)).

444. Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1424 (1996).

whether to accept a plea and waive the right to a trial and whether to testify at trial. The only decision that is taken out of their hands by the proposed prohibition is whether to waive right to counsel. Given the studies of juvenile courts' implementation of *Gault* and the results of the case law research conducted for this Article, continued reliance on juvenile court judges to conduct waiver proceedings that give due attention to the particular needs of juveniles is not sound public policy. Instead, prohibiting waiver and assuring that every child facing delinquency charges in juvenile court has the assistance of counsel will provide the due process that is lacking in many juvenile courts today. Taking this one bold step also should help restore confidence in a juvenile justice system that many believe has lost its way.⁴⁴⁵

2. Collateral Consequences of Invalid Waivers

In addition to the general benefits to society and the juvenile justice system addressed above, a nonwaivable right to counsel will protect juveniles from the increasingly severe and punitive consequences of a delinquency adjudication. Recall that in the cases analyzed in Part III, more than three-quarters of the juveniles whose waivers were overturned had been committed to state custody. As alarming as that rate of wrongful incarceration is, it is just one of the risks borne by a juvenile who is adjudicated delinquent after waiving counsel.

445. See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1083-85 (1991) (arguing that society's current view of adolescence so differs from turn-of-the-century views that dominated creation of juvenile justice system that juvenile court should be abolished, and contending that juveniles will receive better protections of their rights in adult court); Barry C. Feld, Symposium on the Future of the Juvenile Court, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 134 (1997) (proposing abolition of criminal delinquency jurisdiction of juvenile courts and recognition of youthfulness as mitigating factor in criminal sentencing, and arguing that "attempts to combine criminal social control and social welfare goals" are doomed to fail). *But see, e.g.*, Thomas F. Geraghty, Symposium on the Future of the Juvenile Court, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 191 (1997) (arguing that "juvenile court and . . . justice system . . . should be retained after being reinvigorated with both financial and human resources"); Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 185 (responding to Professor Feld's abolitionist argument, and while agreeing with much that he says, departing from him on abolition of juvenile court, believing that trial in adult court is even worse and that because of certain juvenile court benefits that adult courts are not likely to replicate, "[w]e should build on [our] strengths rather than abandon ship").

a. Sentence Enhancement

It has become commonplace in recent years for criminal courts to use delinquency adjudications to enhance the sentence for an adult conviction, even in a capital case.⁴⁴⁶ All fifty states permit such sentence enhancement in one form or another,⁴⁴⁷ despite the fact that statutes in forty-five states specifically provide that a juvenile adjudication is not equivalent to a criminal “conviction”;⁴⁴⁸ a delinquent child is not to be deemed a “criminal”;⁴⁴⁹ and neither the disposition of a child nor evidence presented in juvenile court is admissible as evidence against the child in any other court.⁴⁵⁰ Courts generally have gotten around such provisions by construing the statutes to be inapplicable to adult sentencing decisions.⁴⁵¹

Like state statutes, the Federal Sentencing Guidelines count “juvenile offenses” as sentencing enhancements to the same extent as adult convictions.⁴⁵² The Guidelines assign the same number of points to juvenile and adult sentences.⁴⁵³ Moreover, although the Guidelines limit the number of points that may be assigned for prior adult offenses, they place no limit on the points ascribable to juvenile offenses.⁴⁵⁴ The Guidelines’ treatment of juvenile offenses is troubling on a number of levels. First, the juvenile justice system, in contrast to the criminal law, is founded on rehabilitative principles and, even today, is designed to maintain the primacy of rehabilitation and treatment in juvenile disposition decisions.⁴⁵⁵ Second, because a juvenile adjudication was never meant to carry the weight of a criminal conviction, juvenile courts do not afford juveniles the full procedural protections available to adults in criminal court. The broad discretion of the judge, the unavailability of a jury trial, and the system’s

446. Joseph B. Sanborn, Jr., *Second-Class Justice, First-Class Punishment: The Use of Juvenile Records in Sentencing Adults*, 81 JUDICATURE 206, 209-10 (1998). Sanborn reports that only North Carolina provides for the use of juvenile records in capital punishment cases by statute, N.C. GEN. STAT. § 15A-2000(e)(2) (2001), while fourteen other states allow it pursuant to court decisions. Sanborn, Jr., 81 JUDICATURE at 210.

447. *Id.* at 209.

448. *Id.* at 207.

449. *Id.*

450. *Id.*

451. *Id.* at 207-08.

452. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(d) (2001).

453. *Id.* §§ 4A1.1, 4A1.2(d).

454. *Id.* §§ 4A1.1, 4A1.2(d).

455. See, e.g., Arthur L. Burnett, Sr., *What of the Future? Envisioning an Effective Juvenile Court*, 15 CRIM. JUST., 6, 7 (2000); Jeffrey A. Butts, *Can We Do Without Juvenile Justice?*, 15 CRIM. JUST. 50, 51 (2000); Irene Merker Rosenberg, *Teen Violence and the Juvenile Courts: A Plea for Reflection and Restraint*, 37 HOUS. L. REV. 75, 76-79 (2000) (cautioning against letting headlines reporting teen violence drive juvenile justice policy and advocating maintenance of treatment approach to juvenile crime as more effective than punitive approaches).

rehabilitative aims make it much more likely that a juvenile will be incarcerated than his adult counterpart, "for his own good."⁴⁵⁶

The effect of sentence enhancement provisions is that one set of rules is applied to a juvenile's actions during her minority and another set to that same past conduct once she attains adulthood. This is the essence of unfairness. Given the heightened sensitivity to unfairness that is a normal coincident of adolescence,⁴⁵⁷ the philosophical disconnect reflected in juvenile sentence enhancement provisions is no mere abstraction. Its deleterious effects are real and are felt most by those who have the least ability to protect themselves. A system which permits such demonstrable unfairness must assure, at the very least, that the underlying delinquency determination is a product of procedures which carefully guard the individual's due process rights.

b. Treatment of Juveniles as Adults

The collateral consequences of a delinquency adjudication go far beyond their use in state and federal adult sentence enhancement. For example, delinquency adjudications may affect a juvenile's continuing status as a juvenile for any subsequent offenses.⁴⁵⁸ About one-half of the states now specify by statute that a prior delinquency adjudication may lead to transfer to adult court, either through exclusion of the juvenile from juvenile court jurisdiction or the prosecutor's direct filing of charges against the juvenile in criminal court.⁴⁵⁹ A majority of the states also follow the philosophy, "once an adult, always an adult," meaning that a juvenile once tried as an adult will always be treated as an adult, regardless of his age and the nature of any future allegations of wrongdoing.⁴⁶⁰

In addition, almost all states now permit fingerprinting and photographing of juveniles, at least for investigative purposes,⁴⁶¹ and a

456. See David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1779-81 (1991).

457. Beyer, *supra* note 334, at 33.

458. See Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part I*, 15 CRIM. JUST. 59, 59 (Summer 2000) (hereinafter *Collateral Consequences I*); Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41, 41 (Fall 2000) (hereinafter *Collateral Consequences II*).

459. *Collateral Consequences I*, *supra* note 458, at 59 (citing PATRICK GRIFFIN, ET AL. TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 14 (1998)). See generally Randie P. Ullman, Note, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329 (2000).

460. *Collateral Consequences I*, *supra* note 458, at 59 (quotation marks omitted).

461. *Id.* at 60 (citing HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 101).

growing number of states now require transfer of those records to a central repository in which many do not require segregation of juvenile and adult records.⁴⁶² The upshot of these provisions, as with sentencing enhancement, is that juveniles enter the juvenile justice system under procedures designed for juvenile court and exit as constructive adults without the benefit of all the procedural protections accorded adults in criminal proceedings.

c. Long-term Consequences

Equally troubling are a number of long-term consequences that can arise from a single delinquency adjudication. First, juvenile delinquency adjudications are considered criminal offenses for purposes of military service and can be disqualifying.⁴⁶³ For example, in the Army, an individual is absolutely disqualified from service if he or she has been convicted of either domestic violence against a spouse or family member, two felonies, or one felony and two misdemeanors.⁴⁶⁴ At first blush, the Army's policy of refusing enlistment to felons and perpetrators of domestic violence appears commendable. The problem, however, is that conduct similar to the shoving of the group home worker described in the opening vignette of this Article is charged as an act of domestic violence in some jurisdictions.⁴⁶⁵ If the juvenile admits to the charge, as most unrepresented children do, his later service in the Army, and perhaps other branches of the military, is foreclosed. The felony exclusions are equally problematic. Without counsel, many youth admit to crimes which appear innocuous but are charged as felonies. A single petition may contain two felony charges or one felony and two related misdemeanors, all arising out of simple possession of marijuana and two items of paraphernalia. A fifteen-year-old who waives his right to counsel and admits the charges is prevented from ever serving in the United States Army, whereas his counterpart who is represented by counsel likely will obtain the benefit of a non-felony plea bargain.

Second, a delinquency record can limit one's opportunities to attend college and obtain employment. As noted above, most juvenile codes provide that an adjudication of delinquency is not a criminal conviction. Those provisions enable college and job applicants with juvenile histories to respond in the negative to questions asking whether they have ever been convicted of a crime.⁴⁶⁶ However, employers and educational institutions increasingly include questions concerning an applicant's juvenile court and

462. *Id.*

463. *Collateral Consequences II*, *supra* note 458, at 41-42.

464. *Id.* (citing Army Regulation 601-210, ch. 4, paras. 4-20 through 4-23).

