Journal of Criminal Law and Criminology

Volume 67 | Issue 2 Article 6

1976

Student Comments

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 67, No. 2

Printed in U.S.A.

COMMENTS

Student contributors to this issue are Peter Tullio, Paula Jacobi, David Drew, and Lisa Grossman.

JURISDICTION OBTAINED BY FORCIBLE ABDUCTION: REACH EXCEEDS DUE PROCESS GRASP

INTRODUCTION

State and federal courts have long sanctioned a unique form of lawlessness by assuming jurisdiction over the person of a criminal defendant whom law enforcement officials have illegally apprehended and forcibly brought into their jurisdiction.[1] Courts have exhibited an almost universal adherence to a century old doctrine maintaining that the power of a government to prosecute a defendant is not impaired by the illegality of the method by which it acquires jurisdiction over him. This doctrine originated in *Ker v. Illinois*[2] and was affirmed in *Frisbie v. Collins*[3] and has come to be known as the *Ker-Frisbie* rule.[4]

This doctrine of criminal jurisdiction has, however, been the subject of much criticism,[5] and was sharply attacked by the Second Circuit in *United States v. Toscanino,*[6] where the court found that continued adherence to the *Ker-Frisbie* rule no longer comported with modern notions of due process. Other courts have been unwilling to follow this lead, however, and have continued to hold that a court will not inquire into the manner in which a defendant is brought into the jurisdiction.[7] The Second Circuit itself in *United States ex. rel. Lujan v. Gengler*[8] limited its own *Toscanino* decision by holding that jurisdiction should be divested only in those situations where the kidnapping of a defendant was accompanied by torture or brutality. Nevertheless, *Toscanino* has opened the door to a serious challenge to the *Ker-Frisbie* rule.

This Comment will consider the question of whether a defendant's right to due process is infringed upon when he is kidnapped and forcibly removed to a jurisdiction whose law he has allegedly violated.[9] It will be demonstrated that continued adherence to the *Ker-Frisbie* doctrine does not conform to modern notions of pre-trial due process as they have been formulated in response to unlawful conduct by law enforcement officials. Also, as a matter of policy, it will be shown that continued adherence to such a rule neither enhances respect for the law, nor promotes the integrity of the judicial process.

HISTORICAL BACKGROUND

The technique of abduction to obtain jurisdiction over a criminal defendant received its initial impetus from the United States Supreme Court in *Ker v. Illinois.*[10] In *Ker,* the defendant, a resident of Peru, was indicted by an Illinois grand jury for larceny and embezzlement. The Governor of Illinois requested the President to invoke the treaty of extradition then existing between the United States

[1] It is a well settled principle of criminal procedure that after an indictment is returned, a court is powerless to proceed with the trial unless the defendant is present. The "right to be present" derives from the ancient common law, and has been called a right scarcely less important than the right of trial itself. *See generally* Diaz v. United States, 223 U.S. 442 (1912); Lewis v. United States, 146 U.S. 370 (1892).

[2] 119 U.S. 436 (1886).

[3] 342 U.S. 519 (1952).

[4] For a complete discussion of the rule and its implications see text accompanying notes 10–16 *infra.*

[5] *See* text accompanying notes 24–33 *infra.*

[6] 500 F.2d 267 (2d Cir. 1974).

[7] United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975) (forcible return to the United States no bar to prosecution); United States v. Quesada, 512 F.2d 1043 (5th Cir. 1975) (forcible abduction from Venezuela did not deprive defendant of due process nor fourth amendment guarantees); United States v. Winter, 509 F.2d 975 (5th Cir. 1975) (withholding jurisdiction not required because of forcible abduction); United States v. Marzano, 388 F. Supp. 906 (E.D. Ill. 1975) (extradition treaty violation not sufficient grounds to withhold jurisdiction).

[8] 510 F.2d 62 (2d Cir.), *cert. denied,* 421 U.S. 1001 (1975).

[9] This type of lawless conduct can occur in both the domestic and international setting. One state could abduct the defendant and bring him into the jurisdiction so that the criminal proceeding may be commenced against the defendant in that state. Similarly, state or federal agents might unlawfully abduct a defendant from a foreign country. In either case due process considerations of the federal Constitution are involved.

[10] 119 U.S. 436 (1886).

and Peru.[11] The President complied with this request and issued a warrant which authorized a Pinkerton agent to take custody of Ker from authorities in Peru. The agent never served the warrant, nor did he request Peruvian authorities to surrender the defendant to him.[12] Instead, he forcibly abducted Ker and placed him aboard an American vessel. Ker was then taken to Illinois and tried and convicted there. On appeal, Ker argued that his irregular arrest, which did not comply with the extradition treaty between the United States and Peru, denied him his constitutional right to due process. The Court rejected that argument, holding that the abduction of Ker did not violate the due process clause of the fourteenth amendment, which at that time had been part of the Constitution for less than twenty years. The Court stated that the fourteenth amendment guarantee of due process was satisfied when a party was regularly indicted and brought to trial "according to the forms and modes prescribed for such trials. . . ."[13] It was held, therefore, that Ker could be tried by Illinois regardless of the methods by which personal jurisdiction over him had been obtained.

The Supreme Court again faced this question in *Frisbie v. Collins*.[14] A Michigan state prisoner petitioned for *habeas corpus* alleging that he had been forcibly abducted from Illinois to Michigan by Michigan police officers. The prisoner complained that he had been kidnapped, handcuffed, and blackjacked in Chicago by the Michigan law enforcement officers. He claimed that his subsequent conviction in Michigan violated the due process clause of the fourteenth amendment and the Federal Kidnapping Act,[15] and therefore should be declared null and void. The Supreme Court rejected his claims, holding that the *Ker* principle was still valid and that the power of a court to try a person for crime is not diminished because he was brought within the court's jurisdiction by a forcible abduction. The Court stated that "due process of law is satisfied when one present in court is convicted of crime after being fairly apprised of charges against him and after a fair trial in accordance with constitutional procedural safeguards."[16]

These two cases form the mainstay of the doctrine that has come to be known as the *Ker-Frisbie* rule.

[11] Jurisdiction over a fugitive from justice is normally and legally secured through an extradition treaty. These treaties provide for a procedure through which the surrender of a fugitive from the state or country of refuge to the forum can be accomplished. The practice of extradition has been developed to remedy the inability of a state to otherwise lawfully procure the return of a person who has committed or been convicted of a crime within its territory and thereafter fled to another jurisdiction. Under United States law, an extradition request will not be honored unless the United States has entered into a treaty with the requesting state. *See* Valentine v. United States *ex. rel.* Neidecker, 299 U.S. 5 (1936). The United States presently has over eighty bilateral extradition treaties in force. A compilation of these treaties can be found in 18 U.S.C. § 3181 (1970). An extradition treaty entered into by the United States typically lists a set of offenses; it is agreed that the two countries will extradite to each other persons charged with or convicted of those offenses committed within the territory of the requesting state.

Interstate surrender of fugitives is commonly referred to as rendition. Forty-seven of the fifty states have adopted the UNIFORM CRIMINAL EXTRADITION ACT, 11 UNIFORM LAWS ANN. 51 (1974).

[12] The failure of the agent to serve the warrant may be explained in part by the fact that by the time he arrived in Peru, armed forces of Chile had taken control of Lima as a result of a war between the two countries. For a complete discussion of the facts surrounding the Ker abduction see Comment, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678 (1953).

[13] 119 U.S. at 440.

[14] 342 U.S. 519 (1952).

[15] At that time the Federal Kidnapping Act provided:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom, reward or otherwise, except, in the case of a minor by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

Act of June 25, 1948, ch. 645, § 1201 (a), 62 Stat. 760 (now 18 U.S.C. § 1201 (Supp. IV, 1974)).

In considering this contention the court stated: "This Act prescribes in detail the severe sanctions Congress wanted it to have.... We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers." 342 U.S. at 522–23 (footnote omitted).

[16] 342 U.S. at 522. Strangely, the Court was unanimous in this conclusion despite the fact that two months earlier the Court held in Rochin v. California, 342 U.S. 165 (1952), that a similar type of pre-trial misconduct constituted a violation of due process. In *Rochin* the Supreme Court unanimously reversed a narcotics conviction because it was obtained by conduct which "shocks the conscience." *Id.* at 172. Police officers, upon seeing the defendant swallow two capsules, took him to a hospital where an emetic solution was poured into the defendant's stomach. The solution caused him to vomit the capsules which were later admitted into evidence against him. In reversing the conviction, the Court used the due process clause to strike down a state law enforcement procedure which created no danger of wrongful conviction, but which involved methods that were brutal and offensive to the community sense of fair play and decency. *See* Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 97–98 (1953) [hereinafter cited as Scott].

The Court clearly held that due process was limited to the guarantee of a constitutionally fair trial, regardless of the unlawful methods used to obtain jurisdiction over the defendant.[17] It is apparent, however, that since the *Frisbie* decision the Supreme Court has greatly expanded the interpretation of the due process clause so that it is no longer limited to the guarantee of fair procedure at trial.[18] In an attempt to deter police misconduct, the Court has extended the due process concept to bar the government from realizing the fruits of its own deliberate and unnecessary lawlessness in bringing an accused to trial. In the landmark case of *Mapp v. Ohio*,[19] the Supreme Court overruled *Wolf v. Colorado*[20] and held that due process required that the exclusionary rule be applied in state prosecutions, just at it had for years been binding on the federal courts.[21] Thus, if state law enforcement officials obtain evidence through an illegal search or seizure, such evidence, as a matter of due process, cannot be admitted in the subsequent trial of the person from whom it was unlawfully seized. In *Wong Sun v. United States*[22] the Supreme Court held that due process demanded the exclusion of verbal statements made by a defendant immediately after an unlawful entry and unauthorized arrest by law enforcement officials. Thus, the Supreme Court recognized the need to expand the concept of pre-trial due process in order to deter official disregard for constitutional prohobitions.[23]

Concurrent with these developments, several courts began to question the continued validity of the *Ker-Frisbie* rule. This criticism, however, was passive, demonstrating the unwillingness of courts to engage in a serious consideration of the constitutional implications of abduction to obtain jurisdiction. In *United States v. Cotten*,[24] for example, the Ninth Circuit was asked to hold that the conduct of government officials in returning the defendants to Hawaii from the Republic of Viet Nam was so blatantly violative of their constitutional rights as to deprive the lower court of jurisdiction.[25] The argument of the defendants was based on the concept of fundamental fairness as embodied in the due process standard of both the fifth and fourteenth amendments. The court refused to hold that the lower court was without jurisdiction, basing its conclusion upon "old and well-established authority."

> The Supreme Court has not since abandoned the *Ker* principle, and it has been widely re-asserted, though at times critically, by the circuits. The fact that it was state court jurisdiction that was questioned in the early cases which established the rule is unimportant. The protection sought in the cases enunciating the principle was that of the Federal Constitution. The Supreme Court found that none was afforded then; we are unable to find any now.[26]

[17] It would seem that this holding was broader than prior case law warranted. Prior to *Frisbie*, the Court had dealt with several issues involving pre-trial procedure. In addition to *Rochin*, the Court had held that in a state criminal trial confessions obtained by police coercion must be excluded from evidence, whether such coercion was physical or psychological. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949). Also, in Sorrells v. United States, 287 U.S. 435 (1932), the Court held that when the intent to commit a crime is planted in the mind of the defendant by the police, so that he may later be prosecuted, the defendant may invoke the defense of entrapment.

[18] This expansion has been described as a constitutional revolution by one commentator. *See* Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA.L. REV. 711 (1971).

[19] 367 U.S. 643 (1961). In *Mapp*, Cleveland police officers, suspecting that a criminal was hiding in a certain house, broke down the door, manhandled a woman resident, searched the premises, and discovered some obscene materials in a trunk. The woman was convicted of possession of these materials. The state court pointed out that the seized objects had not been taken from the defendant's person by brutal or offensive force (as in *Rochin*), and thus permitted their use in evidence. The Supreme Court reversed the conviction.

[20] 338 U.S. 25 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961).

[21] Weeks v. United States, 232 U.S. 383 (1914).

[22] 371 U.S. 471 (1963).

[23] *See also* Katz v. United States, 389 U.S. 347 (1967) (bugging of a public telephone booth, even without physical penetration, constituted an unreasonable search and seizure where no prior judicial approval secured); Miranda v. Arizona, 384 U.S. 436 (1966) (suspects must be informed of their right to remain silent and to see counsel prior to police interrogation); Silverman v. United States, 365 U.S. 505 (1961) ("spike mike" projecting into a house amounted to an unauthorized physical penetration of a constitutionally protected area).

[24] 471 F.2d 744 (9th Cir.), *cert. denied*, 441 U.S. 936 (1973).

[25] The defendants were convicted of theft of government property. They had been arrested by Vietnamese officials for minor local offenses, and were then delivered to United States officials who forcibly returned them to Hawaii.

[26] 471 F.2d at 748 (footnotes omitted). The court considered and summarily rejected the defendant's argument that the expanded scope of protection given to accused persons under the fifth and fourteenth amendments precluded the assumption of jurisdiction by the district court. It should be noted that the court may have been influenced by the fact that the United States did not have an extradition treaty with the Republic of Viet Nam. Nevertheless, as the court recognized, the United States Department of State had instituted proceedings to revoke the defendants' passports and to arrange for their deportation to the United States prior to their kidnapping and forcible removal. Thus, it was unnecessary to engage in lawless activity to bring the defendants within the jurisdiction of the court.

The court did recognize that the soundness of the doctrine it followed was suspect. Nevertheless, it refused to strike it down, arguing that "recent legislation and constitutional protections enunciated in the last decade provide viable alternative means of coping with undisciplined law enforcement activities."[27]

In *Virgin Islands v. Ortiz*[28] the Third Circuit also expressed discontent with the *Ker-Frisbie* rule pointing out "that the validity of the *Frisbie* doctrine has been seriously questioned because it condones illegal police conduct."[29] The court did not, however, uphold the defendant's contention that his constitutional rights were violated due to his extralegal transfer into the jurisdiction of the district court.[30]

In *United States v. Edmonds*,[31] the Second Circuit foreshadowed its direct attack on the *Ker-Frisbie* rule in *Toscanino*. The defendants in *Edmonds* contended that their arrests were both brutal and illegal and that the district court should not have been allowed to proceed against them.[32] The prosecution argued that, although patently illegal, the conduct of the police was insufficient to reverse the convictions, relying by analogy on *Frisbie*. The court responded with an enlightened view of the *Ker-Frisbie* rule:

> We do not find *Frisbie* . . . and . . . *Ker* . . . to be a truly persuasive analogy. These cases were decided before the Fourth Amendment as such was held applicable to the states, *Mapp v. Ohio*, . . . and thus rested only on general considerations of due process . . . . Whether the Court would now adhere to them must be regarded as questionable.[33]

Despite these periodic expressions of dissatisfaction with the *Ker-Frisbie* rule, courts have continued to apply the doctrine, refusing to examine the legality of the method by which jurisdiction over a defendant has been obtained. The Supreme Court has never abandoned the principle,[34] and it has been widely reasserted by the circuits.[35] State courts have similarly shown an unwillingness to divest themselves of jurisdiction where illegal methods were used to bring the defendant within the power of the court.[36]

[27] *Id.* at 748 n.11. The court was undoubtedly referring to a civil suit for damage under 42 U.S.C. § 1983 (1970). *See* note 98 *infra*.

