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When Big Brother Becomes "Big Father": Examining the Continued Use of Parens Patriae in State Juvenile Delinquency Proceedings

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ABSTRACT

The U.S. Constitution grants American citizens numerous Due Process rights; but, historically, the Supreme Court declined to extend these Due Process rights to children. Initially, common-law courts treated child offenders over the age of seven in the same manner as adult criminals. At the start of the 20th century, though, juvenile reformers assisted in creating unique juvenile courts that used the *parens patriae* doctrine and viewed children as delinquent youths in need of judicial parental guidance rather than punishment. Later, starting in 1967, the Supreme Court released multiple opinions extending certain constitutional Due Process rights to children in juvenile delinquency proceedings.

While most states have implemented these constitutional rights into statutory and procedural law, the state of Michigan still struggles to clearly delineate how its justice system views and handles child offenders. Although Michigan's Juvenile Code originated from a *parens patriae* standpoint, current Michigan juvenile court practices are inconsistent at best and completely contrary at worst. The conflict between viewing a child as a crim-

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2020. To those of you who entrusted me with your stories, I hope that this Comment brings awareness to the injustices you faced and sparks renewed discussion of juvenile justice reform in Michigan. To my parents, Clint and Bonnie Higley, thank you for dedicating 18 years of your life to my education and for always supporting my dreams. To Dr. Spinney, Dr. Favelo, and Mrs. Thornhill, thank you for encouraging my love of writing and for helping me develop the skills to pursue it. To Professor Prince and Professor Partin, thank you for helping me hone my writing abilities to succeed in the legal profession. To my editors, Sean Kraus and Malcolm McDermond, thank you for patiently working with me to develop and fine-tune my jumbled thoughts into this organized work. And to my brilliant husband, Andrew Mowry, thank you for being my sounding board and support system as I worked on this Comment for the past 18 months. Soli Deo gloria.

inal and as a delinquent youth is evident in the striking differences between Michigan's Juvenile Code and Michigan courts' opinions. This Comment examines Michigan's Juvenile Code and evaluates the Michigan courts' lack of consistency in applying the Juvenile Code and in protecting children's constitutional rights. This Comment will also highlight some pending changes to Michigan's Juvenile Code and will provide recommendations for changes that would improve Michigan children's access to their Due Process protections.

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I. INTRODUCTION

One September evening, 16-year-old high school junior Brock climbed into his pickup truck to travel to his younger sister's volley-

ball game.[1] While driving, Brock realized that his girlfriend, who was driving the car in front of him, was the victim of harassment from a third vehicle.[2] The third driver began tailgating Brock's girlfriend and veered into oncoming traffic to make obscene gestures at her.[3] When Brock came to a passing zone, he passed the third vehicle and pulled in behind his girlfriend to protect her from harassment.[4] The driver of the third vehicle then began harassing Brock by pulling alongside him, by gesturing for him to pull over, by cussing at him, and by following so closely that the driver's front bumper made contact with Brock's rear bumper.[5] Brock, fearful for his safety, refused to pull over and continued driving.[6]

Suddenly, several police cars, with sirens blaring and lights flashing, forced Brock to pull over.[7] Confused, he did so.[8] A police officer walked up to Brock's window, slapped the side of the vehicle, and told Brock, "Get out of the truck."[9] When Brock stepped out, the officer immediately put Brock in handcuffs and began asking what Brock had been drinking or smoking, insinuating that Brock was driving under the influence.[10]

Brock attempted to protest his innocence but could not because the officer failed to disclose the probable cause for the stop.[11] Meanwhile, the driver of the third vehicle walked up to the scene, reeking of alcohol on both his person and his breath.[12] Listening to the conversations between this driver and the officers, Brock real-

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1. Interview with Brock*, Michigan citizen, in Michigan (Dec. 29, 2018). *At Brock's request, I have withheld his last name for privacy purposes.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Brock, knowing that the area had a high crime rate and was well-known for drug trafficking and violent crime, feared stopping on the side of the road in the dark. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Simultaneously, another officer yelled at Brock's girlfriend, who had pulled over and was trying to help Brock. *Id.* The officer told her, "Shut up, get back in your car, and drive away." *Id.* Although she wished to videotape on her phone what was happening, the officers threatened to charge her with driving while texting if she did so; deeply upset, she got back in her car and drove away. *Id.*

11. Interview—Brock, *supra* note 1. Though the officers had Brock's license, which showed his minor age, at no time did the officers make any reference to Brock's age or attempt to follow any juvenile-specific procedures. *Id.*

12. *Id.* Brock never witnessed any officers performing sobriety tests on this driver. *Id.*

ized that the potentially intoxicated driver was an off-duty police officer.[13]

The officers placed Brock in the back of a squad car and searched his truck.[14] Not finding anything, the officers demanded that Brock take a breath test, and he complied.[15] The breath test result was negative, leading the officers to drive Brock to a nearby hospital for a blood test.[16] A nurse drew and tested two tubes of blood, but that test was also negative for any substances; so the officers transported Brock to the police station, leaving him alone in a room—still in handcuffs—while the officers filed a report.[17]

Several hours after Brock's initial detainment, the officers begrudgingly agreed to call Brock's parents, saying, "Yeah, I guess we can do that."[18] The officer who made the call, however, told Brock's parents only that Brock was in an accident and that they should come to the station.[19] When Brock's parents arrived, the officers prevented them from talking to Brock, limiting their access to observing him through a window.[20]

Eventually, the officers took Brock to the county juvenile facility, where he underwent a third drug test—again with a negative result.[21] Brock remained at the juvenile facility until his bail hearing at 3 PM the following day.[22] The officers never read Brock his

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13. *Id.* Brock later found out that this driver had called the police to initiate the stop. *Id.*

14. *Id.* One officer continued questioning Brock during the vehicle search. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Throughout the whole process, Brock remained restrained in handcuffs. *Id.*

18. *Id.* Thankfully, Brock had memorized his father's number; the officers refused him access to his cell phone. *Id.*

19. *Id.*

20. *Id.* Even after Brock's parents arrived, the officers continued to question Brock and to deny him access to counsel and to his parents during these interrogations. *Id.*

21. Interview—Brock, *supra* note 1. At the time the officers took Brock to the facility, he had not talked to his parents or an attorney. *Id.*

22. *Id.* At Brock's bail hearing, he still had not consulted an attorney or his parents. *Id.* At the hearing, Brock discovered that the police officers had alleged that Brock drove recklessly and had caused property damage by striking a parked vehicle. *Id.* Brock's vehicle had no damage. *Id.* Additionally, the officers falsely stated that Brock refused to take the breath test, resulting in an immediate suspension of his driver's license and a difficult process for its reinstatement. *Id.* After the bail hearing, Brock's parents hired an attorney, and the court eventually dismissed the case based on the officers' illegal actions which violated Brock's basic constitutional rights. *Id.* The false allegations led to some harassment from school administration at Brock's private high school, and he left the school in the spring

Miranda[23] rights or an implied consent form for the breath test, never provided probable cause for the initial stop, never obtained warrants for any of the three drug tests, never permitted Brock access to an attorney or to his parents, and never ensured that Brock understood the process.[24] Brock later admitted that, at the time of his arrest, he was completely unaware that he had constitutional rights throughout this process and that the officers were acting illegally.[25]

Brock's story is, sadly, not uncommon. Children across the United States, including those in Michigan, often find themselves thrust into a complex legal system with very little guidance available to them or to their parents. Even worse, many of these children are financially unable to obtain their own attorneys but fail to meet their states' required indigency standards to qualify for court-appointed attorneys.[26]

Although the Constitution protects many civil rights of U.S. citizens[27] and incorporates those rights to the states through the Fourteenth Amendment's Due Process Clause,[28] the extension of those rights to one of the country's most vulnerable populations—children—did not begin until 1967.[29] Even though the United

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of his junior year. *Id.* At the time of our interview, 18-year-old Brock was working full-time, was earning his GED, and was planning a graduation party. *Id.*

23. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that police officers must inform detainees of certain constitutional rights, including the right against self-incrimination and the right to counsel).

24. Interview—Brock, *supra* note 1.

25. *Id.*

26. *See infra* Part III.B.3.

27. *See* U.S. CONST. amends. V, VI (listing constitutionally-protected rights, including the right to avoid double jeopardy, right against self-incrimination, right to due process, right to speedy trial, right to trial by jury of peers, right to be informed of charges, right to confront accusers, right to a defense, and right to counsel).

28. *See* U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("[W]e hold that the *Fourteenth Amendment* guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the *Sixth Amendment's* guarantee."); Malloy v. Hogan, 378 U.S. 1, 10 (1964) ("We hold today that the *Fifth Amendment's* exception from compulsory self-incrimination is also protected by the *Fourteenth Amendment* against abridgment by the States."); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("This noble ideal [fair trials before impartial tribunals in which every defendant stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."); Powell v. Alabama, 287 U.S. 45, 71 (1933) (holding that the right to counsel in capital cases is a due process right originating from the Fifth Amendment but applicable to the states through the Fourteenth Amendment).

29. *See In re* Gault, 387 U.S. 1, 36–57 (1967) (holding that children are entitled to certain constitutional rights); *see also* Planned Parenthood of Cent. Mo. v.