465. Clark County, Nevada is one of those jurisdictions, and I suspect it is not alone.

466. *Collateral Consequences II*, *supra* note 458, at 42.

arrest records.⁴⁶⁷ It is difficult to envision that the answers to those questions serve any purpose other than to assist decision makers in deciding whom to admit or hire and whom to reject. Thus, a juvenile record can limit one's freedom to lead a productive life well after one has become an adult.

Third, juveniles who are resident aliens can suffer consequences to their immigration status. Although juvenile delinquency adjudications are not criminal "convictions" with negative immigration consequences,⁴⁶⁸ a juvenile's conviction as an adult in criminal court meets the law's requirement.⁴⁶⁹ Thus, a major consequence of the transfer of a resident alien youth to adult court is exposure to the likelihood of deportation, depending on the "gravity of the offense charged [and] the nature of the sentence imposed."⁴⁷⁰

Without a lawyer, few juveniles will understand that what appears to be a minor juvenile offense can impact their lives in the ways described here. Just as *Gault* considered the deprivation of liberty attendant to incarceration in a juvenile institution a potential denial of due process,⁴⁷¹ the law's more recent expansion of the negative consequences of a delinquency adjudication implicates due process considerations. Given the continued resistance of the juvenile courts in some jurisdictions to providing counsel to juveniles, as evidenced by the studies and cases discussed in Part III above, the limited ability of juveniles to make good decisions concerning such complex matters as whether to waive right to counsel, and the consequences of a delinquency adjudication as a result of an invalid waiver, due process must be seen to require automatic nonwaivable appointment of counsel for juveniles.

VI. CONCLUSION

The history of juvenile justice in the United States explains, at least in part, why juveniles' right to counsel has encountered such problems in the juvenile courts. The broad discretion granted to juvenile court judges by the court's founders and later by state statutes, coupled with the informality of juvenile court proceedings, have impeded the full recognition of juveniles' constitutional rights. *Gault* and its progeny have, for the most part, constrained the juvenile courts' "worst of both worlds" treatment of juveniles in delinquency proceedings, by focusing on due process and recognizing rights wherever they are essential to the fundamental fairness

467. *Id.*

468. *Id.* at 41 (citing *In re Ramirez-Rivero*, 18 I. & N. Dec. 135, 135 (B.I.A. 1981); *In re C.M.*, 5 I. & N. Dec. 327, 327 (B.I.A. 1953)).

469. *Id.* (citing *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966); *C.M.*, 5 I. & N. Dec. at 327)).

470. *Id.*

471. *See generally In re Gault*, 387 U.S. 1 (1967).

of the juvenile justice system. By adopting the due process approach, the Supreme Court set the stage for recognition of rights and protections for juveniles that are not extended to adults, for the very reason that in order for juveniles to obtain access to due process, they may need more protection than adults.

Waiver of right to counsel is one area in which juveniles should receive added protections based on the particular vulnerabilities of childhood and youth and the failings of the juvenile court. Juveniles do not have the capacity for sound decision making or an understanding of the significance of right to counsel and the consequences of waiving the right. Because they lack a clear understanding of the right to counsel, they are denied that most fundamental constitutional right without knowing they have any recourse. Appeal is an inadequate remedy both because few juvenile lawyers, either public or private, file appeals on behalf of their clients, and without counsel, few juveniles know they have a statutory appeal right. Moreover, juvenile courts have not been inclined to expend the time and effort necessary to conduct appropriate and thorough waiver colloquies with juveniles. As a result, some jurisdictions have decided that the better course is to automatically provide counsel to all juveniles. By eliminating waiver proceedings, courts can devote more attention to the merits of the delinquency petition and the proper disposition for the juvenile in the event of an adjudication of delinquency.

Making right to counsel nonwaivable by juveniles in delinquency proceedings will assure that they receive counsel in the first instance. With counsel, juveniles stand a chance of prevailing in what must be viewed as an adversarial system of juvenile justice. Without counsel, juveniles' rights will continue to be ignored and trampled in the crush of heavy caseloads and the state's demand for juvenile accountability.

A proper procedure is no panacea, of course. It is not just the fact, but the quality, of representation that will determine the effectiveness of any changes in the functioning of the juvenile court system. To effect real change requires a commitment to investing the resources necessary to developing a well-trained cadre of lawyers who specialize in juvenile representation. Only then will the juvenile court system begin to realize its promise.

APPENDIX A
CASES OVERTURNING WAIVER: BACKGROUND

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> Appeal in Navajo County, Juvenile Action No. JV-94000086, 898 P.2d 517 (Ariz. Ct. App. 1995)	17	Possession of drugs and paraphernalia	Admit	Placed in confinement to age 18
<i>In re</i> Appeal in Maricopa County, Juvenile Action No. JV-116553, 782 P.2d 327 (Ariz. Ct. App. 1989)	14	Shoplifting	Admit	Placed on probation
<i>People v. Kevin G.</i> , 205 Cal. Rptr. 424 (Cal. Ct. App. 1984)		Driving under the influence	Deny	Not discussed
<i>In re</i> Manuel R., 543 A.2d 719 (Conn. 1988)	15	Probation violation, 3rd degree battery	Admit	Committed to 2 years at Department of Children and Youth Services training school
<i>In re</i> Juvenile Appeal No. 1983-3, 465 A.2d 1107 (Conn. Super. Ct. Div. 1983)		1st degree criminal mischief	Deny	Committed to Department of Children and Youth Services.
<i>G.E.F. v. State</i> , 782 So. 2d 951 (Fla. 2d DCA 2001)		Resisting officer without violence	Admit	Not discussed
<i>D.C.W. v. State</i> , 775 So. 2d 363 (Fla. 2d DCA 2000)		Battery on detention officer	No contest	Committed to indeterminate term
<i>T.S. v. State</i> , 773 So. 2d 635 (Fla. 5th DCA 2000)	13	Curfew violation	Admit	Committed to juvenile facility

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
E.C.H. v. State, 751 So. 2d 776 (Fla. 5th DCA 2000)		Two felony counts, probation violation	No contest	Not discussed
E.P.M. v. State, 750 So. 2d 720 (Fla. 1st DCA 2000)		Probation violation, violation of community control	Deny	Committed to moderate-risk juvenile facility
B.F. v. State, 747 So. 2d 1061 (Fla. 5th DCA 2000)		Aggravated battery; 2nd degree felony	Admit	Committed to Level 2 placement, "a minimum risk non-residential program"
P.L.S. v. State, 745 So. 2d 555 (Fla. 4th DCA 1999)	14	9 counts burglary, 6 counts petit theft, 3 counts grand theft	Admit	Committed to level 4 program, community control, including 100 hours community service
S.S. v. State, 744 So. 2d 600 (Fla. 2d DCA 1999)		Battery	Admit	Not discussed
M.A.F. v. State, 742 So. 2d 534 (Fla. 2d DCA 1999)		Not identified	Deny	Committed to Department of Juvenile Justice
<i>In re</i> T.G., 741 So. 2d 517 (Fla. 5th DCA 1999)		Felony charges, probation violation/ community control	No contest	Not discussed
A.P. v. State, 740 So. 2d 1241 (Fla. 5th DCA 1999) (Case No. 98-2188)		Not identified	Admit	Not discussed
A.G. v. State, 737 So. 2d 1244 (Fla. 5th DCA 1999)		Drug sale (crack)	No contest	Placed in Level 8 commitment program
A.P. v. State, 730 So. 2d 425 (Fla. 5th DCA 1999)		Burglary of a dwelling	Admit	Placed in Level 6 commitment program

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
D.L. v. State, 719 So. 2d 931 (Fla. 5th DCA 1998)	14	Aggravated assault (2 separate counts), domestic violence	Admit	Not discussed
J.O. v. State, 717 So. 2d 185 (Fla. 5th DCA 1998)		Possession of cannabis, probation violation	Admit	Committed to Department of Juvenile Justice
J.R.V. v. State, 715 So. 2d 1135 (Fla. 5th DCA 1998)	17	Aggravated assault (2 counts), improper exhibition of dangerous weapon	Admit	Not discussed
N.R.L. v. State, 684 So. 2d 299 (Fla. 5th DCA 1996)		Grand theft	No contest	Committed to Department of Juvenile Justice
J.H. v. State, 679 So. 2d 67 (Fla. 5th DCA 1996)		Delinquent act		Not discussed
<i>In Re</i> D.L.A., 667 So. 2d 330 (Fla. 1st DCA 1995)		Not identified		Placed on community control
J.B. v. State, 647 So. 2d 849 (Fla. 3d DCA 1994)		Trespass, petit theft	No contest	Not discussed
N.E.R. v. State, 588 So. 2d 289 (Fla. 2d DCA 1991)		Not identified.		Committed to Department of Health and Rehabilitative Services.