[28] 427 F.2d 1043 (3d Cir. 1970).

[29] *Id.* at 1045 n.2. In support of its statement the court cited Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968) [hereinafter cited as Pitler]; *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 127 (1953).

[30] The defendant petitioned for a writ of *habeas corpus* on the ground that his arrest in Puerto Rico and subsequent return to the Virgin Islands were illegal. Two Virgin Island detectives had removed Ortiz from a Puerto Rican jail and took him to the Virgin Islands without a warrant or extradition or removal proceedings of any kind.

[31] 432 F.2d 577 (2d Cir. 1970). The defendants were arrested for inadvertent failure to have Selective Service cards in their possession. This was merely a pretext, however, since the true motivation for the arrests was the hope that FBI agents who had been attacked the preceeding evening might be able to identify the arrestees as their assailants. The court held that the arrest afforded no lawful basis for procuring evidence with respect to the entirely different offenses for which the defendants were subsequently convicted.

[32] *Id.* at 582.

[33] *Id.* at 583 (footnote and citations omitted).

[34] In Gerstein v. Pugh, 420 U.S. 103 (1975), Florida prisoners claimed a constitutional right to a judicial hearing on the issue of probable cause as a prerequisite to an extended restraint of liberty following arrest. The Court held that a judicial determination was mandatory under the fourth amendment, and that the prosecutor's assessment of probable cause did not alone meet constitutional requirements. In holding the prosecutor's assessment of probable cause insufficient, the Court, citing *Ker* and *Frisbie*, stated:

> Nor do we retreat from the established rule that illegal arrest or detention does not void a subsequent conviction . . . . a suspect who is presently detained may challenge the probable cause for that confinement, [but] a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause.

420 U.S. at 119. The Court, however, was not confronted with a situation of forcible abduction to obtain jurisdiction. The Court's reference to *Ker* and *Frisbie* should not be construed as foreclosing further consideration into the question of whether the divestiture of jurisdiction is proper to deter the lawless conduct of law enforcement officials.

[35] *See* note 6 *supra*. *See also* United States v. Caramian, 468 F.2d 1370 (5th Cir. 1972); United States v. Hamilton, 460 F.2d 1270 (9th Cir. 1972); United States *ex rel.* Calhoun v. Twomey, 454 F.2d 326 (7th Cir. 1971); Bacon v. United States, 449 F.2d 933 (9th Cir. 1971); Hobson v. Crouse, 332 F.2d 561 (10th Cir. 1964); Devine v. Hand, 287 F.2d 687 (10th Cir. 1961); Strand v. Schmittroth, 251 F.2d 590 (9th Cir. 1957); *petition for cert. dismissed*, 355 U.S. 866 (1958); United States *ex rel.* Langer v. Ragen, 237 F.2d 827 (7th Cir. 1956); Wentz v. United States, 244 F.2d 172 (9th Cir. 1955), *cert. denied*, 355 U.S. 806 (1957); Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); Sheehan v. Huff, 142 F.2d 81 (D.C. Cir.), *cert. denied*, 332 U.S. 764 (1944).

[36] *See, e.g.*, State v. Stone, 294 A.2d 683 (Me. 1972). At one time Kansas and Nebraska held that it would be against public policy for the state to sanction unlawful police behavior by allowing the trial of a defendant whose presence was secured by kidnapping. *In re* Robinson, 29 Neb. 135, 45 N.W. 267 (1890); State v. Simmons, 39 Kan. 262, 18 P. 177 (1888). These cases have since been repudiated. *See* Foster v. Hudspeth, 170 Kan. 338, 224 P.2d 987 (1950), *petition for cert. dismissed*, 340 U.S. 940 (1951); Jackson v. Olson, 146 Neb. 885, 22 N.W. 2d 124 (1946).

In light of the widespread criticism[37] of the doctrine and the modern evolution of pre-trial due process, it is somewhat surprising that courts steadfastly repeat the rule without a more serious consideration of its constitutional implications. As one commentator has stated, "[I]t seems that the courts have simply fallen into the habit of repeating, parrot-like, that a court does not care how a defendant comes before the court, without thinking whether such a rule is sound on principle."[38] Upon analysis it becomes apparent that the *Ker-Frisbie* rule is incongruous with the expanded notions of due process enunciated by the United States Supreme Court in cases such as *Mapp v. Ohio*[39] and *Wong Sun v. United States.*[40] In order to deter the unconstitutional conduct of law enforcement officials, the Court found it necessary to hold that due process required the exclusion of evidence obtained as a result of an illegal search and seizure. Similar considerations are present when law enforcement officers forego legal means to obtain jurisdiction over a criminal defendant. A court, by allowing a defendant to be tried after he has been kidnapped and forcibly brought into jurisdiction, is giving the government the right to exploit its own illegal actions. In *United States v. Toscanino*[41] these considerations were finally recognized and applied. The decision is significant and could have far reaching implications concerning the continued vitality of the *Ker-Frisbie* doctrine.

Toscanino and Beyond: A Qualified Attack

Francisco Toscanino, an Italian citizen, was convicted in federal court for the Eastern District of New York of conspiracy to import and deliver narcotics into the United States. On appeal, the defendant did not question the sufficiency of the evidence against him nor did he claim any error with respect to the conduct of the trial. His major argument was that the district court proceedings against him were void, since personal jurisdiction over him had been illegally obtained.[42] In support of this allegation Toscanino offered to prove a bizzare set of circumstances surrounding his kidnapping and transfer to the jurisdiction of the district court. He claimed that he had been kidnapped from his home in Montevideo, Uruguay, by paid American agents[43] and forcibly transported to Brazil where his captors held him for interrogation prior to sending him on to New York. While held captive in Brazil, for seventeen days, Toscanino was incessantly tortured and interrogated.[44] During this entire period the United States Attorney prosecuting the case was aware of the interrogation and did in fact receive progress reports.[45] Also during this period a member of the United States Department of Justice Bureau of Narcotics and Dangerous Drugs was present periodically and participated in portions of the interrogation. After the period of interrogation the defendant was drugged and placed on a flight to the United States, where he was subsequently arrested.

The trial court, relying on the *Ker-Frisbie* rule, held that its jurisdiction over the person of the defendant was not affected by the illegal manner in which Toscanino was brought into the territory of the United States. The Second Circuit, however, refused to take such a sterile view of jurisdiction over the criminal defendant, and held that the district court should have dismissed the case for lack of jurisdiction if the defendant could have substantiated his allegations of kidnapping and forcible removal to the United States. As one basis for this holding, the court reasoned that due process of law is no longer

---

[37] *See* note 29 *supra.*

[38] Scott, *supra* note 16, at 107.

[39] 367 U.S. 643 (1961).

[40] 371 U.S. 471 (1963).

[41] 500 F.2d 267 (2d Cir. 1974).

[42] *Id.* at 269. As a subsidiary issue, Toscanino also alleged that prior to his forcible abduction he had been subjected to electronic surveillance in Uruguay, and that information obtained thereby had been used by the prosecution to convict him. He offered to prove that American officials bribed a telephone company employee in Montevideo, where the defendant resided, to subject him to surveillance. According to Toscanino, this employee was subsequently indicted and imprisoned in Uruguay for illegal eavesdropping. Toscanino moved pursuant to 18 U.S.C. § 3504 (1970) to compel the government to affirm or deny whether he had been subjected to surveillance. The court held his allegations sufficient to require the government to respond to the query. *Id.* at 270–271.

[43] *Id.* at 269. He was seized by a local police officer of Montevideo whom the court characterized as "acting *ultra vires* in that he was the paid agent of the United States government." *Id.* The defendant also alleged that the government of Uruguay did not know of or consent to the kidnapping. *Id.* at 270.

[44] The defendant was denied sleep and all forms of nourishment for days at a time. Toscanino claimed that he was forced to walk up and down a hallway for seven or eight hours at a time. He was also kicked, beaten, and pinched with metal pliers. Agents flushed alcohol into his eyes and nose, forced other fluids into his anal passage, and attached electrodes to his earlobes, toes and genitals. All of this torture was administered in such a manner as to punish without scarring. *Id.* at 270.

[45] At no time, however, had the United States made any request of the government of Uruguay for the extradition of Toscanino. The defendant argued that "from start to finish the government unlawfully, willingly, and deliberately embarked upon a brazenly criminal scheme violating the laws of three separate countries." *Id.* at 270.

satisfied only by a fair trial in accordance with constitutional procedural safeguards, as *Frisbie* declared, but rather the guarantee of due process extends to the pre-trial conduct of law enforcement authorities as well.[46] The court found that the *Ker-Frisbie* rule was irreconcilable with the Supreme Court's expansion of the concept of due process, as evidenced initially by *Rochin*[47] and later by *Mapp*,[48] where the court found it necessary to "protect the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part."[49]

The court noted that it was faced with a conflict between two concepts of due process, one being the restricted version found in *Ker-Frisbie* and the other an enlightened interpretation expressed in more recent decisions of the Supreme Court.[50] The court, making a dramatic break with the weight of prior case law, found that the restrictive *Ker-Frisbie* version must yield. For the *Toscanino* court, due process now required a court to decline personal jurisdiction over a defendant where such jurisdiction "has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[51] The defendant, having been unlawfully seized in violation of the fourth amendment,[52] should as a matter of fundamental fairness be returned by the government to his status quo ante.[53]

The *Toscanino* court also relied on two alternative bases to support its decision. First, the court pointed out that it could rely simply upon its supervisory power over the proper administration of criminal justice in the district courts within its jurisdiction.[54] This power could be used here to prevent the criminal process of a federal district court from being abused or degraded where it is enforced against a defendant who was brought before the court in the manner alleged by Toscanino. It was necessary, the court stated, "to prevent district courts from themselves becoming 'accomplices in the willful disobedience of the law.'"[55]

Second, the most innovative argument of the court was that jurisdiction should be declined in a case that involves the abduction of a defendant in violation of an international treaty of the United States.[56] This

[46] *Id.* at 274.

[47] *See* note 16 *supra*.

[48] 367 U.S. at 657–60.

[49] 500 F.2d at 275.

[50] See text accompanying notes 19–23 *supra*.

[51] 500 F.2d at 275. The court viewed this conclusion as an extension of the power of the federal courts in a civil case to refuse to assume jurisdiction over a defendant whose presence was secured by force or fraud. *See, e.g., In re* Johnson, 167 U.S. 120 (1897); Fitzgerald Construction Co. v. Fitzgerald, 137 U.S. 98 (1890); Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937), *cert. denied*, 303 U.S. 664 (1938). Whereas the rule in civil cases appears to be discretionary, the policy behind the rule is applicable to the forcible abduction of a criminal defendant. In the civil case the plaintiff who uses force or fraud to obtain jurisdiction over the defendant is himself guilty of a wrong, and thus the court refuses to allow him to profit from his actions. In State v. Ross, 21 Iowa 467 (1866), it was held that this reasoning should not be extended to criminal cases because when a defendant is forcibly abducted the people are guilty of no wrong; only the law enforcement officials have broken the law. One commentator has argued that "the better view is that the state is a single entity ..... What the police do in the line of duty should be deemed done by the state as well as for the state." Scott, *supra* note 16, at 104–05. Thus, it may be argued that a state that prosecutes a criminal defendant should be barred from realizing the fruits of the unlawful conduct of its law enforcement officials.

[52] The fourth amendment guarantees the right of people to be secure in their persons against unreasonable seizures. U.S. CONST. amend. IV. The *Toscanino* court found the defendant's constitutional rights violated, relying on the principle that an illegal arrest constitutes a seizure of the person in violation of the fourth amendment. *See* Henry v. United States, 361 U.S. 98, 100–01 (1959); Giordenello v. United States, 357 U.S. 480 (1958) (an illegal arrest per se violates the Constitution); Johnson v. United States, 333 U.S. 10 (1948).

[53] 500 F.2d at 275. The court did not discuss the practical or theoretical problems involved in the "status quo ante" concept. Presumably, the court meant that the defendant would be returned to the jurisdiction from which he was unlawfully removed. Once returned to his status quo ante, it would seem that the defendant could not be subjected to the government's legal attempts to obtain jurisdiction over him with respect to the crime for which he was originally abducted. Thus, the divestiture of jurisdiction should be permanent in order to meet the objective of deterring the unlawful conduct of law enforcement officials. In a similar vein, once it has been determined that jurisdiction must be divested due to the failure of law enforcement officers to lawfully bring the defendant before the court, then it follows that the defendant should be returned to his status quo ante prior to being indicted for other crimes within that or another jurisdiction.

[54] *Id.* at 276. *See* McNabb v. United States, 318 U.S. 332 (1943); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972).

[55] 500 F.2d at 276, *quoting* McNabb v. United States, 318 U.S. 332, 345 (1943).

[56] *Id.* at 277. An extradition treaty did exist between the United States and Uruguay at the time of Toscanino's abduction. *See* 18 U.S.C. § 3181 (1970). It was therefore unnecessary for government agents to engage in lawless conduct, for a special arrangement could have been made with the government of Uruguay for Toscanino's extradition.

point clearly distinguished *Ker* and *Frisbie* from the situation before the court, since neither case rested on the violation of an international treaty.[57] In addition to violating the extradition treaty with Uruguay, the alleged conduct of the government was also a violation of the Charter of the United Nations and the Charter of the Organization of Americah States.[58]

The court found the controlling rule in *Cook v. United States*,[59] which it read as holding that an American court should not try a criminal defendant whose presence has been secured by means of a treaty violation. The *Toscanino* court did not specifically mention due process considerations in its discussions of the treaty violations, but it is arguable that this second alternative holding is but a manifestation of the court's prior assertion that the *Ker-Frisbie* rule has been drastically weakened by *Mapp* and *Rochin*. The policy of deterring official lawlessness, very much a part of those two decisions,[60] may be present in the court's unwillingness to sanction the assumption of jurisdiction over a defendant when his presence has been secured in violation of an international treaty.

The *Toscanino* decision, standing alone, appeared to be a very important step in the breakdown of a traditional rule. Many questions were left unanswered, however, and it was not until *United States ex rel. Lujan v. Gengler*[61] that the scope of the *Toscanino* decision was delineated. Lujan, an Argentine citizen, was indicted in New York for conspiracy to import and distribute heroin. An arrest warrant was issued for the defendant, but, as the court pointed out, it was enforced in a very unconventional manner.[62] Lujan alleged that he was lured into Bolivia by a paid American agent who hired Lujan to fly him there. Bolivian police, also acting as paid agents of the United States, arrested Lujan upon arrival and held him incommunicado for six days. He was then placed on a plane bound for New York, and was arrested upon arrival there.[63]

Lujan did not allege any acts of torture, terror, or custodial interrogation, nor did he assert that the United States Attorney was aware of his abduction or of any interrogation.[64] The court seized upon these points and thus distinguished *Toscanino*, limiting it to cases that demonstrated egregious situations involving torture, brutality, or similar outrageous conduct. The *Lujan* court made it clear that *Toscanino* did not completely abandon the *Ker-Frisbie* rule; it only recognized that government agents no longer had a free reign in bringing defendants into a jurisdiction. Thus, *Lugan* represents a retreat to the traditional concepts which the *Toscanino* court had made a strong effort to eviscerate.