States has made significant improvements in the juvenile courts' treatment of children, many states have yet to fully implement appropriate procedures to protect children's constitutional rights.[30]

This Comment describes the historical context of children's constitutional rights in the United States, starting with the common-law era and following the progression of juvenile courts to the present day.[31] Additionally, this Comment analyzes Michigan's Juvenile Code and juvenile courts and evaluates whether Michigan's laws and juvenile courtrooms actually preserve the constitutional rights of Michigan children.[32] Finally, this Comment recommends actions that Michigan can take to ensure that its law enforcement and juvenile courts preserve the constitutional rights of its children.[33]

II. BACKGROUND

The history of juvenile justice in the United States separates into three distinct eras: the common-law era (pre-1899), the *parens patriae* era (1899–1967), and the post-*Gault* era (1967–present).[34] In the first 100 years of U.S. history, courts made no distinction between child offenders and adult criminals, treating both in the same manner.[35] Reacting to this harsh treatment of children under common law, juvenile reformers created separate juvenile courts that operated with a *parens patriae*, or paternalistic, mentality.[36] But the unanticipated negative effects of *parens patriae* eventually led the U.S. Supreme Court to redirect juvenile courts' focus to-

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Danforth, 428 U.S. 52, 74 (1976) (citations omitted) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

30. *See generally infra* Part II.B.2. (describing the Court's constitutional rights decisions and the states' struggles with implementing those rights).

31. *Infra* Part II. Note that this Comment's discussion of juvenile courts is in the context of juvenile delinquency proceedings and does not include a discussion of juvenile dependency or abuse and neglect proceedings. *See* JUVENILE LAW CENTER, "Glossary," https://bit.ly/2nwJNry [https://perma.cc/W7GV-TDGR] (last visited Sept. 28, 2019) (describing the distinction between an adjudication of delinquency and an adjudication of dependency).

32. *Infra* Parts III.A. and III.B.

33. *Infra* Part III.C.

34. *See* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING xxi-xxx (2004) [hereinafter TANENHAUS—JUVENILE JUSTICE].

35. *Id.*

36. *Id.*; *see also infra* Part II.B.2. (explaining and defining the *parens patriae* doctrine).

ward children's inherent constitutional rights by issuing the landmark opinion, In re *Gault*.[37]

A. Common Law Era (Pre-1899)

Before 1899, U.S. courts employed common-law principles in dealing with children who had committed crimes.[38] Common-law principles used punishment as a form of deterrence rather than as a means of rehabilitation.[39] At common law, courts declined to hold children 7-years-old and younger liable for any criminal actions, and some states extended that age to 12-years-old if the child lacked mental capacity.[40]

Courts processed child offenders over seven in the same manner as adult criminals.[41] The common-law courts employed a straightforward procedure: "[t]he child was arrested, put into prison, indicted by the grand jury, tried by a petit jury, under all the forms and technicalities of our criminal [common] law . . . ."[42] The courts' procedural intent was to determine whether the child had committed the criminal act and, if so, what consequences the law required.[43]

The use of common-law procedure in prosecuting children caused significant problems because courts meted out consequences to children based solely on what the law required (not on each child's particular circumstances), causing children to languish in adult prisons and often resulting in children's future recidivism instead of rehabilitation.[44]

B. Parens Patriae *Era (1899–1967)*

As the 20th Century approached, many social reformers became concerned with the courts' treatment of children and began advocating for a procedural distinction between child offenders and

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

38. TANENHAUS—JUVENILE JUSTICE, *supra* note 34, at xxi–xxx.

39. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909) [hereinafter Mack—*Juvenile Court*] ("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.").

40. *Id.*

41. Julian W. Mack, *The Chancery Procedure in the Juvenile Court*, *in* THE CHILD, THE CLINIC, AND THE COURT 310, 310 (1925).

42. Mack—*Juvenile Court*, *supra* note 39, at 106.

43. *Id.*

44. *See id.* at 106–07.

adult criminals.[45] By 1899, these juvenile reformers' efforts led to the second era of juvenile justice in the United States.[46]

1. Juvenile Reform Movement

Two Chicago women, Lucy Flower and Julia Lathrop, started the movement that eventually spurred national change in juvenile justice policy.[47] Lucy Flower was a wealthy philanthropist and social reformer who mentored the younger Julia Lathrop; together, they lobbied the Illinois government to consider creating separate juvenile courts.[48] Julia Lathrop later suggested that juvenile courts could reduce the number of child offenders by providing services to strengthen and support families' ability to better care for and supervise their children.[49]

In 1899, the efforts and rhetoric of Lathrop and Flowers paid off when Cook County, Illinois, created a juvenile court—the first such institution in the United States.[50] This new juvenile court focused on informality in all hearings by implementing policies prohibiting any formal hearing records or transcripts and by permitting only those involved in the case to enter the courtroom.[51] Juvenile courts no longer called children "criminals" but rather "delinquents" in an effort to remove some of the negative stigmatization surrounding child offenders.[52] Delinquents were not only juveniles who committed criminal acts but also juveniles who exhib-

45. *See id.* at 107. These reformers specifically called for courts to focus on the importance of addressing each child's unique circumstances and on improving each child's life. *Id.* Juvenile reformers regularly criticized the common-law courts, asking:

> Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.

Id.

46. *See id.*

47. TANENHAUS—JUVENILE JUSTICE, *supra* note 34, at 3.

48. *Id.* at 3–5.

49. Julia C. Lathrop, *The Background of the Juvenile Court in Illinois*, *in* THE CHILD, THE CLINIC AND THE COURT 290, 295–96 (1925) ("[T]he social forces which can really lessen the number of children who appear before the juvenile court are creative and not repressive forces. Good and intelligent parents, homes of decent comfort and a community which consciously protects public health, recreation and education are true guarantees of normal childhood.").

50. MARY J. CLEMENT, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS 16 (2d ed. 2002).

51. *See id.* at 19.

52. *See id.* at 73 (defining "delinquent" as a juvenile "who has committed an act for which he or she could be arrested if he or she were an adult").

ited "antisocial behavior," a vague term describing a broad range of socially abnormal behaviors.[53]

2. Parens Patriae *Doctrine*

Juvenile reformers based their movement on the *parens patriae* doctrine, which espouses the belief that government has the power to act on behalf of vulnerable citizens, especially children.[54] In juvenile courts, *parens patriae* became "the power of the state through the court to act in behalf of the child as a wise parent would."[55]

Some juvenile reformers argued that the "breakdown of the home"—through divorce and single parenting—was a major factor causing children to act in a delinquent manner.[56] The alleged lack of "stable parenting" was one justification for the juvenile court's acting in a parent's place.[57] The original juvenile court served not to convict children but rather to evaluate their circumstances and to determine what was in the best interest of both the children and the government, often resulting in the courts' removing children from both their homes and the authority of "unfit" parents.[58]

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53. *See id.* at 75. These "antisocial behaviors" were noncriminal behaviors such as "wanders streets at night," "sleeps in alleys," "attempts to marry without consent," and "given to sexual irregularities." *See id.* at 74–75 (listing 34 activities that courts considered "delinquent" behavior). *See also, e.g.*, Sheila O'Connor, *When 'Incorrigible' Teen Girls Were Jailed*, N.Y. TIMES (NOV. 14, 2019), https://nyti.ms/2OuNoQz [https://perma.cc/845W-FPHY] (detailing the story of the author's grandmother whom the juvenile court placed into a detention facility for the offense of "incorrigibility" because the girl was unmarried, underage, and pregnant).

54. *See* Mack—*Juvenile Court*, *supra* note 39, at 108–09; *see also Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *parens patriae* as the concept that governments have the role of "provider of protection to those unable to care for themselves").

55. ADVISORY COUNCIL OF JUDGES OF THE NAT'L COUNCIL ON CRIME AND DELINQUENCY & NAT'L COUNCIL OF JUVENILE COURT JUDGES, GUIDES FOR JUVENILE COURT JUDGES 1 (Marjorie Bell Ed., 2d ed. 1963).

56. *See* Miriam Van Waters, *The Juvenile Court from the Child's Viewpoint: A Glimpse into the Future*, *in* THE CHILD, THE CLINIC AND THE COURT 217, 219–22 (1925) (arguing that courts implemented *parens patriae* when "parenthood itself began to weaken, so that not only were thousands of children brought before the court who in happier conditions would never have come, but the children themselves had no conception of what a wise, good father and mother ought to be").

57. *Id.* at 218. An allegation of unstable parenting gave the juvenile judge the role of evaluating the child's previous parental involvement and of deciding if the child suffered from a lack of "the fundamental rights of childhood to parental shelter, guidance, and control." *Id.*

58. *See* Mack—*Juvenile Court*, *supra* note 39, at 109, 119–20 (explaining that the juvenile court steps in "to have the state intervene between the natural parent and the child because the child needs it, as evidenced by some of its acts, and because the parent is either unwilling or unable to train the child properly").

Juvenile court judges learned to "[i]ndividualize the child," to "[h]ave an awareness of how the child views himself," to "[w]eigh the past in terms of the future," to avoid tying their "own hands with clichés," and to "[d]etermine the type and quality of treatment services available and select what is needed."[59] Juvenile reformers intended *parens patriae* to emphasize each child's individuality in juvenile courts and to communicate to each child that the juvenile judge would ensure that the child received the opportunity to overcome any previously bad behaviors and to become a model citizen.[60]

The juvenile reformers intended their rehabilitative focus to remove the criminal stigmatizations that had plagued children in the common-law courts and had caused high levels of recidivism.[61] The juvenile judge knew his role as a father-figure was to provide "kindly assistance" in a warm, welcoming atmosphere; to encourage children to speak honestly of their actions; and to "train the child right" in the absence of appropriate parents.[62]

3. Parens Patriae *Problems*

Although the juvenile court founders had noble intentions and meticulous plans, the implementation of their ideas demonstrated some fundamental flaws in the *parens patriae* doctrine, mainly in the areas of constitutional rights and legal representation.[63] Juvenile reformers insisted that, in direct opposition to the common-law courts, the juvenile courts were a social, scientific institution with little basis in actual legal theory and with the purpose of improving children's lives rather than enforcing laws.[64] Juvenile courts drew from contemporary social science rather than from legal precedents in their disposition of cases.[65] Because juvenile reformers did not

59. ADVISORY COUNCIL, *supra* note 55, at 71–82.

60. *See* Van Waters, *supra* note 56, at 235 ("Our chief goal should be the establishment of personal relationships with the child. We must grasp him with heart and mind, vividly and clearly, as our own flesh and blood in distress."); Mack—*Juvenile Court*, *supra* note 39, at 120 ("The child who must be brought into court should . . . be made to feel that he is the object of its care and solicitude.").

