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INTRODUCTION

One of the more troublesome issues dealt with by the courts in recent years has been the question of when and how a juvenile may competently and intelligently waive such constitutionally protected rights as the right to counsel[1] and the privilege against self-incrimination.[2] It is the purpose of this comment to examine the numerous aspects of this controversial subject and to conduct an evaluation of the primary scholarly and jurisdictional views. One view permits a juvenile to waive a constitutional right when the "totality of the circumstances" indicates it is knowing and voluntary. A second view requires that the juvenile have an inter-

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1. U.S. CONST. amend. VI states: "[I]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

2. U.S. CONST. amend. V states: "[N]or shall anyone be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

ested adult present. The ultimate aim of this article is to determine which view is to be preferred.

CONSTITUTIONAL STATUS OF WAIVER

It has long been recognized that an individual may, under certain circumstances, waive his constitutional rights.[3] Valid waiver of a constitutional right has traditionally called for "an intentional relinquishment or abandonment of a known right or privilege."[4]

With regard to confessions and waiver of the fifth amendment privilege against self-incrimination, it was early determined that the central concern should be whether the confession was voluntary.[5] It has long been felt that involuntary confessions are both unreliable and offensive to notions of proper police conduct.[6] Traditionally, in determining voluntariness the Court has assessed the totality of all the surrounding circumstances, including characteristics of the accused and details of the interrogation.[7] In 1966, the case of *Miranda v. Arizona*[8] added significant safeguards to this standard. In *Miranda*, the United States Supreme Court recognized that an environment of incommunicado interrogation "is created for no purpose other than to subjugate the individual to the will of the examiner,"[9] and therefore concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will

3. *See* Johnson v. Zerbst, 304 U.S. 458 (1938).

4. *Id.* at 464.

5. *See* Brown v. Mississippi, 297 U.S. 278 (1936). In Culombe v. Connecticut, 367 U.S. 568 (1961), the Court stated that:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by the maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination is critically impaired, the use of his confession offends due process.

Id. at 602.

6. The broad sweep of cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because involuntary; and (2) that over-zealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused.

State v. Hudson, 281 N.C. 100, 106, 187 S.E.2d 756, 760 (1972).

7. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958) (lack of education as a factor); Fikes v. Alabama, 352 U.S. 191 (1957) (low intelligence as a factor); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (repeated and prolonged questioning as a factor); Davis v. North Carolina, 384 U.S. 737 (1966) (lack of advice on constitutional rights as a factor).

8. 384 U.S. 436 (1966).

9. *Id.* at 457.

to resist and to compel him to speak where he would not otherwise do so freely."[10] Four warnings[11] were developed which are to be given to individuals in custodial surroundings.[12] Once these warnings have been given, if the individual indicates, at any time prior to or during the questioning, that he wishes to remain silent, then the interrogation must cease because he has shown a desire to exercise his fifth amendment privilege. Any statement taken after this privilege has been invoked is considered to be the product of compulsion.[13] Additionally, the court indicated that "if the individual asks for an attorney, the interrogation must cease until the attorney is present."[14]

With regard to waiver, the Court said that "if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the individual knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[15]

One result of the *Miranda* decision is that while the Court's concern that a waiver be voluntary is still strongly evident, the focus of inquiry has shifted to the *capacity of the accused.*

Overview of Juveniles and the Constitution

The early emphasis in the American juvenile justice system was upon the rehabilitation of the youth concerned, rather than punishment.[16] To accomplish this end, the state assumed the role of *parens patriae*[17] in protecting the welfare of the child. The op-

10. *Id.* at 467.

11. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

12. The precise meaning of the term "custodial interrogation" was not given by the Court in this case. It has been left to state and lower federal courts to develop this.

13. 384 U.S. at 473-74.

14. *Id.* at 474.

15. *Id.* at 475.

16. *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. Rev. 167, 169 [hereinafter cited as Paulsen].