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>B.I. v. State</i> , 492 So. 2d 824 (Fla. 2d DCA 1986)	16	Grand theft auto, driving without license	Deny	Committed to Department of Health and Rehabilitative Services for 1 year
<i>K.M. v. State</i> , 448 So. 2d 1124 (Fla. 2d DCA 1984)		2nd degree grand theft auto	No contest	Committed to Department of Health and Rehabilitative Services for 5 years
<i>G.L.D. v. State</i> , 442 So. 2d 401 (Fla. 2d DCA 1983)		Indirect criminal contempt of court dependency order		Five months in Juvenile Detention
<i>J.G.S. v. State</i> , 435 So. 2d 942 (Fla. 2d DCA 1983)		Burglary	Admit	Committed to Department of Health and Rehabilitative Services
<i>In re C.G.H.</i> , 404 So. 2d 400 (Fla. 5th DCA 1981)		Contempt of order to attend school regularly	Deny	Not discussed
<i>In re R.V.P. v. State</i> , 395 So. 2d 291 (Fla. 5th DCA 1981)		Attempt to commit robbery	Deny	Committed to Department of Health and Rehabilitative Services for indefinite period
<i>In re T.D.W.</i> , 493 S.E.2d 736 (Ga. Ct. App. 1997)		Leaving the scene, reckless driving, aggravated assault	Deny	Committed to 120 days in boot camp
<i>In re W.M.F.</i> , 349 S.E.2d 265 (Ga. Ct. App. 1986)	Under 17	Unruly child (runaway)	Admit	Committed to Georgia Dept. of Human Services

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> B.M.H., 339 S.E.2d 757 (Ga. Ct. App. 1986)	8th grade	Smoking pot	Admit	Committed to Division of Youth Services, Georgia Dept. of Human Services
<i>K.E.S. v. State</i> , 216 S.E.2d 670 (Ga. Ct. App. 1975)	15	5 counts of probation violation	Admit	Committed to Family and Children Services
<i>In re</i> Jane Doe, 881 P.2d 533 (Haw. 1994)	13	Running away, truancy, 3rd degree assault	Deny	Placed on probation, ordered to get drug alcohol assessment, write letter of apology
<i>G.B. v. State</i> , 715 N.E.2d 951 (Ind. Ct. App. 1999)		Probation violation	Admit	Committed to Department of Correction until age 18
<i>Bridges v. State</i> , 299 N.E.2d 616 (Ind. 1973)	17	Possession and sale of marijuana	Deny	Placed at state farm for 1 year
<i>In re</i> Kenneth Joseph Jones, 372 So. 2d 779 (La. Ct. App. 1979)	15	Attempted theft of bicycle by force	Deny	Committed to Department of Corrections for indefinite period
<i>In re</i> Christopher T., 740 A.2d 69 (Md. Ct. Spec. App. 1999)	9	Burglary, malicious destruction of property	Deny	Placed on supervised probation and ordered to pay restitution (\$1670.00)
<i>In re</i> Appeal No. 101, 366 A.2d 392 (Md. Ct. Spec. App. 1976)		Assault and battery	Deny	Not discussed

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> Appeal No. 544, 332 A.2d 680 (Md. Ct. Spec. App. 1975)	15	Breaking and entering, stealing	Admit	Committed to Maryland Training School for Boys for indefinite period; pay restitution.
<i>In re</i> D.S.S., 506 N.W.2d 650 (Minn. Ct. App. 1993)	18	Not identified	Admit	Stayed commitment; By restitution perform community service, seek counseling and graduate from high school denial of motion to withdraw admissions in 4 cases
<i>In re</i> D.L., 999 S.W.2d 291 (Mo. Ct. App. 1999)	13	Assault, failure to report assault	Deny	Committed to Division of Youth Services
<i>Edward C. v. Collings</i> , 632 P.2d 325 (Mont. 1981)	17	Illegal possession of alcohol	Admit	Given \$50 fine and 10 days in county jail
<i>In re</i> Paul H., 365 N.Y.S.2d 900 (N.Y. App. Div. 1975)	14	Disobedient and beyond father's control, truant	Admit	Committed to Department of Social Services for placement at McQuade Foundation for 18 months.
<i>In re</i> Johnston, 755 N.E.2d 457 (Ohio Ct. App. 2001)	16	Vandalism, criminal trespass	Deny	Committed to Department of Youth Services to maximum age 21/minimum of 6 months
<i>In re</i> Parker, 2001 WL 259242 (Ohio Ct. App. Mar. 15, 2001)		Probation violation (aggravated robbery)	Deny	Committed to Department of Youth Services to maximum of age 21/minimum of 1 year
<i>In re</i> Smith, 753 N.E.2d 930 (Ohio Ct. App. Mar. 15, 2001)		Assault with deadly weapon (ball point pen)	Admit	Committed to Department of Youth Services

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>State v. Blackington</i> , 2001 WL 149387 (Ohio Ct. App. Feb. 15, 2001)	16	Disorderly conduct, resisting arrest	Deny	Given 90 days suspended commitment with conditions—\$50 fine; 50 hours community service; and counseling for anger management.
<i>In re Pereira</i> , 2001 WL 62550 (Ohio Ct. App. Jan. 26, 2001)	15	Aggravated arson, a 2nd degree felony	Admit	Committed to Department of Youth Services to maximum age 21/minimum 6 months
<i>In re Sproule</i> , 2001 WL 39594 (Ohio Ct. App. Jan. 17, 2001)		Domestic violence	Admit	Committed to Department of Youth Services to maximum of age 21/ minimum 6 months
<i>In re Mason</i> , 2000 WL 968800 (Ohio Ct. App. July 13, 2000)	15	Aggravated assault	Admit	Committed to Department of Youth Services to maximum age 21/minimum 1 year
<i>In re Taylor</i> , 2000 WL 739457 (Ohio Ct. App. June 8, 2000)	16	Aggravated menacing, assault	Admit	3 consecutive terms of 6 months each.
<i>In re J. Hernandez</i> , 2000 WL 277889 (Ohio Ct. App. Mar. 15, 2000)		Petty theft (bicycle)	Deny	Not discussed
<i>In re Gray</i> , 1999 WL 1249550 (Ohio Ct. App. Dec. 23, 1999)		Vandalism, theft, and menacing	Admit	Committed to Department of Youth Services secure facility to maximum age 21, minimum 6 months
<i>In re Baker</i> , 1999 Ohio App. LEXIS 3132 (July 1, 1999)	16	Rape, gross sexual imposition, possession of controlled substance	Admit to rape charge	Committed to Department of Youth Services to maximum age 21, minimum of 1 year

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re Royal</i> , 725 N.E.2d 685 (Ohio Ct. App. 1999)	14	Receiving stolen property, failure to comply with police order, assault, robbery	Admit to robbery	Committed to Department of Youth Services for minimum of 2 years
<i>In re Solis</i> , 706 N.E.2d 839 (Ohio Ct. App. 1987)		Aggravated robbery, petty theft	Admit	Committed to Department of Youth Services to maximum age 21, minimum of 1 year
<i>In re Lytle</i> , 1997 Ohio App. LEXIS 5028 (Nov. 7, 1997)			Admit	Committed to Department of Youth Services not less than 6 months and up to 21st birthday
<i>In re Ward</i> , 1997 Ohio App. LEXIS 2567 (July 12, 1997)		4th degree felony theft	Admit	Committed to Department of Youth Services for indefinite period to age 21
<i>In re Miller</i> , 694 N.E.2d 500 (Ohio Ct. App. 1997)		Rape	Admit	Committed to Department of Youth Services
<i>In re Montgomery</i> , 691 N.E.2d 349 (Ohio Ct. App. 1997)	14	Aggravated trafficking, unlawful possession of criminal tools	Admit	Committed to Department of Youth Services for minimum 6 months, maximum age 21
<i>In re Kimble</i> , 682 N.E.2d 1066 (Ohio Ct. App. 1996)		Habitual truancy, parole violation	Admit	Committed to Department of Youth Services
<i>In re Kuntz</i> , 1996 WL 586408 (Ohio Ct. App. Sept. 20, 1996)		Carrying concealed weapon, drug abuse	Deny	Committed to Department of Youth Services for minimum 1 year, maximum age 21
<i>In re M. Hernandez</i> , 1996 WL 276376 (Ohio Ct. App. May 21, 1996)	15	Aggravated burglary, 1st degree felony	Admit	Committed to Department of Youth Services for minimum 1 year, maximum age 21; restitution ordered

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> Rohm, 1996 WL 183032 (Ohio Ct. App. Apr. 17, 1996)		Aggravated burglary	Admit	Not discussed
<i>In re</i> Johnson, 665 N.E.2d 247 (Ohio Ct. App. 1995)	13	Felony theft	Deny	Not discussed
<i>In re</i> Caruso, 1991 Ohio App. LEXIS 2292 (May 17, 1991)	13	Attempted rape	Admit	Revoked probation and committed to Department of Youth to maximum age 21, minimum of 1 year
<i>In re</i> Nation, 573 N.E.2d 1155 (Ohio Ct. App. 1989)	17	Forgery, complicity in aggravated burglary	Admit	Committed to Department of Youth Services for minimum 1 year, maximum age 21; restitution ordered
<i>In re</i> Kriak, 506 N.E.2d 556 (Ohio Ct. App. 1986)		Driving under the influence	Deny	Suspended driver's license for 1 year; \$50.00 fine.
<i>In re</i> Anzaldua, 820 P.2d 869 (Or. Ct. App. 1991)		No charges identified; disposition hearing VOP	Admit	Committed to juvenile training school
<i>In re</i> Cheney, 773 P.2d 1351 (Or. Ct. App. 1989)		No charges identified; disposition hearing	Deny	Recommitted to Children's Services Division until age 21; consecutive 25-year placement at juvenile training school
<i>In re</i> Clements, 770 P.2d 937 (Or. Ct. App. 1989)	14	Runaway, using car without permission	Admit	Committed to Children's Services Division
<i>State v. Afanasiev</i> , 674 P.2d 1199 (Or. Ct. App. 1984)		Criminal mischief, assault, underage alcohol	Deny	Committed to McLaren Juvenile Training School for 1 year.
<i>In re</i> John D., 479 A.2d 1173 (R.I. 1984)	15	Robbery, assault with a dangerous weapon	Admit	Remanded to Rhode Island Training School

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> R.S.B., 498 N.W.2d 646 (S.D. 1993)	16	Burglary, and petty theft	Deny	Committed to State Training School
<i>In re</i> Torres, 476 S.W.2d 883 (Tex. App. 1972)	14	Misdemeanor shoplifting	Admit	Committed to Gainesville State School for Girls Texas Youth Council
<i>McAlpine v. Texas</i> , 457 S.W.2d 428 (Tex. Civ. App. 1970)		Driving vehicle without owner's permission	Admit	Committed to Gatesville State School for Boys.

