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When Are We Going to Launch *Gault 2.0*?

In *In re Gault,* the U.S Supreme Court affirmed that juveniles share many of the rights adults have in a legal proceeding. The justices relied on very little science in reaching this landmark decision. Since *Gault,* the Court has begun to rely more on empirical research when issuing rulings that impact juveniles. For example, in 2005 in *Roper* the Court cited scientific evidence in ruling that it was unconstitutional to sentence a person to death for a crime committed before the person's 18th birthday.[1] The Court articulated fundamental ways in which adolescents are different from adults.

More recently, in 2012 in *Miller v. Alabama*, the Court ruled that it was unconstitutional to automatically sentence a youth to life without parole for a crime committed before the youth's 18th birthday.[2] Relying on science, the Court stated that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[3] Subsequently, in *Montgomery v. Louisiana*, the Court ruled that the opinion in *Miller* was retroactive.[4]

This article presents research lawyers can use to argue that juveniles, as a class, should not be treated as adults. This article does not describe novel research but relies heavily on peer-reviewed findings published after 2011, the year before *Miller* was argued. If research conducted prior to 2011 is mentioned, it is because the research was either seminal or particularly relevant. In either case, the research presented can be used in individual cases to argue for — using the vernacular of today's world — implementation of *Gault 2.0*.

In *Gault 2.0*, a court's ruling would be consistent with the scientific literature showing, as part of the normal developmental process, that the brain of an adolescent functions differently than that of an adult. Consequently, in *Gault 2.0* courts would require additional safeguards *throughout* the juvenile's involvement with the legal system to address these differences. In deciding *Gault* in 1967, the U.S. Supreme Court said that "we are not here concerned with the procedures or constitutional rights applicable to the pre-judicial stages of the juvenile process, nor do we direct our attention to the postadjudicative or dispositional process."[5] *Gault 2.0* would advance *Gault*. How? The new version would recognize the importance of the developmental differences between adolescents and adults *and* explicitly apply this recognition to pre-judicial stages of the juvenile court process — specifically to the time that young people are taken into custody and informed of their *Miranda* rights.

Based on scientific literature, *Gault 2.0* would also require lower courts to develop a system that ensures judges consider a juvenile's psychosocial maturity when determining the youth's competency to stand trial. The original *Gault* decision repeatedly mentioned that its holding was necessary as a matter of fairness and due process. This would also be a theme of *Gault 2.0*. Reframing the criminal justice system's approach to juveniles to reflect well-established empirical findings related to juveniles is a matter of fairness and justice.

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The Adolescent Brain

Twenty years of empirical findings have documented normative developmental changes in the adolescent brain and how these structural changes impact the brain's functioning.[6] As a normative process, these changes do not culminate until people are in their 20s. Following the onset of puberty, two types of structural changes occur in the brain: (1) white matter increases as cells become more myelinated and (2) gray matter decreases as the synapses are naturally pruned. These changes allow neuronal messages to travel from one part of the brain to another more efficiently, and this leads to the individual parts of the brain functioning more efficiently. Thus, over time, the brain increases its overall efficiency and maturity. Think of it this way: The brain matures from the inside out and from the back to the front. Consequently, the last part of the brain to mature is the frontal lobe. The frontal lobe is often referred to as the CEO of the brain because of its central role in executive functioning.

In addition to the structural changes in the brain during adolescence, there are also normative functional changes. In the dual system model of functional development, the brain's cognitive control system and the socio-emotional system (sometimes referred to as the risk and reward system) account for these changes. The cognitive control system involves portions of the prefrontal cortex and allows a person to do things such as control impulses and consider the consequences (pros and cons) before engaging in an act. Of the two systems, the cognitive control system is the last to mature. The other system — the risk and reward system — contributes to the increase in impulsivity, sensation-seeking and risk-taking. These are all hallmarks of adolescence. Psychosocial maturity is a term psychologists use to refer to a person's development in areas such as sensation-seeking, time orientation, impulsivity, and the ability to resist the influence of adults and peers. When a youth is not with his or her peers or is not emotionally aroused (e.g., scared, excited, etc.), the cognitive control system could be the prevailing system and the adolescent is more likely to demonstrate mature decision-making. However, as it relates to the youth's involvement with the juvenile justice system, peers and emotions are often at play and, under these circumstances, the cognitive control system will not be the dominant system. In general, psychosocial maturity increases as the cognitive control system becomes the prevailing system despite the influence of others or the individual's emotional state.