17. The state became, in effect, a substitute for the natural parents because of their unwillingness or inability to train the child properly. *See* Note, *The Juvenile Court*, 23 Harv. L. Rev. 104, 109 (1909).

erations of the juvenile courts were deemed to be "civil" rather than "criminal."[18] The state, as *parens patriae*, felt that it had the right to deny to the child the procedural rights available to adults. It was asserted that a child, unlike an adult, had a right "not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so."[19]

This position prevailed until the holding of *In Re Gault*,[20] which recognized that such "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[21] The Court asserted that this departure from established principles and procedures frequently resulted in arbitrariness,[22] and the overall failure to observe the fundamental requirements of due process often resulted in "inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[23]

In view of this fact, the Court in *Gault* held that when a juvenile court proceeding may result in a loss of liberty,[24] the juvenile in question is entitled to the right to counsel.[25] Moreover, the Court held that the constitutional privilege against self-incrimination is applicable to juveniles.[26] The Court cautioned that if for some reason an admission is obtained from a juvenile, the greatest care must be taken to assure that it is made *voluntarily and not out of ignorance of one's rights.*[27]

The issue raised at this point was whether the *Miranda* warnings[28] were applicable to juveniles. The Court in *Gault* did not specifically address this issue, although it did cite *Miranda* in stating that the process by which admissions are obtained requires some sort of concrete safeguards.[29]

At any rate, the vast majority of courts since *Gault* have held *Miranda* applicable to juveniles as well as to adults,[30] and in sev-

18. *See* Paulsen, *supra* note 16, at 173.

19. *See* Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A.J. 719, 720 (1962).

20. 387 U.S. 1 (1963).

21. *Id.* at 18.

22. *Id.* at 18-19.

23. *Id.* at 19-20.

24. In light of *Miranda*, it would logically appear that the rights guaranteed in *Gault* would also extend to the pre-trial investigatory phase of juvenile proceedings.

25. 387 U.S. at 41.

26. *Id.* at 55.

27. *Id.*

28. *See* text accompanying note 11 *supra.*

29. 387 U.S. at 56.

30. *See, e.g., In re* Creek, 243 A.2d 49 (D.C. 1968); People v. Horton, 126 Ill. App. 2d 401, 261 N.E.2d 693 (1969); *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd*, 403 U.S. 528 (1971).

eral jurisdictions the reading of *Miranda* warnings has been required by statute.[31]

APPROACHES TO THE QUESTION OF JUVENILE WAIVER

The Totality of Circumstances Standard

An early case which touched upon the question of juvenile waiver was *Haley v. Ohio*.[32] In *Haley*, a fifteen-year-old boy was arrested shortly after midnight on a robbery-murder charge. He was subjected to interrogation by relays of police officers and was not advised of his right to counsel. At 5:00 A.M. he made an oral confession. He was then advised of his right to remain silent, and of the fact that his statement might be used against him. Subsequently, he signed a written confession and was held for three days incommunicado before being arraigned.[33]

The Court in *Haley* recognized that the age of the accused was a crucial element in the determination of whether the confession was voluntary. The Court said,

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is a period of great instability which the crisis of adolesence produces. A 15-year-old lad, questioned through the dead of night by relays of police is a ready victim of the inquisition.[34]

In arriving at its holding in this case, the Court, although recognizing the importance of the accused's age and immaturity to the determination of a valid waiver, declined to hold as a matter of law that these factors were in themselves determinative. Rather, the case was decided pursuant to the "totality of circumstances" standard, in which such factors as the accused's age, "the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, and the callous attitude of the police toward his rights" were taken into consideration. Examination of these factors *combined* to result in a determination that the confession was obtained by methods offensive to due

31. *See, e.g.*, CAL. WELF. & INST. CODE § 625 (West Supp. 1978); OKLA. STAT. ANN. tit. 10, § 1109 (West Supp. 1978).
32. 332 U.S. 596 (1948).
33. *Id.* at 598-99.
34. *Id.* at 599.

process.[35]

In *Gallegos v. Colorado*,[36] a similar approach is evident. In that case, an oral confession was obtained from a fourteen-year-old boy immediately following his arrest in connection with an assault and robbery. Thereafter he was held incommunicado for five days, and, although he was not interrogated, he ultimately signed a formal confession which was used against him in a subsequent murder prosecution after the victim had died.[37] Applying *Haley* to the facts of the case, the Court in *Gallegos* held that the formal confession had been obtained through violation of the youth's due process rights.[38]