APPENDIX B
CASES UPHOLDING WAIVER: BACKGROUND

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> No. JV-108721, 798 P.2d 364 (Ariz. 1990)	16	Burglary, theft	Admit	Probation and weekend in detention and \$50 in restitution
<i>In re</i> T.S., 438 S.E.2d 159 (Ga. Ct. App. 1993)		Aggravated assault, glue sniffing	Deny	
<i>In re</i> M.R., 605 N.E.2d 204 (Ind. Ct. App. 1992)	15	Burglary, theft, escape, handgun violation	Admit	Committed to Department of Correction for Indiana Boys School
<i>In re</i> Bennett, 355 N.W.2d 277 (Mich. Ct. App. 1984)	14	Larceny	Admit	Committed to intermediate level state custody
<i>In re</i> R.M., 252 A.2d 237 (N.J. Super. Ct. 1969)	17	Robbery	Admit	Not discussed
<i>In re</i> R.D.B., 575 N.W.2d 420 (N.D. 1998)	15	Aggravated assault	Deny	One year of probation and 100 hours of community service
<i>In re</i> Rogers, 2001 WL 542331 (Ohio Ct. App. May 23, 2001)	17	Probation violation on 2 counts of rape charges	Admit	Committed to Department of Youth Services for 1 year not to exceed a maximum to age 21
<i>In re</i> Morrison, 2001 WL 246417 (Ohio Ct. App. Mar. 9, 2001)		Probation violation	Admit	Ordered into "court placement"
<i>In re</i> Mark B., 2000 Ohio App. LEXIS 437 (Feb. 11, 2000)	11	Gross sexual imposition	Admit	Probation, follow sex offender "safeguards"

CASE NAME	AGE	CHARGES	PLEA	DISPOSITION
<i>In re</i> Woodson, 1999 WL 195579 (Ohio Ct. App. Mar. 31, 1999)		Gross sexual imposition	Admit	Committed to Department of Youth Services for minimum 6 months up to a maximum to age 21
<i>In re</i> Kuchta, 1999 WL 157439 (Ohio Ct. App. Mar. 10, 1999)	17	Misuse of credit card, receiving stolen property, 1st degree misdemeanor if committed by adult	Admit	Juvenile sentenced accordingly
<i>In re</i> Lovejoy, 1998 WL 114400 (Ohio Ct. App. Mar. 4, 1998)		Burglary, probation violation	Admit	Sentenced to one year in juvenile detention facility
<i>In re</i> K., 1997 WL 327181 (Ohio Ct. App. June 6, 1997)		Gross sexual imposition	Admit	Committed to Department of Youth Services for 6 months
<i>In re</i> Griffin, 1996 WL 547921 (Ohio Ct. App. Sept. 27, 1996)	15	8 probation violations in 16 months	Admit	Committed to Department of Youth Services for 1 to 8 years
<i>In re</i> Adams, 1996 WL 517642 (Ohio Ct. App. Sept. 12, 1996)		Domestic violence 4th degree felony if committed by adult.	Admit	Not discussed
<i>In re</i> Williams, 1996 WL 157349 (Ohio Ct. App. Apr. 4, 1996)	15	Aggravated assault violation of probation, 2nd degree felony if committed by adult	Admit	Committed to Department of Youth Services
<i>In re</i> Peggy L., 1995 Ohio App. LEXIS 5330 (Dec. 8, 1995)		Probation violation, domestic violence	Admit	Committed to Department of Youth Services for minimum of 6 months
<i>In re</i> East, 663 N.E.2d 983 (Ohio Ct. App. 1995)	17	Robbery, assault, theft	Admit	Remanded to state custody for indeterminate period
<i>In re</i> Copeland, 1995 WL 453422 (Ohio Ct. App. July 14, 1995)		Carrying concealed weapon to school	Admit	Committed to Department of Youth Services for minimum of 6 months up to a maximum to age 21

APPENDIX C
CASES OVERTURNING WAIVER: LEGAL ANALYSIS

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Appeal in Navajo County, Juvenile Action No. JV-94000086, 898 P.2d 517 (Ariz. Ct. App. 1995)	Not reported	Statute and required waiver by both juvenile and parent or guardian with whom juvenile resides	ARIZ. REV. STAT. § 8-225(C); ARIZ. JUV. R. 6(c)
<i>In re</i> Appeal in Maricopa County, Juvenile Action No. JV-116553, 782 P.2d 327 (Ariz. Ct. App. 1989)	At time juvenile's mother waived right to counsel, she stated that she would want counsel if disposition was not acceptable. Commissioner only asked if she meant she would have counsel to appeal.	Juvenile and mother were not advised of dangers and disadvantages of self-representation. Waiver of counsel was not knowingly and intelligently made.	ARIZ. JUV. R. § 6(c)
<i>People v. Kevin G.</i> , 205 Cal. Rptr. 424 (Cal. Ct. App. 1984)	Traffic hearing officer informed juvenile that right to counsel applied only if he elected to have hearing in juvenile court. Juvenile and parent signed waiver form that similarly advised them of limited right to counsel.	Traffic hearing officer erred. Because juvenile was charged with a misdemeanor, he was entitled to counsel regardless of forum. He could not intelligently waive counsel as he did not know he had right. Court cannot imply waiver, and signed waiver form was insufficient by itself.	

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Manuel R., 543 A.2d 719 (Conn. 1988)	Appointed public defender asked for continuance of disposition hearing. Mother objected, saying she had to get to work and didn't want to have to come back to court. Court expressed reluctance because of recommended commitment, but first mother and then son waived counsel.	Record disclosed that Manuel did not knowingly and voluntarily waive right to counsel. Mother lacked authority to waive on his behalf because of conflict of interest.	CONN. GEN. STAT. § 45b-135
<i>In re</i> Juvenile Appeal No. 1983-3, 465 A.2d 1107 (Conn. Super. Ct. 1983)	No advisory	Counsel withdrew before disposition and was required to provide counsel without request and to make determination that waiver at that stage was "knowing and perceptive." Waiver can never be presumed from silence.	CONN. GEN. STAT. § 46b-135(a)
G.E.F. v. State, 782 So. 2d 951 (Fla. 2d DCA 2001)	Short colloquy between juvenile, mother, and judge at plea hearing; judge just said she was once again offering counsel and asked if mother could afford it; mother said no.	No advisory re right to appointed counsel if indigent; only abbreviated inquiry regarding waiver of counsel, but failed to meet 8.165 requirements.	FLA. R. JUV. P. 8.165
D.C.W. v. State, 775 So. 2d 363 (Fla. 2d DCA 2000)	Juvenile merely agreed with judge that he heard and understood the judge's speech about rights.	D.C.W. was only minimally informed that he had right to counsel, and court made no inquiry into his comprehension of right or capacity to waive it.	FLA. R. JUV. P. 8.165
T.S. v. State, 773 So. 2d 635 (Fla. 5th DCA 2000)	Record disclosed that juvenile was not represented by counsel or advised of right to counsel at plea hearing. Record contained written waivers of counsel, but neither was witnessed.	Court's failure to advise juvenile of right to counsel at plea hearing, a critical stage of the proceedings, or to obtain knowing and intelligent waiver was fundamental error.	FLA. R. JUV. P. 8.165(a)

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
E.C.H. v. State, 751 So. 2d 776 (Fla. 5th DCA 2000)	No advisory	Court accepted guilty and no contest pleas without first advising E.C.H. of right to counsel and without determining that waiver was freely and intelligently made.	FLA. R. JUV. P. 8.165
E.P.M. v. State, 750 So. 2d. 720 (Fla. 1st DCA 2000)	No advisory at disposition hearing	Court failed to renew offer of appointed counsel at disposition and did not determine that waiver was freely and intelligently made.	FLA. R. JUV. P. 8.165
B.F. v. State, 747 So. 2d 1061 (Fla. 5th DCA 2000)	Court gave group advisory and renewed offer of appointed counsel after juvenile entered admission.	B.F. was minimally informed of right to counsel, but court made no inquiry into his comprehension of right or capacity to waive, despite evidence of mental deficiency.	FLA. R. JUV. P. 8.165
P.L.S. v. State, 745 So. 2d 555 (Fla. 4th DCA 1999)	Court advised juvenile of right to counsel and offered public defender after juvenile said, "I plead guilty."	Court's advisory was not sufficient to establish knowing and intelligent waiver, in light of age (14) and report of ADD, prescribed medications, and hospitalization.	FLA. R. JUV. P. 8.165(b)