The *Lujan* court also addressed itself to the allegation that since the abduction violated the Charters of the United Nations and the Organization of American States,[65] *Tuscanino* was applicable and therefore jurisdiction should be declined. The court held, however, that Lujan's failure to allege that either Argentina or Bolivia in any way protested or objected to his abduction was fatal to his argument.[66] The court said that the charter provisions were designed to protect the sovereignty of states, and therefore the offended state must initially lodge an objection or require redress.[67] Individual rights are derivative through the states in this regard, and if a state does not object to a violation of its sovereignty, then the individual abducted therefrom has no grounds on which to allege a violation of international law.[68]

[57] *Frisbie* involved an alleged interstate abduction. The Supreme Court in *Ker* held that the extradition treaty between the United States and Peru did not apply and would have been violated by the United States only if, after receiving the fugitive, it attempted to try him for a crime other than the one for which he was surrendered. *See* United States v. Rauscher, 119 U.S. 407 (1886).

[58] 500 F.2d at 277. See U.N. CHARTER art. 2, para. 4 (an agreement that all members, which included the United States and Uruguay, must "refrain . . . from the threat or use of force against the territorial integrity of political independence of any state"); O.A.S. CHARTER art. 17 (provides that the "territory of a state is inviolable; it may not be the object even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, or any grounds whatever").

[59] 288 U.S. 102 (1933). In *Cook* the United States Coast Guard seized a British vessel in violation of territorial limits fixed by treaty. The Supreme Court held that the government lacked power to seize the vessel, since it had, through the treaty, voluntarily imposed a territorial limitation upon its own authority. Thus, a subsequent libel for forfeiture of the vessel was properly dismissed by the federal district court, notwithstanding the vessel's physical presence within the jurisdiction.

[60] *See* text accompanying notes 87–99 *infra*.

[61] 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

[62] 471 F.2d at 63.

[63] At no time had he been charged by Bolivian police, nor had the United States made any extradition request.

[64] 510 F.2d at 66.

[65] *See* note 46 *supra*.

[66] Toscanino specifically alleged that the Uruguayan government claimed that it had no prior knowledge of his kidnapping, and that it in fact condemned such apprehension as alien to its laws. 500 F.2d at 270.

[67] 510 F.2d at 67.

[68] *Id.* Illustrative of the operation of this principle is the Adolf Eichmann case. Attorney General v. Eichmann, 36

The *Lujan* court thus severely limited the arguments available to a defendant who has been the subject of an international kidnapping by law enforcement agents. It is arguable, however, that whether or not the state of the defendant's refuge objects, the government's abduction of a person who is under the protection of the laws of that nation violates that nation's sovereignty.[69] The United States has agreed to respect the sovereignty of Uruguay and Bolivia,[70] but by foregoing legal process and engaging in clandestine efforts to abduct criminal defendants, it breached that agreement. The answer to whether the defendant can use such a breach to his advantage in a subsequent criminal proceeding depends more upon the attitude which one takes towards official lawlessness, rather than upon the objection of the offended nation. If notions of modern due process are as expansive as the *Toscanino* court seemed to indicate, then a defendant should have the opportunity to rely upon an international treaty violation in an attempt to demonstrate why a court should divest itself of jurisdiction.[71] *Lujan,* however, restricts this opportunity.

Strong policy considerations are also present in the context of an abduction from an objecting country or in violation of a treaty. Those considerations are (1) respect for the law of nations; (2) the requirements of world society; and (3) the integrity and independence of other nations.[72] The last should be observed not only because of formal charters entered into between nations, but also as unwritten obligations of international law.[73] Respecting the sovereignty and integrity of other nations increases the ability of the United States to demand similar respect for its own sovereign integrity. This pragmatic view, buttressed by the aforementioned policy considerations, further justifies the divestiture of jurisdiction over a defendant who has been illegally abducted from a foreign state of refuge.

The Second Circuit had one further opportunity in *United States v. Lira*[74] to strengthen the *Toscanino* rationale, but instead the court employed another restrictive interpretation and found that *Toscanino* did not control. The defendant appealed from a narcotics conviction alleging that he had been illegelly abducted from Chile and tortured by agents of the United States government, and that under these circumstances dismissal of the case was mandated by *Toscanino.* The defendant testified that he was arrested by Chilean police officers and subsequently tortured by them, during which time he heard English being spoken in a low tone by several persons present.[75] An agent of the Drug Enforcement Administration, who was in Chile at the time of these occurrences, testified that the defendant had been arrested at the request of the D.E.A. and that the United States government had requested an expulsion order.[76] The agent denied that he had ever met the defendant before he boarded the plane in Santiago, or that he or another D.E.A. representa-

---

I.L.R. 18 (Dist. Ct. Israel 1961), *aff'd,* 36 I.L.R. 277 (1962). Adolf Eichmann was a Nazi war criminal who had been kidnapped in Argentina, allegedly by agents of the Israeli government, and forcibly brought to Israel to stand trial. Eichmann argued that his abduction from a foreign country was a breach of international law, and therefore the court was without jurisdiction over him. Argentina lodged a complaint with the Security Council of the United Nations prior to the trial. Subsequent to this complaint, the two countries issued a joint communique resolving "to regard as closed the incident which arose out of the action taken by citizens of Israel, which infringed the fundamental rights of the State of Argentina." 36 I.L.R. at 59. The Israeli court held that since the matter was closed, Eichmann could not benefit from the breach of international law by obtaining dismissal of the case. The court relied, *inter alia,* upon the *Ker-Frisbie* precedent. 36 I.L.R. at 69–71.

[69] *See* Garcia-Mora, *Criminal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study,* 32 IND. L.J. 427 (1957) [hereinafter cited as Garcia-Mora]; Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory,* 29 AM. J. INT'L. L. 502 (1935).

[70] *See* note 58 *supra.*

[71] 500 F.2d at 272, 277.

[72] United States v. Lira, 515 F.2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring). *See also* Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition,* 7 VAND. J. TRANSNATIONAL L. 25 (1973), where the author points out that "[a]side from the flagrant violation of the individual's human rights, these practices [*e.g.,* abductions] affect the stability of international relations and subvert the international legal process." *Id.* at 27.

[73] *See* Garcia-Mora, *supra* note 69.

[74] 515 F.2d 68 (2d Cir. 1975). Judges Mansfield and Oakes participated on both the *Toscanino* and *Lira* panels.

[75] *Id.* at 69. After being held at the local police station for four days, the defendant was then transferred to a prison where he was held for three weeks. During the latter time period he was beaten and tortured. Further interrogation took place in the Chilean Prosecutor's Office. The defendant saw two agents of the United States Drug Enforcement Administration in the building, but they did not participate in any interrogations.

[76] The extradition treaty between the United States and Chile provided that Chilean nationals, which the defendant was, could not be extradited to the United States. An expulsion order is normally issued when a country desires to deport an alien from its territory. Lira was not an alien to Chile, but nevertheless that country chose to expel its own national at the request of the United States. *See generally* 2 D. O'CONNELL, INTERNATIONAL LAW 792–801 (1965).

tive in Chile had received any reports from Chilean police concerning the defendant after his arrest. The agent also testified that the D.E.A. was not involved with the investigation conducted by Chilean police.[77]

The court held that *Toscanino* did not apply in this situation, since there was no direct evidence to suggest that the gross mistreatment leading to the forcible abduction of the defendant was perpetrated by representatives of the United States government. The evidence adduced showed a suspicion of United States involvement in the Chilean police actions,[78] but not that the United States participated or acquiesced in the alleged misconduct of Chilean officials.[79] With no substantial evidence that the Chilean police were acting as agents of the United States in mistreating and abducting the defendant, the court felt constrained to affirm the judgment rendered by the district court.[80]

Restricted by a outmoded rule, yet desirous of implementing a modern analysis, the Second Circuit has managed to make headway in attempting to formulate a workable doctrine applicable to the forcible return of a defendant to a jurisdiction. The holding of *Toscanino,* even though limited by *Lujan* and *Lira* to egregious cases involving torture and brutality toward a defendant by law enforcement officials, nevertheless represents a major break-through in the field of pre-trial criminal due process. It can be contended, however, that limiting *Toscanino* to such circumstances is unwarranted, and that under modern notions of due process the divestiture of jurisdiction over a criminal defendant is necessary to deter forcible abductions in the name of law enforcement. The door was left open in *Lujan* for further consideration:

> [A]doption of an exclusionary rule here would confer a total immunity to criminal prosecution. Moreover, the controls which otherwise exist to prevent illegal abductions—the financial cost of the operation, the possibility of alienating other nations, and the risk that the kidnappers would be prosecuted in a foreign territory for their offense—suggest that the likelihood of numerous violations is not real. If this assumption should, in the future, prove to be ill-founded our conclusion can be reconsidered.[81]

The assumption is ill-founded; Judge Oakes pointed out in *Lira* that the court was told at oral argument that six more cases of D.E.A. abductions were likely to come before them.[82] Moreover, it is inadequate to continue to justify the *Ker-Frisbie* rule on the supposition that the likelihood of numerous violations is not real. If a defendant's due process rights are violated by the pre-trial conduct of law enforcement authorities, this cannot be justified by the relative infrequence of such violations. It is time, therefore, for federal and state courts alike to begin to examine the mode in which a defendant is brought before the court, rather than conveniently restating a rule which upon analysis proves very difficult to justify. It therefore becomes imperative to examine this analysis and demonstrate why continued adherence to the *Ker-Frisbie* approach is no longer acceptable in light of modern notions of due process.

Influence of Modern Analysis

Toscanino stands for the proposition that if law enforcement officals, in the course of kidnapping and forcibly removing a defendant, employ torture or brutality to effectuate their purpose, then a court should refuse to assume jurisdiction over the defendant. This principle is based upon a due process violation of the type recognized in *Rochin v. California,* where the Court reversed a conviction obtained by conduct which "shocks the conscience."[83] A more difficult case is posed, however,

[77] 515 F.2d at 70.

[78] This suspicion would seem to have a firmer basis than the court was willing to recognize. Chilean officials were most cooperative in honoring the D.E.A.'s requests, and even provided a large Chilean escort for the return trip to the United States. It also appears that Chilean law was clearly violated when the Chilean government issued an expulsion decree ordering that the defendant be sent to the United States. *See* note 76 *supra.*

Judge Oakes, recognizing these suspicions, pointed out in a concurring opinion:

> While I concur in the result, I find the case more troublesome perhaps than does the majority. Having sat on *Toscanino* and *Lujan* panels and now on this case, I agree that this case falls—just barely—on the *Lujan* rather than the *Toscanino* side of the line.

515 F.2d at 72 (Oakes, J., concurring).

[79] While United States involvement was questionable, it seems clear that if the mistreatment of the defendant was perpetrated solely by foreign law enforcement officials, after which the United States lawfully obtains custody of the fugitive, the defendant has no grounds to object. The *Lira* court stated: "The D.E.A. can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards." 515 F. 2d at 71.

[80] The court also rejected the defendant's arguments that the United States government was vicariously responsible for his torture, and that the violations by Chilean police of their domestic law were sufficient grounds to withhold jurisdiction. 515 F.2d at 71.

[81] 510 F.2d at 68 n. 9 (citation omitted).

[82] 515 F.2d at 72.

[83] 342 U.S. 165 (1952). *See* note 16 *supra.*

where law enforcement authorities simply forego available legal means to acquire jurisdiction over a criminal defendant in favor of the quick but lawless seizure and removal of the defendant into the jurisdiction of the court.[84] Whether accomplished by agents of a state or of the federal government, it is clear that the agents do not have the extraterritorial power to lawfully accomplish that act. The Supreme Court in *Frisbie* was unwilling to hold that official violation of the law, which in that case was the Federal Kidnapping Act, mandated a court to decline jurisdiction over a defendant.[85] It is difficult to reconcile this concept with *Mapp v. Ohio*[86] and its progeny.

In *State v. Stone*[87] the court was squarely presented with the argument that in light of *Mapp*, state courts could no longer assume jurisdiction over a defendant whose presence was secured by kidnapping.[88] Nevertheless, the court found that the validity of the *Ker-Frisbie* rule had been unaltered by the evidence-exclusionary doctrine imposed upon the states by the United States Supreme Court in *Mapp*.[89] While recognizing that the purpose of deterring unconstitutional police behavior was a high priority value in the original formulation of the *Mapp* evidence-exclusionary principle, the court stated that the primary consideration behind that principle was to protect the integrity of the guilt adjudication process. This could only be accomplished by preventing that process from utilizing evidence acquired by the unconstitutional behavior of law enforcement officials, and by preventing judgments of guilt attributabe in part to such conduct.[90] Having determined this to be the primary emphasis of *Mapp*, the *Stone* court deduced that when the unconstitutional behavior of law enforcement officials relates only to the manner in which a defendant is brought into a jurisdiction, then there is no direct threat to the integrity of the guilt adjudication process. The court went on to state:

> While "process of law" might be said to be involved—if only in the respect that defendants had been produced within the territorial jurisdiction of a Court by government officials, acting under the cloak of the authority of the law—the relationship to the ultimate deprivation of liberty resulting from defendants' convictions of crime is too remote and tenuous to bring into play a violation of "*due* process of law" as the instrumentality to establish a divestment of subject matter jurisdiction binding upon every court in the land under the federal Fourteenth Amendment.[91]

The reasoning employed by the *Stone* court to reject the application of *Mapp* to the concept of abduction to obtain jurisdiction is fallacious on several grounds. The court's reasoning necessarily places primary emphasis upon preventing the contamination of the guilt adjudication process by the introduction of illegally obtained evidence. This certainly was an important concern behind the evidence-exclusionary principle. However, no less a concern was the prevention of unconstitutional police behavior in violation of the fourth amendment, and this concern has received increasing emphasis in more recent applications of the principle to particular situations.[92] The Court in *Mapp* clearly stated that it could no longer permit the "right to be secure against rude invasions by state officers" to be "revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment."[93] Thus, deterring unlawful police activity was clearly an important underpinning of the *Mapp* doctrine. This was recognized in *United States v. Russell*,[94] where the Court pointed out that "the principle reason behind the adoption of the exclusionary rule was the Government's 'failure to observe its own laws.'"[95]

[84] A kidnapping and forcible removal of a defendant ostensibly violates the Federal Kidnapping Act. *See* note 15 *supra*. Nothing in *Frisbie* is to the contrary.

[85] 342 U.S. at 522–23.

[86] 367 U.S. 643 (1961). *Toscanino* stood squarely for this proposition prior to its limitation in *Lujan*.

[87] 294 A.2d 683 (Me. 1972).