As in *Haley*, the Court in *Gallegos* recognized that the factors of youth and immaturity played an important part in the determination of whether or not a valid waiver had been made. The Court said that "he cannot be compared with an adult in full possession of his senses and knowledgable of the consequences of his admissions."[39] Once again, however, the Court declined to rule that age and immaturity alone were conclusive. It was held that the determination of cases such as this could be made only after an evaluation of the "totality of circumstances."[40] In *Gallegos*, the factors considered were the age of the accused, the length of detention, the failure to send for the minor's parents, "the failure to immediately bring him before the judge of the Juvenile Court, and the failure to see that he had access to the advice of an attorney or friend."[41]

The "totality of circumstances" standard, as delineated in the *Haley* and *Gallegos* decisions, would appear to be the approach utilized in several jurisdictions to determine the validity of a juvenile's waiver of his fifth and sixth amendment rights.[42] This standard was well stated in *People v. Lara*,[43] where the court said:

> [T]his, then, is the general rule: a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or con-

35. *Id.* at 600-01.
36. 370 U.S. 49 (1962).
37. *Id.* at 50.
38. *Id.* at 55.
39. *Id.* at 54.
40. *Id.* at 55.
41. *Id.*
42. Among the states which follow the "totality of circumstances" standard, *see, e.g.*: California—People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967); Connecticut—State v. Oliver, 160 Conn. 85, 273 A.2d 867 (1970); Illinois—People v. Pierre, 114 Ill. App. 2d 283, 252 N.E.2d 706 (1969); Kansas—State v. Hinkle, 206 Kan. 472, 479 P.2d 841 (1971); Minnesota—State v. Hogan, 297 Minn. 430, 212 N.W.2d 664 (1973); Nebraska—State v. Lytle, 194 Neb. 353, 231 N.W.2d 681 (1975); New Mexico—State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966); Wisconsin—Theriault v. State, 66 Wis. 2d 33, 223 N.W.2d 850 (1974).
43. 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967).

> sent of counsel, or other responsible adult, and the admissability of such a confession depends not on his age alone, but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.[44]

The "totality of circumstances" standard can be viewed as an integration of two components. The first component is the assertion that a juvenile, by himself, may waive his rights.[45] The second element is the use of a wide variety of factors, including age and immaturity, to determine the validity of such a waiver.[46]

The issue which invariably arises when this standard is used is whether it provides sufficient protection for the juvenile against the dangers occasioned by his own youth.

The "Presence of Parents" Standard

Although, thus far, no case has held that the law extends to juveniles a blanket presumption of incapacity to waive constitutional rights,[47] a number of jurisdictions have taken the view that the protection afforded juveniles by the "totality of circumstances" standard is insufficient, given the natural inequality present in the custodial interrogation process.[48]

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44. *Id.*, at 383, 432 P.2d at 215, 62 Cal. Rptr. at 599.

45. The lower courts have uniformly held that the condition of infancy alone is not sufficient to invalidate an otherwise competent waiver of constitutional rights. *See, e.g.*, United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973); White v. State, 13 Md. App. 1, 280 A.2d 283 (1971); Commonwealth v. Cain, 361 Mass. 224, 279 N.E.2d 706 (1972).

46. An excellent example of the variety of factors used in such an evaluation is found in West v. United States, 399 F.2d 467 (5th Cir. 1968):

> (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogation; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date.

Id. at 469.

47. A possible exception may be in New Jersey, where, in State in Interest of S.H., 61 N.J. 108, 293 A.2d 181 (1972), the court stated: "[R]ecitation of the *Miranda* warnings to a boy of 10 even when they are explained is undoubtedly meaningless. Such a boy certainly lacks the capability to fully understand the meaning of his rights. Thus, he cannot make a knowing and intelligent waiver of something he cannot understand." *Id.* at 115, 293 A.2d at 184-85.