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
S.S. v. State, 744 So. 2d 600 (Fla. 2d DCA 1999)	Trial judge failed to advise juvenile of his right to counsel before she accepted guilty plea.	Waiver form that S.S. and mother signed saying he had right to appointed counsel if he could not pay was insufficient to overcome court's error at arraignment.	FLA. R. JUV. P. 8.165
M.A.F. v. State, 742 So. 2d 534 (Fla. 2d DCA 1999)	Court failed to advise juvenile right to counsel, and waiver form was unsigned.	Court failed to advise M.A.F. of right to counsel and establish knowing and intelligent waiver.	FLA. R. JUV. P. 8.165(b)(2)
T.G. v. State, 741 So. 2d 517 (Fla. 5th DCA 1999)	At plea hearing, the trial judge did not advise T.G. of his right to counsel, including court-appointed counsel if he was indigent, but simply asked T.G. if he wanted a lawyer, to which T.G. replied "no."	Court must inform juvenile of right to counsel, and before accepting plea establish free and intelligent waiver. Juvenile also was entitled to same at disposition hearing.	FLA. R. JUV. P. 8.165(b)(2)
A.P. v. State, 740 So. 2d 1241 (Fla. 5th DCA 1999)	Does not specify whether court or police advised A.P. of rights	Court must advise of rights and establish comprehension and capacity to make knowing and intelligent waiver.	FLA. R. JUV. P. 8.165(a), (b)
A.G. v. State, 737 So. 2d 1244 (Fla. 5th DCA 1999)	Court simply asked if A.G. wanted counsel, and he said "no."	Court failed to advise of nature of rights, determine that A.G. understood consequences, and establish knowing and intelligent waiver.	FLA. R. JUV. P. 8.165
A.P. v. State, 730 So. 2d 425 (Fla. 5th DCA 1999)	No advisory before accepting plea	Court failed to inform A.P. of rights and establish knowing and intelligent waiver.	FLA. R. JUV. P. 8080(b), 8.165(a)
J.O. v. State, 717 So. 2d 15 (Fla. 5th DCA 1998)	No advisory before accepting plea	Court's failed to advise J.O. of right to counsel and establish knowing and intelligent waiver	FLA. R. JUV. P. 8.165

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
D.L. v. State, 719 So. 2d 931 (Fla. 5th DCA 1998)	Court advised D.L. of rights and accepted waiver of counsel without parent present. Court asked if D.L. was under influence of any drugs and whether he had any mental or emotional disabilities. D.L. responded "no" to each question.	Judge accepted waiver without inquiry into D.L.'s capacity to waive and despite testimony at hearing on motion to withdraw plea from expert and mother to the contrary, which raised doubt as to D.L.'s understanding of nature of charges and ability to make knowing and intelligent waiver.	FLA. R. JUV. P. 8.165
J.R.V. v. State, 715 So. 2d 1135 (Fla. 5th DCA 1998)	Court gave group rights advisory. Court accepted waiver without parent present, then asked J.R.V. if he was under influence of any drugs and whether he had any mental or emotional disabilities. D.L. responded "no" to each question.	At hearing on motion to withdraw plea, public defender presented evidence of J.R.V.'s multiple brain disorders and 2nd grade level functioning. J.R.V. testified that he thought he would get out of detention if he pled guilty. Court failed to establish knowing and intelligent waiver.	FLA. R. JUV. P. 8.165(b)(2), (3)
N.R.L. v. State, 684 So. 2d 299 (Fla. 5th DCA 1996)	Not reported	No "thorough inquiry" into N.R.L.'s waiver of right to counsel.	FLA. R. JUV. P. 8.165
J.H. v. State, 679 So. 2d 67 (Fla. 5th DCA 1996)	Not reported	No "thorough inquiry" to establish knowing and intelligent waiver.	FLA. R. JUV. P. 8.165
<i>In re</i> D.L.A., 667 So. 2d 330 (Fla. 1st DCA 1995)	Not reported	Court failed to advise of right to counsel at each stage of proceedings and establish knowing and intelligent waiver.	FLA. R. JUV. P. 8.165
J.B. v. State, 647 So. 2d 849 (Fla. 3d DCA 1994)	At disposition, court offered counsel free of charge and advised of difficulties of appealing.	Court failed to advise of disadvantages of self-representation and range of possible dispositions.	

CASE NAME	ADVISORY RE-RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
N.E.R. v. State, 588 So. 2d 289 (Fla. 2d DCA 1991)	Not reported, but juvenile requested counsel but was not appointed counsel until appeal.	N.E.R. did not expressly waive counsel at any stage in the proceedings.	FLA. STAT. § 39.071; FLA. R. JUV. P. 8.290
B.I. v. State, 492 So. 2d 824 (Fla. 2d DCA 1986)	At arraignment, court advised B.I. and father of right to counsel, appointed if they could not afford to pay.	Court did not renew offer of counsel at all stages of the proceedings	FLA. R. JUV. P. 8.290(b)(4)
K.M. v. State, 448 So. 2d 1124 (Fla. 2d DCA 1984)	Court advised K.M. of right to counsel, appointed if he could not pay and then asked if he was ready to proceed. K.M. said "yes."	Court failed to advise of rights K.M. was relinquishing, to establish knowing and intelligent waiver, and to determine whether special circumstances prevented him from exercising waiver.	FLA. R. JUV. P. 8.290(b)(2), (4)
G.L.D. v. State, 442 So. 2d 401 (Fla. 2d DCA 1983)	Court ordered G.L.D. to surrender guitar to partially pay public defender fees and then asked if he wanted to waive counsel. Court gave him waiver form. He signed.	Court did not inquire into mother's willingness or ability to hire counsel, and to appoint counsel if she could not afford to pay. Court did not inform G.L.D. of rights he was relinquishing, establish knowing and intelligent waiver, or determine whether special circumstances prevented him from exercising waiver.	

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<p>J.G.S. v. State, 435 So. 2d 942 (Fla. 2d DCA 1983)</p>	<p>After J.G.S. admitted charge, judge asked if he wanted an attorney, which he would appoint if J.G.S. did not "understand all this. Do you feel you would like an attorney?" J.G.S. said "no." Court did not renew offer at disposition.</p>	<p>Court never properly advised J.G.S. of right to counsel and did not establish that he understood his rights or that he made knowing and intelligent waiver.</p>	<p>FLA. STAT. § 39.071; FLA. R. JUV. P. 8.290(c)</p>
<p><i>In re</i> C.G.H., 404 So. 2d 400 (Fla. 5th DCA 1981)</p>	<p>Court minutes reflect that court advised juvenile of her rights at arraignment, but not at adjudication or disposition.</p>	<p>Court failed to establish knowing and intelligent waiver and to advise of right at later hearings.</p>	<p>FLA. R. JUV. P. 8.290(d)(5)</p>
<p><i>In re</i> R.V.P. v. State, 395 So. 2d 291 (Fla. 5th DCA 1981)</p>	<p>Docket indicates that court offered counsel to juvenile. Mother waived public defender and said she would retain counsel. R.V.P. appeared without counsel.</p>	<p>Court did not establish R.V.P.'s understanding of right to counsel, knowing and intelligent waiver, or advise of right at later hearings.</p>	<p>FLA. STAT. § 39.071; FLA. R. JUV. P. 8.290(c), (d)(5)</p>
<p><i>In re</i> T.D.W., 493 S.E.2d 736 (Ga. Ct. App. 1997)</p>	<p>The court made no inquiry regarding counsel or T.D.W.'s diligence in procuring representation and proceeded with adjudicatory hearing.</p>	<p>No indication that court addressed issue of T.D.W.'s representation on date of hearing. No evidence that court attempted to ascertain whether T.D.W. or either parent acted with reasonable diligence in obtaining an attorney's services.</p>	

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> W.M.F., 349 S.E.2d 265 (Ga. Ct. App. 1986)	Court advised W.M.F. of right to counsel, appointed if she could not pay. She declined counsel and, after admitting charges, she adjudicated and sentenced him.	Court failed to advise child and mother of dangers of proceeding without counsel or of consequences of admission or delinquency finding.	GA. CODE ANN. § 15-11-26(b), 27(a)
<i>In re</i> B.M.H., 339 S.E.2d 757 (Ga. Ct. App. 1986)	Judge conducted group colloquy with all four girls who were caught smoking pot in school bathroom; judge told them they had right to counsel, including appointed counsel if indigent. All four waived counsel.	Court did not warn B.M.H. or parents of dangers of proceeding without counsel. Court failed to advise of possible dispositions, should she be found delinquent.	GA. CODE ANN. § 15-11-35
<i>K.E.S. v. State</i> , 216 S.E.2d 670 (Ga. Ct. App. 1975)	No court advisory. K.E.S. and mother signed form advising them of rights and checked box indicating they did not want counsel.	Waiver of counsel by mother did not satisfy statutory requirements; as complainant, she had conflict. Court was required to appoint counsel; waiver form was insufficient, particularly in light of child's psychiatric problems and hospitalization for drug abuse.	GA. CODE ANN. § 24A-2001(a)
<i>In re</i> Jane Doe, 881 P.2d 533 (Haw. 1994)	Court advised child of right to counsel, appointed if she could not afford to pay, and of role of attorney.	Court failed to advise child of nature of charge and establish knowing and intelligent waiver, particularly because child was 13 and never talked to counsel.	

