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JUVENILE *MIRANDA* WAIVERS AND WRONGFUL CONVICTIONS

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ABSTRACT

As compared to adults, juveniles disproportionately falsely confess to crimes they did not commit. Some attribute this to the fact that many children do not have the cognitive capacity to understand and voluntarily waive their Miranda *rights. Waiving* Miranda *rights can leave children vulnerable to coercive police practices, and, in the worst scenarios, can lead to false confessions and convicting innocent children. In most cases, the only remedy left for juveniles trying to prevent incriminating statements from being used against them is by challenging the voluntariness of waiving* Miranda *rights, an almost impossible uphill battle. This Article argues that current federal and state laws inadequately protect juveniles. Additional safeguards that take into account age as providing a special status are needed in custodial interrogations, specifically a mandatory rule requiring juveniles to consult with attorneys before waiving their* Miranda *rights. An attorney consultation would decrease involuntary waivers and ultimately protect vulnerable children from providing false confessions.*

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INTRODUCTION

On August 12, 2016, Federal Magistrate Judge Duffin overturned Brendan Dassey's conviction in the 2005 murder of Teresa Halbach because Dassey's confession was found involuntary and therefore inadmissible.[1] Dassey's confession was central to his convictions of first-degree intentional homicide, mutilation of a corpse, and second-degree sexual assault.[2] While being interrogated on March 1, 2006, Dassey, who at the time was sixteen, "implicated himself in the rape, murder, and mutilation of Teresa Halbach."[3] At trial, Dassey argued that his statements on March 1 were untrue, that he heard of Halbach only after she was reported missing, and that he made up the details in his confession.[4]

Nonetheless, the Wisconsin trial court found Dassey's confession voluntary and relied on the fact that: Dassey was in regular high school classes; he was interrogated while seated on a couch without any physical restraints; he was offered food and breaks; he was provided the *Miranda* warning and did not appear upset or intimidated; and "[i]nvestigators used normal speaking tones, with no hectoring, threats or promises of leniency."[5] Although the

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1 Dassey v. Dittmann, 201 F. Supp. 3d 963, 1006 (E.D. Wis. 2016), *rev'd en banc*, 877 F.3d 297 (7th Cir. 2017), *petition for cert. filed*, No. 17-1172 (Feb. 20, 2018). The State of Wisconsin thereafter appealed Judge Duffin's decision, and on June 22, 2017, a panel of the U.S. Court of Appeals for the Seventh Circuit affirmed Judge Duffin's decision to overturn Dassey's conviction. Dassey v. Dittmann, 860 F.3d 933, 956 (7th Cir. 2017) ("[N]o reasonable court could have come to the conclusion that Dassey's confession was voluntary."), *rev'd en banc*, 877 F.3d 297 (7th Cir. 2017). The decision was later reversed by an en banc panel of the U.S. Court of Appeals for the Seventh Circuit on December 8, 2017, thereby upholding the Wisconsin trial court's decision that Dassey's confession was in fact voluntary. Dassey v. Dittman, 877 F.3d 297 (7th Cir. 2017).

2 *Dassey*, 201 F. Supp. 3d at 975, 983.

3 *Id.* at 970.

4 *Id.* at 983 ("Dassey said he did not know why he had made various inculpatory statements. Dassey speculated that the details he provided to investigators might have been gleaned from books, perhaps one called *Kiss the Girls*." (citing Petition for Writ of Habeas Corpus Filed by Brendan Dassey, Dassey v. Dittmann, 201 F. Supp. 3d 963 (E.D. Wis. 2016) (No. 14-CV-1310), ECF No. 19-21)).

5 *Id.* at 994 ("The court of appeals held that these findings of fact were not clearly erroneous." (citing Petition for Writ of Habeas Corpus Filed by Brendan Dassey, Dassey v. Dittmann, 201 F. Supp.