Miranda Warnings

Only *Miranda* waivers made knowingly, intelligently, and voluntarily are valid.[7] Research has demonstrated that juveniles are less able than their adult counterparts to understand *Miranda* warnings, and this lack of understanding could prevent them from providing a knowing, intelligent, and voluntary waiver. These findings are not new. In 1980, Dr. Thomas Grisso published an article in the *California Law Review* describing his empirical findings in this area.[8] Based upon his findings, Dr. Grisso argued "younger juveniles [those under 15 years old] as a class do not understand the nature and significance of their *Miranda* rights to remain silent and to counsel."[9] The results of a study published 35 years after Grisso's were consistent with Grisso's findings.[10] Like Grisso, the more recent study found older youth had a better understanding of their *Miranda* rights. Further, a youth's previous experience with the legal system and *Miranda* warnings was unrelated to the youth's current understanding of the *Miranda* warnings.

Gault 2.0 would consider these well-established empirical findings, change the law, and establish a per se rule that whenever a juvenile under 15 years old has a custodial police interview, the juvenile must have an attorney present and can only waive *Miranda* rights *after* consulting with the attorney.[11]

From a neuronal perspective, science has yet to develop a rich body of literature explaining exactly why the ability to understand and appreciate *Miranda* warnings improves with age.[12] Research has shown, however, that an increase in the understanding of *Miranda* warnings is associated with an increase in psychosocial maturity.[13] As young people become more psychosocially mature — which includes a growing ability to resist the influence of adults and peers — they engage in better decision-making, display an increased ability to appreciate the risk involved in potential situations, and have an increased ability to delay gratification. These attributes can lead to an increased ability to appreciate what it means to waive *Miranda* warnings.

Arguments Against *Gault 2.0*

Several arguments may be made against updating *Gault* to reflect empirical research findings. First, one might argue this change in the law would cause problems such as creating unnecessary delay in the investigative process. In response, the counterargument is that *Gault 2.0* would reiterate that fairness and justice require the law to change to reflect decades of empirical findings.

Another potential argument is that having a parent present for the waiver is an adequate safeguard against normative juvenile developmental shortcomings. Research, however, provides a two-pronged response to this argument. First, the constitutional rights belong to the child (not the parent), and thus only the child can waive those rights. As noted, research has consistently demonstrated that, as a class, adolescents younger than 15 have significant deficits in their ability to understand and appreciate the *Miranda* warnings. Second, although the research examining the particulars of the adolescent-parent dyad as it relates to *Miranda* is scarce, the results that do exist indicate many parents also do not fully understand the *Miranda* warnings.[14] Consequently, the presence of parents does not necessarily offer the same safeguard that an attorney provides. A lawyer, unlike a parent, may create an environment in which the youth's decision to waive *Miranda* rights is the product of the cognitive control system and not the socio-emotional system. Again, in the service of justice and fairness pursuant to *Gault 2.0*, individuals under age 15 (as a class) must be provided an opportunity to consult with an attorney before they can officially waive their rights.

A court operating under *Gault 2.0* would recognize the problems of juveniles providing false confessions. Frequently, juvenile false confessions are the product of the techniques the police use as well as vulnerabilities related to the youth (including factors related to normal adolescent development, mental health, and cognitive development).[15] In *Gault 2.0,* the court would recognize that requiring that an attorney consult with and remain with all youth under 15 would decrease the likelihood that the youth would provide a false, disputed, or coerced confession.