[88] The defendants had been arrested in New Hampshire and detained there by local authorities. Maine law enforcement officials were then notified and they immediately went to New Hampshire. The defendants were handcuffed and physically transported by the Maine officers from New Hampshire to Maine under the ostensible official authority asserted by the Maine law enforcement officials. Both Maine and New Hampshire have adopted, with minor variations, the Uniform Criminal Extradition Act. ME. REV. STAT. ANN. tit. 15, §§ 201–29 (1964); N.H. REV. STAT. ANN. ch. 612 (1973).

[89] Prior to *Mapp*, Maine had declined to follow an exclusionary rule for evidence that was acquired by fourth amendment violations. *See* State v. Schoppe, 113 Me. 10, 92 A. 867 (1915).

[90] 294 A.2d at 694.

[91] *Id.* at 695.

[92] United States v. Russell, 411 U.S. 423 (1973); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963).

[93] 367 U.S. at 660.

[94] 411 U.S. 423 (1973).

[95] *Id.* at 430. The defendants in *Russell* were convicted of illegal manufacture of a controlled substance. The essential

Moreover. the *Stone* analysis does not sufficiently answer the contention that since the fourth amendment guarantees the security of the person as well as the security of property, an unlawful seizure of the person by a forcible abduction violates that amendment no less than an unlawful seizure of property.[96] Since the exclusion of illegally obtained evidence has been deemed a proper way to deter illicit police activity, it is not at all clear why the divesting of jurisdiction over an unlawfully seized defendant should not also be required.[97] As a practical matter, the likelihood that a defendant would institute a civil suit for damages to redress the loss of rights during the course of an unlawful abduction is rather remote.[98] Thus, apparently, law enforcement authorities who ignore lawful means of obtaining jurisdiction over a defendant can profit by their illegal abduction with no real threat of punishment. Divesting a court of jurisdiction is the only effective way to deter such undesirable conduct.[99] In *Mapp* the only sanction necessary to deter the unlawful conduct of law enforcement officials was to exclude unconstitutionally seized evidence. As *Toscanino* points out, when suppression of evidence does not suffice, as in the case of a forcible abduction, then the court must tailor its remedy to insure that an ultimate conviction will not be had through governmental illegality.[100]

Furthermore, it is merely an exercise in intellectual dishonesty to hold that the decency and dignity of the guilt adjudication process is not demeaned when such process is used against one who is brought before the court in a lawless manner. The guilt adjudication process does not operate in a vacuum, oblivious to conduct that occurs prior to the commencement of the trial. Judicial integrity is certainly not furthered when a court refuses to concern itself with the lawless manner in which an accused is brought before it. It is clear that the "concept of due process now protects an accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part."[101] Pre-trial illegality, whether in the form of an unlawful search and seizure or a forcible abduction, must be guarded against. It is no answer to say that the relationship between the ultimate conviction of a defendant and the unlawful method in which he has been brought before the court is too tenuous to admit of a due process violation. An accused cannot be convicted unless he is present before the court. The lawless conduct involved in obtaining his presence becomes a vital link to that conviction, and is not merely remotely related to it.

Thus, as long as *Mapp* and its progeny continue to have vitality in the criminal law,[102] it becomes very difficult analytically to adhere to the *Ker-Frisbie* doctrine. The distinct possibility exists, however, that the Supreme Court may modify the evidence-exclusionary principle in the near future.[103] Assuming that the rule is not abolished altogether, it is likely that the Court may allow law enforcement officials to interpose a good faith defense, whereby the rule would only be applicable to intentional or

---

ingredient in the formula was supplied by a federal narcotics agent. The Court did not find this conduct by the federal agent sufficient to overturn the defendants' convictions, rejecting an analogy to the exclusionary rule. The Court, however, did not diminish the principle that unlawful police conduct demands the exclusion of evidence seized thereby. The majority argued that the conduct of the government in this case violated no independent constitutional right of the defendant, nor did the government agent violate any federal statute or rule or commit any crime while infiltrating the defendant's scheme. *Id.*

[96] *See* note 40 *supra.* The fourth amendment guarantees "[t]he right of the people to be secure in their persons ..."; an arrest is a seizure of the person. U.S. CONST. amend. IV. *See* Barrett, *Personal Rights, Property Rights, and the Fourth Amendement,* 1960 S. CT. REV. 46, 47; Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361 (1921).

[97] Such analysis was originally suggested in Pitler, *supra* note 29, at 600. The court in *Toscanino* apparently based its decision upon this analysis as well.

[98] A civil suit for damages under § 1983 may be viable in some abduction situations, but in the absence of brutal or outrageous conduct, it would be difficult to establish a violation of rights in a § 1983 suit.

[99] *See* Scott, *supra* note 16, at 101-02. The author compared the inadequate remedies against offending officers for abduction to the remedies available for illegal searches and seizures.

> The right to be free from unlawful bodily interference by police officers is at least as important as the right to be free from unlawful search and seizure of property by them; so that the only effective way to deter police from such lawlessness is to say to them, "We will not try a criminal whose presence in the state has been thus secured."

Id.

[100] 500 F.2d at 275.

[101] *Id.* at 272.

[102] It is recognized that the principle is not without its critics. *See* Comment, *Trends in Legal Commentary on the Exclusionary Rule,* 65 J. CRIM. L. & C. 373, 380-84 (1974).

[103] The Court recently heard arguments in two cases which could potentially result in a decision altering the exclusionary rule. *See* Wolff v. Rice, 513 F.2d 1280 (8th Cir.), *cert. granted,* 422 U.S. 1055 (1975); Stone v. Powell, 507 F.2d 93 (9th Cir. 1974), *cert. granted,* 422 U.S. 1055 (1975).

flagrantly illegal police activity.[104] Judge Friendly has pointed out that it may be inconsistent with "the objective of deterrence that the maximum penalty of exclusion should be enforced for an error of judgment by a policeman necessarily formed on the spot and without a set of the *United States Reports* in his hands . . . ."[105] Even if the application of the rule is limited to instances of bad faith by law enforcement officials, it is arguable that a forcible abduction to obtain jurisdiction, in lieu of available legal process, is prima facie bad faith. A forcible abduction cannot be likened to a slight and unintentional miscalculation by the police, which presumably would be amenable to a good faith defense. Rather, kidnapping a defendant and forcibly removing him into the jurisdiction of the court is conduct that is flagrantly illegal. Thus, even under a modified exclusionary principle such lawless conduct by law enforcement officials would still be objectionable.[106]

Concededly, abolition of the *Ker-Frisbie* doctrine would require courts to impose, as a deterrent, a rather harsh remedy to redress the unlawful activity of law enforcement officials—the permanent divestiture of jurisdiction over a particular defendant. As a matter of policy some courts have argued that such a remedy is not proper in light of the strong state interest of enforcing the criminal law by bringing fugitives to justice.[107] The interests of the individual offender are clearly antagonistic to those of the state, and in balancing the two, courts have demonstrated a definite tendency to hold that pre-trial infringements upon an accused's rights are outweighed by the social interest in the suppression of crime. It is certainly arguable as a practical matter that the exclusion of relevant evidence frequently leads to a wrongdoer escaping conviction entirely. It logically follows that a denial of jurisdiction over a particular defendant imposes no greater penalty than would the exclusion of crucial evidence, while accomplishing the same laudable goal of deterring unlawful conduct by law enforcement officials. It is undoubtedly true, as Justice Cardozo pointed out, that under the constitutional exclusionary doctrine, "[t]he criminal is to go free because the constable has blundered."[108] The Court in *Mapp* modified this statement to: "the criminal goes free, if he must, but it is the law that sets him free."[109]

The law sets him free because of a strong countervailing theory to the principle that criminals must be punished for their unlawful acts: the government is not above the dictates of the law. By assuming jurisdiction over a criminal who has been kidnapped and forcibly abducted in contravention of the fourth amendment, the Federal Kidnapping Act,[110] or an international treaty, a court rewards the government's acts of lawlessness, and diminishes public respect for the law.[111] This policy is certainly a very important one, but heretofore has not commanded controlling respect in the consideration of whether a court should decline jurisdiction when it is has been obtained by a clear act of lawlessness. A kidnapping and abduction is merely a shortcut method of law enforcement, and such methods have been clearly denounced in the past as a matter of policy. It has been stated:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, *the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.*[112]

---

[104] This modification was suggested in Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[105] *Id.* at 952.

[106] If, however, there exists no available legal means by which to effect the transfer of a defendant into the jurisdiction, then there would seem to be no objection to an extraterritorial arrest. Any other rule would allow an offender to completely escape justice due to his choice of refuge. Under the exclusionary rule analogy, objections to jurisdiction should be allowed only when law enforcement officials ignore available legal process and obtain jurisdiction by shortcut methods.

[107] The court in *Stone* clearly reflected this concern when it stated that the theory propounded by the defendant "confers upon the objective of deterrence of lawless behavior by law enforcement officials, taken in and of itself, a value primacy so overwhelming that it demands to be fulfilled by any sanction reasonably likely to foster it—regardless of the magnitude of injury concomitantly inflicted upon the public welfare in other respects." 294 A.2d at 694.

[108] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[109] 367 U.S. at 659.

[110] 18 U.S.C. § 1201 (Supp. IV, 1974).

[111] *See* Scott, *supra* note 16.

[112] United States v. Miller, 357 U.S. 301, 313 (1958) (emphasis added). It was held that since the defendant did not receive prior notice of authority and purpose before an officer broke down the door to his home, the arrest was unlawful and the evidence seized should have been suppressed.

Public respect for the law is certainly not enhanced when the very people who are charged with enforcing the law are themselves guilty of serious violations. The government sets a very poor example when it obtains convictions as a result of unnecessary lawless conduct. This conveys the impression that there are two standards of law under the Constitution, one standard for the people and another for those entrusted with law enforcement. One should not forget the serious admonition of Mr. Justice Brandeis' dissenting opinion in *Olmstead v. United States:*[113]

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a Government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.[114]

These serious considerations go unheeded when a court cites the *Ker-Frisbie* rule without giving thought to whether the policy behind that rule is a sound one, and whether respect for the law is seriously diminished.[115]

Federal courts of appeal are in a strong position to recognize these important policy considerations and exercise their supervisory powers over the administration of criminal justice by refusing to allow the assumption of jurisdiction over an illegally apprehended defendant.[116] This supervisory power, first expressed in *McNabb v. United States,*[117] is available to enable federal courts to refuse to countenance "trials which are the outgrowth of fruit of the Government's illegality," since they "debase the process of justice."[118] This clearly reflects the rationale behind divesting jurisdiction over forcibly abducted defendants. State courts, although not equipped with such a convenient supervisory mechanism, should nevertheless recognize that divestiture of jurisdiction is a necessary means of enhancing respect for law and deterring lawless conduct by law enforcement officials.

Conclusion

The conflict recognized by the *Toscanino* court between the *Ker-Frisbie* rule and modern notions of due process[119] is a real one that can no longer be ignored in the administration of criminal justice.

---

[113] 277 U.S. 438, 485 (1928).

[114] In this vein Justice Brandeis also stated:

> The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for the law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination .... To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Id. at 484–85 (footnote omitted).

[115] Mr. Justice Frankfurter, dissenting in Harris v. United States, 331 U.S. 145, 172 (1947), also alluded to the necessity of maintaining respect for law:

> Stooping to questionable methods neither enhances that respect for law which is the most potent element in law enforcement, nor, in the long run, do such methods promote successful prosecution. In this country police testimony is often rejected by juries precisely because of a widely entertained belief that illegal methods are used to secure testimony. Thus, dubious police methods defeat the very ends of justice by which such methods are justified. No such cloud rests on police testimony in England. Respect for law by law officers promotes respect generally, just as lawlessness by law officers sets a contagious and competitive example to others.

See also Judge L. Hand's opinion for the court in United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

[116] This was clearly approved of in *Toscanino,* where the court found that the supervisory power was not limited to the admission or exclusion of evidence, but could be exercised in any manner necessary to remedy abuses of a district court's process. 500 F.2d at 276. *Cf.* Rea v. United States, 350 U.S. 214 (1956). *See also* United States v. Lira, 515 F. 2d 68, 73 (2d Cir. 1975) (Oakes, J., concurring).

[117] 318 U.S. 332 (1943).

[118] *See* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale, and Rescue,* 47 Geo. L. J. 1, 29, 32 (1952). To buttress the exercise of this supervisory power to bar the exercise of jurisdiction over forcibly abducted defendants, federal courts can also rely upon the mandate in Weeks v. United States, 232 U.S. 383 (1914). In that case the Supreme Court held that evidence illegally procured by federal officials was barred from use in federal trials. Thus, even if *Mapp* is modified, federal courts will still be bound by *Weeks,* and can utilize their supervisory power to withhold jurisdiction over forcibly abducted defendants. Federal officials cannot profit from an illegal search since evidence obtained will be excluded in the subsequent trial; they should not be encouraged to pursue unlawful means of obtaining jurisdiction over a defendant, either.

[119] 500 F.2d at 275.

Courts have continued to countenance that rule ignoring its constitutional implications, and thereby rewarding the unlawful conduct of law enforcement officers. It is certainly not necessary to limit the divestiture of jurisdiction to those cases which "shock the conscience" in the narrow due process sense.[120] The concept of due process is broader, and demands that an accused be protected against pre-trial illegality by denying to the government the fruits of its deliberate and unnecessary lawlessness. Kidnapping and forcible removal of a defendant when legal means are available for extradition or transfer is a blatant act of lawlessness. Courts should begin to evaluate this mode of acquiring jurisdiction rather than merely repeating an outmoded rule that is open to serious criticism. Thus far, such analysis is clearly wanting.[121] As a result, a principle is adhered to which conflicts with due process considerations, and respect for law and the integrity of the judicial process are thereby diminished.

[120] *See* note 16 *supra*.

[121] *See, e.g.*, United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975).

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 67, No. 2
Printed in U.S.A.

JUVENILE CONFESSIONS: WHETHER STATE PROCEDURES ENSURE CONSTITUTIONALLY PERMISSIBLE CONFESSIONS

INTRODUCTION

In 1966, *In re Gault*[1] held that all children within juvenile court jurisdictions are entitled to the fifth amendment right against self-incrimination and that juvenile confessions, to be admissible, must be both voluntary and knowing.[2] Since this decision, the issue of admissibility of juvenile confessions into juvenile "civil" proceedings and criminal proceedings, once juvenile jurisdiction has been waived,[3] has been frequently litigated.

The change in the law creates difficulties for many states. Prior to *Gault,* state Juvenile Court Acts had not afforded children the constitutional privileges now required.[4] Juvenile proceedings were forward-looking in nature, focusing on the rehabilitation of troublesome youths[5] rather than the protection of their constitutional rights.

Nonetheless, in recognition of a child's inherent frailties, legislatures and courts created statutory and common law protections for juveniles. Courts must now decide if this protective philosophy will require concrete procedures to guard juveniles during interrogations. For example, should *Miranda v. Arizona*[6] and *Escobedo v. Illinois,*[7] both of which specified procedural safeguards for adults, now apply to children? Should parents, who are included throughout a juvenile proceeding,[8] be required to be present whenever a youth might confess? How intertwined can the criminal and juvenile courts become without damaging the "civil" design geared to shelter children? Finally, how are the various provisions of the juvenile codes to operate: as mandates, or merely as directives?

