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Pre-Adjudication Access to Counsel for Juveniles

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PRE-ADJUDICATION ACCESS TO COUNSEL FOR JUVENILES

ABSTRACT

This Comment considers the juvenile justice system and the application of the Fifth Amendment's privilege against self-incrimination to children. It describes the development of the juvenile system and tracks its development up to In re Gault. *Despite* Gault*'s significance and promising rhetoric, practical barriers still exist that undermine the full expression of children's constitutional rights in the juvenile justice system.*

One of this Comment's overarching goals is to reflect on how Gault*'s central premise—that children are entitled to constitutional rights—can be more meaningfully achieved. Specifically, this Comment looks to juvenile interrogations and proposes mandatory pre-adjudication access to counsel for children encountering the juvenile system, especially prior to and during custodial interrogations. This piece also argues that children should not be able to waive the presence of counsel during interrogation, and it addresses why this kind of mandatory provision is not problematic despite the juvenile system's history of paternalism.*

Recognizing that its proposals are broad in scope, this Comment offers two possible rationales that could support adoption of its suggestions. With reference to the Supreme Court's recent Eighth Amendment jurisprudence and to its cases that interpreted Miranda*'s provisions, this Comment offers examples of how the Court's existing precedent may allow the Court to adopt a heightened constitutional standard to protect children's Fifth Amendment privilege against self-incrimination.*

Finally, this piece concludes by considering the feasibility of the suggestions it offers. Despite some legitimate concerns and arguments that cut against this Comment's proposals, mandatory pre-adjudication access to counsel is necessary for children as they interact with the juvenile system, and there are equally significant costs of non-implementation. Additionally, broader awareness of the costs of current approaches to juvenile justice may serve as an impetus for policy reform.

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INTRODUCTION

In re Gault[1] significantly altered the legal system's relationship with children because it established that children possess certain constitutional rights.[2] Though not addressing "the totality of the relationship of the juvenile and the state,"[3] the Court in *Gault* asserted a novel proposition: "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[4] In doing so, the Court rejected a constitutional scheme in which children had been entitled to custody rather than to substantive, individual rights.[5]

Despite its revolutionary holding, *Gault* left some issues unresolved. This Comment focuses on one unresolved aspect of *Gault*: children's access to counsel before formal adjudication proceedings. For juveniles, pre-adjudication interactions with law enforcement often include some form of custodial interrogation, either at a police station or at school. This Comment argues that the Court should adopt two rules that would more effectively protect children's Fifth Amendment privilege against involuntary self-incrimination.

Part I begins by tracing the history of the juvenile justice system and the theories and goals that led to its creation and practices. With a particular focus on the *parens patriae* doctrine, Part I begins by exploring traditional justifications for regulating child welfare and the ways that juvenile courts reflected these ideas. Offering a thorough analysis of *Gault*, this Part also reflects on how *Gault* changed juvenile courts and constitutional theory. Because *Miranda v. Arizona*[6] was incorporated into *Gault*, this Part also provides background on *Miranda* and on the traditional due process standard that courts apply when determining whether an individual's Fifth Amendment privilege against self-incrimination was voluntarily waived. This Part concludes by discussing the Court's recent case involving juvenile interrogation, *J.D.B. v. North Carolina*.[7]

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1 387 U.S. 1 (1967).

2 *See id.* at 13–14; *see also* Martin Guggenheim, *The Due Process Revolution in Juvenile Court—New York and the Early Years After* Gault, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 79, 79–81 (Kristin Henning et al. eds., 2018).

3 *In re Gault*, 387 U.S. at 13.

4 *Id.*

5 *See id.* at 17 ("The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody.'").

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

7 J.D.B. v. North Carolina, 564 U.S. 261 (2011).

Part II shifts to this Comment's argument. This Comment argues that the Supreme Court could adopt more protective measures for ensuring children's privilege against self-incrimination. Specifically, it discusses why children should be required to consult with counsel during pre-adjudication, as well as why they should not be able to waive counsel's presence during custodial interrogation. The Court could ground these mandates either in its Eighth Amendment jurisprudence or by following the logic of cases that have clarified *Miranda*. Aside from discussing the legal rationales for adopting more protective standards for children facing pre-adjudication interrogation, this Part also argues that an attorney's presence throughout interrogation, as opposed to other "friendly adult[s],"[8] is imperative to protect children's interests in these settings.

Finally, Part III considers some of the implications and consequences of adopting this Comment's suggestions. It begins by acknowledging some of the potential challenges that would arise if the Supreme Court mandated pre-adjudication appointment of counsel. The costs of funding a public defense system that could accommodate this mandate and still provide effective assistance of counsel would present states with challenging budgetary and logistical scenarios, especially in non-urban areas.[9] Part III thus reflects on the relative "costs" of implementation versus non-implementation. Despite recognizing the obvious monetary costs of this Comment's proposals, this Part argues that there are countervailing and weighty costs of non-implementation.

I. THE JUVENILE SYSTEM AND CHILDREN'S CONSTITUTIONAL RIGHTS

This Part begins in Section A by discussing the *parens patriae* doctrine and its significance to the development of juvenile courts. As noted by the Supreme Court, the *parens patriae* doctrine justified the creation of juvenile courts.[10] Section B then discusses the development of juvenile courts and the ways that they were distinguishable from adult criminal courts. It also reflects on the purported goals of juvenile court systems. Having discussed the buildup to *Gault*, Section C provides a full analysis of *Gault* and its impact on children's rights, juvenile justice systems, and constitutional theory. Section D then considers the relationship between *Miranda* and *Gault*, and Section E provides

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[8] *See* Gallegos v. Colorado, 370 U.S. 49, 50 (1962).

[9] *See, e.g.*, Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES, Mar. 20, 2016, at A1.

[10] *See In re Gault*, 387 U.S. at 16.

a backdrop on the standards under which courts assess juvenile *Miranda* waivers and confessions.

A. Parens Patriae

In *Gault*, the Court explained that *parens patriae* served as the guiding principle for establishing juvenile courts and for their distinctiveness from adult criminal courts.[11] Under English common law, *parens patriae* developed as a subset of the broader *Prerogative Regis*[12] and articulated the sovereign's duty to exercise "parental concern" for certain classes of vulnerable individuals, including dependent, though not necessarily delinquent, children.[13] As incorporated into American law and further developed in the United States, *parens patriae* eventually became more closely synonymous with the state's general legislative authority.[14]

Once conceptually moored to the state's limited responsibility for vulnerable or otherwise incapacitated state-dependents, *parens patriae* came to embody the state's assumption of a much broader, wide-ranging responsibility to its citizens.[15] In particular, *parens patriae* justified the state's assertion of responsibility for the welfare of all children, not just those who were state-dependent.[16] As an operative theory in American law, then, *parens patriae* "lack[s] … firm conceptual boundaries,"[17] allowing it to serve as a justification for state regulation or intervention in a variety of contexts, including child labor, education, and delinquency.[18] Despite its broad scope, *parens patriae* has maintained its fundamental connection to "parental" authority and the state acting to oversee the best interests of society.[19]

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[11] *See id.*

[12] Under the theory of *Prerogative Regis*, "the king was understood to be personally sovereign and have pre-eminence over all within the realm." George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Tyrant or Parent*, 25 DEPAUL L. REV. 895, 896 (1976). *Parens patriae* emerged as "an expression of the king's prerogative," capturing the notion of the king being a "guardian" to certain classes of subjects, including children. *Id.* at 896–98.

[13] *Id.* at 898–99.

[14] *See* Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 104–06 (1909).

[15] *See* Curtis, *supra* note 12, at 898–99.

[16] *See Models of Juvenile Justice*, *in* JUVENILE JUSTICE PHILOSOPHY 549, 550, 552 (Frederick L. Faust & Paul J. Brantingham eds., 1974) (discussing competing "orthodox" and "revisionist" views).

[17] Curtis, *supra* note 12, at 895.

[18] *See id*. at 898–99 (describing the expansion of general equitable theories regarding the state, especially *parens patriae*); *see also* Mack, *supra* note 14, at 105 (citing Miner v. Miner, Ill. 40 (1849)) (stating that *Miner* "enunciated the practically unanimous American doctrine that parents' rights" can always be subordinated as against the state for the best interests of the child).

[19] *See* Mack, *supra* note 14, at 104–06.

Though they did not address juvenile courts or delinquency, *Meyer v. Nebraska*,[20] *Pierce v. Society of Sisters*,[21] and *Prince v. Massachusetts*[22] illustrate the *parens patriae* doctrine's development under American law as well as how the Supreme Court interpreted the state's authority to regulate family life and child welfare. *Meyer* and *Pierce* illustrated the tension between balancing the state's legislative interests with the constitutionally protected liberty interests of individuals, and *Meyer* "elevated into constitutional doctrine"[23] particular notions about the relationships and balances of power among children, the family, and the state.[24] Though striking down laws that infringed on the parental prerogative, neither *Meyer* nor *Pierce* questioned the state's overall *parens patriae* authority: "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear …."[25]

The Court in *Prince* more clearly outlined the parameters of the state's power under *parens patriae*. Unlike *Meyer* and *Pierce*, *Prince* upheld a state regulation that curtailed parental autonomy, citing the state's legitimate power to protect children from harm.[26] The Court articulated a broad conception of state regulatory power over children's welfare: "Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."[27] *Prince* also highlighted the Court's understanding of one of the elemental legal differences between children and adults—that the state can justify exerting broader control over the individual liberty of children than it can over adults.[28]

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[20] 262 U.S 390 (1923).

[21] 268 U.S 510 (1925).

[22] 321 U.S. 158 (1944).