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>G.B. v. State</i> , 715 N.E.2d 951 (Ind. Ct. App. 1999)	Juvenile said she wanted a lawyer; judge said, "Your mom just waived your rights to an attorney, sign the papers." She then pled guilty.	G.B. did not "voluntarily join the waiver"; there also was doubt as to whether a "meaningful consultation" occurred between G.B. and her mother.	IND. CODE § 31-32-5-1(2)
<i>Bridges v. State</i> , 299 N.E.2d 616 (Ind. 1973)	No court advisory. Police did and obtained signed waiver. Probation officer later informed juvenile that counsel would not be necessary.	Court failed to advise of right to counsel and to establish either understanding of rights and nature of charges and proceedings or knowing and intelligent waiver.	
<i>In re Jones</i> , 372 So. 2d 779 (La. Ct. App. 1979)	Court advised juvenile and mother of right to counsel at various stages in proceedings.	Court failed to establish knowing and intelligent waiver by juvenile who suffered from mild to moderate mental retardation. Court also failed to establish that juvenile consulted with attorney or adult interested in his welfare who understood rights before waiver.	LSA Court art.1 § 13
<i>In re Christopher T.</i> , 740 A.2d 69 (Md. Ct. Spec. App. 1999)	No court advisory. Court assumed waiver when juvenile and mother appeared without counsel and mother waived public defender.	Waiver can never be presumed from inaction. Court did not advise of role of counsel, nature of charges, or range of dispositions.	Md. R. 11-106
<i>In re Appeal No. 101</i> , 366 A.2d 392 (Md. Ct. Spec. App. 1976)	Court advised of right to counsel. Juvenile said he did not want lawyer, and father said he intended to retain counsel. Juvenile was unrepresented at adjudication, and father said lawyer told him it was not important to have a lawyer.	Court failed to determine that juvenile and father fully comprehended rights and consequences of waiving and to establish knowing and intelligent waiver.	Cts. & Jud. Proc. 3-821; Md. R. 906(b)(1)

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Appeal No. 544, 332 A.2d 680 (Md. Ct. Spec. App. 1975)	Juvenile signed waiver form, waiving right to counsel and hearing, and admitting charges. At hearing, prosecutor informed judge of waivers. Judge then informed him of right to counsel; juvenile again waived counsel.	Court should not have permitted waiver without establishing that juvenile understood nature of charges, right to appointed counsel if he could not afford to pay, and role of counsel. Court must apply criminal rule to juveniles.	Cts. & Jud. Proc. 3-830(d); Md. R. 918(a), (b)
<i>In re</i> D.S.S., 506 N.W.2d 650 (Minn. Ct. App. 1993)	No court advisory. Social worker advised D.S.S. of right to counsel at any time. D.S.S. signed statements confirming that he did not want to talk with counsel. D.S.S. appeared at hearing without counsel.	Court Rule required advisory on the record of right to counsel only by counsel who is not prosecutor or judge, not social worker. Rule also required renewal of offer at each hearing and knowing and intelligent waiver each time.	MINN. STAT. ANN. § 401(1), (2), JUV. CT. R. 15.02(1), (2)
<i>In re</i> D.L., 999 S.W.2d 291 (Mo. Ct. App. 1999)	D.L. and parents signed first waiver of counsel form, and D.L. and mother signed second form. Court advised them of right to counsel, appointed if they could not afford to pay. Both confirmed waiver and proceeded <i>pro se</i> .	Court did not advise D.L. or parents of perils of self-representation, despite fact that D.L. was only 13, had I.Q. of 95, did not comprehend well, had ADD and ADHD, was on prescribed medications, and was attending learning disabled and behavior disordered classes. Court did not establish that waiver was knowing and intelligent.	MO. REV. STAT. § 211.211

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<p><i>Edward C. v. Collings</i>, 632 P.2d 325 (Mont. 1981)</p>	<p>Court advised juvenile of right to counsel and accepted waiver when he appeared at justice court hearing without counsel or parent.</p>	<p>Youth Court Act required parental waiver of right to counsel; prosecutor could not escape requirement by choosing to file in justice court. Court also required to establish that waiver was knowing and intelligent and consider background, experience and conduct of juvenile.</p>	<p>MONT. CODE ANN. § 41-5-511</p>
<p><i>In re Paul H.</i>, 365 N.Y.S.2d 900 (N.Y. App. Div. 1975)</p>	<p>Court advised juvenile and father of rights to counsel and to remain silent and of possible disposition. When court asked what he wanted to do, he replied, "I don't really care to tell the truth."</p>	<p>Court failed to establish knowing and intelligent waiver of right to counsel and made no effort to determine whether juvenile, age 14 with 3rd grade ability, was capable of understanding importance of having counsel or waiving counsel.</p>	
<p><i>In re Johnston</i>, 755 N.E.2d 457 (Ohio Ct. App. 2001)</p>	<p>Johnston was asked at adjudication whether he wanted to go forward without counsel. Johnston said "No" and requested continuance to obtain counsel. Prosecution objected to continuance because they had an out of state witness there. Court asked Johnston what lawyers he had called, and decided to go ahead with hearing.</p>	<p>Adjudication cannot go forward unless juvenile has counsel or has validly waived counsel. Record does not indicate that valid waiver occurred. Instead, it showed that Johnston wanted an attorney, at one point stating: "I don't really know what I'm talking about."</p>	<p>OHIO REV. CODE § 2151.352; OHIO JUV. R. 4(A), 29(B)(3), (B)(4)</p>

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re Parker</i> , 2001 WL 259242 (Ohio Ct. App. Mar. 15, 2001)	No court advisory. Magistrate's form showed only that parties' legal rights, court procedures, and consequences of hearing were explained, that parties waived right to counsel and juvenile admitted charges.	Neither journal entry nor waiver form is valid substitute for court's duty personally to address juvenile to determine whether she voluntarily waived her rights. Court may not presume from entries on preprinted forms that juvenile made either valid admission or valid waiver of counsel.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4, 29, 35(B), 37, 40(D)(2)
<i>In re Smith</i> , 753 N.E.2d 930 (Ohio Ct. App. 2001)	Court told juvenile about right to counsel and appointed counsel if indigent, then asked, "Do you wish to have an attorney?" Nothing more.	Court did not attempt to ascertain whether juvenile understood nature of right to counsel she would be waiving.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 29
<i>State v. Blackington</i> , 2001 WL 149387 (Ohio Ct. App. Feb. 15, 2001)	Mother and juvenile signed waiver form outside court. At hearing, judge asked whether he wanted to proceed without counsel. He said he did. Judge then said this was his last chance to obtain counsel before trial, and did not appoint counsel later, even though mother said reason they had no counsel was that they could not afford one.	Record made clear that juvenile did not make knowing and intelligent waiver of right to appointed counsel. Court was required to explain that right and to explain nature of charges, range of dispositions, possible defenses, and mitigating circumstances.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 29
<i>In re Perreira</i> , 2001 WL 62550 (Ohio Ct. App. Jan. 26, 2000)	Court informed juvenile of nature of charges, possible dispositions, and rights he was waiving by entering plea. Court then asked juvenile if he wanted lawyer, but did not inform him of his right to appointed counsel if indigent.	Court failed to advise juvenile of right to appointed counsel if he could not afford to pay. Statement of Rights form given to juvenile and parents could not substitute for court's required advisory.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4(A), 29(B)

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Sproule, 2001 WL 39594 (Ohio Ct. App. Jan. 17, 2000)	Court made no inquiry into juvenile's desire for counsel at disposition.	Record failed to establish that judge informed juvenile of her right to counsel at disposition and failed to inquire as to voluntary and knowing nature of waiver.	OHIO JUV. R. 29
<i>In re</i> Mason, 2000 WL 968800 (Ohio Ct. App. July 13, 2000)	Magistrate's notes stated only "parties waived counsel."	Magistrate must personally address juvenile defendant and ensure validity of waiver of counsel. Journal entry consisting of boilerplate language, without additional evidence, is not adequate to show that court explained juvenile's rights.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4, 29, and 37(A)
<i>In re</i> Taylor, 2000 WL 739457 (Ohio Ct. App. June 8, 2000)	Judge, "Do you want to be represented by a lawyer, or do you want to go forward without a lawyer?" Juvenile responded, "I just want to get it over with." Judge then said, "All right, so I'll take that as a waiver of your right to be represented."	No showing that Taylor fully understood and intelligently relinquished right to counsel. Waiver must affirmatively appear on the record. Judge told her she had right to be represented by counsel on new charges, but did not mention that right extended to charges she had admitted.	OHIO JUV. R. 29
<i>In re</i> Hernandez, 2000 WL 277889 (Ohio Ct. App. Mar. 15, 2000)	Court told juvenile that his mother had chosen not to get a lawyer for him, but did not ever advise him of right to counsel or right to appointed counsel if indigent.	Trial court failed to properly advise juvenile of right to counsel at initial hearing and thereafter failed to advise him that he had right to obtain counsel at any point.	OHIO JUV. R. 29

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Gray, 1999 WL 1249550 (Ohio Ct. App. Dec. 23, 1999)	No advisory at all. Magistrate simply accepted guardian <i>ad litem</i> 's statement that juvenile was waiving right to counsel and admitting the charges.	No explanation of right to counsel. No inquiry into knowing, intelligent, and voluntary nature of waiver, only colloquy was about plea.	OHIO JUV. R. 4, 29
<i>In re</i> Baker, 1999 Ohio App. LEXIS 3132 (July 1, 1999)	Magistrate advised Baker of right to counsel at plea and appointed public defender to represent him. Record was silent about Baker's appearance at disposition alone.	Magistrate did not comply with requirement that he advise Baker of right to counsel and establish knowing and intelligent waiver at disposition hearing.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4(A), 29(B)
<i>In re</i> Royal, 725 N.E.2d 685 (Ohio Ct. App. 1999)	Magistrate advised Royal of right to counsel and made entry finding Royal's admission voluntarily and intelligently made, without any inquiry into what juvenile knew or his mental and emotional capacity, etc.	To be valid, judge must inform juvenile of charges against him, range of allowable punishments, possible defenses and mitigating circumstances, and all other facts essential to broad understanding. Court also must make inquiry-encompassing totality of circumstances, including age of juvenile, his emotional stability, mental capacity, and prior criminal experience.	OHIO JUV. R. 3, 29
<i>In re</i> Solis, 706 N.E.2d 839 (Ohio Ct. App. 1997)	Journal entry stated only that juvenile waived counsel after judge informed him of his rights.	Journal entry is insufficient to establish a knowing and voluntary waiver of right to counsel.	OHIO JUV. R. 29, 37
<i>In re</i> Lytle, 1997 Ohio App. LEXIS 5028 (Nov. 7, 1997)	"No record whatsoever of what, if anything, occurred relating to Lytle's right to counsel."	Record of proceedings was unintelligible; therefore, appeals court was required to presume that right was not properly waived.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4, 29