61. *See* Mack—*Juvenile Court*, *supra* note 39, at 109; ADVISORY COUNCIL, *supra* note 55, at 3.

62. Mack—*Juvenile Court*, *supra* note 39, at 117, 120.

63. *See* ADVISORY COUNCIL, *supra* note 55, at 65, 79.

64. *See* Nils Anderson, *Trial by Newspaper*, *in* THE CHILD, THE CLINIC AND THE COURT 108, 116–17 (1925).

65. *See generally* A.L. Jacoby, *"When a Feller Needs a Friend": The Adolescent Delinquent*, *in* THE CHILD, THE CLINIC AND THE COURT 5, 12 (1925) (explaining the juvenile court theory that children's bad behavior is caused by "the power of the sex urge" and "the absence of inhibitions and the impulsiveness of this period of life").

view the juvenile court as a criminal institution, the juvenile court philosophy was that children did not have constitutional rights in this setting because the judge's role was to act in children's best interests and not necessarily as an arbiter of justice.[66]

As the ultimate decision-maker in the juvenile courts, the juvenile judges acted in whatever manner they deemed best for the child, regardless of the potential violation of constitutional rights.[67] Juvenile judges' broad discretion led to a de-emphasis of the importance of legal counsel in juvenile proceedings; the role of most attorneys involved in juvenile courts was only to convince children to admit their "delinquent behavior" and to assist the court in implementing appropriate consequences.[68] Because "the principles and philosophy of the [juvenile] court are intended to protect the rights of the child," very few lawyers actually found themselves representing children in the juvenile courts.[69]

Ultimately, these constitutional issues led legal professionals to question whether the juvenile reformers' various social theories could be fully implemented in practice and whether those theories that were in effect were actually protecting children.[70]

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66. Mack—*Juvenile Court*, *supra* note 39, at 109–14 (citing language from numerous state supreme court opinions that dismissed claims alleging a need for constitutional rights and that instead reasserted the juvenile court's role as "the legitimate guardian and protector of children"). One state judge used very strong language to assert his belief that constitutional rights have no place in juvenile courts:

> It would be carrying the protection of "inalienable rights," guaranteed by the Constitution, a long ways to say that that guaranty extends to a free and unlimited exercise of the whims, caprices, or proclivities of either a child or its parents or guardians for idleness, ignorance, crime, indigence, or any kindred dispositions or inclinations.

Id. at 111 (quoting *Ex parte* Sharpe, 96 P. 563, 565 (Idaho 1908)).

67. *See* ADVISORY COUNCIL, *supra* note 55, at 79 ("The child and his parents may consider commitment to be 'cruel and unusual' punishment, but the judge must be guided by his conviction of what will ultimately be best for the child.").

68. Daniel L. Skoler, *The Right to Counsel and the Role of Counsel in Juvenile Court Proceedings*, 43 IND. L. J. 558, 579–81 (1968).

69. ADVISORY COUNCIL, *supra* note 55, at 65 (mentioning parents' right to hire their child an attorney but failing to address children's own right to an attorney).

70. *See* Mack—*Juvenile Court*, *supra* note 39, at 114 (demonstrating one of the idealistic but impractical theories by advocating the creation of rurally-located facilities "laid out on the cottage plan" that feature couples caring for the delinquent children in a way that provides "fresh air and contact with the soil" and supplants "locks and bars and other indicia of prisons" with "human love," "human interest," and "vigilance").

C. Setting the Stage for Gault *(1960s)*

1. "The Worst of Both Worlds"

In the 1960s, the Supreme Court began to grant certiorari to juvenile justice cases to attempt to clarify some of these constitutional questions. However, before the Supreme Court's landmark decision In re *Gault*, the Court first examined juvenile justice issues in *Kent v. United States*.[71]

Morris Kent, Jr., an African-American child, was 14-years-old in 1959 when he appeared before the juvenile court in the District of Columbia.[72] Three years later, in 1961, police officers detained Morris on suspicion of breaking into a woman's apartment, robbing her, and raping her; he was 16 at the time.[73] The police questioned Morris for seven hours; and, though Morris eventually confessed, the police continued questioning him the next day.[74] Four days after the police took Morris into custody, his mother obtained an attorney for him.[75] Despite the defense attorney's objections and provision of documentation proving Morris's mental illness, the police detained Morris for nearly a week without a hearing until a juvenile judge ultimately ordered the jurisdictional waiver of Morris's case to adult criminal court.[76]

Morris appealed the jurisdictional waiver in multiple courts; but, while the appeals were proceeding, a jury found Morris "not guilty [of the rape charge] by reason of insanity."[77] The trial court sent Morris to a mental institution; and, after his mental treatment, Morris received a sentence of 30–90 years for his conviction on the remaining charges.[78] Morris continued the appeals, maintaining that the manner of his arrest and questioning violated his constitutional rights.[79]

The U.S. Supreme Court eventually held that the juvenile court's jurisdictional waiver was improper, stating that juvenile

71. Kent v. United States, 383 U.S. 541 (1966).

72. *See* DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN 54–56 (2011) [hereinafter TANENHAUS—CONSTITUTIONAL RIGHTS]; *see also* Kent v. United States, 383 U.S. 541, 543 (1966) (explaining that Morris's first encounter with the juvenile court was on charges of breaking and entering and stealing a purse, which resulted in the court's placing Morris on probation and sending him back to his mother).

73. *Kent*, 383 U.S. at 543.

74. *Id.* at 543–44.

75. *Id.* at 544.

76. *Id.* at 545–46.

77. *Id.* at 549–50.

78. *Id.* at 550.

79. *Id.* at 551.

courts do not have "a license for arbitrary procedure" and that "the admonition to function in a 'parental' relationship [*parens patriae*] is not an invitation to procedural arbitrariness."[80] The Court also highlighted growing concerns about the effectiveness of juvenile courts in practice.[81] The Court observed that "the child receives the worst of both worlds" but declined to consider the overall question of whether constitutional rights exist in delinquency proceedings.[82]

Throughout his appeals, Morris remained in the mental institution to which the trial court had committed him at the start of the case in 1961.[83] When the Supreme Court's final decision overturned the trial court disposition in 1968, Morris was able to leave the mental institution and to pursue a normal life, marrying and having children while avoiding any new criminal involvement.[84]

Although the Court did not definitively rule on children's constitutional rights, the *Kent* case is important for being the first to look at the national use of *parens patriae* in juvenile courts and for demonstrating that even the Supreme Court was aware of children's potential need for constitutional protection.[85]

2. Challenging the "Grossly Overoptimistic View"

In February 1967, the national discussion on juvenile justice methods continued with a report by The President's Commission on Law Enforcement and Administration of Justice.[86] The report featured an entire chapter entitled "Juvenile Delinquency and Youth Crime."[87] The Commission emphasized the importance of eliminating the high rates of juvenile recidivism that were overflowing into adulthood and that constituted a large portion of all criminal

80. *Id.* at 552–55.

81. *See id.* at 555 ("[S]tudies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.").

82. *Id.* at 556.

83. ALIDA V. MERLO & PETER J. BENEKOS, REAFFIRMING JUVENILE JUSTICE: FROM *Gault* to *Montgomery* 10 (2017).

84. *Id.*

85. *See Kent*, 383 U.S. at 555–56 ("There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

86. THE PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967), https://bit.ly/2SaPSDB [https://perma.cc/2KFA-XUTX].

87. *See id.* at 55–89.

activity.[88] The Commission suggested that the best way to lower crime rates was "by ameliorating the conditions of life that drive people to commit crimes and that undermine the restraining rules and institutions erected by society against antisocial conduct."[89]

Investigating the juvenile court system, the Commission expressed disappointment that "the great hopes originally held for the juvenile court have not been fulfilled" and that the high recidivism rates among children reflected this failure to meet the juvenile court's goal of rehabilitation (rather than incarceration).[90] The Commission primarily blamed the troubles of the juvenile court on the lack of appropriately qualified juvenile judges.[91] Overall, the Commission reported that the juvenile courts never implemented the juvenile reformers' idealistic intentions in practice due to a dearth of available qualified staff and to an inability to rehabilitate in the desired manner.[92] The Commission went so far as to claim that the very scientific and social philosophies that were the juvenile court's foundation originated from flawed understandings of the causes of delinquency.[93]

The Commission found that the juvenile court had adopted many formal, criminal court characteristics in conflict with its intended informal, *parens patriae*-based setting.[94] The Commission strongly recommended that the states restrict the jurisdiction of the juvenile courts and apply "basic principles of due process" to juvenile proceedings.[95] The Commission cited *Kent* as an example of how discontent with the juvenile courts had prompted a national discussion and acknowledged that *Gault*, then before the Supreme Court, could considerably change the juvenile court process.[96] The

88. *Id.* at 55.

89. *Id.* at 58.

90. *Id.* at 80.

91. *See id.* ("A recent study of juvenile court judges in the United States revealed that half had no undergraduate degree; a fifth had received no college education at all; a fifth were not members of the bar.").

92. *See id.* (using the phrase "grossly overoptimistic view" to describe the original intentions for the juvenile court procedure and results).

93. *See id.* ("What research is making increasingly clear is that delinquency is not so much an act of individual deviancy as a pattern of behavior produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counselor, or psychiatrist.").

94. *Id.* at 81. At this point, the legal community had not acknowledged this procedural and substantive change in the juvenile courts. *Id.* The significance of this unacknowledged change was that children were once again receiving criminal treatment without the same constitutional protections that adult criminals received. *Id.*

95. *See id.* ("Counsel and evidentiary restrictions are among the essential elements of fundamental fairness in juveniles as well as adult criminal courts.").