[23] *See* Barbara Bennett Woodhouse, *Who Owns the Child:* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1100 (1992) ("The decision touched on an area of rapidly changing social realities. Relations of parent and child to each other and to the family, and of the family to the state were as much a zone of social ferment as relations between capital and labor, and employer and employee. *Meyer* elevated into constitutional doctrine a particular notion of those relations, grounded in patriarchal traditions that had acquired the force of natural law ….").

[24] *See id.* at 999 ("The questions latent in these cases are still with us. Who owns the child? What are the interests of the community in the child? If not a resource of the state, is the child a private asset of the parent?").

[25] *See Meyer*, 262 U.S at 401.

[26] *See Prince*, 321 U.S. at 166, 168.

[27] *Id.* at 166.

[28] *Id.* at 168.

In each of these three cases, the Court did not consider whether children possessed rights independently of their parents.[29] Instead, *Meyer*, *Pierce*, and *Prince* exemplify in different ways the prevailing assumption that children were entitled "not to liberty, but to custody."[30] The balance of children's "rights" was determined in reference to a state-parent dichotomy that did not include children themselves.[31] Given that *Meyer*, *Pierce*, and *Prince* were decided in 1923, 1925, and 1944, respectively[32]—and given that from 1899 to 1925, most states passed legislation creating juvenile courts[33]—these cases reflect conceptions of children's constitutional rights when states were either creating, or had already created, juvenile court systems.[34]

B. The Development of Juvenile Courts

In 1899, Illinois established the United States' first juvenile court.[35] By 1925, almost every state had passed a juvenile court law, and juvenile courts existed in most of the country's major cities.[36] Though scholars disagree about the social goals that spurred the creation of juvenile court systems,[37] these courts were intended to intervene and divert children from the adult criminal system,[38] thereby offering young offenders "treatment" and "rehabilitation" rather than punishment.[39] Consequently, juvenile courts were designed to reject many of the defining characteristics of the adult criminal system.[40]

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[29] Woodhouse, *supra* note 23, at 999–1000.

[30] *In re* Gault, 387 U.S. 1, 17 (1967); *see also* Woodhouse, *supra* note 23, at 997.

[31] *See* Woodhouse, *supra* note 23, at 999–1001. Though in a different context, Justice Stevens addressed the continued legacy of this kind of thinking in his dissent in *Troxel v. Granville*, 530 U.S. 57, 86 (2000) (Stevens, J., dissenting) ("Cases like [these] do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.").

[32] Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[33] David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 45 (Margaret K. Rosenheim et al. eds., 2002).

[34] *See id.* at 44–45.

[35] *Id.* at 42.

[36] *Id.* at 45.

[37] *See Models of Juvenile Justice*, *supra* note 16, at 550–53.

[38] Barry C. Feld, *Competence and Culpability: Delinquent in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 475 (2017).

[39] *In re* Gault, 387 U.S. 1, 15–16 (1967) ("The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive. These results were to be achieved … by insisting … that the state was proceeding as *parens patriae*.").

[40] *See id.* at 17; *see also Models of Juvenile Justice*, *supra* note 16, at 550; Mack, *supra* note 14, at 106.

Prior to the creation of juvenile courts, specialized courts for children did not exist.[41] At common law, children under the age of seven were exempt from criminal prosecution,[42] and those between the ages of seven and fourteen were typically not subjected to criminal proceedings.[43] The mechanisms and defenses available to protect children from the criminal system were not absolute, though.[44] Part of the motivation for developing juvenile courts was to divert children away from adult criminal proceedings and punishments altogether.[45]

The development of juvenile court systems sprang from a belief that children would benefit from the use of alternative penal methods.[46] Traditional approaches assumed that adults freely chose to engage in criminal activity, so punishments were intended to deter future criminality and provide an impetus for personal reform.[47] Adult penal theories focused on retribution, incapacitation, and deterrence, rather than rehabilitation.[48] By contrast, juvenile systems recast the adult system's focus on individual culpability and punishment, reframing juvenile "criminality" as a "disease" that needed a "cure."[49] The juvenile court movement purported to offer treatment and rehabilitation rather than punishment and retribution.[50]

C. In re Gault

Given its goals of treating and rehabilitating juvenile offenders, the juvenile system was distinguished by its lax procedural standards and paternalistic

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[41] *See Models of Juvenile Justice*, *supra* note 16, at 550.

[42] *Id.*

[43] *Id.* at 550–51. Under the "infancy defense," children between the ages of seven and fourteen were presumed incapable of possessing the capacity to form criminal *mens rea*. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 505 (1984). Additionally, some courts and judges used "nullification" to exempt children from being subjected to criminal punishments. *See Models of Juvenile Justice*, *supra* note 16, at 554–55.

[44] For example, the "infancy defense" was rebuttable at common law, meaning that children as young as seven could technically be prosecuted. *See Models of Juvenile Justice*, *supra* note 16, at 550–51.

[45] *See Gault*, 387 U.S. at 15 ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals."); *see also Models of Juvenile Justice*, *supra* note 16, at 554.

[46] *See Models of Juvenile Justice*, *supra* note 16, at 551, 554–55.

[47] *See id.* at 558–59; *see also* Mack, *supra* note 14, at 106.

[48] *See* Mack, *supra* note 14, at 106 ("The fundamental thought in our criminal jurisprudence was not, and in most jurisdictions is not, reformation of the criminal, but punishment; punishment as expiation for the wrong, punishment as a warning to other possible wrongdoers.").

[49] *See Models of Juvenile Justice*, *supra* note 16, at 559.

[50] *See In re Gault*, 387 U.S. at 15–16; *see also* Walkover, *supra* note 43, at 505–06.

approaches.[51] Such paternalism was justified by *parens patriae*.[52] Given this backdrop, the Supreme Court had previously declined to extend traditional procedural due process safeguards to children in the juvenile system.[53] The facts of *Gault* illustrated the troubling reality that lay at the foundation of the juvenile justice system: Juvenile courts could administer weighty forms of "punishment"[54]—sometimes more harsh, in fact, than an adult court could administer under similar circumstances[55]—with unchecked discretion and in the absence of traditional forms of procedural due process.[56]

At the age of fifteen, Gerald Gault was taken into custody after his neighbor claimed that Gault and a friend had "made lewd or indecent remarks" during a telephone call to her.[57] At the time, Gault was on probation for "having been in the company of another boy who had stolen a wallet from a lady's purse."[58] Gault was taken into custody on June 8, 1964;[59] the next day, the officer in Gault's case filed a petition for juvenile action to be initiated, but the petition did not specify a factual basis for doing so.[60] The juvenile court judge then held a factual hearing on that day, June 9, but "[n]o transcript recording was made[, and n]o memorandum or record of substance of the proceedings was prepared."[61] After the hearing on June 9, Gault continued to be detained until June 11 or 12.[62] On June 15, without the presence or testimony of the complainant, Gault was determined to be a juvenile delinquent and was committed to the state's reform school "for the period of his minority"—until the age of twenty-one.[63] As noted

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[51] *See* Mack, *supra* note 14, at 120 ("The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.").

[52] *See id.*. at 104 ("We are familiar with the conception that the state is the higher or the ultimate parent of all of the dependents within its borders.").

[53] *See* Kent v. United States, 383 U.S. 541, 556 (1966) ("This concern, however, does not induce us in this case to accept the invitation to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation.").

[54] The Court in *Gault* was troubled by the obvious constraint on Gerald Gault's freedom that was involved in his disposition: He was institutionalized and removed from his family's home. *See Gault*, 387 U.S. at 27.

[55] *See id.* at 29.

[56] *See id.* at 29–30.

[57] *Id.* at 4.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 5.

[61] *Id.*

[62] *Id.* at 6.

[63] *Id.* at 7.

by the Supreme Court, the juvenile court in Gault's case had "virtually unlimited discretion"; yet, as was common to all juvenile courts, it had withheld access to various procedures—notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of the proceeding, and right to appellate review—that would have been available to adult defendants facing detentions.[64]

Seizing on the juvenile system's procedural informality and unchecked discretion,[65] the Supreme Court discussed how the peculiarities known only to juvenile courts[66] had been justified by the *parens patriae* doctrine and widespread paternalism.[67] Though acknowledging the juvenile system's "substantive benefits," the majority insisted that reasonable application of procedural due process would not undermine the positive aspects of juvenile courts.[68] The Court concluded that the juvenile system's history—its lack of procedure and unchecked discretion—"demonstrated that unbridled discretion however benevolently motivated is frequently a poor substitute for principle and procedure."[69] Departing from its former decisions and calling for change to the juvenile system, the Court in *Gault* held that children were entitled to a litany of constitutional rights.[70]

Despite the significance of *Gault's* constitutional underpinnings, the Court's holding was still limited: "[W]e are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the post-adjudicative or dispositional process."[71] *Gault*'s holding, therefore, did not state that a child's right to counsel must attach before formal delinquency proceedings.[72] For instance, *Gault*'s holding did not require that counsel be present for police questioning and interrogation.[73]

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64 *Id.* at 10.

65 *Id.* at 17–21.

66 *Id.* at 17.

67 *Id.* at 16.

68 *Id.* at 21; *see also* Guggenheim, *supra* note 2, at 80.

69 *Gault*, 387 U.S. at 18.

70 *See id.* at 10 (listing procedural rights, including notice of charges; right to counsel; right to confrontation and cross-examination; privilege against self-incrimination; right to a transcript of the proceedings; and right to appellate review).

71 *Id.* at 13.

72 *Id.* at 41 (holding that juveniles must be represented by counsel only when facing delinquency proceedings that could "result in commitment to an institution in which the juvenile's freedom is curtailed").