Wisconsin trial court judge and Judge Duffin assessed the voluntariness of Dassey's confession under the same test, Judge Duffin ultimately found Dassey's confession involuntary. Judge Duffin relied on the fact that: Dassey was a juvenile and was questioned without an adult looking out for his interests; investigators repeatedly suggested they were looking out for Dassey's best interests; Dassey had below average intellect, making him more vulnerable to coercion; he was in regular high school classes, but required the support of special education services; he had no prior contact with law enforcement; and investigators repeatedly told Dassey they knew what happened and that Dassey had nothing to worry about.[6]

Dassey's case raises concerning questions about the reliability of juvenile confessions. Whether or not Dassey falsely confessed, studies show that, as compared to adults, juveniles disproportionately falsely confess to crimes they did not commit.[7] Some attribute this to the fact that many children do not have the cognitive capacity to understand and voluntarily waive their *Miranda* rights.[8] The *Miranda* warning was implemented in order to protect individuals from overly coercive police interrogation techniques that could lead to involuntary confessions.[9] Despite this protection, children often waive their *Miranda* rights because they "do not understand the full range of consequences that flow from a decision to waive those rights and speak with police officers."[10] By waiving their rights, children are left vulnerable and prone to coercion, and in the worst scenarios end up falsely confessing to crimes.[11]

Despite the recognized cognitive difference between adults and juveniles, the Constitution provides juveniles and adults the same protection in custodial interrogations. If juveniles want to challenge their statements made during an interrogation, they must show that their statements were not "made

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3d 963 (E.D. Wis. 2016) (No. 14-CV-1310), ECF No. 1-5)).

6 *Id.* at 1000–01.

7 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004) (stating that juveniles "are over-represented" in false confessions and "suggesting that children . . . may be especially vulnerable to the pressures of interrogation and the possibility of false confession").

8 *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 433 (highlighting a study revealing the limited ability of children to "comprehend the meaning and significance of the *Miranda* warnings"); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 893 (2010) ("The cognitive, social, and emotional traits that make youth so different from adults may, in turn, make them especially vulnerable to the systemic factors already known to contribute to wrongful convictions.").

9 Robert E. McGuire, *A Proposal to Strengthen Juvenile* Miranda *Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1365 (2000).

10 Tepfer et al., *supra* note 8, at 919.

11 *See id.* at 893–94 ("[C]hildren and teens are more likely than adults to falsely implicate themselves during police interrogation . . . .").

voluntarily, knowingly and intelligently."[12] Courts are directed to look at the totality of circumstances surrounding the interrogation to determine whether a *Miranda* waiver is voluntary.[13] The Supreme Court has not provided specific factors that must be considered, nor how each factor should be weighed, and ultimately leaves discretion to judges.[14] This totality test was applied in the *Dassey* case, and its application exposes three fundamental problems: (1) with the same facts, the Wisconsin trial court judge and a federal magistrate judge came to different conclusions on voluntariness; (2) judges are not required to give special weight to the fact that someone at the time of their interrogation is a juvenile; and (3) the totality test provides a retrospective protection and does not help a juvenile at the time a *Miranda* warning is read to them. Although the federal protection is quite limited, some states provide additional protections where absence of a specific safeguard will trigger an exclusion of the *Miranda* waiver. Some safeguards include requiring the advice or presence of a parent, guardian, or attorney before a juvenile can waive his or her *Miranda* rights, and others bar statements and confessions of children under a certain age.

This Article analyzes whether additional safeguards are necessary to protect children in custodial interrogations. Part I examines the link between wrongful convictions, false confessions, and juvenile vulnerability.[15] Part II provides an overview of what the Supreme Court says on custodial interrogations and how some states are going further than federal requirements by adding additional safeguards.[16] Finally, Part III argues that the current federal and state requirements are inadequate in protecting juveniles.[17] Instead, mandatory rules requiring a juvenile to consult with an attorney before waiving his or her *Miranda* rights would offer better protection for juveniles.

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12 Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

13 Fare v. Michael C., 442 U.S. 707, 724–25 (1979) ("[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." (citing *Miranda*, 384 U.S. at 475–77)).

14 David T. Huang, *"Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 448–49 (2001).

15 *See infra* notes 18–86 and accompanying text.

16 *See infra* notes 87–142 and accompanying text.

17 *See infra* notes 143–87 and accompanying text.