48. *See* text accompanying note 39 *supra.*

One such case was *Lewis v. State*,[49] which involved an oral confession by a seventeen-year-old youth in regard to a murder. Although the youth had been informed of his rights per *Miranda*, neither a parent nor counsel was present at the time of the admission.[50] In considering the validity of the accused's waiver, the court took exception to the imprecision of the "totality of circumstances" standard when it said:

> [T]he authorities seeking to question a juvenile enter into an area of doubt and confusion when the child appears to waive his rights to counsel and against self-incrimination . . . . There are no concrete guidelines for the authorities to follow in order to insure that the waiver will be upheld . . . . It is harmful to the system of criminal justice to require law enforcement authorities to second guess the courts in the area of constitutional rights. Clearly defined procedures should be established in areas which lend themselves to such standards. Age is one area which lends itself to clearly defined standards.[51]

The court observed that although for many years the high courts of the United States had recognized the necessity of a different approach to juvenile waiver, none of them had specified precisely which method should be employed.[52] The court held that while a juvenile is entitled to waive his rights to the same extent as an adult, certain safeguards recognizing the inherent differences between adults and minors are required "to insure that any waiver is truly voluntary."[53] The safeguards established in *Lewis* were that a juvenile's statement was inadmissable against him in a subsequent trial or hearing unless the child was given an opportunity to consult with his parents, guardian, or an attorney as to whether or not to waive those rights.[54]

A similar view is reflected in *State in Interest of Dino*,[55] a murder case in which the court held invalid a confession by a thirteen-year-old boy. Although he had been informed of his rights per *Miranda*, the court ruled that the waiver was not the product of a knowing and intelligent choice due to the absence of a parent or interested adult at the time that it was made.[56] The court reasoned that "because most juveniles are not mature enough to understand their rights and are not competent to exercise them, the concepts of fundamental fairness embodied in the Declaration of Rights of our [Louisiana] Constitution require that juveniles not be permitted to waive constitutional rights on their own."[57]

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49. 259 Ind. 431, 288 N.E.2d 138 (1972).
50. *Id.* at 433, 288 N.E.2d at 139-40.
51. *Id.* at 436-37, 288 N.E.2d at 141.
52. *Id.* at 438, 288 N.E.2d at 142.
53. *Id.* at 439.
54. *Id.*
55. 359 So. 2d 586 (La. 1978).
56. *Id.* at 594.
57. *Id.*

The court in *Dino* established that the state must satisfy three prerequisites if it is to sustain its burden of proving a valid waiver: (1) "that the juvenile in question actually consulted with an attorney or adult before waiver," (2) "that the attorney or adult consulted was interested in the welfare of the juvenile," and (3) "that if an adult other than an attorney was consulted, the adult was fully advised of the rights of the juvenile."[58] In comparison to *Lewis*, it can be seen that the standard in *Dino* features the additional component of requiring either a parent or an *interested adult* to be present prior to waiver.

A series of decisions in Pennsylvania[59] had established a rule[60] similar to that in *Dino*. This rule provided the background for *Commonwealth v. Smith*,[61] a murder case which elaborated to some extent on the sort of expansion seen in *Dino*. The case involved a confession by a seventeen-year-old accused which was made after there had been an opportunity for him to consult with his father. Even though an opportunity to consult had been afforded, the confession was deemed inadmissable because the court determined that the father was not an informed adult[62] or interested in the welfare of his son.[63]

The court reasoned that if the adult consulted is not one who is concerned with the interest and welfare of the individual, "the protection sought to be afforded is illusory and the procedure fails to accomplish its purpose of offsetting the disadvantages occasioned by the immaturity."[64] The court also noted that if the interested adult to be consulted is as ignorant of the accused's constitutional rights as the accused himself, then the protective

58. *Id.*

59. Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286 (1974); Commonwealth v. Starkes, 461 Pa. 178, 335 A.2d 698 (1975); Commonwealth v. McCutchen, 463 Pa. 90, 343 A.2d 669 (1975); Commonwealth v. Chaney, 465 Pa. 407, 350 A.2d 829 (1975).