73 *Id.*

D. Gault, Miranda, *and the Fifth Amendment*

One year before *Gault*, *Miranda* ushered in a constitutional shift that implicated a criminal suspect's right to counsel under the Fifth Amendment.[74] In *Miranda*, the Court mandated that certain "procedural safeguards" be observed to protect an individual's Fifth Amendment right to be free from government-compelled self-incrimination.[75] With regard to the role of counsel in these situations, "*Miranda* … declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."[76]

Miranda also recognized the inherently coercive aspects of custodial interrogations: "[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[77] Stressing the psychologically manipulative practices carried out in most police interrogations,[78] the Court recognized that the Fifth Amendment privilege from involuntary self-incrimination might need to be protected by clearer procedural practices, including expressly warning suspects of their rights to avoid giving statements and to have access to counsel.[79] As the Court discussed in different contexts and reemphasized in *Miranda*, one of its concerns was to honor the balance between the government's interest in successful law enforcement and the protection of citizens' rights and dignities.[80] The *Miranda* decision suggested that the availability of counsel could stabilize an otherwise imbalanced relationship between the state and a citizen.[81]

A year after the *Miranda* decision, the Court in *Gault* considered *Miranda*'s applicability to children. Recognizing that Gerald Gault had likely made admissions that implicated him in the activity for which he was eventually found to be a delinquent,[82] the Court in *Gault* acknowledged that "[n]either Gerald nor his parents were advised that he did not have to testify or make a statement, or

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[74] *See* Miranda v. Arizona, 384 U.S. 436 (1966); *Gault*, 387 U.S. at 1.

[75] *See Miranda*, 384 U.S. at 444–45.

[76] Edwards v. Arizona, 451 U.S. 477, 482 (1981).

[77] *Miranda*, 384 U.S. at 455.

[78] *Id.* at 448 ("[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented…. [C]oercion can be mental as well as physical.").

[79] *Id.* at 444–45.

[80] *See id.* at 460 ("The constitutional foundation underlying the privilege [against self-incrimination] is the respect a government … must accord to the dignity and integrity of its citizens."); *see also In re* Gault, 387 U.S. 1, 47 (1967) (discussing practical and philosophical underpinnings for the privilege against self-incrimination and the kind of relationship it is intended to establish between the state and individual citizens).

[81] *See id.* at 457–58, 469.

[82] *See Gault*, 387 U.S. at 43.

that an incriminating statement might result in his commitment as a 'delinquent.'"[83] The Court held that children in the juvenile system are entitled to the Fifth Amendment's privilege against involuntary self-incrimination[84] and to *Miranda*'s prophylactic procedures.[85] The Court rejected the argument that juveniles and their parents would be better served if they were not advised of their children's right to remain silent or otherwise not incriminate themselves—that "confession is good for the child as the commencement of the assumed therapy of the juvenile court process."[86] Here, as it did earlier in its opinion, the Court rejected paternalistic justifications for denying juveniles access to procedures that would otherwise protect their rights and personal interests: "[E]vidence is accumulating that confessions by juveniles do not aid in 'individualized treatment' … [nor serve] any other good purpose."[87]

The Court in *Gault* also discussed the underlying values of the privilege against involuntary self-incrimination.[88] Though stating that the privilege serves to advance the state's interest in attaining trustworthy confessions,[89] the Court also framed the privilege as serving the broader purpose of "prevent[ing] the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation."[90] To this end, the Court reasoned that the privilege helps to guarantee "the equality of the individual and the state" under circumstances that might otherwise be imbalanced.[91]

In line with its concern that children be afforded the privilege against self-incrimination, the Court also addressed the presence of counsel during juvenile

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[83] *Id*. at 43–44.

[84] *See id.* at 47 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception. And the scope of the privilege comprehensive.").

[85] *See id.* at 44–47.

[86] *Id.* at 51.

[87] *Id.* at 51–52.

[88] *See id.* at 47.

[89] *Id.* at 47 ("The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admission or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of truth.").

[90] *Id.*

[91] *Id.* ("[T]he 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."). The Court dispensed with the notion that simply because the juvenile court's proceedings are referred to as "civil" that these proceedings are not substantively similar to adult criminal proceedings. *See id* at 49–50. Because adult "criminal" proceedings and juvenile "delinquency" proceedings may result in some form of supervised confinement, the Court finds that they should be similarly regarded in terms of the procedures afforded to individuals in each respective system. *Id* at 50.

interrogations.[92] The Court suggested that counsel should always be present when children are being interrogated by police, but, if not, that "the greatest care must be taken to assure that the admission was voluntary … [and] that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[93] Here again, the Court insisted that constitutional principles did not change depending on the setting or the age of the individual being interrogated—that is, the child in a juvenile setting must be equally free from coercion and involuntary self-incrimination as the similarly situated adult who may face charges in superior court.[94]

As part of its discussion about juvenile confessions, the Court also cited precedent for applying heightened standards of review for juvenile confessions.[95] Quoting extensively from its opinion in *Haley v. Ohio*,[96] the Court stressed the obvious differences between how adults and children may cope with the inherent pressures of interrogation.[97] The Court also emphasized practices that might ameliorate the predictable psychological strains that such an environment would induce in children.[98] When discussing the presence of counsel specifically, the Court implied that lawyers are uniquely equipped to ensure that a child does not become "a victim of coercion."[99] The Court also made clear that procedural safeguards observed in adult interrogations were the minimum expectation for juveniles and likely would be insufficient to protect children's unique vulnerabilities in these environments.[100] Finally, the Court turned to a functional argument for the privilege to apply in juvenile courts: Though juvenile proceedings are termed "civil" rather than "criminal," juvenile courts can place children in secured detention if they are adjudicated

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92 *Id.* at 55.

93 *Id.*

94 *Id.*

95 *Id.* at 45 (citing Haley v. Ohio, 332 U.S. 596 (1948)) ("This Court has emphasized that admissions and confession of juveniles require special caution.").

96 *Haley*, 332 U.S. at 596.

97 *In re* Gault, 387 U.S. 1, 45–46 ("A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal …. But we cannot believe that a lad of tender years is a match for the police in such a contest." (quoting *Haley*, 332 U.S. at 599)).

98 *Id.* ("[The child] 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." (quoting *Haley*, 332 U.S. at 600)).

99 *Id.* (quoting *Haley*, 332 U.S. at 600) ("No lawyer stood guard to make sure that the police went so far and no farther … that they stopped short of the point where he became the victim of coercion.").

100 *See id.* at 45–46 (quoting *Haley*, 332 U.S. at 599–600).

delinquents.[101] Therefore, the procedural protections available to these children need to be commensurate to that of an adult who may be imprisoned.[102]

Despite the breadth of *Gault*'s analysis, the Court's holding regarding children's Fifth Amendment privilege was constrained to a somewhat narrow set of circumstances: "[T]he question is whether, in [a proceeding to determine whether a minor is a 'delinquent'], an admission by the juvenile may be used against him in the absence of clear and unequivocal evidence" that the juvenile had been apprised of his Fifth Amendment rights.[103] Though the Court later addressed the possibility of juveniles being questioned before an investigation had become a delinquency proceeding, the Court's holding regarding juveniles' Fifth Amendment privilege, as with *Gault*'s other constitutional holdings, was limited to the facts and circumstances of Gerald Gault's case.[104] As a result, the Court did not require counsel's presence in interrogation settings, nor did it mandate that juvenile and adult confessions be considered under different standards of voluntariness.[105]

E. Analyzing Juvenile Confessions

Though the Court stated that "the greatest care" should be observed when children are interrogated, *Gault* did not require juvenile confessions to be assessed under a unique constitutional standard.[106] The traditional due process standard for determining whether individuals have voluntarily, knowingly, and intelligently waived their rights under the Fifth and Fourteenth Amendments requires a "totality-of-the-circumstances" analysis.[107] The totality-of-the-circumstances analysis is designed to determine, based on "both the characteristics of the accused and the details of the interrogation," whether an individual's "will was overborne."[108] Courts continue to rely on this standard.[109]

As discussed earlier, and in the *Gault* majority opinion, *Haley* illustrated the application of the totality-of-the-circumstances test to determine the

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[101] *See id.* at 49–50 ("To hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings.").

[102] *See id.*

[103] *Id.* at 44.

[104] *See id.*

[105] *See id.* at 55 (suggesting but not mandating that counsel be present for interrogations).

[106] *See id.* at 55–56.

[107] Fare v. Michael C., 442 U.S. 707, 724–25 (1979) (citing Miranda v. Arizona, 384 U.S. 436, 475–77 (1966)).

[108] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

[109] *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 267–68 (2011) (citing *Schneckloth*, 412 U.S. 218).

voluntariness of a juvenile confession.[110] The Court, in considering the totality of the circumstances, determined that the interrogation tactics used on a fifteen-year-old had not met the due process standards that the Fourteenth Amendment commands.[111] The fifteen-year-old had been held *incommunicado* for three days and interrogated through the night by teams of police officers.[112] There was evidence that the police officers subjected him to physical abuse.[113] The egregiousness of the circumstances led the Court to admit that it would "pause for careful inquiry" even "if a mature man were involved."[114] Therefore, though *Haley* illustrated interrogation techniques that violated a juvenile's constitutional rights, the circumstances were so unacceptable that the Court's analysis does not necessarily provide a useful way of distinguishing between interrogation techniques that are constitutional if used on adults but unconstitutional if applied to children.[115] Despite this conceptual shortcoming, lower courts continue to cite *Haley* as a reference for totality-of-the-circumstances analyses.[116]

While *Haley* addressed the overarching constitutional standard for determining the voluntariness of juvenile confessions,[117] the standard was decided before *Miranda* and *Gault*.[118] The Court in *Fare v. Michael C.*,[119] which was decided twelve years after *Gault*, considered the standard for assessing juvenile waivers of *Miranda* warnings.[120] Specifically, the Court considered whether the traditional totality-of-the-circumstances approach was appropriate for assessing the voluntariness of juvenile *Miranda* waivers.[121] To begin, the Court stressed that the determination of whether individuals waive their rights under the Fifth Amendment "is not one of form" but instead requires consideration of whether they "in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."[122] The Court held that the totality-of-the-circumstances approach should still be applied to children to determine whether

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110 *Schneckloth*, 412 U.S. at 226.