Protecting Youth 15 or Older

Age is not the only factor affecting a person's ability to understand the *Miranda* warnings. Research has shown that for youth 15 and over, IQ is also an influential factor in determining the youth's ability to understand *Miranda* warnings. Adolescents 15 or older with a less than average IQ are less able to understand their rights, which could prevent them from providing a knowing and intelligent waiver.[16] Research has consistently demonstrated that youth in the justice system have lower cognitive

abilities or IQ scores than their counterparts who are not involved in the system. In a recent study of nearly two thousand detained youth, over half of the males detained scored below the tenth percentile on an intelligence test and more than three quarters of them scored below average.[17] In *Gault 2.0*, the court would rule that the current system does not provide safeguards for the large number of juveniles 15 and over who have less than average IQ scores and that the system must be reformed to remedy this problem.

Unlike the solution proposed for youth 15 or younger, a court would not be as prescriptive or describe a specific remedy because the empirical literature does not point to a clear solution. Instead, the court would offer solutions that a jurisdiction could implement, but the court would also encourage jurisdictions to develop their own solutions. Either way, the court would send the message that the existing system is not adequate and must be reformed.

Currently under *Miranda*, the state bears the "heavy burden" to show that if a waiver occurred, it was knowing, intelligent, and voluntary.[18] Based on empirical findings, in *Gault 2.0* the court would require the state to present a forensic report as evidence of a youth's ability to provide a knowing, intelligent, and voluntary waiver. Consistent with best practices, this type of forensic evaluation is a retrospective evaluation. Thus, the proper question is not, does the youth understand his rights as he stands before the judge? Rather, the proper question is, under the unique circumstance of the custodial interrogation, did the youth understand and appreciate the import of waiving his *Miranda* rights when the police presented them?[19]

Additionally, the evaluator would be required to consider the developmental differences between adolescents and adults, identify which factors were present at the time of the waiver that may have amplified these differences, and consider factors typically addressed in the totality of the circumstances analysis. As expected in any evaluation of a juvenile, the evaluator must also review relevant records (including, but not limited to, school, mental health, treatment and placement records) and interview the youth's primary caregiver and other relevant collateral sources.[20] Given the current understanding of adolescent development, anything short of this would be insufficient for meeting the state's heavy burden of proving a knowing, intelligent, and voluntary waiver.

What Would *Gault 2.0* Require?

Based on empirical evidence, *Gault 2.0*'s holding would extend the reach of its predecessor. *Gault 2.0* would require that youth *younger* than 15 years of age have the opportunity to consult with an attorney before they could waive their *Miranda* rights. Because some, but not all, youth who are 15 years of age or *older* can appreciate and understand their rights, in *Gault 2.0* the court would require a heightened scrutiny analysis for any statement made by these youth without an attorney present.

Competency to Stand Trial

A seminal study of juvenile competency to stand trial (CST) was conducted in 2003.[21] In this groundbreaking study (the MacCAT study), researchers used an instrument, the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA), which assesses three fundamental components of CST: understanding, reasoning, and appreciation. The *understanding* component assesses comprehension and knowledge of courtroom personnel, including their roles, courtroom procedure, and aspects of a defendant's rights during trial. The *reasoning* component assesses a person's ability to identify information that would be relevant to legal defense and legal decisions. Finally, the reasoning component differs from the *appreciation* component because the former applies these concepts in a general sense, but the latter applies the concepts as they apply to the individual's own case.

A unique aspect of the MacCAT-CA is that many of the questions require the person to explain the reasons for his or her answer. Doing so provides the evaluator an opportunity to assess the degree to which the response may be related to a mental health illness such as paranoia or delusions. In this study the researchers also examined different aspects of psychosocial maturity.