60. The rule established was that before any waiver of *Miranda* rights, a juvenile must be afforded an opportunity to consult with a mature and informed individual, concerned primarily with his welfare prior thereto.

61. 472 Pa. 492, 372 A.2d 797 (1977).

62. The court reasoned that:

> Where an informed adult is present the inequality of the position of the accused and police is to some extent neutralized and due process satisfied. However, where the adult is ignorant of the constitutional rights that surround a suspect in a criminal case and exerts his or her influence upon the minor in reaching the decision, it is clear that due process is offended.

Id. at 501, 372 A.2d at 801.

63. *Id.* at 500.

64. *Id.*

procedure is meaningless.[65]

The decisions in *Lewis, Dino*, and *Smith* are indicative of a general trend away from the "totality of circumstances" standard. This approach has been adopted by at least two other jurisdictions,[66] and is favored by several commentators.[67]

Simplified Language

Because a major part of the problem of juvenile waiver centers on the minor's inability to comprehend the nature of his constitutional rights, a suggestion is sometimes made that the information be conveyed in terms that the juvenile can understand.[68]

In 1969, an empirical study was conducted by two California attorneys for the purpose of answering two questions: (1) should the *Miranda* warnings be revised for the juvenile offender and, (2) does a minor have the capacity to knowingly and intelligently waive his *Miranda* rights?[69] Interviews were conducted with ninety juveniles to calculate their understanding of a simplified warning[70] and a formal warning.[71] The results were tabulated in terms of a percentage figure of understanding. The overall results were not striking, and little difference in understanding was noted

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65. *Id.*

66. In Missouri, a confession by a juvenile is inadmissible unless both he and either a parent, guardian, or adult friend were informed of his rights to remain silent and to an attorney. The juvenile must also be given an opportunity to consult with either his parents, guardian, adult friend, or attorney as to whether he wishes to waive those rights. *See In re* K.W.B., 500 S.W.2d 275 (Mo. App. 1973).

In Georgia, the state is required to advise the parents of the accused juvenile of his right to counsel prior to any waiver. *See* Freeman v. Wilcox, 119 Ga. App. 325, 167 S.E.2d 163 (1969).

67. *See, e.g.*, Comment, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543 (1972-73); Comment, *Recent Developments—Criminal Law*, 1972 UNIV. OF ILL. L. FORUM 625.

68. *See, e.g., In re* Dennis M., 70 Cal. 2d 444, 450 P.2d 296, 75 Cal. Rptr. 1 (1969). The court in this case said: "To avoid future conflicts on this issue, we recommend that juvenile officers and police be prepared to give their compulsory *Miranda* warnings in terms that reflect the language and experience of today's juveniles." *Id.* at 464 n.13, 450 P.2d at 308 n.13, 75 Cal. Rptr. at 13 n.13.

69. Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1969) [hereinafter cited as Ferguson & Douglas].

70. You don't have to talk to me at all, now or later on, it is up to you.

If you decide to talk to me, I can go to court and repeat what you say against you.

If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on.

Do you want me to explain or repeat anything about what I have just told you?

Remembering what I've just told you, do you want to talk to me?"

Id. at 40.

71. The standard San Diego City Police Department Miranda warning was used.

between those who were read the formal rights and those who were read the simplified rights.[72] However, when the results attributable to delinquent youths were deleted, a sample was obtained that prompted the authors of the study to conclude that a non-deliquent juvenile[73] responds more positively to a simplified warning.[74]

The results of the above study and others[75] indicate that the use of simplified terminology in explaining constitutional rights to a juvenile may be a valuable tool in solving the problem of juvenile waiver. Its use as a *total* solution is doubtful, however, since the problem of juvenile waiver cannot be solved solely by eliminating the comprehension aspect.

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72. The overall percentage of understanding was computed with regard to five elements: (1) the right to silence, (2) the possibility that the court might use statements made by the juvenile later at court, (3) the right to an attorney, (4) the right to an attorney during questioning, and (5) the fact that an attorney can be appointed at no cost. Ferguson & Douglas, *supra* note 69, at 43. The overall results are as follows:

	Miranda	Simplified
Right to Silence	.90	.89
Court's Use of Statements	.67	.70
Right to an Attorney	.89	.84
Right to an Attorney during Questioning	.27	.34
Right to an Attorney without Cost	.61	.39

Id. at 48.