111 Haley v. Ohio, 332 U.S. 596, 599 (1948).

112 *Id.* at 598.

113 *Id.* at 597.

114 *Id.* at 599.

115 *See id.* at 599–601.

116 *See, e.g.*, Hardaway v. Young, 302 F.3d 757 (7th Cir. 2002); Gachot v. Stadler, 298 F.3d 414 (5th Cir. 2002).

117 *Haley*, 332 U.S. 596.

118 In addition to *Haley*, courts also look to *Gallegos v. Colorado*, 370 U.S. 49 (1962). Both cases were cited by the majority in *J.D.B. v. North Carolina*, 564 U.S. 272 (2011).

119 442 U.S. 707 (1979).

120 *Id.* at 724–25.

121 *Id.* at 725.

122 *Id.* at 724 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

they voluntarily waived their Fifth Amendment privileges.[123] Under this form of analysis, as previously discussed, courts "inquir[e] into all the circumstances surrounding the interrogation" to determine whether an individual "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[124] The Court emphasized that the totality-of-the-circumstances approach is particularly suitable for assessing juvenile confessions because the approach requires courts to evaluate "the juvenile's age, experience, education, background, and intelligence," as well as "whether he has the capacity to understand … the nature of his *Fifth Amendment* rights."[125]

The practical result of the Court's decision in *Fare* has been to consolidate the analyses of *Miranda* waivers and voluntariness of a confession into one conceptual framework: Because of *Fare*, "the analytic constructs for assessing voluntariness of a *Miranda* waiver and due process voluntariness of a statement became essentially identical."[126] While the Court in *Fare* reasoned that the totality-of-the-circumstances approach is ideal because the approach provides courts with the flexibility to consider all relevant factors,[127] others have argued that the totality-of-the-circumstances approach is problematic because of its amorphousness.[128] Because the totality-of-the-circumstances approach has no formal standards, and because some of the Court's most significant decisions regarding involuntary juvenile confessions have been based on egregious constitutional violations,[129] the result has been that courts typically limit their findings of involuntariness "to cases with extremely compelling showings of involuntariness."[130]

In one of its most recent cases regarding juvenile interrogations and *Miranda* waiver standards for juveniles, *J.D.B. v. North Carolina*,[131] the Court considered "whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda*."[132] Because the *Miranda* custody analysis entails

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123 *Id.* at 725.

124 *Id.*

125 *Id.* (emphasis added) (citing *Butler*, 441 U.S. 369).

126 Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression*, 38 WASH. U. J.L. & POL'Y 109, 136 (2012).

127 *See Fare*, 442 U.S. at 725.

128 *See* Guggenheim & Hertz, *supra* note 126, at 136–37.

129 *See* Haley v. Ohio, 332 U.S. 596 (1948).

130 Guggenheim & Hertz, *supra* note 126, at 137.

131 564 U.S. 261 (2011).

132 *Id.* at 264.

an inquiry into the circumstances surrounding an interrogation,[133] the Court reflected on characteristics that "apply broadly to children as a class" and are so evident as to be "commonsense conclusions."[134] The Court discussed, for instance, the extent to which children are conditioned to obey authority figures because disobedience—even in the form of non-cooperation—is often grounds for further disciplinary action.[135] Referring to its own precedent, the Court disregarded the notion that children can be treated like "miniature adults,"[136] emphasizing that children and adults experience the pressures of authority differently[137] because of "real differences" in their respective behaviors and psychologies.[138]

The Court in *J.D.B* also emphasized that "*Miranda*'s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake."[139] From this logic, an obvious question emerges: Are *Miranda*'s procedural safeguards, by themselves, sufficient to protect children from involuntary self-incrimination? At the end of the majority opinion in *J.D.B.*, the Court suggested that the answer to this question could be "no": "To hold … that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."[140] In other words, literal equality between adults and children will mean actual inequality for children.[141] Even accepting, as the Court reasons in *J.D.B.*, that there are "very real differences" between adults and children and that these differences call for a different *Miranda* analysis,[142] it is still not clear that the Court's decision in *J.D.B.* creates tangible benefits for children facing custodial interrogation.

II. MANDATORY ACCESS TO COUNSEL BEFORE ADJUDICATION

The Court should adopt two rules that would address pre-adjudication access to counsel for juveniles and provide greater protection in interrogation settings: (1) Juveniles must consult with counsel, outside of the presence of law

133 *See id.* at 270 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
134 *Id.* at 272.
135 *See id.* at 275–76.
136 *Id.* at 274.
137 *Id.* at 275–76.
138 *See id.* at 281.
139 *Id.*
140 *Id.*
141 Feld, *supra* note 38, at 504.
142 *J.D.B.*, 564 U.S. at 281.

enforcement, prior to any pre-adjudication interrogations;[143] and (2) counsel must be present during any custodial interrogation, without the option of waiver. The Court could justify adopting these rules by finding that children's rights under the Fifth Amendment require unique standards of protection, a ruling that would align with its reasoning in two Eighth Amendment cases, *Roper v. Simmons*[144] and *Miller v. Alabama*.[145] The Court could also create these two provisions as prophylactic constitutional rules that would apply specifically to children. Functionally, this option would most likely be understood as a way of expanding *Miranda*'s provisions to suit juveniles. For reasons discussed in the subsequent Sections, the latter approach would align with the reasoning of some of the Court's opinions in which it clarified and refined the scope of *Miranda* and its protections.[146]

Section A focuses on arguments for the mandatory presence of counsel in pre-adjudication custodial interrogations. The Section begins by addressing some of the reasons children need access to counsel, and argues that the presence of parents or other non-attorneys during custodial interrogations is an insufficient procedural mechanism for ensuring children's Fifth Amendment rights. Section B then turns to the Court's Eighth Amendment jurisprudence as a way of establishing a potential rationale for the Court to adopt this Comment's proposal. Section B begins by outlining the Court's reasoning in two of its Eighth Amendment cases[147] and draws a conceptual link to Fifth Amendment application. Section C concludes by considering how increasing access to counsel for children in pre-adjudication interrogation may further state interests and legitimize the state's *parens patriae* authority.

A. Access to Counsel as a Mandatory Provision

Children should be represented by counsel during pre-adjudication interrogations because of the possibility of facing delinquency proceedings and eventual secure confinement.[148] This Section argues that children facing pre-

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[143] Others in the field have suggested this proposal. *See* Guggenheim & Hertz, *supra* note 126, at 170–71 ("The only way to ensure adequate enforcement of children's due process and Fifth Amendment rights during police interrogation is a remedy proposed a long time ago but never adopted: establish a bright-line rule that a child under the age of eighteen must be afforded an opportunity to confer with counsel before police interrogation.").

[144] 543 U.S. 551 (2005).

[145] 567 U.S. 460 (2012).

[146] *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); Edwards v. Arizona, 451 U.S. 477 (1981).

[147] *See* Miller v. Alabama, 567 U.S. 460 (2012); Roper v. Simmons, 543 U.S. 551 (2005) (applying different sentencing standards to children based on substantive differences between adult and child offenders).

[148] Though not mandating pre-adjudication appointment of counsel, the Court in *Gault* recognized the

adjudication interrogation situations must not be able to waive their right to have counsel present. The following subsections address why the right to counsel functions as a protective right, and, secondly, why children must be represented by legal counsel rather than their parents during their interactions with the juvenile system.

1. The Right to Counsel for Juveniles

Concern for children's welfare, especially regarding their interactions with police and the juvenile justice system, is not a new phenomenon. Child advocates, practitioners, and scholars have called for increasing pre-adjudication access to counsel for children,[149] and some jurisdictions have attempted to make *Miranda* warnings more understandable.[150] Like this Comment, some have expressly called for mandatory access to counsel before adjudication.[151] Others have proposed that children should be unable to waive their right to counsel unless they have consulted with counsel beforehand.[152]

While not holding that access to counsel was a constitutional requirement to ensure compliance with the Fifth Amendment's privilege against compelled self-incrimination,[153] the Court in *Miranda* identified the presence of counsel as a useful—and perhaps necessary—measure that could be used to protect against Fifth Amendment violations during custodial interrogations.[154] In doing so, the Court articulated a fundamentally protective vision for the role of counsel as it relates to the Fifth Amendment's privilege against self-incrimination.[155] Furthermore, *Miranda* established that custodial interrogations are presumed coercive even for adults.[156] Given its precedent regarding the differences in

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liberty interest at stake when children face the potential of being placed in state custody in secure confinement as a result of juvenile proceedings. *See In re* Gault, 387 U.S. 1, 27–29 (1967).

149 *See* Guggenheim & Hertz, *supra* note 126, at 170–71.

150 *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1573 (2008).

151 *See* Guggenheim & Hertz, *supra* note 126, at 170–71.

152 Kenneth J. King, *Waving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 434 (2006).

153 When *Miranda* was decided, and in subsequent cases leading up to *Dickerson v. United States*, there was debate as to whether the provisions established in *Miranda* were merely "prophylactic rules" intended to successfully protect the Fifth Amendment's privilege against self-incrimination, or if they were themselves Constitutional rights. *See* 530 U.S. 428, 438–39 (2000) (finding that the *Miranda* guidelines were constitutional rules, not merely "prophylactic rules," despite "language in some of [the Court's] opinions that supports [the opposite position]").

154 Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) (noting need for application of "procedural safeguards" to protect the privilege against self-incrimination).