I. LINKING WRONGFUL CONVICTIONS, FALSE CONFESSIONS, AND JUVENILE VULNERABILITY

"To date, 356 people in the United States have been exonerated by DNA testing . . . ."[18] These cases reveal a troubling fact of our criminal justice system—innocent people can be wrongfully convicted for crimes they did not commit. By studying exoneree cases, a number of reoccurring factors have been shown to contribute to convicting the innocent: false confessions, eyewitness misidentification, faulty forensic science, informants testifying against innocent people, inadequate representation, and procedural hurdles for appeals and habeas proceedings.[19] This Article looks specifically at false confessions and the troubling fact that "more than 1 out of 4 people wrongfully convicted but later exonerated by DNA evidence made a false confession or incriminating statement."[20] Part A provides an overview of the facts and statistics on false confessions.[21] Part B looks specifically at juveniles and why they are more prone to false confessions.[22]

A. False Confessions

Significant weight is given to confessions during a trial. The Supreme Court has stated, "A confession is like no other evidence. . . . [T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."[23] Underlying this fact is the assumption that people do not falsely confess.[24] During closing arguments at Brendan Dassey's trial, the prosecution stated, "People who are innocent don't confess in the detail provided to the extent [Dassey] provided it. They don't do that."[25] Exonerations resulting from DNA testing have largely challenged this assumption, and studies have shown that psychological pressure and coercive police interrogations can lead to people confessing to crimes they did not commit.[26] Research also shows the troubling fact that people are able to

18 *Exonerate the Innocent*, INNOCENCE PROJECT, http://www.innocenceproject.org/exonerate/ (last visited May 20, 2018).

19 BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 8–10 (2011).

20 *False Confessions or Admissions*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited May 6, 2018).

21 *See infra* notes 23–39 and accompanying text.

22 *See infra* notes 40–86 and accompanying text.

23 Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (internal quotation marks omitted) (quoting Bruton v. United States, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

24 GARRETT, *supra* note 19, at 18.

25 Dassey v. Dittman, 201 F. Supp. 3d 963, 996 (E.D. Wis. 2016), *rev'd en banc*, 877 F.3d 297 (7th Cir. 2017), *petition for cert. filed*, No. 17-1172 (Feb. 20, 2018).

26 GARRETT, *supra* note 19, at 18.

provide in great detail facts about a crime they did not commit.[27]

In Brandon Garrett's updated study on DNA exonerees, he found that 68 out of 330 cases, roughly 20%, involved false confessions.[28] Factors contributing to false confessions during interrogations include: "duress, coercion, intoxication, diminished capacity, mental impairment, ignorance of the law, fear of violence, the actual infliction of harm, the threat of a harsh sentence, and misunderstanding the situation."[29]

Garrett examined the series of events that leads to someone falsely confessing and revealed a concerning pattern. Before an individual is interrogated, police are required to read individuals their *Miranda* rights.[30] If individuals decide to waive their rights and speak to police, police are first instructed to ask open-ended questions.[31] In fact, of the twenty-eight new cases of false confessions Garrett examines in his updated study, all of the individuals waived their *Miranda* rights.[32] Once individuals waived their *Miranda* rights, they were often left vulnerable to coercive police practices. The Reid Technique, the leading police interrogation protocol, "instructs police to apply pressure but at the same time suggest that the suspect has something to gain by confessing."[33] Police can also lie and tell a suspect that they have damaging evidence proving an individual's guilt.[34] Taken together, an individual may receive overwhelming psychological pressure to falsely confess.

Although the Reid Technique allows coercive techniques, it warns police to "never contaminate a confession by feeding or leaking crucial facts."[35] Despite the fact that police officers are instructed to never disclose to suspects specific, non-public facts about how a crime was committed, Garrett's study reveals that police do not always follow their guidelines and sometimes contaminate confessions.[36] Garrett's study shows that the majority of exonerees

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27 *Id.* "Forty of the first 250 DNA exoneration cases (16%) involved a false confession." *Id.* at 18. "[A]lmost all[ ] of these exonerees' confessions were contaminated." *Id.* at 19. "Fourteen of these exonerees were mentally retarded, three were mentally ill, and thirteen were juveniles." *Id.* at 21.

28 Brandon L. Garrett, *Convicting the Innocent Redux*, *in* WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 40, 43, 46 (Daniel S. Medwed ed., 2017).

29 *False Confessions or Admissions*, *supra* note 20.