96. PRESIDENT'S COMM'N, *supra* note 86, at 85–86.

Commission concluded that all of these changes meant that children should receive greater access to counsel in juvenile proceedings.[97]

D. Constitutional Era (1967–present)

Just over a year after the *Kent* decision, the U.S. Supreme Court once more ruled on a juvenile constitutional issue in the *Gault* case.[98] The *Gault* decision ushered in an era of Supreme Court opinions on the constitutional rights of children, an era that has continued into the 21st century.[99]

1. Ending "Kangaroo Courts"[100]

On June 8, 1964, Gerald ("Jerry") Gault, a 15-year-old resident of a small town in Arizona, was home alone, enjoying summer break, when a police officer knocked on his door and took him into custody.[101] The police officer accused Jerry and his friend Ronnie of making a sexually suggestive, inappropriate phone call to a woman whose only report of the incident was a phone call to the officer.[102]

When the police officer carted Jerry away from his home and to the county "drunk tank," neither of Jerry's parents were home; moreover, the officer failed to contact or to notify the Gaults that their son was in police custody.[103] When Mrs. Gault finally found out where her son was, she went to visit him and to find out what was happening; but an officer at the jail prevented her from seeing Jerry and informed her that a hearing would occur the next day.[104]

The juvenile court did not prepare a transcript of that hearing; and every individual present remembered the facts differently,

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97. *See id.* at 86 ("And in all cases children need advocates to speak for them and guard their interests.").

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

99. *See* MERLO, *supra* note 83, at 49–70.

100. A "kangaroo court" is "a self-appointed tribunal or mock court in which the principles of law and justice are disregarded, perverted, or parodied." *Kangaroo Court*, BLACK'S LAW DICTIONARY (11th ed. 2019). Usually, a kangaroo court is a "sham legal proceeding." *Id.* While the origins of the term are unknown, legal scholars assume that the word "kangaroo" is meant to "refer to the illogical leaps between 'facts' and conclusions . . . ." *Id.*

101. *See* TANENHAUS—CONSTITUTIONAL RIGHTS, *supra* note 72, at 28–30. Jerry had previous encounters with law enforcement and the juvenile court system during his young life due to some minor offenses but had so far avoided punishment other than probation. *Id.* at 28.

102. *Id.* at 30–31.

103. *Id.* at 30–31.

104. *Id.*

leading to a disagreement over whether Jerry actually confessed in the hearing to making the phone call and comments.[105] Later that day, the officer sent Mrs. Gault a note informing her that the juvenile judge had scheduled another hearing in less than a week.[106] Mr. and Mrs. Gault did not hire an attorney because their landlord—who was also the chief of police—claimed that the juvenile judge "was giving the boy a year's probation."[107]

At the second hearing, the juvenile judge shocked the Gaults by sentencing Jerry to a state juvenile facility for an indefinite time—possibly until Jerry's 21st birthday.[108] Jerry went to a state juvenile detention facility in Fort Grant, Arizona,[109] and his parents began looking for someone who could bring Jerry home.[110] The Gaults hired Amelia Lewis as their attorney, and she filed a habeas corpus petition with the state superior court,[111] resulting in a hearing in which Lewis emphasized the lack of notice given to the Gaults and the dearth of reasoning supporting the juvenile judge's decision.[112] Despite Lewis's efforts, the superior court judge denied the habeas corpus petition, and Lewis appealed to the Arizona Supreme Court, adding an allegation that Arizona's juvenile court law was unconstitutional.[113]

Unsurprisingly, the Arizona Supreme Court affirmed the superior court's ruling,[114] and Lewis proceeded to get assistance from the local ACLU chapter in preparing an appeal to the U.S. Su-

105. *Id.* at 31.

106. *Id.* at 32. At this point, Jerry remained in police custody. *Id.*

107. *Id.*

108. *See id.* at xv, 33 (describing how Mrs. Gault's questioning the juvenile judge about the continued absence of Jerry's accuser from the proceedings may have irritated him and caused his surprising sentence, his forbidding Mrs. Gault from saying farewell to Jerry before being taken to the detention facility, and his saying "she ought to be sent down to Fort Grant").

109. *Id.* The facility to which Jerry went, Fort Grant, had a long and tortured history, earning itself the name of "desert devil's island." *Id.* at 23. Soon after his sentence began, Jerry experienced Fort Grant's brutality when other juvenile detainees raped a younger juvenile detainee who suffered from cerebral palsy. *Id.* at 33. Shortly after the rape, the child victim committed suicide while still at Fort Grant. *Id.*

110. *Id.* at 33.

111. *See* TANENHAUS—CONSTITUTIONAL RIGHTS, *supra* note 72, at 33 (explaining that Arizona prohibited juveniles from appealing their delinquency adjudications which meant that habeas corpus was Jerry's only recourse).

112. *See id.* at 36–37 ("Since the process was so informal and there was no appellate review of juvenile court cases, Judge McGhee was not accustomed to explaining his decision-making. He had a difficult time, for example, articulating how he applied the relevant laws or why he had sent Jerry to Fort Grant.").

113. *Id.* at 39.

114. *In re* Gault, 407 P.2d 760 (Ariz. 1965).

preme Court.[115] On May 15, 1967, the Court issued its opinion in Jerry's case, beginning a new era of juvenile justice and extending constitutional rights to children across America.[116] The Court determined that children have the following constitutional rights in delinquency proceedings: the due-process right to notice, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.[117]

The Court started its analysis of Jerry's case with a clarification of what was at issue: only "the proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part . . . ."[118] Additionally, the Court spent a great deal of its opinion providing a background history on the juvenile court, using language conveying the Court's disapproval of the *parens patriae* doctrine's effects on juvenile proceedings.[119] The Court emphasized the importance of due process in juvenile court proceedings.[120] The Court also cited both *Kent* and the President's Commission's report in its decision regarding whether children possess constitutional rights in juvenile court proceedings.[121]

The Court expressed its displeasure at the lack of notice provided to Jerry and his parents and at the juvenile judge's failure to consider alternatives to sending Jerry to a state facility.[122] The Court restated its assertions from *Kent* that even juvenile proceedings must adhere to "the essentials of due process and fair treatment."[123] The Court defined notice very differently from the lower courts, stating that "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court pro-

115. TANENHAUS—CONSTITUTIONAL RIGHTS, *supra* note 72, at 44–45.

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

117. Zawadi Baharanyi & Randy Hertz, *The Many Stories of In re* Gault, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 3, 6–10 (Kristin Henning, et al., eds., 2018).

118. *Gault*, 387 U.S. at 14. These proceedings are otherwise known as "delinquency adjudication" hearings. *Id.*

119. *See id.* at 15–20 (using language such as "[*parens patriae*'s] meaning is murky and its historic credentials are of dubious relevance" and "the constitutional and theoretical basis for this peculiar system is—to say the least—debatable").

120. *See id.* at 20–21 ("Due process of law is the primary and indispensable foundation of individual freedom.").

121. *Id.* at 13–15.

122. *Cf. id.* at 28–29 ("Under our Constitution, the condition of being a boy does not justify a kangaroo court . . ." and "one would assume . . . the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home" and "safeguards available to adults were discarded in Gerald's case . . .").

123. *Id.* at 30–31 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)); *see also* Kent, 383 U.S. at 552–55.

ceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' "[124]

The Court was emphatic that neither the probation officer nor the juvenile judge could represent the interests of a child in juvenile courts and strongly suggested that children need representation in juvenile hearings.[125] The Court first addressed a child's right to counsel and held:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[126]

Next, the Court evaluated a child's right against self-incrimination and held that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."[127] Finally, the Court considered a child's right to confront his or her accuser and held that, "absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements."[128]

Ultimately, the Supreme Court overturned Jerry's delinquency adjudication.[129] By the time the Court made its decision in 1967, 17-year-old Jerry had already come home from Fort Grant, was training to be a welder, and was eager to join the military.[130] Jerry eventually enlisted in the United States Army, served over twenty

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124. *Gault*, 387 U.S. at 33 (quoting THE PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967)).

125. *See id.* at 36. The Court emphasized children's dependence on legal assistance:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him."

Id. (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

126. *Id.* at 41.

127. *Id.* at 55.

128. *Id.* at 56–57.

129. *Id.* at 59.

130. *See* TANENHAUS—CONSTITUTIONAL RIGHTS, *supra* note 72, at 91, 93 (describing how Amelia Lewis had to fight the state to clear Jerry's record of the adjudication since he could not join the army with such a conviction).

years, and married and raised children and grandchildren, maintaining his innocence his whole life.[131] Jerry learned from his juvenile delinquency experience, stating, "People in this society need to realize that these children that we are putting behind bars, without counsel, are our next leaders."[132]

Meanwhile, nationwide, "[t]he *Gault* decision set the stage for a reassessment of juvenile interventions under *parens patriae*."[133] Numerous cases came before the Supreme Court in the following years, leading the Court to re-emphasize that "children are people" while still maintaining the uniqueness of the juvenile courts.[134] Young Jerry Gault could not have known that his case would become a landmark federal decision establishing that at least some of the rights enumerated in the Constitution apply to children as well as to adults.[135]

2. Continuing the Trend

In the decades following the *Gault* decision, the Supreme Court handed down numerous decisions that further delineated the constitutional rights of children. These holdings include: children's convictions must meet a standard of beyond a reasonable doubt;[136] children are not constitutionally entitled to receive a jury trial;[137] trying a child in both juvenile court and adult criminal court for the same offense constitutes a double-jeopardy violation;[138] children have a right to privacy in certain circumstances;[139] children cannot exercise their *Miranda* rights by requesting their probation officer be present rather than a lawyer;[140] children under the age of 18