155 *See id.*

156 *See id.* at 455–56.

capacity between adults and children,[157] the Court should expand access to counsel for children during pre-adjudication interrogation, thereby creating an additional procedural mechanism to mitigate the coerciveness of the environment.[158]

Despite efforts to make *Miranda* warnings more easily understandable for children, there is evidence that such efforts have been generally unsuccessful.[159] Though *Miranda* warnings could be changed to better suit children, such measures, like the decision in *J.D.B.*, still fall short of creating an adequate solution to aid children in the juvenile system. Even with adjusted *Miranda* warnings, or more factors for courts to consider, children nonetheless must decide whether to waive their right to silence or to counsel.[160] And despite some courts' insistence to the contrary, juveniles—even those who have had repeated encounters with the justice system—often do not concretely understand how an attorney may be helpful to them, or the general role of an attorney within the criminal system.[161] Even if courts express significant ambivalence about the standards they must apply, they are generally unable to act differently.[162]

2. The Role of Counsel in Pre-Adjudication Interrogation

Under *Miranda* and *Gault*, children must be informed of their right to have counsel present during interrogations.[163] Given the juvenile system's continued distinctiveness from the adult criminal system, parents are often allowed to be present in custodial interrogation settings, or at least for sessions of "informal" questioning.[164] And under the due process "totality of circumstances" analysis used to determine the voluntariness of a confession, courts often consider whether a "friendly adult," such as a parent, was present.[165] Though it may appear intuitive that a parent's presence would be preferred in interrogation situations, some practitioners insist that having parents present in these settings,

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157 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–75 (2005).

158 *See Miranda*, 384 U.S. at 455–56.

159 *See* Weisselberg, *supra* note 150, at 1572–73.

160 *See* Feld, *supra* note 38, at 502 (discussing complex decisions that children must make under these circumstances).

161 When a juvenile suspect who was sixteen-and-a-half years old was told that he had "the right to an attorney," he responded, "How I know [sic] you guys won't pull no [sic] police officer in and tell me he's an attorney?" Fare v. Michael C., 442 U.S 707, 710 (1979).

162 *See, e.g.*, Hardaway v. Young, 302 F.3d 757, 759–60 (7th Cir. 2002) (expressing "the gravest misgivings" about its duty to affirm the lower court's application of the traditional voluntariness standard).

163 *See In re* Gault, 387 U.S 1, 44–50 (1967).

164 *See* SANDRA SIMKINS, WHEN KIDS GET ARRESTED: WHAT EVERY ADULT SHOULD KNOW 19–20 (2009).

165 *See* Gallegos v. Colorado, 370 U.S. 49, 55 (1962).

in lieu of legal counsel, may significantly damage the child's interests.[166] Because parents may not have legal training and may not understand how a child's statement can lead to unforeseen legal consequences, parents sometimes encourage their children to disclose information that damages their legal interests.[167] Additionally, even statements that seem exculpatory to non-attorneys can nevertheless lead to a child being adjudicated delinquent on a different basis.[168] If attorneys were present in these situations, their presence could mitigate some of the unforeseen issues that arise, thus ameliorating the problem of over-criminalizing childhood misbehavior.

The problem of parents encouraging their children to speak candidly when they are facing questioning about a potential crime or juvenile offense plays out in a variety of contexts, but a recent case from Georgia exemplifies some of the most obvious pitfalls of the current standards. In *State v. Daniell*, a ninth-grade boy was found unconscious in his school's bathroom.[169] The school's resource officer, a corporal with the local police department, questioned the defendant in the principal's office.[170] The defendant's mother encouraged him "to not cover up for anybody and to tell what he knew about the incident," and he promptly admitted to choking the other boy.[171] As the appellate court noted, "no one expected [his] admission," nor did the school resource officer even know at that time whether he would be charged with a crime.[172] Nothing in the appellate court's description indicated that the boy or his mother understood the potential legal ramifications of his offering a statement to the school's resource officer.[173] Questioning in this circumstance was entirely informal, and, as in *J.D.B.*, took place in a setting that has not always been considered "custodial."[174] The boy was charged with aggravated assault and his case was referred to superior court.[175]

Daniell presents an additional reason to consider why juveniles should receive heightened forms of procedural due process to prevent involuntary self-incrimination: The fact of being a legal minor does not mean that an individual

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166 *See* SIMKINS, *supra* note 164, at 19.

167 *See* Feld, *supra* note 38, at 512–13; *see also* SIMKINS, *supra* note 164, at 19–21.

168 SIMKINS, *supra* note 164, at 21.

169 817 S.E.2d 358, 359 (Ga. Ct. App. 2018).

170 *Id.*

171 *Id.*

172 *Id.*

173 *See id.* at 359–60.

174 *See* J.D.B. v. North Carolina, 564 U.S. 261, 276 (2011) (discussing in-school interrogation and its potential for custodial qualities).

175 *See Daniell*, 817 S.E.2d at 358–59.

will remain under the exclusive jurisdiction of a juvenile court; states have provisions for waiving juveniles into superior court based on certain offenses.[176] In *Daniell*, the school resource officer informed the victim's mother of the defendant's statement, and the defendant was ultimately charged with aggravated assault.[177] *Daniell* thus illustrates the problem facing many juveniles when they are questioned at school or in other non-traditional interrogation settings: The potential legal consequences of providing statements in these settings may be unknown even to those carrying out the questioning.[178] Because children in these situations unknowingly face potential delinquency or criminal proceedings, either of which can lead to a child being placed in secured detention, there should be greater administrative and procedural mechanisms available to ensure that children are afforded due process when their liberty is at stake. At least one possible solution would be for counties to assign an attorney to schools that employ resource officers, thereby ensuring that a person with legal training could be present for disciplinary situations that are likely to carry legal significance.

Parental presence during interrogations, especially when parents encourage their child to speak candidly to authorities, likely also makes it more difficult to later suppress the child's statement.[179] This issue was also presented in *Daniell*.[180] There, the trial court suppressed the defendant's statement because he had not been given *Miranda* warnings before being questioned in the principal's office; the appellate court reversed, stating that he was not in custody when being questioned.[181] Additionally, the appellate court noted that, even if the defendant had been in custody, the fact that his mother had encouraged him to give his statement would, in fact, work against an argument for suppression.[182]

B. Rationales for Adopting Additional Rules

If the Court were to adopt the provisions proposed in this Comment, it could do so under two rationales. First, it could rely on the reasoning of its Eighth Amendment jurisprudence, where the Court has applied different and heightened forms of constitutional analysis to children because of certain unique

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176 *See* Howard N. Snyder, *The Juvenile Court and Delinquency Cases*, 6 FUTURE CHILDREN 53, 57–58 (1996).

177 *Daniell*, 817 S.E.2d at 359.

178 *Id.*

179 *Id.* at 360.

180 *Id.*

181 *Id.* at 359–60.

182 *Id.* at 360.

characteristics of childhood and adolescence.[183] Second, the Court could follow the reasoning from *Edwards v. Arizona*[184] and *McNeil v. Wisconsin*,[185] two cases that clarified *Miranda*'s parameters and addressed issues of capacity and waiver. The following subsections discuss these rationales in greater detail and reflect on the benefits of either approach.

1. Eighth Amendment Examples

Under its Eighth Amendment jurisprudence, the Supreme Court has created precedent for applying unique constitutional standards for children.[186] The Court's analysis in the Eighth Amendment context suggests that similarly functional approaches can and should be applied in other constitutional contexts that implicate the rights of juveniles, particularly the right to counsel and the Fifth Amendment's privilege against self-incrimination.[187]

Courts have acknowledged both anecdotal and scientific evidence that adults and children differ in important ways.[188] In the years following its decision in *Gault*, the Supreme Court considered how to best accommodate differences between adults and children and the implications these differences have for the application of children's constitutional rights.[189] By recognizing that certain differences between adults and children do exist, the Court has also had to consider how constitutional protections and rights may operate differently, but not less meaningfully, when applied to children rather than adults.[190]

Roper v. Simmons[191] and *Miller v. Alabama*[192] illustrate the Court's attempts to account for adult-child differences and the way such differences should affect constitutional analysis.[193] These cases provide insight into how courts may conceive of the Constitution's application to children in ways that both respect

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[183] *See* Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[184] 451 U.S. 477 (1981).

[185] 501 U.S. 171 (1991).

[186] *See Miller*, 567 U.S. at 460; *Roper*, 543 U.S. at 551 (applying different sentencing standards to children based on substantive differences between adult and child offenders).

[187] *See Roper*, 543 U.S. at 551 (establishing categorical constitutional rule applicable only to juveniles and based on an analysis of how constitutional guarantees may come to bear differently on children and adults based on substantive differences between them).

[188] *See, e.g.*, *id.* at 569–70 (noting three "general differences" between children and adults).

[189] *See id.* at 569.

[190] *See id.* at 569–71.

[191] *Roper*, 543 U.S. at 551.

[192] *Miller*, 567 U.S. at 460.

[193] *See, e.g.*, *Roper*, 543 U.S. at 569–74 (finding application of the Eighth Amendment to juveniles required consideration of substantive differences between adults and children).

children as rights-possessors while also adopting approaches that accommodate meaningful differences between adults and children. Because the Court has engaged in this form of analysis in multiple cases,[194] there is now precedent for analyzing how constitutional rights may be understood in contextual rather than absolute terms. Applying this kind of analysis may produce more robust, constitutionally mandated protections for children, which would satisfy a broadly held social goal of creating more effective legal protections for children.