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re Ward</i> , 1997 Ohio App. LEXIS 1567 (July 12, 1997)	Magistrate's notes indicated that he informed Ward of right to counsel, appointed if he could not afford to pay.	Record did not establish that court advised Ward of right to counsel or inquire as to knowing, voluntary, and intelligent waiver. Court must personally address juvenile.	OHIO JUV. R. 4(A), 29
<i>In re Miller</i> , 694 N.E.2d 500 (Ohio Ct. App. 1997)	Court's group advisory stated only that if any child wished to speak with lawyer before proceeding, he could. No specific mention of right to appointed counsel if indigent, even when judge spoke with each juvenile individually.	No specific mention of right to appointed counsel if indigent, even when judge spoke with each juvenile individually. No colloquy regarding Miller's waiver of counsel and whether it was made knowingly and intelligently.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 29(B)
<i>In re Montgomery</i> , 691 N.E.2d 349 (Ohio Ct. App. 1997)	Referee's report and journal entry indicated that juvenile was present with parents rights were explained, and juvenile waived counsel.	Record failed to disclose explanation of probable consequences of admission or knowing and intelligent waiver.	OHIO JUV. R. 29, 37, 40(D)(5)
<i>In re Kimble</i> , 682 N.E.2d 1066 (Ohio Ct. App. 1996)	Judge said, "Since you are here without an attorney, am I to assume that you wish to proceed without an attorney?" Juvenile said "yes." Court did not advise juvenile of his right to appointed counsel if indigent.	Court did not advise juvenile of his right to appointed counsel if indigent, nor did it inquire into knowing nature of waiver by explaining nature of charges, range of punishment, possible defenses, and mitigating circumstances.	OHIO REV. CODE § 2151.022; OHIO JUV. R. 29
<i>In re Kuntz</i> , 1996 WL 586408 (Ohio Ct. App. Sept. 20, 1996)	Juvenile was advised of constitutional rights, including right to be represented by counsel, but record showed nothing about waiver.	Referee's report/judgment entry did not reflect whether Kuntz waived right to counsel. It stated only that he was advised of right. This does not demonstrate knowing and intelligent waiver of right.	OHIO REV. CODE § 2151.352; OHIO JUV. R. 4(A)

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<p><i>In re Hernandez</i>, 1996 WL 276376 (Ohio Ct. App. May 21, 1996)</p>	<p>The court asked, "Do you have an attorney or wish an attorney in this matter, do you understand if you can't afford one, one will be appointed for you or you may waive that right?" Although juvenile's response was inaudible, judge asked if charge of aggravated burglary was true or not. Juvenile admitted the charge.</p>	<p>Judge failed to engage juvenile in any colloquy regarding her understanding of charges, range of penalties she faced, or possible defenses, to determine whether waiver was voluntary and intelligent.</p>	<p>OHIO REV. CODE § 2151.352; OHIO JUV. R. 29</p>
<p><i>In re Rohm</i>, 1996 WL 183032 (Ohio Ct. App. Apr. 17, 1996)</p>	<p>Referee's report indicated that Rohm was advised of right to counsel and waived it; he didn't want "no trial in this matter," and then admitted the charges.</p>	<p>Record did not disclose inquiry into his financial status or discussion of right to appointed counsel if indigent, nor was there a written waiver in the record.</p>	<p>OHIO REV. CODE § 2151.352</p>
<p><i>In re Johnson</i>, 665 N.E.2d 247 (Ohio Ct. App. 1995)</p>	<p>At first hearing, referee just asked if juvenile wanted counsel, and he said "no." At adjudication, referee gave basic explanation of right to counsel, appointed if juvenile could not pay, and juvenile again said "no." At disposition, referee did not broach subject of counsel.</p>	<p>At all three hearings, referee failed to advise juvenile of purpose and possible consequences of hearings and to determine validity of waiver. At disposition hearing, referee failed to advise juvenile of right to counsel.</p>	<p>OHIO REV. CODE § 2151.352; OHIO JUV. R. 29</p>
<p><i>In re Caruso</i>, 1991 Ohio App. LEXIS 2292 (May 17, 1991)</p>	<p>Referee explained that juvenile had right to trial, to have counsel represent him, and to remain silent, and that he was presumed innocent. Then said, "Now, with all that information, I'm going to allow you to admit or deny this crime."</p>	<p>Record reveals neither required written waiver, express words of waiver at hearing, nor colloquy between referee and juvenile to establish that waiver was knowing, voluntary, and intelligent.</p>	<p>OHIO JUV. R. 35(b); OHIO CRIM. R. 32.3(D), 44(C)</p>

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> Nation, 573 N.E.2d 1155 (Ohio Ct. App. 1989)	Judge informed juvenile of right to counsel, and she said she "don't think so." Judge sensed her equivocation and said she could talk to her mother. Her mother, who was the victim, only said, "[Laura] has already signed waivers that she was guilty."	"So-called waiver proceedings" failed to establish that juvenile had given up her right to counsel "freely, voluntarily, intentionally, and intelligently."	
<i>In re</i> Kriak, 506 N.E.2d 556 (Ohio Ct. App. 1986)	Judge explained right to counsel. Kriak was not represented, and no record of the hearing was made.	Journal entry did not indicate right to appointed counsel or whether Kriak was indigent. Nor did it show that he had made a written or recorded waiver of counsel.	
<i>In re</i> Anzaldua, 820 P.2d 869 (Or. Ct. App. 1991)	Juvenile and mother appeared at hearing with counsel, and juvenile admitted some of the charges. Court proceeded to hear probation officer recommend commitment, then continued hearing so that juvenile and parents could discuss family therapy rather than commitment. Court reconvened, but neither lawyer was present. Officer said that family had agreed to begin therapy next day, but court ordered commitment to training school.	Record was silent as to whether juvenile understood he had right to counsel's presence at disposition and intelligently and competently relinquished that right. Court had obligation to advise of right and make a record clearly indicating that waiver was product of intelligent and understanding choice.	OR. REV. STAT. § 419

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<p><i>In re Cheney</i>, 773 P.2d 1351 (Or. Ct. App. 1989)</p>	<p>Counsel moved to withdraw based on breakdown of relationship with juvenile. Judge asked juvenile what he wanted to do. Juvenile said, "I do not wish for Mr. Collins to be my counsel at this time." Judge proceeded to trial with juvenile's mother assisting him.</p>	<p>Trial court has duty to determine, on the record, that juvenile understands impact of his choice, which requires that he first understand what he is charged with and possible penalties. Judge here said nothing about these matters, but simply proceeded.</p>	<p>OR. REV. STAT. § 419.476(1)(a), § 419.498(2)(a)</p>
<p><i>In re Clements</i>, 770 P.2d 937 (Or. Ct. App. 1989)</p>	<p>Court advised juvenile of right to counsel, appointed if he could not pay, and advantages of having counsel, but did not inform him of maximum possible penalty.</p>	<p>Record made clear that court endeavored to give child thorough admonitions, but child should not receive fewer procedural safeguards than adults (right to know maximum penalty allowable). It also was significant that child was unrepresented when he made his admission.</p>	<p>OR. REV. STAT. § 161.605(3), § 164.135, § 419.511(1)</p>
<p><i>State v. Afanasiev</i>, 674 P.2d 1199 (Or. Ct. App. 1984)</p>	<p>Court granted juvenile two continuances to obtain counsel. Probation officer informed court at next hearing that juvenile wished to proceed without counsel. Court replied, "whether he does or doesn't, we are going to proceed today."</p>	<p>Record was "completely bare" of any determination that juvenile understood nature of charges, elements of offenses he was charged with, or punishment he faced. Waiver was not product of intelligent and understanding choice.</p>	

CASE NAME	ADVISORY RE RIGHT TO COUNSEL	INVALID WAIVER	STATUTE OR RULE
<i>In re</i> John D., 479 A.2d 1173 (R.I. 1984)	Court advised John and mother of right to counsel, appointed if they could not afford to pay. Court asked if he wanted counsel, and John said, "No. Going to plead guilty." Court then told him he could consult with public defender before entering plea. John again said, "No. I'll just plead guilty."	Court failed to advise John of nature of charges, maximum possible sentence, benefits of presumption of innocence, and consequences of entering a guilty plea. Uncounseled waiver should be allowed "only in the most extraordinary circumstances."	
<i>In re</i> R.S.B., 498 N.W.2d 646 (S.D. 1993)	At evidentiary hearing, judge said, "And that's the way you want to proceed this morning? [without a lawyer]?" R.B. replied "No." Father requested more time to find a lawyer. Judge denied request and proceeded with hearing.	Judge apparently deemed as waiver juvenile's appearance without counsel. Record contained no indication that R.B. was aware of dangers and disadvantages of self-representation or that he knowingly and intelligently waived counsel.	S.D. CODIFIED LAWS § 26-7a-54
<i>In re</i> Torres, 476 S.W.2d 883 (Tex. App. 1972)	Court adequately advised Torres of right to counsel and established valid waiver at plea hearing, but not at adjudication.	No evidence that either Torres or her mother made intelligent and understanding waiver of right to counsel at adjudication.	
<i>McAlpine v. Texas</i> , 457 S.W.2d 428 (Tex. App. 1970)	No court advisory. Evidence at habeas hearing was that mother testified judge only asked juvenile and mother if they wanted to waive counsel, and she did not know juvenile could have a lawyer.	No evidence that juvenile or parents knew they were entitled to appointed counsel or that they could afford counsel. No evidence that waiver was knowing and intelligent.	