The subjects in the MacCAT study were youths age 11-17 years old and young adults age 18-24 years old. Each group consisted of some subjects who were in a jail or detention center and some who were not. The researchers found that age and IQ are significantly related to a youth's competence to stand trial. Specifically, youth under age 16 were more likely to show significant deficits than older youth and young adults. Additionally, those youth, regardless of age, with a less than average IQ were more likely to have significant impairments. The authors of the MacCAT study reached the following conclusion: "Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is even greater among adolescents who are in the justice system than it is among adolescents in the community."[22]

Research has shown that psychosocial maturity impacts a youth's CST abilities. Younger juveniles, regardless of whether they were detained or in the community, were more compliant with authority, and theoretically this compliance can impact their CST abilities.[23] A study published in 2011 examined the impact of future orientation (another aspect of psychosocial immaturity) on youth's CST. The youths who were more future-oriented showed greater abilities associated with CST.[24] Not surprisingly, research has demonstrated that judges consider a youth's level of psychosocial maturity when rendering a decision about a youth's competence.[25] In 2012, Cox and colleagues presented a national sample of 342 judges with a hypothetical CST evaluation report of a juvenile. Judges tended to find youth who are more immature as incompetent.

In *Gault 2.0*, the court would require judges to explicitly consider the impact of normal adolescent development, IQ, age, and psychosocial maturity when rendering an opinion about a youth's CST. In doing so, judges could render a ruling of incompetency based on developmental or psychosocial immaturity. *Gault 2.0* also would recognize that some jurisdictions may choose to develop a "juvenile" version of the CST standard.[26] Consequently, *Gault 2.0* would refer those jurisdictions to the document *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*.[27]

This portion of the *Gault 2.0* ruling may impact the type of CST forensic reports typically tendered to court. Clinicians would be required to consider a juvenile's psychosocial maturity and how it relates to the youth's CST

abilities. These are not uncharted waters. Since at least 2005, forensic psychiatrists and psychologists have urged clinicians to consider a youth's level of psychosocial maturity and how that level impacts the youth's CST abilities.[28] Despite this, for some clinicians, considering psychosocial immaturity will be a novel idea. In such cases, the clinicians should consider utilizing a forensic instrument such as the Juvenile Competency Assessment Interview. At a minimum, clinicians should make sure they have collected data that allows them to develop a clinical opinion regarding the minor's level of psychosocial maturity.

Conclusion

Since the holding in *In re Gault* 50 years ago, the Supreme Court has relied on more empirical evidence when rendering its rulings in cases related to juveniles or those who were juveniles at the time of conviction. Based on scientific evidence, *Gault 2.0* would require changes in law that reflect the long-standing empirical evidence that, as a class, youth under age 15 are not able to provide a knowing, intelligent and voluntary waiver of their *Miranda* rights. Pursuant to *Gault 2.0*, in cases involving youth 15 and older, the state would have to meet its heavy burden of proving a waiver was knowing, intelligent, and voluntary by showing actual evidence of such comprehension. *Gault 2.0* would also address the need for CST decisions to reflect empirical findings. At a minimum, a lower court would be required to articulate its consideration of factors such as psychosocial maturity, age, and IQ when rendering an opinion about a youth's CST. Consequently, a court could rule that a youth was incompetent based on immaturity. In short, *Gault 2.0* is a necessary evolution of law.

Notes

1. *Roper v. Simmons*, 543 U.S. 551 (2005).

2. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

3. *Id.* at 2467.

4. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

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

6. For an in-depth review of this literature the reader is referred to Mariam Arain et al., *Maturation of the Adolescent Brain*, *in* Neuropsychiatric Disease and Treatment 449 (2013); Iroise Dumontheil, *Adolescent Brain Development*, 10 Current Opinion in Behav. Sci. 39 (2016).

7. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

8. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134 (1980).

9. *Id.* at 1166.

10. Heather Zelle et al., *Juveniles' Miranda Comprehension: Understanding, Appreciation, and Totality of Circumstances Factors*, 39 Law & Hum. Behav. 281 (2015).

11. In *Gault 2.0* the court would reiterate the earlier finding of *J.D.B. v. North Carolina*, which held that police must take into consideration a youth's age when making a *Miranda* custody analysis. Furthermore, a "reasonable person standard" for a youth is how another youth would respond, not how an adult would respond in that situation.