In *Roper v. Simmons*, the Court considered the constitutionality of imposing the death penalty on juveniles convicted of capital crimes.[195] The Court employed a three-part analysis: It considered (1) the purposes and justifications for the death penalty; (2) the implications of the Eighth Amendment's protection from cruel and unusual punishment; and (3) how these two factors should be analyzed in light of juvenile development and capacity.[196] One of the Court's main concerns in *Roper* was finding a way to articulate the meaningful differences between adults and children and how these differences come to bear on a constitutional analysis.[197]

As framed by the Court, the central issue in *Roper* was whether children could ever meet the heightened culpability threshold that justifies administering the death penalty.[198] In other words, the Court considered whether a child who commits an identical crime as an adult defendant could ever be understood to be equally "culpable."[199] In analyzing this narrow issue, the Court found that at least three significant psychological and emotional differences[200] exist between children and adults, and that these differences required a different constitutional analysis under the Eighth Amendment.[201]

First, the Court noted that both anecdotal and scientific evidence[202] confirm that children are more likely to engage in "impetuous and ill-considered actions and decisions" and be less responsible in their decision-making than adults.[203]

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194 *See Miller*, 567 U.S. at 460; Graham v. Florida, 560 U.S. 48 (2010); *Roper*, 543 U.S. at 551.

195 *Roper*, 543 U.S. at 555–56.

196 *See id.* at 560–75.

197 *See id.* at 569–75.

198 *Id.* at 568–75.

199 *Id.* at 569 (considering whether children can be "reliably classified among the worst offenders").

200 *Id.* ("Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.").

201 *See id.* at 569–75.

202 *See id.* at 569 ("[A]s any parent knows and as the scientific and sociological studies … tend to confirm … '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults ….'" (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).

203 *Id.* (discussing legal prohibitions placed on children due to their "comparative immaturity and

Second, the Court recognized that children are less capable of coping with traumatic experiences within their environments and are more susceptible to being negatively influenced by pressures that may not negatively impact adults.[204] Third, the Court found that children's personalities are "more transitory" and subject to change than are adults'.[205]

In its analysis, the Court also discussed its understanding of certain constitutional principles—specifically, the values the Constitution is meant to embody and the relationship it is intended to establish between the government and its citizens.[206] The Court noted that respect for human dignity lay at the heart of the Eighth Amendment's promise against cruel and unusual punishment: "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[207] In *Roper*, then, two lines of constitutional analysis converged: First, that certain constitutional rights themselves acknowledge and protect human dignity,[208] and second, that the law can recognize significant differences between adults and children for constitutional purposes.[209] From this convergence, an important theoretical precedent emerged: There are constitutional measures and principles designed to protect human dignity, and they may apply to children in unique and more protective ways.[210]

Of equal importance to its analysis of the substantive differences between adults and children and the constitutional imperatives that flow from these recognized differences, *Roper* also established precedent for creating a categorical constitutional rule that can be applied specifically to juveniles.[211] As conceived by the Court in *Roper*, a full prohibition on imposing the death penalty on children was constitutionally necessary, given their unique developmental and psychological characteristics.[212] Though not unanimously accepted,[213] and

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irresponsibility").

[204] *Id.* ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (alteration in original) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982))).

[205] *Id.* at 570.

[206] *See id.* at 560.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 569–70, 573–75.

[210] *Id.* at 560, 573–75.

[211] *Id.* at 572.

[212] *See id.* at 560–61, 569–74.

[213] *See id*. at 588 (O'Connor, J., dissenting) ("Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers

though the Court acknowledged that categorical rules can be criticized as arbitrary,[214] the Court's holding in *Roper* illustrates that constitutional rights can be tailored to serve the unique attributes of children and that this flexibility is required for children's constitutional rights to meaningfully exist.[215] The Court's reasoning suggests that constitutional rights and values can be more fully expressed when placed in context with the unique vulnerabilities of childhood.[216]

Citing *Roper*, the Court in *Miller* reasoned[217] that a sentencing authority must have the ability to "consider the mitigating factors of youth."[218] Specifically, the Court called into question sentencing procedures that "proceed as if [the defendants] were not children," thus stressing the need for children to be evaluated differently than under the standard adult provisions.[219]

At least part of the Court's analysis in the Eighth Amendment context centered around juvenile capacity. For instance, the Court's discussion of whether children who had committed serious crimes could be considered "among the worst offenders" was informed by considerations of whether they had the capacity to appreciate the consequences of their behavior.[220] In other contexts, the Court has discussed juvenile capacity and "held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."[221] And at common law, children traditionally were assumed to lack the capacity to enter legally binding agreements.[222] Building off of these capacity considerations, the Court could justify implementing specific rules about children's access to counsel by adopting a presumption that children lack the capacity to make fully informed legal decisions, especially those that may carry significant consequences.[223] Scholars and practitioners have already voiced concern—and

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are sufficiently mature to deserve the death penalty in an appropriate case.").

[214] *Id.* at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18…. For the reasons we have discussed, however, a line must be drawn…. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.").

[215] *Id.* at 569–75.

[216] *Id.* at 560, 569–75.

[217] The Court also relied on another of its Eighth Amendment cases, *Graham v. Florida*, 560 U.S. 48 (2010).

[218] Miller v. Alabama, 567 U.S. 460, 476 (2012) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

[219] *Id.* at 474.

[220] *Roper*, 543 U.S. at 569–70.

[221] *See* Bellotti v. Baird, 443 U.S. 622, 635 (1979).

[222] *See* Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 904 (2017).

[223] *See* Feld, *supra* note 38, at 511 (noting that 92.8% of children and 80% of adults waive their rights

doubt—regarding the appropriateness of children independently shouldering weighty legal decisions.[224] Similarly, the Court itself expressed such doubt, even before *Miranda* and *Gault*:

> [W]e are told that this boy was advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed. That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions. Moreover, 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.[225]

As the Court acknowledged in this quotation from *Haley*, and as it has shown through its Eighth Amendment jurisprudence, protecting children's constitutional rights requires a willingness to consider the nuances particular to childhood and to resist formulaic application of constitutional mechanisms suited for adults.

2. Edwards *and* McNeil

In addition to relying on its Eighth Amendment jurisprudence to adopt a new standard for analyzing juvenile confessions, the Court could also turn to its decisions in *Edwards*[226] and *McNeil*[227] as a basis for adopting this Comment's proposal as prophylactic constitutional rules. Under this line of reasoning, the Court would be adapting *Miranda* to suit the unique needs of children.

In *Edwards*, the Court clarified the implications of *Miranda* and of a suspect's Fifth Amendment right to counsel during custodial interrogations.[228] Specifically, the Court considered the admissibility of a statement made to police during custodial interrogation after the suspect had affirmatively requested access to counsel.[229] The Court found that use of the suspect's statement, having

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after receiving *Miranda* warnings).

[224] *Id.* at 502–03 ("*Gault* made delinquency hearings more formal, complex, legalistic, and required youths to participate in making difficult decisions.").

[225] Haley v. Ohio, 332 U.S. 596, 601 (1948).

[226] Edwards v. Arizona, 451 U.S. 477 (1981).

[227] McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

[228] *Edwards*, 451 U.S. at 482.

[229] *Id.* at 479 (discussing implications of suspect requesting counsel on the day he was arrested and police returning the next day, without counsel, Mirandizing him again, and proceeding to receive a confession from the suspect).

been obtained subsequent to his request for counsel,[230] was in violation of his Fifth Amendment rights under *Miranda*.[231] The Court held that "when an accused has invoked his right to have counsel present during custodial interrogation," further interrogation must cease—and cannot resume—until counsel is present, unless the suspect himself re-initiates communication with police.[232] In *Edwards*, the Court considered what a suspect's request for counsel means under the circumstances of custodial interrogation, suggesting that unlike invoking the right to silence, which may only indicate a general unwillingness to speak, invoking the right to counsel suggests a suspect's "desire only to deal with police through counsel."[233]

In *McNeil v. Wisconsin*,[234] the Court clarified its holding in *Edwards* and explained the differences between the right to counsel under the Fifth and Sixth Amendments, respectively.[235] The Court clarified that the right to counsel under the Sixth Amendment is "offense specific" and attaches for the purpose of protection in formal, adversarial proceedings.[236] In these respects, the Sixth Amendment right to counsel is wholly distinct from the Fifth Amendment right to counsel under *Miranda* and *Edwards*.[237] The Fifth Amendment right, as shaped by *Miranda* and *Edwards*, is both a narrower and broader right, and its invocation by a suspect serves a specific purpose in a specific setting:[238] The invocation allows the suspect to gain assistance in dealing with police during custodial interrogation.[239] To this end, invoking the right to counsel under the Fifth Amendment has been understood as an expression of one's need for legal assistance before proceeding further with questioning.[240] Rather than expressing a mere unwillingness to speak with law enforcement, the Court has stated that invoking the right to counsel for interrogation suggests an awareness of one's inability or unwillingness to navigate the complexities of interrogation without legal assistance.[241] Stated otherwise, the Court has said that invoking one's right

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230 *See id.*

231 *Id.* at 480.

232 *Id.* at 484–85.

233 *Id.*; *see also* McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

234 *McNeil*, 501 U.S. at 171.

235 *See id.* at 177–78.

236 *See id.* at 175, 177 ("The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government…." (alteration in original) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984))).

237 *See id.* at 177–78 ("To invoke the Sixth Amendment interest is, as matter of *fact*, *not* to invoke the *Miranda-Edwards* interest.").

238 *See id.* at 178.