30 GARRETT, *supra* note 19, at 22.

31 *Id.*

32 Garrett, *supra* note 28, at 8.

33 GARRETT, *supra* note 19, at 22. "Police engage in storytelling and offer the suspect a series of alternative narratives. They try to get the suspect to initially agree to having committed legally excusable or less reprehensible acts. For example, . . . police may try to get the suspect to admit to having attacked the victim, but only in self-defense. Police may also imply that they might grant leniency if the suspect confesses or impose consequences if the suspect does not." *Id.* (footnote omitted).

34 *Id.*

35 *Id.* at 23. Garrett further explains that "[t]he Reid manual advises that '[w]hat should be sought particularly are facts that would only be known by the guilty person.'" *Id.* (second alteration in original).

36 *Id.* at 20.

who falsely confessed were able to provide key details about a crime, suggesting that facts were fed to suspects during the interrogation process.[37] Even more troubling is the fact that after an individual falsely confesses, he or she faces an uphill battle in preventing his or her statements from being used as evidence. For example, if a defense attorney attempts to challenge a contaminated confession at trial, police officers could testify that they never disclosed facts to a suspect and that it was the accused that volunteered key information.[38] Also, defense attorneys are unable to argue that a confession is false and unreliable because the Supreme Court does not require statements to be truthful; statements need to be voluntary.[39]

B. Juveniles Are Cognitively Different from Adults and Are More Vulnerable to False Confessions

Similar to adults, juveniles often waive their *Miranda* rights and end up succumbing to similar psychological pressures—coercive police practices during interrogations, relying on suggestions that something can be gained by confessing, and exposure to key details about a crime making a confession contaminated. This is especially problematic for juveniles because they are cognitively different from adults and are therefore more vulnerable to the pressures contributing to false confessions.[40] In Garrett's study, he found that "[o]ver one-third of all sixty-eight false confessions involved juveniles."[41] This Part provides evidence as to why juveniles are more vulnerable to false confessions: (1) science proves that children are cognitively different from adults; (2) the Supreme Court recognizes the difference between juveniles and adults; (3) studies show that juveniles are not as capable as adults in understanding their *Miranda* rights; and (4) interrogation experts say juveniles should be treated differently.

Science proves that children are cognitively different from adults.[42] Neuroscience has shown that adults and juveniles think and reason differently

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37 *See id.* at 24 ("It is unlikely that innocent suspects could reconstruct the crimes out of whole cloth from their own imagination.").

38 *See id.* at 28 ("[A]t trial, the police denied ever having disclosed . . . key facts. The trial transcripts show that in twenty-seven of the thirty confession cases that went to a trial, the police officers testifying under oath at trial denied that they had disclosed facts to the suspect, or they described the suspect having volunteered the central facts during the interrogation.").

39 *Id.* at 37.

40 INT'L ASS'N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 4 (Sept. 2012), http://www.theiacp.org/portals/0/pdfs/reducingrisksanexecutiveguidetoeffectivejuvenileinterviewandinterrogation.pdf [hereinafter Police Report: REDUCING RISKS] (noting that the unique traits of juveniles make them more "likely to respond to the fear and stress of interrogation by making involuntary or false statements").

41 Garrett, *supra* note 28, at 8.

42 King, *supra* note 8, at 434–45.

because juvenile brains are not as developed as adult brains.[43] In particular, during adolescence the pre-frontal cortex of the brain is not fully developed.[44] The pre-frontal cortex is "responsible for judgment, problem-solving, and decision-making" and "regulates impulsive behavior by acting as a brake on the parts of the brain that are activated by fear and stress."[45] "Because juveniles are not fully developed until the end of adolescence," certain traits unique to juveniles can be observed, such as "[d]ifficulty weighing and assessing risks," "[e]mphasis on immediate rewards rather than long-term consequences," and "[v]ulnerability to external pressure."[46]

This science explains why countless juveniles have falsely confessed to crimes they did not commit. For example, Nga Truong, only sixteen years old at the time of her arrest, falsely confessed to smothering her thirteen-month-old baby to death.[47] Truong spent three years in jail awaiting her trial.[48] Prosecutors eventually dropped the charges after a judge "tossed out the confession, ruling it was the product of deception, trickery and implied promises to a frightened teenager."[49] While Truong was interrogated, she did not have a parent or lawyer present, was not given a proper *Miranda* warning, and eventually gave interrogators what they wanted to hear when promised that she and her brothers would be able to go to a foster home.[50] Similarly, in the well-publicized Central Park jogger case, five juveniles, ages fourteen to sixteen at the time, were wrongfully convicted of brutally beating and raping a woman.[51] Four of the men served about seven years in prison, and one man served thirteen years.[52] Their convictions ultimately rested on incriminating false statements.[53] The film, *The Central Park Five*, depicts these five juveniles pressured into implicating themselves and reveals the cascading effect of false statements—the ability of using one confession to get another confession.[54]

Not only does science recognize that children are cognitively different

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43 *Id.* at 437–40 (describing recent developments in neuroscience).