73. The delinquent youths were deleted to obtain a pure sample, uninfluenced by prior exposure to warnings from police, probation, and judicial officers. *Id.* at 49.

74. This portion of the study was confined to fourteen-year-olds, who comprised 44 of the 90 individuals interviewed. *Id.* Concentration on this age group was the result of the fact that under California law, age 14 is the age at which a juvenile is felt to be competent to commit crime. *Id.* at 41; *see* CAL. PENAL CODE § 26 (West 1955). The results were as follows:

	Miranda	Simplified
Right to Silence	.74	.84
Court's Use of Statements	.47	.53
Right to an Attorney	.69	.81
Right to an Attorney during Questioning	.19	.34
Right to an Attorney without Cost	.47	.44

Ferguson & Douglas, *supra* note 69, at 50.

75. In a survey conducted by members of the Juvenile Justice Committee of the Los Angeles County Grand Jury of a random selection of school children visiting the Criminal Courts Building, it was found that 61% of the subjects indicated a better understanding of a proposed set of "Juvenile Miranda Rights." 1977-78 L.A. County Grand Jury Final Report 110, 111.

The problem of juvenile waiver is two-fold. One difficulty is the inability of the juvenile generally to comprehend his rights. Another problem is that an extra element of coercion may be present when a juvenile is subjected to prejudicial interrogation. Ideally, the standard used to determine a valid juvenile waiver will be one which solves both aspects of the problem.

EVALUATION

As has been seen, the issue raised in a consideration of juvenile waiver has not been whether a minor may waive his constitutional rights, but rather *when* and *how* he may do so. The resolution of this general issue depends upon the resolution of two subissues: (1) what can be done to resolve the problem of a juvenile's *comprehension* of his constitutional rights, and (2) what can be done to alleviate the extra element of *coercion* which results from the minor's lack of experience and immaturity? The preferred approach to juvenile waiver is the one which best provides solutions to both issues.

The Comprehension Issue

In *United States v. Frazier*,[76] a dissenting justice, discussing the importance of the *Miranda* warnings to inform one of his constitutional rights, acknowledged that "the purpose of the *Miranda* warnings is to convey information to the suspect. Plainly, one who is told something he does not understand is no better off than one who is told nothing at all."[77] This statement clearly describes a major problem inherent in a determination of whether a waiver was knowing and intelligent, even in an instance where *Miranda* warnings have been given.

The Court in *Haley*[78] said, "we cannot give any weight to recitals which merely formalize constitutional requirements. Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."[79] Apparently, one such fact of life may be the natural difficulty a juvenile experiences in comprehending the abstract notion of his legal rights.

In the 1969 empirical study discussed above,[80] one of the questions raised was whether a minor has the capacity to knowingly and intelligently waive his *Miranda* rights. The results[81] showed

76. 476 F.2d 891 (D.C. Cir. 1973).
77. *Id.* at 900 (dissenting opinion).
78. Haley v. Ohio, 322 U.S. 596 (1948).
79. *Id.* at 601.
80. *See* text accompanying note 69 *supra*.
81. *See* note 74 *supra*.

that, when read the *Miranda* warning, the average non-delinquent fourteen-year-old showed a disturbing overall lack of comprehension of his rights. This was especially evident with regard to the following: (1) the possibility that a statement may be used against them in court, (2) the fact that they may have an attorney during the interrogations, and (3) the fact that they may obtain the services of an attorney at no charge if they are unable to afford one.[82] The conclusion drawn by the authors of the study was that only a small percentage of juveniles is capable of knowingly and intelligently waiving *Miranda* rights.[83] It was also concluded that if intelligent relinquishment of a known right were the sole standard to be used to determine the validity of a waiver, then eighty-six of the ninety juveniles interviewed (96%) would have given statements that could have been inadmissible at law.[84]

Clearly, comprehension of constitutional rights is a problem. Thus, the question is, which of the approaches thus far examined best addresses this problem?