131. *Id.* at 122–23.
132. *Id.* at 123.
133. MERLO, *supra* note 83, at 49.
134. *Id.*
135. *Id.* at 48–49.
136. *In re* Winship, 397 U.S. 358, 368 (1970).
137. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (reasoning, in part, from a *parens patriae* standpoint and claiming that a jury trial could have the potential to "remake the juvenile proceeding into a fully adversary process" by destroying "the idealistic prospect of an intimate, informal protective proceeding").
138. Breed v. Jones, 421 U.S. 519, 530–31 (1975).
139. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (holding that children's right to privacy in school is outweighed by "the substantial need of teachers and administrators for freedom to maintain order in the schools"); Carey v. Population Serv. Int'l, 431 U.S. 678, 693 (1977) ("[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976) (holding that a pregnant minor's right to privacy outweighs parental interest in that minor's ending a pregnancy).
140. *See* Fare v. Michael C., 442 U.S. 707, 722–24 (1979) ("[T]he probation officer is not in a position to offer the type of legal assistance necessary to protect

cannot receive a death sentence;[141] children have a right to be free from unreasonable search and seizures;[142] children cannot be sentenced to life imprisonment without parole;[143] and children are in a different constitutional and legal class than adults.[144]

Additionally, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA),[145] which created the Office of Juvenile Justice and Delinquency Prevention (OJJDP)[146] in 1974; both actions stemmed from a desire to regulate juvenile delinquency and rehabilitation on a national level.[147] The JJDPA sets aside federal funding for OJJDP to provide to states for juvenile delinquency prevention programs and rehabilitation services.[148]

In response to these landmark decisions and new legislation, a considerable number of young lawyers began to enter public interest fields, forming nonprofit organizations dedicated to protecting children's rights.[149] While these new juvenile defenders had to con-

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the *Fifth Amendment* rights of an accused undergoing custodial interrogation that a lawyer can offer.").

141. Roper v. Simmons, 543 U.S. 551, 568, 575 (2005) (emphasizing that the United States was the last nation to officially sanction children to be executed and holding that juvenile death sentences violate the Eighth and Fourteenth Amendments).

142. *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 376–77 (2009) (holding that a school official's strip search of a student was unreasonable under the Fourth Amendment).

143. Miller v. Alabama, 567 U.S. 460, 479 (2012); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (holding that *Miller* must be applied retroactively to anyone currently incarcerated for life without parole sentences from offenses committed as juveniles and that states must either resentence those convicted or consider those convicted for parole because children "must be given the opportunity to show their crime did not reflect irreparable corruption").

144. *See* J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) ("children are not adults").

145. Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA), Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 18 and 34 U.S.C. (2018)).

146. Office of Juvenile Justice and Delinquency Prevention (OJJDP), https://bit.ly/2NAukS1 [https://perma.cc/ZE6Q-8975] (last visited Nov. 9, 2019).

147. MERLO, *supra* note 83, at 14.

148. *Id.* at 14–15. In order to receive the money, states must meet several standards: "1. [r]educe disproportionate minority contact in the juvenile justice system"; "2. [d]einstitutionalize status offenders"; "3. separate juveniles from adults in secure facilities"; and "4. remove juveniles from adult jails and lockups." *Id.* at 15. The difficulty arises when states choose to forego the funds so that they do not have to meet the required standards. *Id.*

149. *See, e.g.*, Robert Schwartz, Gault's *Ripple Effect: the Founding of Juvenile Law Center*, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 99, 99–100 (Kristin Henning et al., eds., 2018) (describing the formation of the Juvenile Law Center, which Temple Law School graduates started in Philadelphia in 1975); Patricia Puritz, *Building a National Juvenile Defense Community: the National Juvenile Defender Center*, *in* RIGHTS,

front the fundamental question of all lawyers—who is my client?—and learn how to represent the wishes of children rather than solely their best interests,[150] the biggest difficulty facing children's lawyers was and still is the lack of any national or centralized databases for juvenile justice statistics.[151] The other main issue for juvenile attorneys is children's lack of education regarding the rights they have during detention, questioning, arrest, and delinquency proceedings.[152] Children's lack of constitutional knowledge has resulted in the abuse of children's rights by corrupt juvenile judges and legal officials, as the Kids for Cash scandal in Pennsylvania demonstrated.[153] Although the Supreme Court decided *Gault* more than 50 years ago, many states—especially Michigan—still fail to ensure the protection of children's guaranteed constitutional rights.

III. ANALYSIS

When the Supreme Court held in 2016 that the ban on sentencing children to life imprisonment without parole (LWOP) applies retroactively to those currently serving such sentences ("juvenile lifers"),[154] most states implemented this holding by offering parole consideration. Two states, however, chose to resentence the juve-

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RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 169, 174–76 (Kristin Henning et al., eds., 2018) (describing the formation of the National Juvenile Defender Center (NJDC), which was founded to develop a community amongst and provide a resource for juvenile defenders nationwide).

150. *See* Schwartz, *supra* note 149, at 103–06 (explaining how many juvenile judges were not accustomed to having lawyers who represented a child's wishes and struggled to accept the practice in their courtrooms).

151. *See* DONALD J. SHOEMAKER, JUVENILE DELINQUENCY 28–29 (3d ed. 2018) (detailing the lack of a national database for juvenile court statistics); MERLO, *supra* note 83, at 12–13 ("states do not have a uniform system for providing counsel" and "procedures often vary county by county [and state by state]").

152. *See* MERLO, *supra* note 83, at 55 (analyzing a survey that found that merely ten percent of detained children exercised their right to counsel, which suggests that most children do not "fully comprehend the language of the *Miranda* warning," are "unclear on what the right to counsel means" and are "mistaken in their understanding of the right to remain silent"). *See also supra* notes 24–25 and accompanying text.

153. *See* MERLO, *supra* note 83, at 56–57. The Kids for Cash scandal erupted in 2009 when Luzerne County, Pennsylvania, removed juvenile judges Mark Ciavarella and Michael Conahan from the bench for a multitude of criminal charges involving their acceptance of $2.8 million in kickbacks for sending juveniles to two private, for-profit detention facilities. *Id.* The judges denied children access to legal counsel in nearly 2,000 cases. *Id.* "[T]he illegal and immoral behavior of the two judges demonstrates that it is insufficient to stipulate that juveniles are to be represented by counsel and that they will have due process protections without also taking steps to ensure that they will be afforded those rights." *Id.*

154. See *supra* note 143 and accompanying text.

nile lifers; these states are Michigan and Pennsylvania.[155] Michigan's treatment of juvenile lifers sparked significant scrutiny of its juvenile justice system in general, inspiring this analysis of the failure of Michigan's current laws and actual implementation of those laws to meet the constitutional standards for children.

A. Michigan's Juvenile Code

The Probate Code of 1939 contains Michigan's current laws regarding juvenile delinquency proceedings.[156] Michigan's juvenile delinquency proceedings are not considered criminal proceedings—unless waived to adult criminal court—and, as a result, do not have to adhere to the rules of criminal procedure.[157] Michigan's circuit courts hear delinquency cases in the family division.[158]

Under Michigan's current law, a "juvenile" is anyone "less than 17 years of age," with no statutorily-set minimum age.[159] Although Michigan recently enacted "Raise-the-Age" legislation that changes the automatic age of adult criminal culpability to 18,[160] this

155. *See* RJ Vogt, *The Biggest Access to Justice Decisions of 2018*, LAW360 (Dec. 16, 2018, 8:02 PM), https://bit.ly/2BFtzk2 [https://perma.cc/4NXH-WSLR].

156. *See* MICH. COMP. LAWS § 712A.1–712A.32 (2018). This section of the Probate Code is commonly called the "Juvenile Code" in Michigan. See the explanation following the code section: https://bit.ly/2V0mcuE [https://perma.cc/UK8E-K9NZ].

157. *See* MICH. COMP. LAWS § 712A.1(2) (2018).

158. MICH. COMP. LAWS § 712A.1(e) (2018). The family division of the circuit courts also handle matters such as child custody, parental rights hearings, and child neglect cases. *Michigan's Current Court System*, MICHIGAN COURTS, https://bit.ly/2ttfmSY [https://perma.cc/9MZF-B4YZ].

159. MICH. COMP. LAWS § 712A.1(1)(i) (2018). Michigan is in the minority with its current age of 17. *See* David Eggert, *Bills to Raise Adult Criminal Age to 18 Advance in Michigan*, DETROIT FREE PRESS (Apr. 30, 2016, 5:26 PM), https://bit.ly/2XbYjlK [https://perma.cc/X6V3-VTAN] (describing how nine states permitted 17-year-olds to be charged as adults in 2016); Anne Teigen, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 17, 2017), https://bit.ly/2BunSTg [https://perma.cc/3Q76-8ZY6] (describing how only five states had a criminal culpability age of 17 in 2017); Ben Thorp, *State House Committee Passes Bills to Raise the Age Michiganders Can Be Tried as Adults*, MICHIGAN RADIO (Nov. 28, 2018), https://bit.ly/2NeHKRy [https://perma.cc/58MK-DKN9] (describing how only four states had a criminal culpability age of 17 in 2018). *But see* MICH. COMP. LAWS § 712A.17(2) (2018) (granting children the right to a jury trial upon request). One way in which Michigan is leading the states is by permitting children the right to a trial by jury upon request, a constitutional right specifically withheld from children. *Id.*; *see supra* note 137 and accompanying text. Because the Supreme Court previously held that juvenile jury trials are inconsistent with the *parens patriae* doctrine, Michigan's granting that right seems to conflict with the majority of its own Juvenile Code which largely demonstrates a *parens patriae* basis. *See supra* note 137 and accompanying text; *infra* note 198 and accompanying text.