Five basic approaches have arisen in the last ten years as states have struggled to reconcile their basic presumptions concerning juveniles with *Gault's* constitutional mandate.[9] Yet, rarely do these approaches directly confront the problem of ensuring that a juvenile's confession is extracted by constitutional means. Since most states are reluctant to provide extra procedural safeguards, children appear to be losing their "need" status. This may unfortunately result in an inadequate protection of their recently-acquired fifth amendment right.

FEDERAL LAW REGARDING CONFESSIONS

The fifth amendment provides that no citizen shall be forced to incriminate himself in any criminal matter.[10] To preserve this guarantee, self-incriminating statements are admissible into evidence only if they are made voluntarily, and after a voluntary and knowing waiver of one's fifth amendment privilege has been given.[11]

[1] 387 U.S. 1 (1967).

[2] *Id.* at 55.

[3] M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A STUDY OF JUVENILE CODES IN U.S. (1974) [hereinafter cited as LEVIN & SARRI].

Nearly every state has a statutory provision providing for transfer of a child from the juvenile jurisdiction to adult criminal jurisdiction. Transfer can occur if a child, usually thirteen years or older, has committed an offense which, if committed by an adult, would be a felony. The procedure varies from state to state as to who may require the transfer and whether a hearing or only an investigation is required before juvenile jurisdiction is waived.

Kent v. United States, 383 U.S. 541 (1966) concluded that the District of Columbia transfer statute was "critical" and as such required a hearing governed by due process requirements. The following is a typical transfer statute:

> In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters . . . (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority.

ILL. REV. STAT. ch. 37, § 702-7 (3) (a) (1975).

[4] *See* note 45 *infra.*

[5] *See* notes 45-47 *infra.*

[6] 384 U.S. 436 (1966).

[7] 378 U.S. 478 (1964).

[8] *See* note 172 *infra.*

[9] *In re* Gault, 387 U.S. at 55.

[10] U.S. CONST. amend. V provides: "[N] or shall [anyone] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." The fourteenth amendment prohibits state infringement of this privilege. Malloy v. Hogan, 378 U.S. 1 (1964).

[11] Brown v. Mississippi, 297 U.S. 278 (1936). *Brown* established the "voluntariness" test. Prior to *Miranda v. Arizona* it was the standard which governed the admissibility of a confession or other incriminatory statement.

Prior to *Miranda v. Arizona*,[12] the Supreme Court focused on whether the confession had been voluntarily given, consistently holding that confessions involuntarily obtained violate the fifth amendment[13] this constitutional violation prohibits the admission of the coerced confession into evidence.[14]

The "voluntariness" requirement[15] was originally established to stop the physical abuse too often used to obtain confessions.[16] But the concept of coercion has been expanded to include psychological as well as physical "force,"[17] both types of compulsion rendering a confession inadmissible.

Three reasons support the requirement that a confession used in a judicial proceeding be voluntary. First, a coerced confession is felt to be testimonially unreliable.[18] Courts fear that an innocent man may confess under fear and pressure, and then be convicted of an offense he did not commit. For example, in *Chambers v. Florida*,[19] police randomly chose and questioned thirty blacks regarding the murder of an elderly white man. The first one who confessed, Chambers, was charged with the crime. As a statement of truth, Chambers' confession seems suspect. Given after a week of grilling, Chambers' first admission was rejected by the district attorney as insufficient to establish his guilt. It took the defendant another day to "invent" an acceptable confession—one that fit the crime that had been committed. The Supreme Court found the confession totally unreliable as a statement of truth.

Second, involuntary confessions offend certain societal values. The criminal law should not be used as an instrument of unfairness since the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.[20] The dignity and integrity of each citizen, which deserve protection in a free society, are not maintained when one is forced to incriminate himself.[21]

In determining whether a confession is voluntary, courts have analyzed the facts on a case-by-case basis.[22] Looking at the "totality of the circumstances," courts assess many factors involved in a confession to determine if it was indeed voluntary.[23] Various factors considered relevant are the length of questioning,[24] the mental and physical limitations of the accused,[25] the existence of inappropriate police conduct,[26] and the defendant's access to supportive people from outside the jailhouse.[27]

[12] 384 U.S. 436 (1966).

[13] Mallory v. United States, 354 U.S. 449 (1957), said that the fourteenth amendment prevented state admittance of involuntary confessions. Further, when a federal constitutional issue is involved, federal law, as interpreted by the Court, controls state interpretation of the right. "The question of a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law." Brookhart v. Janis, 384 U.S. 1, 4 (1966).

[14] Statements were held inadmissible in each of the following cases: Blackburn v. Alabama, 361 U.S. 199 (1960) (mentally disabled man interrogated for nine hours); Watts v. Indiana, 338 U.S. 49 (1949) (sustained police pressure); Chambers v. Florida, 309 U.S. 227 (1940) (repeated solitary inquisitions); Brown v. Mississippi, 297 U.S. 278 (1936) (defendant was beaten).

[15] Brown v. Mississippi, 297 U.S. 278 (1936). "Due Process" of the fifth and fourteenth amendments is violated if a coerced confession is admitted.

[16] *Id.*

[17] Psychological as well as physical coercion makes a confession involuntary. "There is torture of mind as well as body; the will is as much affected by fear as by force." Watts v. Indiana, 338 U.S. 49, 52 (1949).

[18] *In re* Gault, 387 U.S. 1 (1967), 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940). The case of *In re* Carlo, 48 N. J. 224, 225 A.2d 110 (1966) illustrates the unreliability of confessions obtained from frightened juveniles. Over a six-hour interrogation period, two contradictory statements were given by the youth. Both statements were proven inaccurate by the autopsy report.

[19] 309 U.S. 227 (1940).

[20] Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

[21] 384 U.S. at 460. *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968).

[22] McNabb v. United States, 142 F.2d 904 (6th Cir. 1944) ("voluntariness" is a question of fact).

[23] Reck v. Pate, 367 U.S. 433 (1961) (the record presented a totality of coercive circumstances); Grant v. Wainwright, 496 F.2d 1043 (5th Cir. 1974) (no sleep, interrogation by relays of police, fifty-three hours passed before he was presented to the magistrate); United States v. Blocker, 354 F. Supp. 1195 (D.D.C. 1973) (forced to strip, mental deficiencies, police threats with promises of leniency).

[24] Davis v. North Carolina, 384 U.S. 737 (1966) (sixteen days); Culombe v. Connecticut, 367 U.S. 568 (1961) (five days); Watts v. Indiana, 338 U.S. 49 (1949) (seven days).

[25] Jackson v. Denno, 378 U.S. 368 (1964) (sickness); Reck v. Pate, 367 U.S. 433 (1961) (mentally retarded nineteen year-old); Blackburn v. Alabama, 361 U.S. 199 (1960) (mental disability); United States v. Blocker, 354 F. Supp. 1195 (D.D.C. 1973) (I.Q. of 70); People v. Price, 24 Ill. 2d 46, 179 N.E.2d 685 (1962) (two hours of questioning passed before accused's second degree burns received medical attention).

[26] Spano v. New York, 360 U.S. 315 (1959) (deception), Harris v. South Carolina, 338 U.S. 68 (1949) (accused's family was threatened); Chambers v. Florida, 309 U.S. 227 (1940) (threatened with an angry mob).

[27] Gallegos v. Colorado, 370 U.S. 49, *rehearing denied*, (1962) (five days held incommunicado); Cotton v. United States, 446 F.2d 107 (8th Cir. 1971) (questioned by a sole postal officer alone); People v. Baker, 9 Ill. App. 3d 654, 292 N.E. 2d 760 (1973) (denied twelve requests by youth to

The "totality of the circumstances" standard was later supplemented by several procedural safeguards. First, the Supreme Court in *Escobedo v. Illinois*[28] required that an attorney be available to an accused starting at the "crucial stage" of police contact, once the focus on an individual is accusatory and his freedom of movement is restrained.[29] Second, *McNabb v. United States*[30] and *Mallory v. United States*[31] held that confessions obtained during an extended, unjustified delay in presenting an accused to a magistrate, in violation of a federal rule of procedure,[32] are inadmissible as a matter of law. Third, an accused must be given the warnings required by *Miranda v. Arizona*[33] which inform the accused of his constitutional rights. An intelligent, knowing, and voluntary waiver of these rights must then be made for any subsequent confession to be admissible.[34] Unless these protective devices are used to dispel "the compulsion inherent in custodial surroundings,"[35] the Court reasoned that no statement can be truly voluntary.

While these procedural requirements were established to protect one's fifth amendement rights[36] a secondary benefit arose from their mandatory use. Courts are partially relieved from the necessity of looking for coercive influences in each confession.[37] If a presumption can be raised that the procedure has decreased undue influence on the accused, a less in-depth analysis may then be needed to determine the voluntariness of an admission.

Miranda has introduced not only a mandatory procedure, but has changed the focus of analysis to the issue of waiver. One must make a knowing, intelligent, and voluntary waiver of his fifth amendment rights[38] for any subsequent confession to be constitutionally permissible as evidence. This requirement minimizes the possibility that a fundamental guarantee will be relinquished out of ignorance or pressure. While there is a presumption against waiver of one's constitutional rights,[39] courts analyze the character of a waiver in much the same way they used to assess the voluntariness of the confession, by examining the totality of the surrounding circumstances.[40]

Therefore, a confession must withstand a three-part analysis before it will be deemed a valid waiver of an accused's privilege against self-incrimination. First, procedural safeguards, including *Miranda* warnings, must have been followed.[41] Second, the interrogation proceedings must have been conducive only to a voluntary and knowing waiver of one's right to remain silent. Third, the confession itself must have been voluntarily given. Case law mandates that these three "tests" be met before a confession can be admitted into evidence.[42] Yet, as will be seen later, in the context of juvenile confessions, this analysis is not always followed. Unfortunately, admissibility seems to hinge increasingly on the judge's determination of whether the accused made a valid waiver of his *Miranda*[43] rights, thus overlooking the well-established "voluntariness" test.[44]

Constitutional Rights Afforded Juveniles Under the Juvenile Court Jurisdiction

Juvenile Court Acts[45] arose in the early 1900's and were designed to allow a state to control children

see his parents); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968) (youth was told he could see his mother only if he confessed).

[28] 378 U.S. at 492.

[29] The right to an attorney begins even before interrogation begins. Once the police have asked a citizen to come with them for questioning the "accusatory stage" has begun. Miller v. Warden, 338 F.2d 204 (4th Cir. 1964).

[30] 318 U.S. 332 (1943).

[31] 354 U.S. 449 (1957).

[32] Fed. R. Crim. P. 5(a).

[33] 384 U.S. at 444. Any person in custodial interrogation must be informed of his right to be silent, the right to an attorney during questioning, that if he cannot afford to retain an attorney one will be appointed for him, and that any statement may be used against him in a court of law.

[34] *Id.* at 444. *Miranda* does not apply to spontaneous statements made by a defendant.

[35] *Id.* at 458.

[36] *Id.* at 463.

[37] People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968).

[38] 384 U.S. at 444.

[39] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See also* Carnley v. Cochran, 369 U.S. 506 (1962).

[40] United States v. Hayes, 385 F.2d 375 (4th Cir. 1967), *cert. denied*, 390 U.S. 1006 (1968).

[41] Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 342 (1943).

[42] Miranda v. Arizona, 384 U.S. at 444.

[43] *See* Note, *Waiver of Rights in Police Interrogations:* Miranda *in the Lower Courts*, 36 U. Chi. L. Rev. 413, 417 (1969).

[44] *See* notes 15 and 21 *supra.*

[45] Illinois enacted the first Juvenile Court Act in 1899. By 1928 all but two states had followed suit. Levin & Sarri, *supra* note 3.

> In juvenile cases, the state, as *parens patriae*, was given the task not to determine guilt or innocence of the child, but rather what had best be done in his

felt to be in need of guidance.[46] Using the concept of *parens patriae,*[47] legislatures authorized broad discretionary powers to rehabilitate "troubled" youths.[48] In the absence of effective parental control or rearing of a child, legislators felt the welfare of society necessitated taking control over such a youth. Further, by operating as "civil proceedings," the juvenile system was able to avoid the stigma of criminal adjudication and to open the door to treatment, not punishment,[49] for juveniles processed through their courts.

However, the labeling of juvenile proceedings as "civil" has allowed the courts to deprive juveniles of certain constitutional liberties guaranteed to adults in criminal proceedings.[50] Juvenile courts argued that strict adherence to procedural regularity might prevent their obtaining total disclosure of a child's character and the offense in question.[51] Full disclosure is seen as necessary to design an effective treatment plan. Case law reflected the strong feeling that a child, unlike an adult, had a right "not to liberty but to custody."[52] Since parents need no special procedure to deprive their children of liberty, neither should the state when standing in the parents' shoes.[53] In sum, courts did not require the juvenile court systems to protect juvenile constitutional rights, since the courts found no such rights existing.

Disagreeing with the general position outlined above, some federal[54] and state courts,[55] had held by the 1960's that juveniles were protected by "due process" of the fifth and fourteenth amendments. Since children had been afforded constitutional rights prior to the enactment of the various juvenile codes,[56] these courts disagreed that a juvenile court act could now be "an instrument for the denial to a minor of a constitutional right or of a guarantee afforded by law to an adult."[57]

However, it was not until 1966, in *In re Gault,*[58] that the United States Supreme Court squarely addressed the issue of a child's constitutional rights. The Court limited its holding to the due process elements constitutionally required in a juvenile court hearing.[59] Yet, the fifth and sixth amendment privileges, which the Court held applicable to children, begin even earlier than the hearing—once the

---

interest and in the interest of the state to save him from a downward career.

Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–120 (1909).

After the decisions in *Gault* and *United States v. Kent*, and perhaps prompted by these cases, major revisions of all but eight states' juvenile codes occurred. The amended codes reflect and implement provisions to meet the newly emphasized constitutional requirements. LEVIN & SARRI, *supra* note 3.

[46] Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198 (1905). The court in Lindsay v. Lindsay, 257 Ill. 328, 336, 100 N.E. 892, 895 (1913) held it was the "duty of . . . government, in its character of *parens patriae,* to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy . . . are unable to take care of themselves."

[47] "Also sound is the ancient right of the state as *parens patriae* to exercise its corrective influence over a minor in the dispositional phase, once he is deemed to be deliquent by methods of due process." J.C. Watkins, Jr., Parens Patriae, Gault and Beyond, May 1968 (unpublished thesis in Northwestern University Law School Library), at 66.

[48] LEVIN & SARRI, *supra* note 3, at 1.

[49] *Id.*

[50] *Id.*

[51] Note, *Juvenile Delinquents: The Police, State Courts, And Individualized Justice,* 79 HARV. L. REV. 775, 794–95 (1966).

[52] *In re* Gault, 387 U.S. at 17.

> [T]he Legislature surely may provide for the salvation of such a child, if its parents or guardian be unable or unwilling to do so . . . . The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home, to save it and to shield it from the consequences of persistence in a career of waywardness; nor is the state, when compelled, as parens patriae, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child to lead it into one of its courts.