44 Police Report: REDUCING RISKS, *supra* note 40, at 4.

45 *Id.*; *see also* King, *supra* note 8, at 441 (concluding that "adolescents are much less able to engage in sound hypothetical, contingent reasoning than are adults and that the physiological immaturity of adolescent brains is a major factor in adolescents' inability to perform these tasks").

46 Police Report: REDUCING RISKS, *supra* note 40, at 4.

47 David Boeri, *Woman in Tossed-Out Confession Gets $2.1M Settlement from Worcester*, WBUR: ALL THINGS CONSIDERED (June 30, 2016), http://www.wbur.org/all-things-considered/2016/06/30/nga-truong-worcester-settlement.

48 *Id.*

49 *Id.*

50 *Id.*

51 THE CENTRAL PARK FIVE (PBS 2012).

52 Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for $40 Million*, N.Y. TIMES (June 19, 2014), http://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html?_r=0.

53 *Id.*

54 THE CENTRAL PARK FIVE (PBS 2012).

from adults, the Supreme Court also recognizes that there are fundamental differences between juveniles and adults. In *Roper v. Simmons*, the Court abolished the death penalty for juveniles, relying on three general differences between juveniles and adults: (1) juveniles lack maturity and have "an underdeveloped sense of responsibility"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures"; and (3) juveniles are not as formed as adults.[55] Based on these differences, the Court concluded that juveniles could not be given the harshest penalty because they are not as culpable as a fully developed adult, and therefore cannot be classified with the worst offenders.[56] In *Graham v. Florida*, the Court held that life without parole sentences for juveniles who did not commit a homicide was unconstitutional.[57] The Court in *Graham* relied on the Court's earlier reasoning in *Roper* that recognized juveniles as less culpable and thereby less deserving of the most severe punishments.[58] The Court in *Miller v. Alabama* also relied on the rationale in *Roper* and *Graham* that juveniles are less culpable and held that mandatory life without parole sentences for juveniles were unconstitutional.[59]

The Court has also stated that a child's age "generates commonsense conclusions about behavior and perception."[60] In *J.D.B. v. North Carolina*, the Court held that a child's age must be considered when determining whether a child is in custody for interrogation purposes.[61] The Court in *J.D.B.* noted how it has "[t]ime and again" drawn "commonsense conclusions" that children are "less mature and responsible than adults," "often lack the experience, perspective, and judgment to recognize and avoid choices that could

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55 Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

56 *Id.* at 571 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.").

57 Graham v. Florida, 560 U.S. 48, 82 (2010).

58 *Id.* at 68–71.

59 Miller v. Alabama, 567 U.S. 460, 469–70 (2012). "Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'" *Id.* at 472 (alteration in original) (internal quotation marks omitted) (quoting Graham v. Florida, 560 U.S. 48, 71 (2010)).

60 J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) (internal quotation marks omitted) (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004)).

61 *Id.* at 277. An individual is only read their *Miranda* rights when they are rendered "in custody." *Id.* at 270 (quoting Stansbury v. California, 511 U.S. 318, 322 (1994) (per curiam))). To determine whether someone is in custody, "the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Id.* (internal quotation marks omitted) (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)). The objective test involves looking at the totality of circumstances surrounding an interrogation, "including any circumstance that 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.'" *Id.* at 271 (quoting *Stansbury*, 511 U.S. at 325). By taking into account a child's age, courts must recognize the reality that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 272.

be detrimental to them," and "'are more vulnerable or susceptible to . . . outside pressures' than adults."[62] The Court also noted how law has historically treated adults and children differently.[63] For example, juveniles are limited in their ability to purchase alcohol and tobacco products, gamble, enter into binding contracts, and marry without parental consent.[64]