239 *See id.*

240 *See id.*

241 *See id.* ("The purpose of the *Miranda-Edwards* guarantee … is to protect … the suspect's 'desire to

to counsel for the purposes of interrogation communicates a lack of capacity to handle interrogation on one's own.[242]

Under *McNeil v. Wisconsin*, when adults invoke their right to counsel for interrogation, their invocation serves as an acknowledgement that they lack the capacity to manage interrogation without legal assistance.[243] Given the Court's recognition of children's different developmental capacity from adults, the juvenile system's intended purpose of treating and rehabilitating children rather than administering retributive punishment,[244] and the state's broad responsibility under *parens patriae* to protect the welfare of children,[245] there is reason to adopt a more protective standard for children under the Fifth Amendment and, again, ground the decision in juveniles' lack of capacity to make independent, informed legal decisions.[246] This is especially true in light of the Court's concerns in *Gault* that children benefit neither from the procedural regularity of the adult criminal system nor the purported benevolence of the juvenile system.[247]

Edwards and *McNeil* solidified the current framework for access to counsel in the Fifth Amendment context: When suspects indicate their desire to have access to counsel before or during custodial interrogations, the Court has understood that request to reflect their inability to properly manage the interrogation setting.[248] Because the Court has already implied that there may need to be justification for counsel not being present during juvenile interrogations,[249] and given its precedent for regarding juvenile confessions with special suspicion,[250] the Court could adopt a standard under which children are presumed incapable of handling police interrogations without the mandatory assistance of counsel. Mandatory access to counsel for children would more reliably ensure that juvenile proceedings achieve their desired result—a transparent, fact-driven conclusion to a case—while also reducing the obvious risks of coercive interrogation and confessions.[251]

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deal with the police only through counsel' …. It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (citation omitted) (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1984))).

242 *See id.*

243 *See id.*

244 *See, e.g.*, GA. CODE ANN. § 15-11-1 (2018).

245 *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

246 *See* Lapp, *supra* note 222, at 904.

247 *In re* Gault, 387 U.S. 1, 15–18 (1967).

248 *See McNeil*, 501 U.S. at 178.

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

250 *Id.* at 46–49 (citing Haley v. Ohio, 332 U.S. 596 (1948)).

251 *See* Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("We have also learned the companion lesson of

C. Serving State Interests and Legitimizing Parens Patriae

Requiring the presence of counsel in all custodial interrogation settings will serve a variety of legitimate state interests.[252] This Section considers the ways that adopting this Comment's proposal would serve important state interests and also legitimize the state's *parens patriae* authority.

1. Serving State Interests

Increasing juveniles' access to counsel during pre-adjudication interaction with law enforcement will help to ensure the protection of their constitutional rights while also increasing the likelihood that the state can eventually carry out fair and transparent juvenile proceedings. Because "[e]ven the intelligent and educated layman has small and sometimes no skill" in navigating the unique complexities of criminal proceedings, the Court has emphasized counsel's indispensability not only to ensuring the rights of individual defendants, but also to ensuring that the justice system can function properly.[253] Mandating access to counsel for children during pre-adjudication interrogations would help to ensure that statements given to police will be well considered and vetted by their attorneys for inconsistencies or other peculiarities.

Clearer, more reliable statements from juveniles serve the state's interest for at least two reasons, both of which have been discussed by the Supreme Court.[254] First, as the Court noted in *Gault*, if a suspect is willing to provide a confession or some other formal statement, law enforcement officials tasked with investigating a given crime or issue of juvenile delinquency have a practical interest in such statements being reliable, clear, and consistent so as to not waste time or resources.[255] Second, courts likewise have an interest in the reliability of such statements, for they are tasked with determining whether evidence is

history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system.").

[252] For example, the state as *parens patriae* is responsible for children's general welfare. *See* Prince v. Massachusetts, 321 U.S. 158, 165 (1944). The state also has an interest in obtaining reliable statements and confessions. *See Gault*, 387 U.S. at 52.

[253] By emphasizing the potential pitfalls facing laypersons who proceed without counsel—"he is incapable, generally, of determining for himself whether the indictment is good or bad"—the Court suggested that, absent counsel's assistance and expertise, the criminal system itself could struggle to distinguish between guilty and innocent individuals. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[254] *See Gault*, 387 U.S. at 52.

[255] *See id.* at 55.

admissible and, more generally, with ensuring that the accused receives a fair trial based on available facts.[256] To this end, it is unequivocally within the state's interest to be aided by clear testimony that will enable it to conduct fully transparent, efficient determinations of matters it pursues. Given that *Gault* collapsed the artificial distinction between criminal and delinquency proceedings, the interest in having transparent and efficient delinquency proceedings is equally important to the adult and juvenile systems. [257]

2. Legitimizing Parens Patriae

Adopting this Comment's proposal would also help to further legitimize the state's *parens patriae* authority because states would be able to more effectively protect children's interests in the juvenile system. As discussed in Part I, juvenile courts were created by state statutes, and their practices could vary among jurisdictions.[258] Despite these variations, most juvenile systems sprang from reformers' general concerns about child welfare.[259] As noted by the Court in *Gault*, juvenile courts were designed with the stated purpose of helping children rather than punishing them.[260] The goals of a state's juvenile system are sometimes included within the statute; for example, Georgia's Juvenile Code begins by articulating its purpose: "The purpose of this chapter is to secure for each child who comes within the jurisdiction of the juvenile court such care and guidance, preferably in his or her own home, as will secure his or her moral, emotional, mental, and physical welfare."[261] Given the Court's precedent regarding childhood psychology,[262] the nature of the right to counsel under the Fifth Amendment,[263] and the juvenile system's general goal of operating in the best interest of the welfare of the child,[264] introducing attorneys at the early, critical stage of custodial questioning would help to ensure that children are not needlessly—or even inadvertently—exploited or harmed and would thus align with the state's responsibilities as *parens patriae*.

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[256] *Id.* at 55 (noting that juvenile courts sometimes reject juvenile confessions from being admitted as evidence because they are often plainly unreliable and untrustworthy).

[257] *Id.* at 49–50.

[258] *See* Tanenhaus, *supra* note 33, at 44.

[259] *See id.* at 45.

[260] *See Gault*, 387 U.S. at 15–16.

[261] GA. CODE ANN. § 15-11-1 (2018).

[262] *See* Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

[263] *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); Edwards v. Arizona, 451 U.S. 477 (1981).

[264] *See, e.g.*, § 15-11-1.

Most juvenile systems also have mechanisms through which a child is "waived" out of juvenile court's jurisdiction and is instead prosecuted in adult criminal court.[265] Three of the most common mechanisms are "statutory exclusion, prosecutorial discretion, and judicial waiver or transfer."[266] In *Gault*, the Court recognized and discussed some of the problems presented by a child's potential waiver, particularly with regard to interrogations after an arrest but before formal delinquency proceedings have commenced or charges have been filed.[267] As noted by the Court, at the point of arrest, "there is little or no assurance … in most if not all of the States[] that a juvenile apprehended and interrogated by police … will remain outside of the reach of adult courts."[268] For this reason alone, it would be prudent for the Supreme Court to consider mandating that counsel represent children during all pre-adjudication interrogations.

III. IMPLICATIONS AND CONSEQUENCES

Adopting this Comment's proposals would present various implications and consequences. Section A addresses the two most obvious critiques of this Comment's proposals: high costs and logistical infeasibility. In discussing these two counter-arguments, this Section simultaneously reflects on the equally costly implications of not adopting this Comment's proposals. Section B outlines why this Comment's proposals are not tinged by the kind of paternalism that traditionally plagued the juvenile system, though its suggestions would create unique mandates that would apply exclusively to children. Finally, Section C argues that adopting this Comment's suggestions could help to redress systemic imbalances in juvenile policing and adjudication.

A. Costs and Feasibility

Though potentially appealing on a purely conceptual level, guaranteeing children pre-adjudication access to counsel, particularly during custodial interrogations, would be an expensive undertaking. Given the practical financial burden such a mandate would present for state governments, courts would have to analyze this mandate under the "specific dictate of due process" standard established in *Mathews v. Eldridge*.[269] In that case, the Court balanced the "governmental and private interests" that would have been affected if it had

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265 *See* Snyder, *supra* note 176, at 57.

266 *Id.*

267 *In re* Gault, 387 U.S 1, 50–51 (1967).

268 *Id.*

269 424 U.S. 319, 335 (1976).

recognized a certain due process requirement.[270] Because the due process requirement being considered in *Mathews* would have required additional administrative procedures, the Court considered the private interests, potential costs, and "administrative burdens" of making such a determination.[271] The Court held that "identification of … specific dictates of due process … requires consideration of three distinct factors," one of which is the "fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[272] Were the Court to adopt a new due process standard for juveniles and hold that they were entitled to mandatory pre-adjudication presence of counsel in custodial interrogations, the Court would undoubtedly be shifting an increased and substantial financial burden to state governments. Because states already struggle to fund their public defense systems,[273] the Court may flatly resist adopting this approach.[274]

The financial cost of this proposition makes its adoption potentially difficult, but so too does a lack of public defense resources, especially in rural areas of the country.[275] The Washington, D.C. public defense system could arguably serve as a model for the nation,[276] but Washington, D.C. benefits from its small size and unique resources, including non-profits and numerous law schools' public defense clinics.[277] By comparison, in states such as Louisiana or Illinois, funding and resources have proved scarce in non-urban areas.[278]

Though potentially difficult and costly to adopt, this Comment's suggestions serve as a starting point for acknowledging the variety of costs associated with the current operation of the juvenile justice system and for re-imagining alternative possibilities.[279] And despite the difficulty of implementing this Comment's suggested course of action, there are also significant, countervailing

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[270] *Id.* at 334.

[271] *Id.* at 335.

[272] *Id.*

[273] *See, e.g.*, Robertson, *supra* note 9; *see also* Debbie Elliott, *Public Defenders Hard to Come by in Louisiana*, NPR (Mar. 10, 2017, 5:29 PM), https://www.npr.org/2017/03/10/519211293/public-defenders-hard-to-come-by-in-louisiana.

[274] *See Mathews*, 424 U.S. at 335 (noting that administrative costs are part of a court's consideration).

[275] *See, e.g.*, NAT'L JUVENILE DEF. CTR. ET AL., ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 14 (2007).

[276] *See* NAT'L JUVENILE DEF. CTR. ET AL., THE DISTRICT OF COLUMBIA: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL 25 (2018).

[277] *See id.*

[278] *See* NAT'L JUVENILE DEF. CTR., *supra* note 275, at 14; *see also* Robertson, *supra* note 9.