[53] Commonwealth v. Fisher, 213 Pa. 48, 50, 62 A. 198, 200 (1905).

[54] Gallegos v. Colorado, 370 U.S. 49, *rehearing denied,* 370 U.S. 965 (1962); Haley v. Ohio, 332 U.S. 596 (1948), United States v. Morales, 233 F. Supp. 160 (D. Mont. 1964).

In a proceeding under the Federal Juvenile Delinquency Act, "due process and fundamental fairness compel the same safeguards for a juvenile as for an adult charged with the same offense." United States v. Morales, *supra* at 164–65.

[55] *In re* Contreras, 109 Cal. App. 2d 787, 241 P.2d 631 (1952).

[56] People v. Flack, 125 N.Y. 324, 26 N.E. 267 (1891). Juveniles have the right to notice of charges, a speedy public jury trial, and generally can not be deprived of their liberty without due process of law, whether the case is criminal or "civil" in nature. "The Constitution is the highest law; it commands and protects all." People v. Turner, 55 Ill. 280, 288 (1870).

[57] 109 Cal. App. 2d, at 789, 241 P.2d at 633. *See also* Trimble v. Stone, 187 F. Supp. 483, 485 (D.D.C. 1960).

[58] 387 U.S. 1 (1963).

[59] *Id.* at 13. *Gault* involved the adjudication of a fifteen year-old who was declared "delinquent" for allegedly making obscene phone calls. Gault was "sentenced" to remain in a state industrial school until he reached the age of majority.

child is in custody.[60] Citing *Miranda* as authority,[61] the Court held that no person, not even a juvenile, can be compelled to be a witness against himself. Since *Miranda* is effective once an individual is an "accused" and in custody, *Gault* rights also become effective at that point.

The procedural and substantive rights of juveniles, which the Court found must be protected to satisfy the due process requirement,[62] are as follows: (1) notice of the charges; (2) right to counsel; (3) right to confrontation and cross-examination; (4) privilege against self-incrimination; (5) right to a transcript of the proceedings; and (6) right to appellate review.[63]

The Court in *Gault* countered arguments previously used to justify the denial of juvenile rights. First, it disagreed that the unique benefits of the juvenile court system, which gives a "treatment" orientation without criminal stigmatization, would "be impaired by constitutional domestication."[64] Nor would the order and regularity introduced by the constitutionally protective procedures destroy the "kindly" atmosphere juvenile courts try to provide.[65] Second, lower courts had held that truth is the ultimate goal of a juvenile proceeding,[66] and that a confession was therapeutically beneficial for a youth.[67] These goals were facilitated by restricting the juvenile's right against self-incrimination. *Gault* disagreed with this reasoning by the lower courts. Citing psychological studies,[68] the Court agreed that to induce a child to confess through the use of a paternal atmosphere and then discipline the child, would cause anti-therapeutic results. The child will most likely become hostile and adverse, feeling he had been tricked.[69]

Thus, the Court's ultimate determination was that juveniles, even under the juvenile jurisdiction, must be afforded the same due process and fundamental fairness safeguards given adults. The prior "unbridled discretion"[70] in juvenile proceedings was adjudged a poor substitute for procedures which are vital to protect a child's potential loss of liberty.[71]

Gault held that a confession must meet two criteria to be admissible into evidence. First, the confession must be voluntary.[72] Second, it must not be made in ignorance of one's fifth amendment rights.[73] The same considerations which created the "voluntariness" test in adult courts[74] support *Gault's* requirement that juvenile confessions be voluntary. First, the personal liberty that our democracy should preserve would be squelched if an individual, through force of psychological domination, could be deprived "of the freedom to decide whether to assist the state in securing his conviction."[75] Second, the Court feared that if coaxed, a child might falsely accept guilt.[76] Illustrative of this possibility is *People v.*

[60] To deprive the minor at the accusatory stage of the protection considered necessary for his protection during the hearing is to repudiate the reasoning of *Escobedo* which held that the interrogation was a "critical stage" when legal aid and advice [and the right against self-incrimination] were most critical.
Note, *The Confessions of Juveniles,* 5 WILLAMETTE L. J. 66, 70 (1968).

[61] 387 U.S. at 50 n.87, 56 n.97. The Court holds that the *Miranda* warnings add order and certainty, which help secure the fifth amendment.

[62] *Id.* at 21, 27, 28. Finding that "due process of law" is indispensable to individual freedom, the Court thought it would be "extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase."

[63] *Id.* at 10.

[64] *Id.* at 22. The Court also questioned whether the juvenile system which emphasizes rehabilitation, was producing any benefit in exchange for the lack of individual liberties.

> Certainly, these figures and the high crime rates among juveniles to which we have referred, could not lead us to conclude that the absence of constitutional protections reduces crime, or that the juvenile system, functioning free of constitutional inhibitions as it has largely done is effective to reduce crime or rehabilitate offenders.

Id.

[65] *Id.* at 27.

[66] *In re* Carlo, 48 N.J. 224, 244, 225 A.2d 110, 121 (1966) (Weintraub, C.J., concurring).

[67] *In re* Gault, 387 U.S. at 51.

[68] *Id.* at 51 n.90.

[69] *In re* Gault, 387 U.S. at 52.

[70] *Id.* at 18.

[71] Many cases, where the child is statutorily old enough, and the crime committed if committed by an adult would be a felony, may be transferred to criminal court where the sanction is a "classical" loss of freedom—not just "custody." Further, even within the juvenile jurisdiction, an admission exposes a juvenile to the loss of freedom through detainment. So, the nature of the fifth amendment privilege turns on the exposure a confession invites, not the specific proceeding involved.

[72] 387 U.S. at 55.

[73] *Id.*

[74] *See* notes 18 and 21 *supra.*

[75] 387 U.S. at 47.

[76] *Id.* at 45, *quoting* 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

> This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose...

Id. at 47.

> Simply stated, the Court's decision in this case rests upon the considered opinion—after nearly four busy years on the Juvenile Court bench during which the

Hester.[77] In that case a fourteen year old was interrogated for twelve hours while isolated from his parents and counsel and was not informed of his constitutional rights. The court, in light of the total situation, admitted the statement into evidence. Yet the confession seems highly unreliable as an admission of guilt. It directly contradicted the police explanation of how the murder must have occurred; also the youth could only devise a confession after he was shown photos of the murder scene.

The second part of the *Gault* standard requires that the juvenile know about his fifth amendment privilege before he confesses. While *Gault* did not directly hold that the *Miranda* warnings[78] must be given, courts since *Gault* have so held[79]—probably to ensure that the juvenile is aware of his rights. Further, language in *Gault* points to the need for "certainty and order"[80] in receiving a confession, and cites *Miranda*[81] as a procedure necessary and capable of ensuring constitutional rights.

However, *Gault*[82] and prior cases, *Haley v. Ohio*[83] and *Gallegos v. Colorado,*[84] went beyond holding that juveniles cannot be adjudged by less than constitutionally required due process methods. Children are recognized as needing special care.[85] While giving no specifics, the Court found a different standard necessary to assess whether a child's constitutional privileges have been abused. For a child "cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[86] Plus, a youth may not know how to protect his own interests. As the Court in *Gallegos* pointed out, where a fourteen-year-old was questioned incommunicado for five days regarding a robbery, a child, in comparison with an adult, cannot sense as fully the substantial consequences of a confession.[87]

Taking note of the inherent differences between adults and children, the Supreme Court has demanded that special care and scrutiny be taken in juvenile cases. Yet, states have been given great leeway to experiment with methods they consider sufficient to guarantee a youth's right against self-incrimination. While *Gault* recognizes that special problems may arise with a child's waiver of his fifth amendment right[88] and that procedures may differ depending upon the child's age and the presence and competence of his parents or counsel,[89] no mandatory procedures are set down. States are left with the two-fold criteria to which admissible confessions must adhere—a standard many states' procedures do not seem to ensure.

Juvenile Statutory and Case Law Constitutional Guidelines

The law regarding the admissibility of an adult confession places a strong emphasis on whether the defendant's waiver of his right to remain silent was both voluntary and knowing.[90] A defense frequently raised in juvenile confession cases is that, as a matter of law, juveniles are not competent to waive their constitutional right against self-incrimination.[91] This position, which has rarely been accepted as law,[92]

> testimony of thousands of such juveniles has been heard—that the statements of adolescents under 18 . . . who are arrested and charged with violations of law are frequently untrustworthy and often distort the law.

Id. at 55, *citing In re* Four Youths, Nos. 28-776-J, 28-778-J, 28-783-5, 28-859-J, (D.C. Juv. Ct. 1961).

[77] 39 Ill. 2d 489, 237 N.E.2d 466 (1968).

[78] *See* note 33 *supra.*

[79] United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973); State v. Councilman, 105 Ariz. 145, 460 P.2d 640 (1969); *In re* M., 75 Cal. Rptr. 1, 450 P.2d 296 (1969), People v. Baker, 9 Ill. App.3d 654, 292 N.E.2d 760 (1973); State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); State v. Wright, 515 S.W.2d 421 (Mo. 1974); *In re* Rust, 53 Misc. 2d 51, 278 N. Y. S.2d 333 (1967).

[80] The Court in *Gault* held the juvenile's confession made to the juvenile judge inadmissible, since the

> process by which the "admissions" were obtained and received must be characterized as lacking the *certainty* and *order* which are required of proceedings of such formidable consequences.

387 U.S. at 56 (emphasis added).

[81] 387 U.S. at 56n.97. The court also agreed with the procedural safeguards required in Kent v. United States, 383 U.S. 541 (1966). This case dealt with the due process requirements of the hearing, necessary in the District of Columbia, to transfer a child from the exclusive juvenile jurisdiction to criminal jurisdiction.

[82] "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony . . . ." 387 U.S. at 57, *quoting* Kent v. United States, 383 U.S. 541, 544 (1966). Further, the Court emphasized that giving the *Miranda* warnings to a child will not bear significant weight in determining the "voluntariness" requirement of the confession. 387 U.S. at 54.

[83] 332 U.S. 596, 601 (1948).

[84] 370 U.S. 49 (1962).

[85] Haley v. Ohio, 332 U.S. at 599.

[86] *Id.*

[87] Gallegos v. Colorado, 370 U.S. at 54.

[88] 387 U.S. at 55.

[89] *Id.*

[90] *See* note 43.

[91] United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973); 67 Cal. 2d 365, 432 P.2d 202; People v. Lara, 62 Cal. Rptr. 586 (1967), *cert. denied,* 392 U.S. 945 (1968); Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311 (1972).

[92] The only case found, which held that as a matter of law a child could not make a knowing intelligent waiver of

follows from two facts: children are generally regarded as unable to enter legal transactions and are presumed to lack the requisite intelligence to make a valid waiver.

Due to their age and comparative immaturity, children are commonly found incompetent to protect their own interests.[93] As a result, both statutory and judicial law have been developed to protect a child's personal and property rights.[94] For example, minors are not liable for their contracts; nor can they make valid wills or marry without parental consent.

Logically, these limitations on a minor's legal capabilities, largely based on a child's simple inability to understand the ramifications of his acts,[95] should apply to waivers. For a waiver to be constitutionally permissible, the individual must understand the full impact of dispensing with his privilege against self-incrimination. Yet courts, contrary to the general legal presumptions about children, maintain that a juvenile waiver is legally possible. This position seems to be a necessity rather than a sincere belief as to the depth of a child's intelligence. If waivers were not possible, as a matter of law, *all* admissions made by youths would violate the fifth amendment. And confessions are often the most effective, if not the only, tools available to law enforcement officials.[96]

Merely establishing that a child has the legal capability to waive his constitutional rights[97] does not foreclose the issue. Special problems still may arise with juvenile waivers.[98] Some courts have held that a youthful age will itself raise a presumption against an intelligent waiver. In both *Williams v. Huff*[99] and *Moore v. Michigan*,[100] seventeen year olds claimed that the waivers of their sixth amendment right to counsel had not been given competently or intelligently. While both cases held that the burden of proof was on the adolescent to show an incompetent waiver, (a highly questionable position since *Miranda* specifically places the burden of showing an intelligent, knowing waiver on the state,[101] if counsel is absent during questioning), they also held that the defendant's age "creates an inference of fact that his waiver was not intelligent."[102]

This presumption of an unintelligent waiver seems to establish an even stronger presumption. While all citizens are considered competent to waive their constitutional rights, depending on the facts of each case,[103] a strong presumption against the release of such fundamental privileges exists.[104] Therefore, adding this basic presumption to the extra inference against a knowing, intelligent waiver which arises from the youth of the accused, a double presumption is created.

Applying the Adult "Totality" Standard to Juvenile Confessions

Five basic formats[105] for assessing the legality of juvenile confessions are currently in use. All these approaches incorporate the adult standard of scrutinizing the total situation[106] to see if a confession was constitutionally obtained. Four approaches, the Indiana rule,[107] exclusionary rule,[108] atmosphere requi-

his constitutional rights, is *In Interest* of S.H., 61 N.J. 108, 293 A.2d 181 (1972). Even here, the court narrowed its holding to a ten-year old child.

[93] Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944), *remanded*, 146 F.2d 867 (D.C. Cir. 1945).

[94] *Id.* at 92.

[95] Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HAST. L.J. 223, 225 (1967).

[96] *See* Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968):

> A confession has long been a valuable legal and psycho-social commodity. Usually regarded as the clearest evidence of guilt, it alleviates doubts in the minds of judges and jurors more than any other evidence and by itself largely ensures a conviction.

[97] The *vast* majority of cases have held that juvenile waiver is a factual issue.

[98] *In re* Gault, 387 U.S. at 55.

[99] Williams v. Huff, 142 F.2d 91 (D.C. Cir. 1944), *remanded* 146 F.2d 867 (D.C. Cir. 1945).

[100] 355 U.S. 155 (1957).

[101] 384 U.S. at 475 (while waiver need not be expressly given in writing, silence is not a valid waiver).

[102] Williams v. Huff, 146 F.2d 867, 868 (D.C. Cir. 1945). *See also* 355 U.S. at 165-66.

[103] Escobedo v. Illinois, 378 U.S. at 490 n. 14.

[104] Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[105] (1) The federal juvenile jurisdiction, Arizona, California, Illinois, Nebraska, New Jersey, and Pennsylvania use only the "totality of the circumstances", with age and the presence of parents or counsel as factors to consider.

(2) Indiana disallows any confession made out of the parent's presence, and both child and parent must be informed of their right to an attorney. Lewis v. Indiana, 259 Ind. 431, 288 N.E.2d 138 (1972).

(3) District of Columbia has adopted an exclusionary rule. Any confession received prior to a child's transfer from the exclusive juvenile jurisdiction to criminal court is inadmissible in adult criminal court.

(4) Many states base their decision of admissibility on where the confession is received, excluding from non-juvenile proceedings statements made within the friendly juvenile setting.

(5) New York excludes juvenile confessions if obtained in violation of juvenile code provisions. Most states do not hold a confession obtained in violation of a statute inadmissible per se.

[106] *See* notes 22-27 *supra*.