At first glance it would appear that both the "totality of circumstances" standard and the "presence of a parent or interested adult" standard are equally well-equipped (or equally well-unequipped) to handle this aspect of the overall problem of juvenile waiver. The solution to the problem of increasing a juvenile's comprehension of his rights seems to lie in the area of making a greater and more conscientious effort to explain the relevant rights, using whatever tools are available to aid in this explanation. The use of simplified language and "Juvenile *Miranda* Warnings" may be such tools.[85]

It can be argued that the presence of an interested adult is more conducive to effective comprehension of constitutional rights by a juvenile. In *Commonwealth v. Smith*,[86] the court observed that:

> [T]he administering of *Miranda* warnings to a juvenile, without providing an opportunity to that juvenile to consult with a mature, informed individual concerned primarily with the interest of the juvenile, was inadequate to offset the disadvantage occasioned by his youth. The new rule appreciates that the inexperience of the minor affects not only his or her ability

82. *Id.*
83. Ferguson & Douglas, *supra* note 69, at 54.
84. *Id.*
85. The authors in the Ferguson and Douglas study admitted, however, that use of the simplified Miranda rights form failed to increase understanding significantly. *Id.*
86. *See* note 61 and accompanying text *supra.*

> to understand the full implication and consequences of the predicament but also renders the judgment inadequate to assess the spectrum of considerations encompassed in the waiver decision.[87]

Similarly, the court in *In Re K.W.B.*[88] recognized that "[t]he presence of a juvenile's parent at police questioning will provide the advice and protection that the juvenile officer cannot, consistently with his other duties, provide."[89]

This argument certainly does have merit and, thus, it appears that where the problem of a minor's comprehension of his rights is concerned, the "presence of a parent or interested adult" standard is superior.

The Coercion Aspect—Voluntariness

It has long been recognized in the area of juvenile waiver of constitutionally protected rights that special care must be taken to ensure that it was voluntary.[90] This fact was reiterated in *In Re Gault*,[91] where the Court cautioned that "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair."[92]

The issue that arises at this point is, what can be done to safeguard against such a waiver? The Court in *Haley v. Ohio*[93] stated that "[h]e [the juvenile] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."[94]

In evaluating the level of protection afforded an accused juvenile against involuntary waiver, the "totality of circumstances" standard appears clearly inferior to the "presence of a parent or interested adult" standard. This is so because it provides no safeguards other than an indefinite case-by-case determination which "tends to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them."[95]

On the other hand, the "presence of a parent or interested adult" standard provides protection which has support both in case law and in common sense. Perhaps the court in *In Re*

87. Commonwealth v. Smith, 472 Pa. at 492, 372 A.2d at 800.
88. 500 S.W.2d 275 (Mo. App. 1973).
89. *Id.* at 282.
90. *See* text accompanying note 34 *supra.*
91. 387 U.S. 1.
92. *Id.* at 55.
93. 332 U.S. 596.
94. *Id.* at 600.
95. *In re* Dino, 359 So. 2d 586, 591 (La. 1978) (footnote omitted).

Dino,[96] paraphrasing a passage from *Miranda*,[97] summed it up best when it stated:

> the rights which a juvenile may waive before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or advisor so relatively simple and well established as a safeguard against a juvenile's improvident judicial acts, that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights. Assessments of how the "totality of circumstances" affected a juvenile in a particular case can never be more than speculation.[98]

CONCLUSION

It seems clear the the preferred approach to be used in determining the validity of a juvenile waiver is to require the presence of a parent or interested adult prior to waiver. This standard provides substantial protection for the accused juvenile whereas the "totality of circumstances" standard does not. The time and expense spared the courts and the litigants by the use of a concrete standard adds additional weight to this viewpoint.

It may be argued that the use of this standard will overly interfere with the investigative activities of the law enforcement authorities, but "[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[99]

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96. *Id.*

97. The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.
384 U.S. at 468-69.

98. *In re* Dino, 359 So. 2d at 592.

99. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).