In the context of juveniles waiving *Miranda* rights and their ability to fully understand the consequences of waiving rights of silence and counsel, studies show that juveniles, especially those under fifteen, are unable to meet the adult standard for adequately comprehending these rights.[65] For example, 44.8% of juveniles, as compared to 14.6% of adults, misunderstood their right to consult an attorney and have an attorney present during an interrogation.[66] Juveniles were often confused as to the "time and place an attorney could be consulted, 'interrogation' often being misconstrued as an adjudication hearing."[67] Additionally, 23.9% of juveniles, as compared to 8.5% of adults, misunderstood the statement that anything said during an interrogation could be used against them in court.[68] Also, 61.8% of juveniles, as compared to 21.7% of adults, did not recognize that a judge could not penalize an individual for invoking their right to silence.[69]

"When a person doesn't understand [his or her *Miranda*] rights, those rights have no meaning."[70] By misunderstanding *Miranda* rights, children will often waive their rights, leaving key constitutional rights unprotected.[71] Once a child waives their rights, police may interrogate a child using similar techniques as adults, sometimes resulting in false confessions.[72] For example, a thirteen-year-old boy in California spent three years in prison after waiving

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62 *Id.* at 272 (alteration in original) (internal quotation marks omitted) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); then quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979); and then quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

63 *Id.* at 273.

64 *See id.* at 273–74 ("[C]hildren cannot be viewed simply as miniature adults."); State v. Fernandez, 712 So. 2d 485, 490 (La. 1998) (Johnson, J., dissenting) (stating society has chosen to disallow minors from consuming alcohol or gambling regardless of the individual minor's maturity and intelligence).

65 Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1152 (1980).

66 *Id.* at 1154.

67 *Id.*

68 *Id.*

69 *Id.* at 1158.

70 HumanRightsWatch, *You Have the Right to Remain Silent – California Bill Strengthens* Miranda *for Kids*, YOUTUBE (Aug. 17, 2016), https://www.youtube.com/watch?v=Z-VW8Ldw6YI&t=30s. Children have "less capacity to understand their rights."

71 *Id.*

72 *See* Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 556 (2012) ("[H]igher incidence of false confessions among juveniles exists because standard police tactics—which in all probability were designed with the hardened adult suspect in mind—are frequently deployed against far softer targets: children and adolescents.").

his *Miranda* rights and falsely confessing to a murder he did not commit.[73]

In a California case, *In re Joseph H.*, a ten-year-old boy shot his father to death. Although it was not a wrongful conviction case, the case highlights an extreme example of a court finding that a ten-year-old could voluntarily waive his *Miranda* rights.[74] A California appeals court found that "Joseph's responses indicated he understood," that "[n]othing in the record supports the premise that he was confused or suggestible," and that "the interview shows he had no trouble communicating, aside from needing explanation of a few terms."[75] Although the Supreme Court of California denied a petition to review the case, Justice Liu provided a dissenting statement that challenged the lower court's finding that ten-year-old Joseph understood his *Miranda* rights and the consequences of waiving those rights. Justice Liu's dissent draws on common sense and science to question Joseph's capacity to understand his rights, and he uses the exchange between the detective and Joseph to illustrate this point.[76] Before the interrogation began, the detective said, "So, you have the right to remain silent. You know what that means?"[77] Joseph replied, "Yes, that means that I have the right to stay calm."[78] The detective explained, "That means y-you do not have to talk to me."[79] Joseph responded, "Right."[80] Without further explanation, the detective moved on to other questions. Joseph's response arguably illustrates that a ten-year-old child cannot comprehend *Miranda* rights and the legal implications of waiving those rights.

Finally, interrogation experts say juveniles should be treated differently. The Reid Technique explains that "special precautions" should be taken when interrogating juveniles.[81] The technique recognizes that juveniles are more vulnerable to false confessions, and that interrogators should corroborate statements to ensure accuracy.[82] In terms of reading a juvenile's behavior in determining guilt or innocence, the Reid Technique's website states,

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73 HumanRightsWatch, *supra* note 70.

74 Joseph was read his *Miranda* rights and then interrogated in order to determine whether he understood the wrongfulness of shooting his father. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 181–82 (Cal. Ct. App. 2015).

75 *Id.* at 186.