[107] McClintock v. State, 253 Ind. 333, 253 N.E.2d 233 (1969); Sparks v. State, 248 Ind. 429, 229 N.E.2d 642 (1967). *See* note 105(2) *supra*.

[108] Edwards v. United States, 330 F.2d 849, 850 (D.C.

site,[109] and statutory mandate,[110] supplement the adult standard with additional criteria, giving the extra protection[111] children have been recognized as needing. Yet, none of these standards squarely confront the *Gault* mandate[112] to ensure voluntary and knowing juvenile confessions.

Most of the states examined,[113] the federal juvenile jurisdiction,[114] and the Supreme Court[115] proceed case by case, analyzing the specific factual context in which a confession is received. Only the minimal procedural requirements have been set forth.[116] Some factors, such as the presence of parents during questioning,[117] are considered only when the accused is a child. Yet, most other circumstances evaluated in juvenile cases are important in all confession cases.

The age of a defendant is interpreted as undercutting the voluntariness of the confession[118] or the understanding of a confession's repercussions.[119] Courts rarely find age alone sufficient to invalidate a confession.[120] However, when combined with an impermissibly long interrogation,[121] a mental deficiency beyond mere immaturity,[122] a fear-provoking atmosphere,[123] or interrogation without the presence of a familiar adult,[124] the confession can become impermissible as violating the youth's right against self-incrimination.

Judicial discretion cannot be avoided. Yet, with no clear-cut rules which could protect a child who is not as mature or knowledgeable as an adult, courts are left without clear touchstones by which to evaluate a particular confession. Arguably, then, a child is in the same position as an adult. Law enforcement officers need to follow no extra regulations. Contrary to the Court's declaration[125] that children, differing from adults, may require different techniques, this discretionary policy, the "totality of the circumstances," may fail to meet the *Gault* standard.[126]

Exclusionary Rule

Harling v. United States[127] established the District of Columbia's exclusionary rule, a rule no other jurisdiction has adopted. It prohibits any confession received prior to waiver of juvenile jurisdiction from being used in adult court, once the juvenile is transferred to adult court.[128] While the court established a clear-cut rule which seems to alleviate the need for judicial discretion, it fails to state how a juvenile confession may constitutionally be received. Such a standard is still necessary to review any challenged confessions of adolescents who remain within the juvenile system. Thus, since no proce-

Cir. 1964); Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961). *See* note 105 (3) *supra.*

[109] State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973); State v. Wright, 515 S.W.2d 421 (Mo. 1974); State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966). *See* note 105(4) *supra.*

[110] *In re* M., 44 A.2d 791, 355 N.Y.S. 2d 117 (1974), *In re* Aaron D., 30 App. Div. 2d 183, 290 N.Y.S. 2d 935 (1968). *See* note 105(5).

[111] *In re* Gault, 387 U.S. at 56; Gallegos v. Colorado, 370 U.S. at 54; Haley v. Ohio, 332 U.S. at 600.

[112] It should be kept in mind that the *Gault* standard is the standard by which to evaluate a juvenile's confession when obtained under juvenile jurisdiction, whether admissibility is sought in the juvenile court or criminal court following jurisdictional transfer.

[113] *See* note 105(1) *supra.*

[114] United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973); Cotton v. United States, 446 F.2d 107 (8th Cir. 1971).

[115] *See* note 111 *supra.*

[116] *See* 18 U.S.C. § 5035 (1970) which requires bringing a minor, once arrested, before a juvenile officer without unnecessary delay. This procedure is comparable to FED. R. CRIM. P. 5(a). *See* United States v. DeMarce, 513 F.2d 755 (8th Cir. 1975); United States v. Binet, 442 F.2d 296 (2d Cir. 1971); United States v. Glover, 372 F.2d 43 (2d Cir. 1967).

[117] State v. Hardy, 107 Ariz. 583, 491 P.2d 17 (1971) (presence of child's parents and a consent by them to waiver of rights is one factor in determining voluntariness); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968) (refusal by police for child to see his parents prior to confession); *In re* S.H., 61 N.J. 108, 293 A.2d 181 (1972) (child should be interviewed in presence of his parents).

[118] People v. Connolly, 33 Ill. 2d 128, 210 N.E.2d 523, (1965).

> Minority is simply another factor to be considered in determining voluntariness, and there is no distinct or separate rule of evidence applicable to the confession of minors.

State v. Lytle, 194 Neb. 353, 358, 231 N.W.2d 681, 686 (1975).

[119] *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

[120] *In re* Gault, 387 U.S. 1 (1967); Miranda v. Arizona, 384 U.S. at 467.

[121] People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968) (twelve hour interrogation). *Contra*, Cotton v. United States, 446 F.2d 107 (8th Cir. 1971) (two hours detention).

[122] People v. Devine, 17 Ill. App. 3d 1053, 309 N.E.2d 76 (1974) (mental age seven, only 2.5 grade reading level); Bean v. State, 234 Md. 432, 199 A. 2d 773 (1964) (fifteen year old with a 74–80 I.Q.); State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966) (fifteen year old mental patient).

[123] *In re* Carlo, 48 N.J. 224, 225 A. 2d 110 (1966).

[124] *See* note 117.

[125] *In re* Gault, 387 U.S. at 55.

[126] *Id.*

[127] Harling v. United States, 295 F.2d 161 (D.C. Cir. 1961).

[128] *See* D.C. CODE ANN. § 16-2307 (1973) (which allows transfer of adolescents from juvenile to criminal jurisdiction, depending on the offense and minor's age).

dural guidelines are given, reliance rests solely on the police, and later the judges, to receive confessions in compliance with the fifth amendment.

Harling involved the admissibility of a statement made in police custody prior to waiver of the juvenile jurisdiction. Two weeks later, the seventeen year old was transferred to criminal court on a robbery charge and the state introduced the confession as evidence. In reversing the district court's admission of the statement, the Court of Appeals gave two reasons for establishing an exclusionary rule. First, the court held that fundamental fairness would be offended if

> admissions made by the child in the non-criminal and non-punitive setting of juvenile proceeding(s) [were] used later for the purpose of securing his criminal conviction and punishment.[129]

If this consideration was the court's only concern, interrogation in an unfriendly police atmosphere need only have been required.[130] However, the court preferred to establish a solid barrier between the juvenile and criminal courts.[131] Without this division, the court feared that the juvenile system would become an appendage of the criminal system, which in turn might destroy the *parens patriae* relationship between the child and the juvenile court. Thus, the exclusionary rule seems designed more to preserve the integrity of the juvenile system[132] than to ensure valid confessions. The courts do not address the *Gault* standard, despite the need to test the constitutionality of confessions used in juvenile proceedings.

Atmospheric Requisite Standard

The atmosphere in which the juvenile is questioned creates an important distinction in some jurisdictions.[133] A rule has developed in Minnesota,[134] Missouri,[135] and Oregon[136] which allows a confession made prior to waiver of juvenile jurisdiction to be admissible in a subsequent criminal proceeding if the confession is received by a police officer, instead of a juvenile officer. This practice attempts to fulfill the second part of the *Gault* standard which requires a knowing confession.[137]

Statutes restricting the use of juvenile confessions have been enacted in the above jurisdictions:

> [A]ny evidence given by the child in the juvenile court shall not be admissible as evidence against him in any case or proceeding in any other court. . . .[138]

However, this particular statute did not prevent a Minnesota court from admitting a juvenile confession into a criminal prosecution.[139] In *State v. Loyd.*[140] a mentally deficient sixteen year old was questioned, outside the presence of his parents or counsel, and acknowledged his involvement in a robbery to a police officer. Satisfied that the adolescent had received the required *Miranda* warnings, the court held that a proper, intelligent waiver of his fifth amendment guarantee had been made. Awareness of possible criminal responsibility, which can be imputed from the fact that the police handled the interrogation,[141] is sufficient to create an "intelligent" confession.

Apparently, the fear that the friendly, permissive atmosphere of the juvenile court will prevent a real understanding of a confession's consequences is alleviated when a police officer is the interrogator.[142] "So long as it is made clear to the juvenile that the questioning authorities are not operating as his friends but as his adversaries,"[143] sufficient warning of the gravity of a confession is held to exist.[144]

---

[129] Harling v. United States, 295 F.2d at 163.

[130] *See* notes 133–44 *infra.*

[131] Harling v. United States, 295 F.2d at 163, *citing* Pee v. United States, 274 F.2d 556, 558 (D.C. Cir.):

> [F]rom the moment a child commits an offense, "in effect he is exempt from the criminal law" unless and until the Juvenile Court waives its jurisdiction.

[132] Edwards v. United States, 330 F.2d 849, 850 (D.C. Cir. 1964). This case, factually similar to *Harling*, followed precedent and excluded the boys' confessions which had been made prior to transfer. Yet the victim's identification of the boys, which might have been impossible but for the confessions, was allowed into evidence in the robery prosecutions.

[133] Minnesota, Missouri, and Oregon.

[134] State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973).

[135] State v. Wright, 515 S.W.2d 421 (Mo. 1974); State v. Sinderson, 455 S.W.2d 486 (Mo. 1970). In both these Missouri cases parents were present during questioning. *Contra,* State v. Rone, 515 S.W.2d 438 (Mo. 1974).

[136] State v. Phillips, 245 Ore. 466, 422 P.2d 670 (1967); State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966).

[137] *See* notes 94–104 *supra.*

[138] MINN. STAT. ANN. § 260.211 (1971). *See also* N. Y. FAMILY CT. ACT § 783 (1963):

> [N]or any confession . . . made by him to the court or to any officer thereof in any stage of the proceeding is admissible as evidence against him or his interests in any other court.

This type of statutory provision is common in state juvenile acts.

[139] *See* MINN. STAT. ANN § 260.125(1) (1971).

[140] 297 Minn. 442, 212 N.W.2d 671 (1973).

[141] *Id.* at 448, 212 N.W.2d at 677.

[142] 51 N.D.L. REV. 205, 207 (1974).

[143] State v. Phillips, 245 Ore. 466, 471, 422 P.2d 670, 672 (1967), *quoting* State v. Gullings; 244 Ore. 173, 416 P.2d 311 (1966).

[144] *See* note 135; State v. Rone, 515 S.W.2d 438

Assuming the validity of this position,[145] understanding may increase, but at the cost of "voluntariness"—a vital characteristic of any constitutionally permissible confession. One empirical study, done in California,[146] tested the effect *Miranda* warnings had on an adolescent's understanding of his fifth amendment privilege. Police custody was found to undermine the understanding the warnings did give the juveniles. While 98 per cent of the youths understood that they could remain silent, 29 per cent felt obligated to talk to the police.[147]

> Apparently knowledge is often subordinate to [one's] mental state at the time of arrest confrontation. Perhaps the difference between knowledge of the right to silence and subjective feeling of a necessity to talk is explained by the findings that 60 per cent felt it would go against them if they remained silent [and] 74 per cent felt it would benefit them to talk. . . .[148]

Mandatory Presence of Parents or Counsel During Questioning

The most frequent recommendation made by state courts,[149] the federal courts,[150] and various commissions[151] is that an adolescent's parents, guardian, or counsel be available to the child during police questioning. However, only Indiana has adopted this recommendation as a mandatory practice, which, if not followed, prevents the use of any confession received.[152] Having a responsible adult with a child during interrogation is designed to increase the youth's understanding of his rights and the consequence of their waiver[153] and to lessen the fear and compulsion to talk,[154] all essential factors for a constitutionally permissible confession.

An accused's ability to comprehend is often considered by courts,[155] whether an adult or a child is involved. Mental retardation,[156] a low I.Q.,[157] or lack of education[158] can play an integral part in persuading a court that a confession was not "knowingly" given. Beyond these special factors, normal children are also seen as handicapped by their natural immaturity.[159] Courts have recognized that children often "lack the judgment to appreciate the seriousness of the situation and harm which they may do themselves by yielding to the pressure of insistent police questioning."[160]

The California study,[161] which used ninety adoles-

(Mo. 1974). The court here went even further. A juvenile officer was present while police interrogated the youth. Still, the presence of the juvenile officer was held insufficient to bring the statement within MO. ANN. STAT. § 211.-271(3) (Vernon 1959). The confession was admissible.

[145] Results of a study done in New Haven may indirectly support the proposition that an adversary, police atmosphere will increase overall understanding. A prior record was the most important factor in cases where a confession was not obtained; a greater knowledge of what the interrogation might lead to helps one maintain his right against self-incrimination. Note, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1648 (1967).

[146] Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970).

[147] *Id.* at 51.

[148] *Id.*

[149] State v. Hardy, 107 Ariz. 583, 491 P.2d 17 (1971); People v. Burton, 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971); People v. Lara, 67 Cal 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586, (1967); *In re* Carlo, 48 N.J. 224, 225 A.2d 110 (1966).

Some states, such as Illinois, which includes the absence of family members during a child's questioning as just one factor within the total context, seem interested only in whether an intelligent waiver of fifth amendment exists. People v. Devine, 309 N.E.2d 76, 17 Ill. App. 3d 1053 (1974); People v. Baker, 9 Ill. App. 3d 654, 292 N.E.2d 760 (1973).

[150] *In re* Gault, 387 U.S. 1 (1967); Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948); United States v. Fowler, 476 F.2d 1091 (7th Cir. 1973).

[151] *In re* Carlo, 48 N.J. 224, 241, 225 A.2d 110, 119 (1966), *citing* Standards for Specialized Court Dealing with Children (Children's Bureau, Dept. of Health, Education, and Welfare 1954) at 39.

Whenever possible, a child should be interviewed in the presence of his parents or guardian. *In re* Gault, 387 U.S. 1 (1967), *citing The Challenge of Crime in a Free Society*, REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 86-87 (1967); 41 CALIF. S.B.J. 798, 803 (1966), *citing* Committee on Criminal Law and Procedure of the California Bar.

The committee proposed that "no statement taken from a juvenile under eighteen . . . be utilized in any subsequent criminal proceeding unless made in the presence of an attorney." Model Rules for Juvenile Court of Evidence 25 (1969), *proposed by* Council of Judges of the National Council on Crime and Deliquency.

[152] Lewis v. Indiana, 259 Ind. 431, 288 N.E.2d 138 (1972).

[153] Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

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

[155] People v. Devine, 17 Ill. App. 3d 1053, 309 N.E.2d 76 (1974); People v. Hester, 39 Ill. 2d 489, 237 N.E.2d 466 (1968).

[156] Reck v. Pate, 367 U.S. 433 (1961).

[157] People v Baker, 9 Ill. App. 3d 654, 292 N.E.2d 760 (1973) (I.Q. 72).

[158] Gilbert v. Beto, 274 F. Supp. 847 (S.D. Tex. 1967) (only a seventh grade education).

[159] Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962).

[160] *In re* Carlo, 48 N.J. 224, 241, 225 A.2d 110, 119 (1966).