APPENDIX D
 CASES UPHOLDING WAIVER: LEGAL ANALYSIS

CASE NAME	JUVENILE COURTS' ADVISORIES	SUFFICIENCY OF ADVISORIES ON APPEAL	STATUTE OR RULE
<i>In re</i> No JV-108721, 798 P 2d 364 (Ariz 1990)	Informed juvenile of right to counsel, nature of trial, role of counsel, possible dispositions	Adequate advice to juvenile, who had committed theft and burglary before, had 9th grade education and was emotionally stable.	ARIZ JUV RULE 6
<i>In re</i> T S, 438 S E 2d 159 (Ga Ct App 1993)	Signed "acknowledgement of rights" form advised of right to counsel, appointed if T S could not afford to pay, and of hazards of proceeding without counsel After two continuances to retain counsel, court said juvenile was not entitled to appointed counsel and proceeded with hearing.	Under the circumstances, judge was authorized to conclude that juvenile and mother had waived right to retain counsel	
<i>In re</i> M R, 605 N E 2d 204 (Ind Ct App 1992)	At initial hearing, where M R 's mother was present, he waived right to counsel and said he knew and understood rights to be represented by counsel, to have a speedy trial, to compel attendance of witnesses, to remain silent and not testify, and possibility of sentence to the Indiana Boys School.	Judge's face to face instruction on M R 's rights, coupled with prior written advisement of rights and videotape viewing, M R and mother were fully advised of right to counsel at public expense if they were indigent and desired representation by counsel No requirement that they be advised of minimum and maximum sentences.	IND CODE § 31-6-4-13
<i>In re</i> Bennett, 355 N W 2d 277 (Mich Ct App 1984)	Informed juvenile of right to counsel at arraignment, but not at disposition	No requirement that juvenile be informed of right to counsel at disposition Child can waive counsel with parent's concurrence	MICH COMP LAWS § 712A 17; MICH JUV RULE 8 2(c)

CASE NAME	JUVENILE COURTS' ADVISORIES	SUFFICIENCY OF ADVISORIES ON APPEAL	STATUTE OR RULE
<i>In re</i> R.M., 252 A.2d 237 (N.J. Super. 1969)	Judge told juvenile of right to counsel. Juvenile and mother executed waiver of counsel form 3 times.	Juvenile understood what he was doing. He was a slow learner, but progressed at work and school and had previous rape and driving without a license charges.	
<i>In re</i> R.D.B., 575 N.W.2d 420 (N.D. 1998)	The court carefully explained to R.D.B. and his parents they had a right to be represented by an attorney and one would be appointed for them if they could not afford an attorney.		N.D. CENT. CODE § 27-20-26(2)
<i>In re</i> Rogers, 2001 WL 542331 (Ohio Ct. App. May 23, 2001)	Transcript revealed that court advised juvenile of right to counsel, appointed if needed, and explained that lawyer knows the law, can investigate what happened, give advice and recommendations on how to proceed, and if necessary represent him at trial.		OHIO JUV. RULE 35(b)

CASE NAME	WHAT THE COURT SAID	ADVISEMENT OF RIGHT TO COUNSEL SUFFICIENT	STATUTE OR RULE
<i>In re Morrison</i> , 2001 WL 246417 (Ohio Ct App Mar 9, 2001)	Court advised juvenile of her rights to an attorney, appointed if she needed	Record reflected that court made sure juvenile and mother understood she had right to appointed counsel, but juvenile waived right, both in open court and in writing.	
<i>In re Mark B</i> , 2000 Ohio Ct App LEXIS 437 (Feb 11, 2000)		Court advised, probed, explained, and made express findings that Mark B knew his rights and waived them voluntarily. He was intelligent enough, even though in special classes for other reasons, nor did the fact he came from an abused background render him incapable of waiving his rights.	OHIO JUV RULE 29(b)
<i>In re Woodson</i> , 1999 WL 195579 (Ohio Ct App Mar 31, 1999)	Transcript revealed that magistrate informed Woodson of right to counsel, appointed if he could not afford one. Magistrate also informed him of charges, rights he would give up by not going to trial, and possible consequences.	Record showed substantial compliance with Juv Rule 29; additional inquiries are not required	OHIO REV CODE § 2151 32; OHIO JUV RULES 4(a), 29
<i>In re Kuchta</i> , 1999 WL 157439 (Ohio Ct App Mar 10, 1999)	Journal stated that judge explained all rights to juvenile and he waived right to counsel. Journal from dispositional hearing stated that court addressed juvenile pursuant to Juvenile Rule 29	Juvenile argued that his conviction should be overturned because parole officer and Sheriff's Department detective counseled his plea. Record demonstrates that court personally explained to Kuchta his right to counsel and that he waived it.	OHIO JUV RULE 29

CASE NAME	WHAT THE COURT SAID	ADVISEMENT OF RIGHT TO COUNSEL SUFFICIENT	STATUTE OR RULE
<i>In re Lovejoy</i> , 1998 WL 114400 (Ohio Ct. App. Mar. 4, 1998)	Court informed juvenile of right to counsel, and when he appeared in court without a lawyer, told him the court would appoint one if he could not afford to pay. At later hearing, judge informed him 6 more times of right to counsel.	Record revealed that court fully advised defendant about his right to counsel every time he appeared in court. Court asked defendant each time whether he wished to waive his right to counsel, and each time he indicated that he did. No more is required.	OHIO REV. CODE § 2151.352
<i>In re Clayton K.</i> , 1997 WL 327181 (Ohio Ct. App. June 6, 1997)	Hearing transcript showed that referee advised juvenile that if he was found in violation of probation, he could be committed to Department of Youth Services. He was fully advised of rights to remain silent, to counsel, appointed if he could not afford to pay.	Juvenile was advised of his right to counsel three times. Each time, he stated he understood the right but chose not to invoke it.	OHIO JUV. RULE 29
<i>In re Griffin</i> , 1996 WL 547921 (Ohio Ct. App. Sept. 27, 1996)	After reviewing probation violation charge with juvenile, judge asked, "Do you understand those two charges?" Juvenile replied "yeah." Very next question inquired whether he wanted counsel. He replied "No," then admitted violations.	Juvenile was advised of his rights at adjudicatory hearing and chose to waive counsel. He had been to juvenile court 11 times in previous 16 months and was familiar with court processes. His mother was present at all hearings.	OHIO REV. CODE § 2151.352; OHIO JUV. RULES 4, 29, 35
<i>In re Adams</i> , 1996 WL 517642 (Ohio Ct. App. Sept. 12, 1996)	Proceedings were not recorded. Record contains referee's report stating that complaint was read and referee explained legal rights, procedures, and possible dispositions.	Referee's report contained notation that she advised juvenile of rights in mother's presence. That was sufficient indication of valid waiver of counsel, based on similar cases.	OHIO JUV. RULES 29, 37
<i>In re Williams</i> , 1996 WL 157349 (Ohio Ct. App. Apr. 4, 1996)		Neither <i>Gault</i> nor OHIO REV. CODE § 2151.352 require judge to continually obtain waivers at all stages of proceedings where litigant has once waived right to counsel. Waiver, once given, can be revoked, but revocation requires affirmative act on litigant's part.	OHIO REV. CODE § 2151.352

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<i>In re</i> Peggy L., 1995 Ohio Ct App, LEXIS 5330 (Dec 8, 1995)	After advising juvenile of rights and of dangers of proceeding without counsel, referee left courtroom to give her time to think. Referee said she was going to appoint counsel, but juvenile insisted on waiving. At initial hearing, court explained right to counsel, other rights, court procedure, and possible consequences	Referee fully advised juvenile of rights and possible consequences of not having counsel. Juvenile had prior history with court; current case stemmed from domestic violence adjudication and several probation violations.	OHIO JUV RULES 4(a), 34(c), 35(b)
<i>In re</i> East, 663 N E 2d 983 (Ohio Ct App 1995)	At initial hearing, court explained right to counsel, other rights, court procedure, and possible consequences	Juvenile is entitled to counsel at all stages of proceedings, but need be advised only once. Rule does not require waiver to appear on record; journal entry is sufficient.	OHIO REV CODE § 2151 352; OHIO JUV RULES 4(a), 29(b)
<i>In re</i> Copeland, 1995 WL 453422 (Ohio Ct App July 14, 1995)	Court advised juvenile and father that they would have to sign waiver form, and then said, "you do not wish to consult an attorney; is that correct?" Boy and his father both responded "yes." Court again said, "You understand that by signing [the waiver form] you are giving up your right to an attorney in this case?" Boy answered "yes."		OHIO JUV RULE 29