12. A literature search was conducted with the search words fMRI and *Miranda* and yielded no results. Furthermore, in order for such a study to be ecologically valid, the study would need to include key elements of an interrogation.

13. Richard Rogers et al., *Mired in Miranda Misconceptions: A Study of Legally Involved Juveniles at Different Levels of Psychosocial Maturity*, 32 Behav. Sci. Law 104-120 (2014) (increase in *Miranda* knowledge with increase in psychosocial maturity).

14. Jennifer Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. Youth & Adolescence 685 (2008).

15. For a brief review of this literature see Robert Weinstock & Christopher Thompson, *Commentary: Ethics-Related Implications and Neurobiological Correlates of False Confessions in Juveniles*, 37 J. Am. Acad. Psychiatry & L. 344 (2009). *Conviction of the Innocent: Lessons From Psychological Research* (Brian L. Cutler ed., 1st ed. 2014) (see Chapters 1 and 3). *See also* Brian L. Cutler & Richard A. Leo, *Analyzing Videotaped Interrogations and Confessions*, The Champion, December 2016 at 40.

16. Heather Zelle, *supra* note 10.

17. A.E. Lansing et al., *Cognitive and Academic Functioning of Juvenile Detainees: Implications for Correctional Populations and Public Health*, 20 J. Correctional Health Care 18 (2013).

18. *See Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

19. Alan M. Goldstein & Naomi E. Sevin Goldstein, Evaluating Capacity to Waive Miranda Rights (1st ed. 2010) (see Chapter 6). Irving B. Weiner & Randy K. Otto, Handbook of Psychology, Forensic Psychology (Volume 11) (2d ed. 2012) (see Chapter 17).

20. APA Handbook of Psychology and Juvenile Justice (Kirk Heilbrun ed., 1st ed. 2015) (see Chapter 22); Elena L. Grigorenko, Handbook of Juvenile Forensic Psychology and Psychiatry (2012); Thomas Grisso, Forensic Evaluation of Juveniles (2d ed. 2013) (see Chapter 2); Kirk Heilbrun et al., Foundations of Forensic Mental Health Assessment (1st ed. 2008); Ivan Kruh & Thomas Grisso, Evaluation of Juveniles' Competence to Stand Trial (1st ed. 2008).

21. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333 (2003).

22. *Id.* at 356.

23. *Id.*

24. Aaron Kivisto et al., *Future Orientation and Competence to Stand Trial: The Fragility of Competence*, 39 J. Am. Acad. Psychiatry & L. 316 (2011).

25. Jennifer Mayer Cox et al., *The Impact of Juveniles' Ages and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence*, 36 Law & Hum. Behav. 21 (2012).

26. Philip C. O'Donnell & Bruce Gross, *Developmental Incompetence to Stand Trial in Juvenile Courts*, 57 J. Forensic Sci. 989 (2012).

27. Kimberly Larson & Thomas Grisso, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, National Youth Screening & Assessment Project (2011).

28. APA Handbook of Psychology and Juvenile Justice (Kirk Heilbrun ed., 1st ed. 2015) (see Chapter 23); Thomas Grisso, Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice (2005); Thomas Grisso, Forensic Evaluation of Juveniles (2d ed. 2013) (see Chapter 3); Elena L. Grigorenko, Handbook of Juvenile Forensic Psychology and Psychiatry (2012) (see Chapter 12); Aaron Kivisto, *supra* note 24; Matthew Soulier, *Juvenile Offenders Competence to Stand Trial*, 35 Psychiatric Clinics N. Am. 837 (2012); Sofia T. Stepanyan et al., *Juvenile Competency to Stand Trial*, 25 Child & Adolescent Psychiatric Clinics N. Am. 49 (2016). ■

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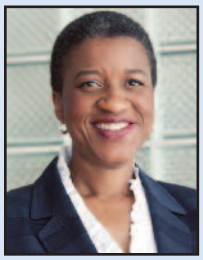

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