[161] Ferguson & Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39 (1970).

cents, ages twelve to seventeen, with varying backgrounds, concluded that children do not always completely comprehend their constitutional rights or waiver of these rights. Such a defect results in an inadmissible confession.[162] Only four juveniles, out of the ninety tested,[163] had a perfect score of understanding. And, even more significant, only 27 per cent of the youths comprehended that they had a right to an attorney during interrogation.[164]

A second consideration, which prompted having a parent or counsel available, parallels a basic factor of the "voluntary" test. Incommunicado interrogation has been condemned as inherently compulsive.[165] Hopefully, the presence of a familiar adult will decrease the powerlessness and fear a child, more so than an adult,[166] undoubtedly feels.[167]

One wonders if the presence of this "friendly adult" will create the intended results. Parents, possibly ashamed and/or angered that their child is in custody, may further coerce the child into owning up to the alleged offense, instead of affording the youth shelter. Moreover, a parent may be no more knowledgable than the juvenile about constitutional rights and the consequences of a confession. *United States v. Fowler*[168] is a good illustration of this point. Fowler, a sixteen year old, was interrogated by a postal officer regarding a burglary. The confession, given in the presence of his father, was held inadmissible because it was not knowingly or voluntarily given. The court found not only an invalid *Miranda* warning, but that "[w]hat Fowler needed at the time was counsel and support.... The father, however, did not fill this need."[169] Fowler's father was as upset and ignorant of his son's options as Fowler himself. Perhaps increased understanding and decreased compulsion would be better met by requiring counsel "as a matter of course whenever coercive action is a possibility, without requiring choice by the child or parent."[170]

Even though the above procedure may not accomplish the result desired, Indiana has, in adopting this rule, directly addressed the two-part analysis of *Gault*.[171] While California and New Jersey implicitly[172] recommended that a parent or counsel be present[173] Indiana adopted a per se rule to ensure that confessions admitted into evidence were acquired by constitutional means.[174] Since Indiana courts specifically hold that a child cannot make a knowing[175] or

[162] *In re* Gault, 387 U.S. at 55.

[163] The adolescents were given the *Miranda* warnings and then their comprehension was tested. The overall percentage of understanding of each group was as follows:

	Delinquent	Non-Delinquent
Right to Remain Silent	.98	.82
The Use of the Right	.76	.58
Right to an Attorney at Trial	.96	.78
Right to an Attorney during Questioning.	.22	.30
Right to court-appointed Attorney	.70	.53

Ferguson & Douglas, *supra* note 161, at 48.

[164] Another study in the area also questioned the validity of the warnings. Note, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1563 (1967): "In our estimation, warnings were a factor in reducing the success of interrogation in only eight of the 81 cases which could be evaluated." The Yale study involved all age groups and found those who had never been through such an ordeal before—first offenders—needed the most protection.

[165] Miranda v. Arizona, 384 U.S. at 458.

[166] Gallegos v. Colorado, 370 U.S. 49, 54 (1962). A child "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."

[167] Haley v. Ohio, 332 U.S. 596, 600 (1948). "He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him."

State v. Hardy, 107 Ariz. 583, 584, 491 P.2d 17, 18 (1971). "The presence of the child's parents ... is only *one* of the elements to be considered ... in determining that the statement was voluntary."

In re Williams, 49 Misc. 2d 154, 165, 267 N.Y.S.2d 91, 106 (Fam. Ct. 1966). "The failure of the police to notify this child's parents that he had been taken into custody, ... is germane on the issue of its [confession] voluntary character."

[168] 476 F.2d 1091 (7th Cir. 1973).

[169] *Id.* at 1093, *quoting* Haley v. Ohio, 332 U.S. 596, 600 (1948).

[170] *In re* Gault, 387 U.S. at 40 n.65.

[171] *Id.* at 55.

[172] CAL. WELF. & INST'NS CODE §§ 627.5, 634, 700 (1972); N. J. STAT. ANN. § 2A; 4-55 (1974). Both states' juvenile codes involve a minor's parents or guardian in every stage of the juvenile proceedings, including their being informed of the minor's constitutional rights. Therefore, it is held advisable to have the parent or guardian present during the questioning and to have their consent to the minor's fifth amendment rights being waived.

[173] People v. Lara, 67 Cal.2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967); *In re* S.H., 61 N.J. 108, 293 A.2d 181 (1972). For instance, in one case the court held that the police should see that a parent or some relative or friend is present to allay the fear or pressure a youngster could feel in strange hands and a strange setting. *In re* Carlo, 48 N.J. 224, 235, 225 A.2d 110, 121 (1966).

[174] [T]he true test as to the admissibility of a confession is that it be voluntarily made and that in making it the accused was aware of the probable consequences of his act.

Sparks v. State, 248 Ind. 429, 432, 229 N.E.2d 642, 645 (1967).

[175] McClintock v. State, 253 Ind. 333, 253 N.E.2d 233 (1969).

voluntary[176] waiver while alone, an admission is inadmissible if the child's parents or attorney are not informed of his constitutional rights, allowed to consult with the youth regarding waiver, and present during questioning.[177] Clearly, if the Indiana rule warrants criticism, it stems from the actual effect this procedure has on a child, not from the court's analysis of the problem.

Statutory Violation

Each state's juvenile system is governed by the statutory provisions of its Juvenile Court Act. The thrust of these systems is the care, protection, and rehabilitation of children coming within their purview.[178] Yet, most jurisdictions allow these acts to be violated without the imposition of any sanctions.[179] Only New York[180] and the Federal Juvenile System[181] consistently implement these legislative mandates by finding confessions obtained in violation of specific statutes inadmissible per se. Their positions follow the Supreme Court's rationale underlying the *Mallory-McNabb* rule.[182]

Most state courts have rejected a per se consequence to a statutory violation. For example, New Jersey has a statute which prohibits placing a child under sixteen in a police station.[183] The New Jersey courts recognize that the legislative purpose of this statute is to protect a child from a frightening atmosphere which "is likely to have harmful effects on the mind and will of the boy."[184] Yet, violation of this statute is just one factor to be weighed against the voluntariness of a confession received in police quarters.[185]

Illinois,[186] Minnesota,[187] Missouri,[188] and Oregon[189] all avoid an exclusionary statute by interpreting the prohibition against the use of statements received under the juvenile court's jurisdiction as not including statements given to police officers. Still other courts rationalize that a particular violation of a Juvenile Act provision may be discounted as insufficiently grievous to prohibit the use of the confession obtained.[190]

Contrary to this majority approach, New York has consistently required full compliance with section 724 of the New York Family Court Act.[191] No confession is admissible into evidence if obtained from a juvenile prior to notifying his parents or relative and releasing the adolescent to them or the Family Court.[192] In *In re Rust*[193] and *In re Addison,*[194] where children were questioned before their parents were contacted, the courts justified their holdings solely on the basis of statutory construction.[195] The Juvenile Act had been violated; the sanction was to declare the confession inadmissible as a matter of law.

The Illinois Juvenile Court Act is similar to that of New York.[196] A law enforcement officer, who takes a minor into custody without a warrant, must immediately make a reasonable attempt to notify the child's parents or guardian, and, without unnecessary delay, take the minor to the nearest juvenile

[176] Lewis v. Indiana, 259 Ind. 431, 288 N.E.2d 138 (1972).

[177] *Id.*

[178] *In re* Patterson, 210 Kan. 245, 499 P.2d 1131 (1972).

[179] Illinois, Missouri, New Jersey, and Oregon have all rejected the position that a violation of the juvenile act renders any confession obtained therein inadmissible *per se.*

[180] Violation of N. Y. FAMILY CT. ACT § 724(a), (1963) while obtaining a confession, will result in its inadmissibility.

[181] Violation of 18 U.S.C. § 5035 (1970) will also result in a confession's exclusion from evidence, if the admission occurred during the violation.

[182] *See* text accompanying notes 30, 31, 32, 116 *supra.*

[183] N.J. STAT. ANN. § 2A: 4-57 (1974);

[184] *In re* Carlo, 48 N.J. 224, 239, 225 A.2d 110, 118 (1966).

[185] *Id.*

[186] People v. Connolly, 33 Ill.2d 128, 210 N.E.2d 523 (1965); ILL. REV. STAT. ch. 37, § 702-9 (1973).

[187] State v. Loyd, 297 Minn. 442, 212 N.W.2d 671 (1973), MINN. STAT. ANN. § 260.21(1) (1971).

[188] State v. Wright, 515 S.W.2d 421 (Mo. 1974), MO. ANN. STAT. § 211. 271 (3) (Vernon 1959).

[189] State v. Gullings, 244 Ore. 173, 416 P.2d 311 (1966).

[190] State v. Phillips, 245 Ore. 466, 422 P.2d 670 (1967); ORE. REV. STAT. § 419.575 (1975), which prohibits juveniles from being questioned in jail, was violated. However, the court decided that the purpose of the statute was satisfied since the child was not in contact with adult criminals. *Contra, In re* K.W.B., 500 S.W.2d 275 (Mo. 1973).

The court supported the exclusion of any confession obtained without the child's constitutional rights first being discussed with parents, attorney, or an adult friend by the fact that several code provisions involved a child's parents. MO. ANN. STAT. §§§ 211.031, 211.04, 211.101 (Vernon 1959).

[191] N.Y. FAMILY CT. ACT. § 724 (1963).

[192] *In re* M. 44 App. Div. 2d 791, N.Y.S.2d 117 (1974); *In re* Aaron D., 30 App. Div. 2d 183, 290 N.Y.S.2d 935 (1968); *In re* Addison, 20 App. Div. 2d 90, 245 N.Y.S.2d 243 (1963); *In re* Rust, 53 Misc. 2d 51, 278 N.Y.S.2d 333 (1967); *In re* Williams, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (1966).

[193] *In re* Rust, 53 Misc. 2d 51, 278 N.Y.S.2d 333 (1967).

[194] *In re* Addison, 20 App. Div. 2d 90, 254 N.Y.S.2d 243 (1963).

[195] *Contra, in re* Williams, 40 Misc. 2d 154, 267 N.Y.S.2d 91 (1966). Here, the court held the non-compliance contradicted the finding of a voluntary confession.

[196] ILL. REV. STAT. ch. 37 § 703-2 (1973).

officer.[197] Yet, these two states reach opposite results when these provisions are violated. Illinois has repeatedly held[198] that failure to comply with section 3-2 does not render a confession inadmissible. The Illinois courts support their position with the following rationale:

> [P]roper police investigation of a minor, or the admission of... confessions obtained by the police, [does not] thwart or subvert the purpose of the Juvenile Court Act.... The Act was not intended to erect a shield between minors and criminal prosecution... but, to accomplish rehabilitation....[199]

Clearly, in the face of the transfer provisions in nearly every jurisdiction,[200] juvenile acts have not been designed to isolate adolescents, from criminal processes. Yet the reasoning of the states which allow code violations[201] ignores the mandatory nature of various code provisions. The creation of separate juvenile jurisdictions illustrates the legislative intent to afford the juvenile protections in addition to those he already possesses under the Federal Constitution. The legislative intent was to enlarge, not diminish these protections.[202] Therefore, the violation of a protective provision designed to bolster a child's natural weakness should raise a strong, if not conclusive, presumption that the juvenile was not afforded enough protection to ensure a voluntary, knowing confession. Since it would not meet the *Gault* standard, such a confession should be inadmissible as a violation of the youth's fifth amendment right.[203]

While *Miranda* and *Escobedo* are applicable to juvenile cases, other protective provisions in various juvenile codes—such as the provision in forty states which parallels Federal Rule of Criminal Procedure 5(a)—do not receive the same attention. Nor do their violations result in the same conclusive presumptions. This inconsistent position ignores the purpose of the juvenile codes, prevents the securing of protection a child needs, and increases the possibility of admitting unconstitutional juvenile confessions.

Conclusion

Two basic faults exist with the present laws regarding juvenile confessions. First, with few exceptions, the problem is not carefully analyzed. The two essential elements of a permissible confession—voluntariness and knowingness—should be separately considered, and have procedures designed to ensure the existence of both characteristics. Second, juvenile confessions are often handled in the same fashion as adult confessions. A child, while under the juvenile jurisdiction, is recognized as needing special protection. Yet courts often use no extra precautions when a juvenile has been interrogated, and his age becomes just one factor to be considered. Time may be saved since police and courts will be less encumbered. But the underlying goals of each juvenile act, rehabilitation and protection, become increasingly improbable. Furthermore, a child's recently-proclaimed constitutional guarantees may be violated.

Therefore, to ensure voluntary and knowing confessions, juveniles should be given at least the safeguards afforded adults. *Miranda* warnings must be given. An attorney should be present if requested. And, as California has held,[204] a child's request for his parents is comparable to an adult's request for an attorney. Also, the Juvenile Court Acts should serve as the procedural guidelines for juvenile interrogation. *Gault* stressed the advantages for clear-cut procedures in preserving constitutional rights.[205] For

---

[197] *Id.*

[198] People v. Simmons, 60 Ill. 2d 173, 326 N.E.2d 383 (1975); People v. Steptore, 51 Ill. 2d 208, 281 N.E.2d 642 (1972); People v. Zepeda, 47 Ill. 2d 23, 265 N.E.2d 647 (1970).

[199] People v. Zepeda, 47 Ill. 2d 23, 29, 265 N.E.2d 647, 650 (1970).

[200] Levin & Sarri, *supra* note 3.

[201] *See* notes 179, 198 *supra*.

[202] United States v. Dickerson, 168 F. Supp. 899, 902 (D.D.C. 1958).

[203] United States v. DeMarce, 513 F.2d 755 (8th Cir. 1975); United States v. Binet, 442 F.2d 296 (2d Cir. 1971); United States v. Glover, 372 F.2d 43 (2d Cir. 1967).

All of these cases disallowed confessions obtained in violation of 18 U.S.C. § 5035 (1948). The court in United States v. Glover, *supra,* reasoned that

> Section 5035 evidences a strong Congressional concern with the protection of the rights of juveniles.... There is here no hint of any purpose to allow detention for any other objective than prompt arraignment before a judicial officer, so that the magistrate may explain and protect the juvenile's rights—among others, the right against compulsory self-incrimination.... The Act makes plain the concern of the Congress that those of adolescent age be kept separate from hardened adult offenders. We may assume that it was no less concerned with the greater need of the young and inexperienced for independent, unbiased advice as to the right to counsel and the right to refrain from self-incrimination, when interrogated by the police authorities.

[204] People v. Burton, 3 Cal. 3d 375, 380, 491 P.2d 793, 798, 99 Cal. Rptr. 1, 5 (1971).

[205] *In re* Gault, 387 U.S. 1, 21 (1967), *quoting* Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., separate opinion): "The history of American freedom is, in no small measure, the history of procedure."

example, forty states have provisions comparable to Federal Rule of Criminal Procedure 5(a). Yet, its violation does not raise the presumption that a confession so obtained is involuntary. To ignore the juvenile code provisions is to undermine their *raison d'être:* to protect and rehabilitate children. Holding that a code violation raises a conclusive presumption that any confession obtained was neither voluntary or knowing, may prompt the police to obey statutes which bring the juvenile court officers and/or parents into the picture before a juvenile is questioned. Further requiring the presence of independent counsel seems to be the logical extension of the *Gault* reasoning, and, combined with the above suggestions, will ensure that the juvenile fifth amendment right is a reality.