76 *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015) (Liu, J., dissenting).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 Making a Murderer*: The Reid Technique and Juvenile Interrogations*, JOHN E. REID & ASSOCIATES, INC. (Jan. – Feb. 2016), http://reid.com/educational_info/r_tips.html?serial=20160101-1&print=%5Bprint. *But see* Tepfer & Nirider, *supra* note 72, at 556 (noting that the "special caution" is "underemphasized in Reid's interrogation manual and trainings, and is rarely implemented in real life").

82 Making a Murderer*: The Reid Technique and Juvenile Interrogations*, *supra* note 81.

"Due to immaturity and the corresponding lack of values and sense of responsibility, the behavior symptoms displayed by a youthful suspect may be unreliable."[83] It also recognizes that juveniles may not be able to understand their *Miranda* rights and the implications of a waiver.[84] The website advises against using "trickery and deceit" tactics that are commonly used on adults, including tactics that involve using fictitious evidence.[85] "[Juvenile] suspects may not have the fortitude or confidence to challenge such evidence and, depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime."[86]

II. CUSTODIAL INTERROGATIONS AND *MIRANDA* WAIVERS: FEDERAL AND STATE REQUIREMENTS

Federal and state laws purportedly protect juveniles during custodial interrogations by taking into account the specific needs of juveniles. A custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[87] This Part provides an overview of federal and state requirements during custodial interrogations of juveniles and examines the shortfalls of this current regime. By failing to fully address juvenile vulnerability, the current regime does not provide the necessary safeguards to decrease the unacceptable risk of false confessions and wrongful convictions. Part A examines what the Supreme Court requires during custodial interrogations.[88] Part B provides an overview of measures taken by states to provide additional protections for children.[89] Finally, Part C provides the rationale by proponents and opponents of additional safeguards.[90]

A. Federal Requirements

Haley v. Ohio was the first case that the Supreme Court recognized that juveniles as a class have special status during custodial interrogations.[91] In *Haley*, a fifteen-year-old was convicted of first degree murder after confessing

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83 *Id.* (internal quotation marks omitted) (quoting FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2011)).

84 *Id.* ("Certainly a child under the age of ten is incapable of fully understanding the implications of waiving *Miranda* rights. Younger adolescents also may fall into this category.").

85 *Id.*

86 *Id.*

87 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

88 *See infra* notes 91–111 and accompanying text.

89 *See infra* notes 112–22 and accompanying text.

90 *See infra* notes 123–42 and accompanying text.

91 332 U.S. 596, 599 (1948); *see also* Huang, *supra* note 14, at 442.

to the crime. His conviction was challenged on the basis that his confession was obtained in a manner that violated the Due Process Clause of the Fourteenth Amendment.[92] From midnight until 5:00 AM, five to six police officers interrogated the boy without the presence of counsel or anyone else looking out for the boy's interests.[93] Eventually the boy signed a written confession.[94] The Court focused on the age of the boy and reversed his conviction because the methods used were inappropriate for juveniles.[95] The Court stated, "[W]hen . . . a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used."[96] The Court also recognized the importance of having counsel or someone else looking out for the boy's interests during the interrogation.[97]

Similar to *Haley*, the Court in *Gallegos v. Colorado* overturned the conviction of a juvenile because obtaining a fourteen-year-old boy's confession violated due process.[98] The boy was held for five days without access to a parent, lawyer, or an adult looking out for his interests, making the interrogation coercive.[99] Consistent with *Haley*, the Court recognized the youthfulness of the boy as a crucial factor.[100] Also similar to *Haley*, the Court focused on the need to have an adult present to ensure a juvenile's interests are being looked after. The Court stated,

> He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself.[101]

Protections for juveniles during custodial interrogations expanded with the decision in *Miranda v. Arizona* and *In re Gault*. The Court in *Miranda* held that prior to questioning, an individual "must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either

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92 *Haley*, 332 U.S. at 599.

93 *Id.* at 598.

94 *Id.*

95 *Id.* at 599–601.

96 *Id.* at 599. "A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest." *Id.* at 599–600.

97 *Id.* at 600. "He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him." *Id.*

98 370 U.S. 49, 55 (1962).

99 *Id.* at 50.

100 *Id.* at 53.