160. 2019 Mich. Pub. Acts 108 (October 31, 2019).

law will not take effect until October 1, 2021, and will not apply retroactively, meaning 17-year-old children in Michigan will continue to face criminal charges for the next two years.[161] Additionally, Michigan currently has no minority age for criminal liability, in contrast with common law.[162] Michigan's statutory juvenile age applies to "the time of the commission of the offense"; so, even if a child turns 17 before the hearing commences, that child must be tried in juvenile court—barring a jurisdictional waiver by the prosecutor.[163] If a child erroneously ends up in adult criminal court for an offense committed while still a juvenile, the adult criminal court must "transfer the case without delay . . . ."[164]

Although the automatic age of adult culpability is 17, Michigan permits courts to jurisdictionally waive to adult criminal court children 14 and older who commit a felony-equivalent offense.[165] The jurisdictional waiver occurs upon a prosecutor's petition and a judge's approval of that petition.[166] Though the child—and attorney, if applicable—must receive notice of the prosecutor's petition, the child's parents or guardians only receive notice if the court is aware of their addresses.[167] Before approving the waiver petition, the juvenile court must hold a probable cause hearing and, on a finding of probable cause, must determine whether the waiver is in the best interests of both the child and the public.[168] The other form of jurisdictional waiver occurs when an adult criminal court previously tried a child for a felony-equivalent offense and when

161. *See id.* (listing the effective date as October 1, 2021); *see also* Miriam Francisco, *Michigan Raises the Age of Legal Adulthood for Most Criminal Cases*, DETROIT METRO TIMES (Nov. 1, 2019, 2:13 PM), https://bit.ly/2NyjTOA [https://perma.cc/T9VU-653D]. Because the new Raise-the-Age law does not go into effect until 2021, this Comment will consistently refer to and analyze the currently in-force law which requires adult criminal culpability for children 17 and older.

162. *See supra* text accompanying note 40 (describing common law's minimum age for criminal liability).

163. MICH. COMP. LAWS § 712A.3(1) (2018).

164. *Id.*

165. MICH. COMP. LAWS § 712A.4(1) (2018).

166. MICH. COMP. LAWS § 712A.4(1)–(2) (2018). Prosecutors have a discretionary power to petition for a jurisdictional waiver. *Id.*

167. MICH. COMP. LAWS § 712A.4(1)–(2) (2018). No Juvenile Code provision requires notice to parents/guardians when a child is in custody or notice to the child regarding why detention occurred. *See* MICH. COMP. LAWS § 712A.15 (2018).

168. *See* MICH. COMP. LAWS § 712A.4(3)–(4) (2018). The juvenile court must consider six factors in its best interest determination: 1) the "seriousness of the alleged offense in terms of community protection," 2) the child's culpability, 3) the child's previous delinquency history, 4) the child's previous participation in delinquency programs, 5) the "adequacy of the punishment or programming available," and 6) the child's "dispositional options." MICH. COMP. LAWS § 712A.4(4) (2018). But the statute requires the court to give "greater weight" to the first and third factors than to any of the others. MICH. COMP. LAWS § 712A.4(3) (2018).

the current offense is also a felony-equivalent—"once an adult, always an adult."[169] Michigan also permits law enforcement to place children 15 and older in an adult detention facility, although those children must stay in a cell separate from adults.[170]

B. Practice What You Preach

1. Jurisdictional Waiver

Michigan's Juvenile Code permits juvenile judges to waive to adult criminal court the juvenile court's jurisdiction over children aged 14 and older upon the prosecutor's request.[171] As a result, one of the greatest inconsistencies of Michigan's juvenile courts involves the waiver of juvenile jurisdiction. The large majority of issues involve the failure of trial courts to follow the "at the time of the offense" rule.[172] In some cases, the appeals courts will remand a case to juvenile court if they discover that the offender was under 17 at the time of the offense.[173] But this result is not a guarantee.[174]

2. Waiver of Constitutional Rights

One reason why the waiver of constitutional rights presents an issue for children in Michigan is that delinquency proceedings have two phases: adjudicative and dispositional.[175] The Michigan Su-

169. MICH. COMP. LAWS § 712A.4(5) (2018). Jurisdiction over a child in such circumstances is automatically waived to adult criminal court with no hearings or motions. *Id.*

170. MICH. COMP. LAWS § 712A.16(1) (2018).

171. *See supra* notes 165–68 and accompanying text; *see also* Espie v. Birkett, No. 07-12506-BC, 2010 WL 2994010, *15 (E.D. Mich. July 28, 2010).

172. *See supra* note 163 and accompanying text.

173. *See* Dickens v. Jones, 203 F. Supp. 2d 354, 362–65 (E.D. Mich. 2002) (holding that the case should have never remained in adult criminal court due to the defendant's being a juvenile at the time of the offense and ordering the juvenile court to now evaluate whether the defendant's best interest required being heard in the juvenile court).

174. *See* People v. Hana, 504 N.W.2d 166, 175 (Mich. 1993) ("[W]e are unaware of a constitutional right to be treated as a juvenile."); *see, e.g.*, *In re* Collins, No. 337855, 2018 WL 987241, *4–7 (Mich. Ct. App. Feb. 20, 2018) (applying *Hana* and holding that adjudication as an adult was permissible—even though offenses were committed when defendant was 13–16 years old—because the defendant "had no right to remain under the [juvenile] court's jurisdiction and be treated as a juvenile"). Such a result is inconsistent with MICH. COMP. LAWS § 712A.3(1)). *But see In re* Matson, No. 332780, 2017 WL 4803572, *7 (Mich. Ct. App. Oct. 24, 2017) (court affirming the denial of waiver to adult criminal court for a defendant who was 16 at the time of offense).

175. *See In re* Scruggs, 350 N.W.2d 916, 918–19 (Mich. Ct. App. 1984) (pointing out the distinct categories of juvenile proceedings and holding that probation violations do not require an adjudicative phase to determine the court's jurisdiction because the juvenile has been before the court previously). The adjudicative phase involves the jurisdictional determination of whether the child is even under

preme Court has held that children are not entitled to constitutional rights in the dispositional phase of juvenile proceedings.[176] Michigan courts have also refused to retroactively apply *Kent* and *Gault*.[177]

Michigan courts have addressed children's specific rights as well as children's "full panoply of constitutional rights,"[178] holding that 15 minutes is not sufficient for a juvenile to prepare for a court proceeding[179] and that In re *Winship*[180] only applies to the adjudicative phase and not to the dispositional phase.[181] Unfortunately, Michigan's laws permit children as young as 11-years-old to waive their constitutional rights without ensuring that those children fully understand the waiver's significance and consequences.[182]

3. Accessing Counsel

Although the Supreme Court held that children have a right to counsel at "every step" of delinquency proceedings, the Court did not specify standards for the provision of children's counsel or for

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the juvenile court's authority. *Id.* The dispositional phase follows the adjudicative phase and involves the court's deciding what action to take with regards to the child. *Id.*

176. *Hana*, 504 N.W.2d at 177.

177. *See, e.g.*, People v. Price, 179 N.W.2d 177, 178 (Mich. Ct. App. 1970); People v. Terpening, 167 N.W.2d 899, 902 (Mich. Ct. App. 1969).

178. *Hana*, 504 N.W.2d at 177.

179. *See, e.g.*, People v. Gillman, 248 N.W.2d 553, 553 (Mich. Ct. App. 1976) (first citing *In re* Gault, 387 U.S. 1, 33 (1967); then citing People v. Gulley, 238 N.W.2d 421 (Mich. Ct. App. 1975); and then citing People v. Bell, 241 N.W.2d 203 (Mich. Ct. App. 1976)) ("To comply with due process requirements, the notice [of the charge] must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded."). "Fifteen minutes does not meet the test of reasonable opportunity to prepare." *Id.*

180. *In re* Winship, 397 U.S. 358 (1970).

181. *See In re* Belcher, 371 N.W.2d 474, 477 (Mich. Ct. App. 1985) (holding that "the standard of proof in a juvenile probation revocation proceeding is proof by a preponderance of the evidence" because *Winship* only applies to the adjudicative phase and not to the dispositional, to which probation hearings belong).

182. *See* People v. Abraham, 599 N.W.2d 736, 739–43 (Mich. Ct. App. 1999) (affirming the juvenile court's permission for an 11-year-old boy tried in adult criminal court after a jurisdictional waiver to additionally waive both his *Miranda* rights and his right to an attorney with his mother present); *see also id.* at 747–48 (Doctoroff, J., dissenting) (pointing out that the child's mental and intellectual capacity was significantly below the normal standard for his age, with some of his skills being at either a six or eight-year-old level). *Cf.* People v. Williams, No. 234442, 2004 WL 1933115, *1 (Mich. Ct. App. Aug. 31, 2004) (permitting a 16-year-old child to waive his *Miranda* rights and right to counsel with no parents or guardians present and prior to his parents even being notified of his detention); *id.* at *2 (Cooper, J., dissenting) ("It is clear in the court rules and juvenile code that a juvenile's parent or guardian must be contacted immediately when he or she is taken into custody.").

the qualifications of children's counsel.[183] The Court has clearly held, however, that probation officers are not qualified to represent a child in a delinquency proceeding.[184] Michigan permits juvenile judges to allow probation officers to act as "referees," with one of their duties being to "examine witnesses," a function lawyers have traditionally performed.[185]

Additionally, Michigan requires juvenile courts to "advise the child that he or she has a right to an attorney at each stage of the proceeding"[186] but also permits a child to waive that right without first consulting a parent or an attorney.[187] A juvenile court only appoints lawyers to represent children in specific scenarios.[188] But the Juvenile Code provides no guidance for the juvenile judge to use in determining whether or not the child (or child's parents) can afford to hire an attorney.[189] The Juvenile Code does not require the court to ensure that the child understands what "right to an attorney" actually means,[190] something that the Michigan legislature should remedy due to the low percentage of children who actu-

183. *See supra* notes 125–26 and accompanying text.

184. *See supra* note 140; *see also In re* Gault, 387 U.S. 1, 36 (1967) ("The probation officer cannot act as counsel for the child.").