[279] *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 232 (1995) ("Sometimes re-visioning, even if utopian, is valuable simply because it forces us to consider old relationships in new lights ….").

costs of non-implementation. First, as addressed above, American court systems—whether juvenile or adult—are charged with administering impartial and transparent proceedings.[280] To fulfill their duties, courts must have access to information that is reliable and not tainted by coercion.[281] For this reason alone, especially in light of the Supreme Court's recognizing that children often feel uniquely compelled to obey authority figures,[282] expanded access to counsel in interrogations would help to more effectively ensure that, if children choose to speak, they do so freely and in a way that reflects their knowledge of a situation, not their fear of disobeying a police officer.

Additionally, if state and local governments do not have to think critically about the costs of their policing techniques, they may rely on policing methods that prove ineffective for accomplishing the purported goals of juvenile courts. Because a central goal of juvenile justice systems is to rehabilitate and treat children[283] rather than prosecute them, overreliance on custodial interrogation, which the Supreme Court has found to be inherently coercive,[284] would be an ill-advised and counterproductive way of working toward a rehabilitative goal.

Finally, greater awareness of the financial costs of government action can itself be an impetus for reform. For example, awareness of the ballooning costs of incarceration in the United States has led to increased national debate about the merits of "mass incarceration" and even a reconsideration of some of the mechanisms that lead people to spend more time in jails and prisons.[285] If providing proper legal assistance to children who face police interrogation is too costly, then it could force states and local governments to reconsider how they police children and whether arrests and custodial interrogations are effective uses of their resources. The need for mandatory counsel—and the resulting costs—will correlate directly with a given locality's approach to formally policing children and subjecting them to custodial interrogations.

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280 *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

281 *See In re* Gault, 387 U.S. 1, 52–55 (1967).

282 *See* J.D.B. v. North Carolina, 564 U.S. 261, 264–65 (2011) ("It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.").

283 *See* GA. CODE ANN. § 15-11-1 (2018).

284 *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966).

285 *See Mass Incarceration Costs $182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INST. (Feb. 6, 2017), https://eji.org/news/mass-incarceration-costs-182-billion-annually; *see also* Marc Santora, *City's Annual Cost per Inmate Is $168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html.

B. Paternalism

Creating a non-waiver provision for a constitutional "right" may at first seem inherently problematic. Given the juvenile system's fraught history with paternalism, there may be justifiable hesitation when considering a form of mandatory "protection" for children in the juvenile system.[286] But as the Supreme Court has acknowledged, under some circumstances, protective measures may be required to account for children's unique vulnerabilities or lack of capacity, especially because they are conditioned to defer to authorities.[287] Therefore, though mandatory access to counsel could be deemed overly protective and paternalistic, a procedure that reduces pressure on children in pre-adjudication interrogations and ensures that they will be reasonably informed of the consequences of their interactions with law enforcement would nevertheless be practically beneficial to them.[288] This practice would increase the likelihood that children are fully informed of their constitutional rights under the unique circumstances of custodial interrogations. Furthermore, it would ensure that children facing interrogation and potential delinquency proceedings have a representative who can act according to their stated desires.

Additionally, the paternalistic aspect of a non-waiver provision can be reasonably minimized by considering the limitations of its application: The suggested measure would divide a juvenile's interaction with police and the justice system into well-defined "stages" where different procedures could be employed to ensure protection of children's constitutional rights according to the demands of that stage. The mandatory presence of counsel would be necessary at the stages of arrest and questioning because of the unique pressures presented by those circumstances;[289] counsel's presence may not be similarly mandatory in different contexts.[290] Under this model, custodial interrogation would require heightened protections because of the unique pressures that exist at the critical, initial stages of interaction between the state and the child.[291]

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[286] *See Gault*, 387 U.S. at 16.

[287] *See id.* at 45–46; *see also J.D.B.*, 564 U.S. at 261 (describing circumstances under which children feel compelled to cooperate with authority figures).

[288] This may lead to better outcomes, such as no state institutionalization.

[289] *See Miranda*, 384 U.S. at 455 (noting coercive environment of custodial interrogations).

[290] For instance, in different contexts when the "best interest" of the child are being discussed, perhaps the presence of a parent or guardian *ad litem* would be sufficient.

[291] As discussed earlier, it may not always be clear, at the point of arrest, whether a child will remain in the juvenile system or be waived into the adult criminal system. *See Gault*, 387 U.S. at 50–51 (noting initial uncertainty of whether a child will waived into adult court for prosecution despite first interacting with juvenile system).

Gault created a potentially unforeseen problem: Insisting on "formal equality" between adults and children may result in "practical inequality" for children.[292] By granting children greater procedural rights, they also are tasked with making decisions that are fraught with legal significance.[293] Increasingly, scholars and practitioners question children's capacity to independently appreciate and comprehend their legal rights, especially during individual encounters with law enforcement.[294] To this end, some have proposed that children should be barred from waiving their right to counsel in interrogation settings unless counsel is already present and may advise the child.[295]

While children may lack the developmental capacity to understand the full implications of waiving their right to counsel, there are additional reasons that mandatory appointment of counsel for children is not overly paternalistic. The Court in *Gault* discussed the pitfalls of the juvenile system's paternalistic approaches, emphasizing the ways that such paternalism had worked to deprive children of meaningful access to procedural rights.[296] But this Comment's suggestions would enhance rather than diminish children's ability to benefit from their Fifth Amendment privilege from self-incrimination. Rather than being a procedural mechanism that cuts back on the ability to access and exercise a constitutional right, this Comment's suggestions would help to ensure that a child's constitutional right is not needlessly waived because of fear, impatience, or misunderstanding.

Finally, mandatory appointment of counsel is also distinguishable from other paternalistic measures because attorneys are functionally distinct from guardians *ad litem*.[297] While guardians *ad litem* may override a child's wishes to instead focus on that child's best interests, attorneys are traditionally understood to be responsible for advocating for their clients' expressed desires.[298] As some courts have discussed in the context of representation of clients with diminished capacity, attorneys can still serve some role in ensuring that a client's best interests are considered—attorneys can alert a court to the potential need for a guardian *ad litem*—while also fulfilling the necessary role of advocating for their clients' wishes.[299]

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[292] Feld, *supra* note 38, at 504.

[293] *See id.* at 502–03.

[294] *See* King, *supra* note 152, at 431–33.

[295] *Id.* at 434.

[296] *Gault*, 387 U.S. at 18–19.

[297] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 76 (11th ed. 2018); *see also In re* M.R., 638 A.2d 1274, 1283 (N.J. 1994).

[298] *M.R.*, 638 A.2d at 1283.

[299] *See id*. at 1285 ("On perceiving a conflict between [a client's] preference and best interests, the attorney

C. Redressing Systemic Imbalances and Bias

The Supreme Court has discussed an individual's right to counsel, albeit under the Sixth Amendment, with reference to the substantial resources that the state can devote to prosecuting crimes.[300] The Court has acknowledged the inherent power imbalance that can exist between the state and individuals it prosecutes, even when the state is acting "quite properly" and pursuing meritorious prosecutions.[301] The same logic can apply to the juvenile system, where the state's significant resources may be used to adjudicate delinquency and confine delinquents to a juvenile institution.[302] Broader access to attorneys in schools that employ resource officers and use custodial interrogation in school settings could also help to offset systemic bias against minority and socioeconomically disadvantaged children for whom such practices are more common.[303]

CONCLUSION

This Comment has considered why the Supreme Court should adopt measures that more robustly protect children's privilege against self-incrimination under the Fifth Amendment. It has traced the development of the juvenile justice system, as well as that system's significant change in light of *Gault*, and it has suggested how children's constitutional rights, recognized for the first time in *Gault*, may be more meaningfully expressed by providing juveniles with counsel during pre-adjudication interactions with law enforcement. By making access to counsel mandatory and unwaivable, particularly for pre-adjudication interrogations, the Court could ensure that children do not needlessly incriminate themselves.

Though this Comment's proposition presents certain logistical obstacles, it nevertheless presents an argument for further legitimizing the state's *parens patriae* authority, and it finds precedent in the Court's cases—both under its

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may inform the court of the possible need for a guardian *ad litem*.").

[300] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crimes.").

[301] *Id.*

[302] *See* Liz Ryan & Carmen Daugherty, Gault *at 50: What Juvenile Defenders Can Do to Dismantle the Youth Prison Model*, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 252, 252–53 (Kristin Henning et al. eds., 2018).

[303] *See* Feld, *supra* note 38, at 483 (discussing "substantial racial disparity in rates of detention" among juveniles).

Eighth Amendment jurisprudence[304] and in cases clarifying *Miranda*[305]—for fashioning a unique constitutional standard for children.

This Comment has also addressed the potential infeasibility of applying a broad constitutional mandate granting children pre-adjudication access to counsel. Despite some of the financial and logistical obstacles these rules would present, this Comment has sought to acknowledge that there are also significant, countervailing costs of continuing to deprive juveniles of full expression of their Fifth and Fourteenth Amendment rights. Furthermore, broader recognition of the rising costs of ensuring that children's constitutional rights are protected will serve to create more awareness—and perhaps skepticism and disapproval—of the ways that children are policed and questioned, especially in school settings.

This Comment has also attempted to account for the successes and shortcoming of *Gault*. Though *Gault* succeeded in addressing some of the juvenile system's most serious problems, *Gault*'s central premise—that children are entitled to and fully possess constitutional rights—requires special attention from courts and legislatures. Specifically, *Gault* requires that the Supreme Court continue to consider how constitutional standards and procedures can be modified to best suit juveniles and protect their rights.

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304 *See* Miller v. Alabama, 567 U.S. 460 (2012); Roper v. Simmons, 543 U.S. 551 (2005).

305 *See* McNeil v. Wisconsin, 501 U.S. 171 (1991); Edwards v. Arizona, 451 U.S. 477 (1981).

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