185. MICH. COMP. LAWS § 712A.10(1) (2018); *cf. In re* Bennett, 355 N.W.2d 277 (Mich. Ct. App. 1984).

186. MICH. COMP. LAWS § 712A.17c(1) (2018). The statute does not require the juvenile courts to likewise advise the parents of the child's right to counsel. *Id.* Such a requirement is in violation of the Court's holding in *Gault*. *See Gault*, 387 U.S. at 41 ("[T]he child and his parents must be notified of the child's right to be represented by counsel . . . ."). Because Michigan permits children to waive their right to representation without first consulting their parents, informing the parent of the right to representation is even more crucial to ensure that the parent has the opportunity to object to the waiver (the one exception to the child's ability to waive). *See supra* note 182 and accompanying text.

187. *See* MICH. COMP. LAWS § 712A.17c(3) (2018).

188. MICH. COMP. LAWS § 712A.17c(2) (2018). These scenarios include: 1) if the parents are absent (even intentionally) from the delinquency proceedings, 2) if the parent brought the charges or was the victim, 3) if the child or child's parents/guardians are "financially unable to employ an attorney" (and the child does not waive representation), 4) if the child's parents/guardians "refuse or neglect" to hire an attorney (and the child does not waive representation), or 5) if the court finds that the child's best interests or the public's best interests demand an appointed lawyer. *Id.* Of course, if the child waives his or her right to representation, the judge no longer has an obligation to appoint counsel in these scenarios. *See id.*

189. *Id.*

190. MICH. COMP. LAWS § 712A.17c (2018). *Compare* People v. Berry, 157 N.W.2d 310, 313 (Mich. Ct. App. 1968) (citing *Gault*, 387 U.S. 1 (1967)) ("[T]he mere showing that the accused knew of his right to counsel is not sufficient to show a waiver of counsel . . . ."), *with* People v. Berry, 165 N.W.2d 896, 897 (Mich. Ct. App. 1968) (reversing the prior holding and ruling that "the absence of an *express waiver* of that right is not reversible error").

ally understand their rights to representation.[191] As one children's advocate has written: "Having a child navigate the court system without a lawyer is like having them drive on the highway at rush hour without ever having been behind the wheel. It is fast, confusing, and dangerous."[192]

Although Governor Snyder enacted measures in 2013 to improve indigent access to counsel statewide[193] and most counties have now implemented these required changes,[194] the current system is still county-controlled, meaning that each county is solely responsible for funding and maintaining a form of indigent defense.[195] Additionally, the Michigan Indigent Defense Commission has yet to conduct a report on children's access to indigent counsel and currently has no requirements for counties to have dedicated juvenile public defenders.[196] But another source reports from an interview with an in-state juvenile attorney that the Michigan legal system frequently takes advantage of children.[197]

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191. *See supra* note 152.

192. Mary Ann Scali, *Being David: The Future of Juvenile Defense and the Goliath of Youth Injustice*, *in* RIGHTS, RACE, AND REFORM: 50 YEARS OF CHILD ADVOCACY IN THE JUVENILE JUSTICE SYSTEM 187, 191 (Kristin Henning et al., eds., 2018).

193. *See About the Michigan Indigent Defense Commission*, MICH. INDIGENT DEF. COMM'N, https://bit.ly/2mGBQjD [https://perma.cc/A25X-N8W2] (last visited Sept. 29, 2019) (describing how Governor Snyder created this commission to monitor and supervise the implementation of better policies regarding indigent access to defense counsel across the state).

194. Mark McCabe, *An Update on the Michigan Indigent Defense Commission Act*, TRI-COUNTY TIMES (Sept. 24, 2019), https://bit.ly/2opDN4q [https://perma.cc/Z35M-DNZH].

195. *See The Right to Counsel and the Michigan Indigent Defense Commission – Part II*, TRI-COUNTY TIMES (July 24, 2018), https://bit.ly/2EgUZhT [https://perma.cc/7VK3-5JH4]; *see also* Emily Zantow, *Michigan County Sues over New Public Defender Rules*, COURTHOUSE NEWS SERV. (Dec. 12, 2018), https://bit.ly/2Lkf7BT [https://perma.cc/7XTC-HAV8] (describing a lawsuit filed by Oakland County, Michigan, challenging the Commission's new policies, which would require the County to allocate more money for their currently subpar indigent defense system).

196. *See Policies & Reports*, MICH. INDIGENT DEFENSE COMM'N, https://bit.ly/2DOfVMm [https://perma.cc/E9TA-VNXV] (last visited Dec. 4, 2019) (listing the reports and data collection published by the Commission, none of which addresses children's access to counsel in Michigan).

197. *See* NAT'L JUVENILE DEF. CTR., *Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel* 27 (2017), https://bit.ly/2mJioTr [https://perma.cc/9TR2-7QPA] ("One attorney in Michigan reported observing four unrepresented children waive their right to an attorney, enter guilty pleas, and be fingerprinted in violation of state law."). Presumedly, these children were permitted to waive their right to an attorney pursuant to the Juvenile Code. *See supra* note 187 and accompanying text.

4. Categorizing Juvenile Proceedings

Because Michigan treats juvenile matters "not as criminal proceedings" but also does not label them "civil proceedings,"[198] a question arises as to what procedural rules should apply in juvenile courts. The *Gault* Court expressly raised concerns that the lack of procedural standards for juvenile proceedings results in the juvenile courts' taking advantage of the "informal" nature of the hearings and often causing harm to the children.[199] The "informal nature," of course, stems from the principles of the *parens patriae* doctrine—principles which form the foundation for much of Michigan's Juvenile Code.[200]

Permitting juvenile courts the latitude to determine a child's best interests without providing guidance for doing so can lead to situations like the Kids for Cash scandal in Pennsylvania.[201] Such situations result from juvenile judges' informing children that the role of the judge is to act in the child's best interest, leading the child to forego legal representation that would ensure that the child's best interests and wishes are accurately represented in the proceedings.[202] Pennsylvania responded to its judges' abuse of power by amending its statutes to presume that all children are indigent the moment they step into juvenile court, meaning that the

198. *See supra* note 157 and accompanying text; *see also* MICH. COMP. LAWS § 712A.17(1) (2018) (permitting Michigan's juvenile delinquency proceedings to be "informal"). *But see* People v. McFarlin, 208 N.W.2d 504, 513–14 (Mich. 1973) (holding that sentencing determinations for adult convictions must include considerations of juvenile records/adjudication); *In re* Carey, 615 N.W.2d 742, 743–48 (Mich. Ct. App. 2000) (holding that juvenile competency should be determined using the same competency standards used for adults in criminal court proceedings).

199. *See In re* Gault, 387 U.S. 1, 21–26 (1967) ("'Procedure is to law what "scientific method" is to science.'") (quoting Henry H. Foster, Jr., *Social Work, the Law, and Social Action*, 45 SOC. CASEWORK 383, 386 (1964)).

200. *See, e.g.*, MICH. COMP. LAWS § 712A.2d(2) (2018) (giving courts the ability to grant a prosecutor's petition for a jurisdictional waiver if the court finds it in the best interest of the child); *id.* § 712A.4(4) (requiring the court to determine if a jurisdictional waiver is in the child's best interest before granting the prosecutor's petition); *id.* § 712A.11(1) (permitting the court to take action on preliminary inquiries into allegations against a child if the court determines it is in the child's best interest); *id.* § 712A.17(1)(b) (allowing the court to grant a continuance or adjournment if the court determines it is in the child's best interests); *id.* § 712A.17c(2)(e) (requiring the court to appoint an attorney for a child if the court finds it in the best interest of the child).

201. *See supra* note 153 and accompanying text.

202. *See, e.g.*, *supra* note 153 and accompanying text.

juvenile courts must automatically assign an attorney to the child as soon as delinquency proceedings begin.[203]

Although Michigan's Juvenile Code contains individual procedural steps for certain sections, no statutory provision dictates the order in which those steps should proceed.[204] Additionally, the juvenile courts apply the existing rules inconsistently and seem to confuse terminology on a regular basis.[205]

C. Recommendations

Michigan, despite beginning to consider how to improve children's constitutional rights,[206] could take immediate remedial action in several ways.[207]

1. Presumption of Indigency

The first way that Michigan can improve access to constitutional rights for children is to adopt a statute similar to that adopted

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203. *See* 42 PA. CONS. STAT. § 6337.1(b)(1) (2018). This presumption can only be overcome by proving to the juvenile court that the child—not the parents—can afford an attorney. *Id.*

204. *See*, *e.g.*, MICH. COMP. LAWS § 712A.11 (2018) (listing the procedure for fingerprint orders but not specifically stating that the steps must be done in any particular order). This Comment's analysis focuses specifically on Michigan's *statutory* provisions for juvenile delinquency proceedings; however, court rules can add important procedural details and requirements that may not be specifically codified in the statutes. An analysis of Michigan's juvenile court rules is beyond the scope of this Comment. *See* MICH. CT. R. 3.901–3.993 (listing Michigan's juvenile court rules); *see generally* MICH. JUDICIAL INST., JUVENILE JUSTICE BENCHBOOK: DELINQUENCY AND CRIMINAL PROCEEDINGS (3d ed. 2019), https://bit.ly/2O4eYE6 [https://perma.cc/MDX6-C5XB] (providing guidance to juvenile judges and court/legal personnel on proper implementation of statutes, rules, and policies in Michigan's juvenile courts).

205. *See generally* People v. Ristich, 426 N.W.2d 801, 802–03 (Mich. Ct. App. 1988) (pointing out that the *Gault* Court said that juvenile proceedings can be considered "criminal" proceedings when dealing with the self-incrimination privilege and using that to argue that juvenile proceedings can be considered "criminal" proceedings in additional contexts); *In re* Belcher, 371 N.W.2d 474, 476 (Mich. Ct. App. 1985) (claiming that juvenile probationers and adult probationers are "analogous" and can be held to the same burden of proof); *In re* Chapel, 350 N.W.2d 871, 874 (Mich. Ct. App. 1984) (discussing "juvenile criminal matters").

206. *See, e.g.*, *Gov. Snyder Signs Legislation Creating Juvenile Mental Health Courts*, TV6 FOXUP (Dec. 28, 2018), https://bit.ly/2BHpmfQ [https://perma.cc/HPK9-LUFR]. At the end of 2018, shortly before leaving office, Governor Rick Snyder signed House Bills 5806–5808, which will create juvenile mental health courts as another rehabilitative recourse for children charged with juvenile delinquency in Michigan. *Id.*

207. For a discussion of ways that Michigan could improve children's access to justice and constitutional protections through a substantive due process framework, see generally Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 LOY. U. CHI. L. J. 211 (2018).

in Pennsylvania,[208] which presumes that every child who enters the juvenile court is indigent and needs publicly-funded counsel. Such a change would only work, though, if the Michigan Indigent Defense Commission were to require the county-based defender organizations to employ dedicated juvenile public defenders to fill the need that such a statute would create.[209] The Commission should also conduct its own study of juvenile courts statewide to definitively determine just how widespread the lack of juvenile access to counsel truly is.[210]

2. Age Adjustments

The second way that Michigan can improve its children's access to constitutional rights is to address the recent Raise-the-Age legislation's deferred effective date[211] and to set a minimum age for criminal culpability.[212] Such changes could effectively ensure that only children who know the difference between right and wrong are legally punished for offenses and that children who are still in high school are not automatically sent to the adult criminal justice system for offenses that can be handled in the juvenile courts.

Because Michigan has no minimum age for criminal culpability, prosecutors were able to pursue charges against a 10-year-old child in Detroit for having a gun in his backpack at school, and the juvenile court could require a $5,000 personal bond against the child.[213] Likewise, Michigan's current laws require 17-year-old children, many of whom are still in high school, to automatically be charged as adult criminals; the recently-passed legislation to remedy that problem will not go into effect for 2 years, during which time 17-year-olds will continue to face automatic criminal culpability.[214]

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208. *See supra* note 203 and accompanying text.

209. *See supra* notes 193–97 and accompanying text.

210. *See supra* notes 196–97 and accompanying text.

211. *See supra* notes 159–61 and accompanying text.

212. *See supra* note 162 and accompanying text.

213. *See* Benjamin Raven, *Ten-Year-Old Michigan Boy Charged After Bringing Loaded Gun to School*, MLIVE (Dec. 6, 2018), https://bit.ly/2Ej2rcx [https://perma.cc/4DRC-5GZT]. The school later admitted that the "loaded gun" had one bullet in the chamber but no additional ammunition. *See 10-Year-Old Boy Charged for Bringing Loaded Gun into Detroit School*, WXYZ DETROIT (Dec. 6, 2018), https://bit.ly/2V5WoNI [https://perma.cc/CY3X-TQZA].

214. *See* Interview with Zachary*, Michigan resident (Dec. 28, 2018). *At Zachary's request, I have withheld his last name for privacy purposes. Zachary, at the age of 17, was alleged to have engaged in several counts of sexual misconduct with his previous girlfriend and was facing charges in adult criminal court. *Id.* The court assigned Zachary, who was a senior in high school and estranged from his mother (with no clear alternative guardian), a public defender with whom Zachary

3. No Blanket Jurisdictional Waivers

The third way that Michigan can improve its children's access to constitutional rights is to create more rigorous requirements for jurisdictional waivers to adult criminal courts[215] and to consistently follow the existing laws regarding jurisdictional waiver.[216]

Perfunctorily waiving children 14 and over to adult criminal court defeats the very purpose of Michigan's Juvenile Code.[217] A Michigan Supreme Court judge emphatically expressed his belief that the waiver concept is incompatible with the rehabilitative nature of the juvenile court.[218] The constant jurisdictional waiver has also resulted in countless children being housed with adult criminals, violating Michigan's own Juvenile Code.[219] These types of waivers can also have far-reaching and unexpected implications for and consequences on other aspects of children's lives. Besides the obvious impact of adult criminal convictions on a child's criminal record (convictions that are extremely difficult to expunge in comparison to juvenile delinquency adjudications),[220] a non-citizen

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had to initiate contact. *Id.* Zachary's public defender, a private attorney receiving a government fee for his work on this case, encouraged Zachary to take a plea deal (plead guilty to a felony, serve one year in jail, and be placed on the sex offender's registry). *Id.* Zachary, although innocent, had no one else to consult and accepted this plea deal. *Id.* Shortly after Zachary finished his jail time, the alleged victim recanted to the prosecutor, and the judge rescinded the requirement for Zachary to register as a sex offender. *Id.* The felony conviction remains on Zachary's record, however, and has presented numerous problems as he strives to provide for his wife and three children. *Id.* Although he has a pardon letter from the governor, Zachary must carry that letter with him to counteract the false conviction still on his record. *Id.*

215. *See supra* note 168 and accompanying text.

216. *See supra* notes 171–74 and accompanying text.

217. *See* MICH. COMP. LAWS § 712A.1(3) (2018) ("This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state.").

218. *See* People v. Hana, 504 N.W.2d 166, 178–79 (Mich. 1993) (Cavanagh, C.J., dissenting) ("In reality, the decision to waive juvenile court jurisdiction is not a decision to *rehabilitate*, but, rather, a decision to *punish* the juvenile upon conviction.").

219. *See supra* note 170 and accompanying text. Although Michigan statutes require children to be kept separate from adult prisoners, the Sixth Circuit recently heard an appeal on a lawsuit that alleges that Michigan has housed 500 children in close quarters with adult prisoners in Michigan correctional facilities, resulting in many of these children's suffering sexual abuse including rape. *See generally* Doe v. Snyder, 945 F.3d 951 (6th Cir. December 18, 2019); Kevin Koeninger, *Juveniles Housed with Adults Bring Claims to Sixth Circuit*, COURTHOUSE NEWS SERV. (Dec. 6, 2018), https://bit.ly/2NdqV9P [https://perma.cc/426V-R675].

220. *See, e.g.*, "Expunging Juvenile Records," *Expungement, Wrongful Conviction, CQEs and CAEs in Ohio*, FRANKLIN COUNTY LAW LIBRARY, https://bit.ly/34M8tww [https://perma.cc/S8K5-GBNZ] (last visited Nov. 10, 2019).

child's being waived to adult criminal court can potentially result in that child's deportation because adult convictions are criminal and trigger mandatory deportation statutes.[221]

4. Consistent Categorization of Juvenile Proceedings

The final way that Michigan can improve its children's access to constitutional rights is to ensure that juvenile proceedings are consistently categorized as either civil (according to the current statute) or criminal (as court opinions often reference) but not both.[222] Juvenile judges who lived through the changes of the *Gault* case find the recent changes to juvenile justice—to treat children more like adult criminals than like children in need of *parens patriae* guidance—to be disturbing.[223]

Because Michigan's juvenile courts are inconsistent in how they treat children (sometimes like adult criminals and sometimes as children in need of guidance),[224] children in Michigan cannot know for sure where they stand when they enter a juvenile courtroom. Michigan needs to either continue to follow its own Juvenile Code and treat children in the manner of *parens patriae* through civil proceedings[225] or to follow the recent trend of its juvenile judges and shift towards treating all offenders—even children—in the same manner through criminal proceedings.[226] Despite the additional constitutional rights that criminal categorization would guarantee, civil categorization could provide other protections.[227]

IV. CONCLUSION

The treatment of children in U.S. courts has undergone a myriad of changes in the last 100 years: although common-law courts originally dealt with child offenders in the same manner as adult criminals, the 20th century saw the creation of unique juvenile

221. *See generally In re* Devison-Charles, 22 I. & N. Dec. 1362 (B.I.A. Sept. 12, 2000) (stating that juvenile delinquency adjudications do not trigger mandatory deportation statutes because delinquency proceedings are civil rather than criminal).

222. *See supra* note 205 and accompanying text.

223. *See* Douglas Levy, *A Sidebar with . . . Judge Frank D. Willis*, MICH. LAWYERS WEEKLY (Mar. 9, 2015), https://bit.ly/2tqMoD7 [https://perma.cc/KZ3G-GS33]. Judge Willis, a retired juvenile court judge, expressed his concern that the then-recent decision to permit juveniles access to the incompetency defense and to competency hearings reflects a dangerous trend to treat children as adults rather than "in the patriarch theory." *Id.*

224. *See supra* note 205 and accompanying text.

225. *See supra* note 198 and accompanying text.

226. *See supra* note 205 and accompanying text.

227. *See supra* notes 220–21 and accompanying text.

courts that used the *parens patriae* doctrine to treat child offenders as delinquent youth in need of guidance from parental authority figures. As the 21st century began, though, juvenile courts across the country followed the Supreme Court's lead by providing constitutional protections to children.

This shift originated from the Supreme Court's realization that children need the protection that constitutional rights provide and cannot rely on imperfect, human judges to consistently provide that protection. Michigan, though, has yet to emerge from this transition and to fully implement the necessary protections for its children. Michigan's Juvenile Code, clearly created based on a *parens patriae* mentality, is at conflict with the practices used in many of Michigan's juvenile courts.

To begin taking steps towards the protection of its children, Michigan needs to implement some legal and procedural changes: amend its current statutes regarding child indigent defense to create a presumption of indigency when a child steps into the juvenile court; consider eliminating the child's ability to waive the right to counsel; find a way to remedy the gap between the passage and implementation of the recently-enacted Raise-the-Age legislation; start a discussion about the need for a minimum age of criminal liability; increase the standards and requirements for jurisdictional waivers of children into adult criminal court; and consistently categorize juvenile court proceedings as either civil or criminal in nature.

Children's constitutional rights are critical to their safety and protection, as exemplified by what happened to Brock when the police completely disregarded his constitutional rights. As the Kids for Cash scandal demonstrated, juvenile court judges cannot always be relied upon to act in a child's best interests; thus, it is critical that Michigan ensures that its juvenile courts preserve and respect the constitutional rights of children at all stages of delinquency proceedings.

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