101 *Id.* at 54.

retained or appointed."[102] The Court also stated that these rights could be waived, "provided the waiver is made voluntarily, knowingly and intelligently."[103] However, if an interrogation proceeds without a *Miranda* warning or an appropriate waiver, statements made during an interrogation may not be used against a suspect at trial.[104]

The Court's decision in *In re Gault* held that even in adjudicatory proceedings, juveniles must be provided procedural safeguards, including the right against self-incrimination and the right to counsel.[105] The Court also briefly recognized that "depending upon the age of the child and the presence and competence of parents" during an interrogation, different techniques may be needed to achieve a voluntary *Miranda* waiver.[106] The Court stated, "[T]he greatest care must be taken to assure that [a juvenile's] admission was voluntary."[107] Despite the Court's recognition of alternative techniques, *In re Gault* did not provide lower courts with clear guidelines on how to determine the voluntariness of *Miranda* waivers.[108]

Fare v. Michael C. provided the test used today in determining whether juveniles voluntarily waived their *Miranda* rights. Courts are directed to look at the totality of circumstances surrounding the interrogation to determine whether a *Miranda* waiver is voluntary.[109] If the waiver is voluntary, statements made during a custodial interrogation may be used against the accused.[110] The Court noted that the totality of circumstance approach "mandates . . . inquiry into all the circumstances surrounding the interrogation," including "evaluation of the juvenile's age, experience, education, background, and intelligence," in order to determine whether a juvenile understands his or her *Miranda* rights, the nature of those rights, and the consequences of a waiver.[111] Though age is a factor to be considered, *Fare* does not require that it be given significant weight in determining voluntariness.

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102 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

103 *Id.* A waiver is made voluntarily, knowingly, and intelligently if it is "the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986).

104 *Miranda*, 384 U.S. at 479.

105 *In re* Gault, 387 U.S. 1, 55 (1967).

106 *Id.*

107 *Id.*

108 Huang, *supra* note 14, at 445.

109 Fare v. Michael C., 442 U.S. 707, 724–25 (1979).

110 *Id.*

111 *Id.* at 725.

B. Additional State Procedural Safeguards

Some states have gone further than federal law in order to provide additional safeguards for juveniles during custodial interrogations.[112] A number of states have per se rules, which means that if a rule is not followed, a *Miranda* waiver could be found involuntary.[113] These additional protections arrive by statute and judicial decisions.[114] Some states require the advice or presence of a parent, guardian, or attorney before waiving *Miranda* rights. For example, in Colorado, statements are only admissible into evidence if during a custodial interrogation a "parent, guardian, or legal or physical custodian of the juvenile" was present.[115] In Massachusetts, the state must "show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights."[116] Other states bar the confessions or statements from children under a certain age altogether. For example, in New Mexico, "confessions, statements or admission" by children under thirteen are barred.[117]

The majority of states, however, provide a tiered approach to providing additional protections for children—more protections are provided to younger children, and as children get older, those protections decrease.[118] For example, although New Mexico bars statements by children under thirteen, "fifteen, sixteen, and seventeen-year-olds receive no specific protections."[119] In Connecticut, statements made by children under sixteen are

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112 *See* Brief of Amicus Curiae Human Rights Watch in Support of Petition for Writ of Certiorari at 8, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15-1086) [hereinafter Brief] ("Seventeen states have specific statutes regulating in some form the custodial interrogation of children. The remaining thirty-three states and the District of Columbia have no specific regulations and instead use the same totality-of-the-circumstances test that applies to adults."). Seventy-five percent of juveniles arrested each year reside in jurisdictions that use the *Fare* totality test, so most juveniles in the U.S. are not able to benefit from the minority of states that provide additional safeguards. *Id.*

113 *See* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 36–37 (2006) ("These states have prospectively adopted a categorical policy to prevent invalid waivers, rather than trying to assess after-the-fact the impact of immaturity on the validity of each individual waiver under the 'totality of the circumstances.'").

114 Petition for a Writ of Certiorari at 25, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15–1086) [hereinafter Petition].

115 COLO. REV. STAT. § 19-2-511(1) (2017); *see also* IND. CODE § 31-32-5-1 (2017) (requiring consent by counsel or a "custodial parent, guardian, custodian, or guardian ad litem" in order to waive *Miranda* rights).

116 Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 657 (Mass. 1983). Vermont provides a similar safeguard. *See In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982) (noting that a juvenile may only waive his or her Miranda rights if "given the opportunity to consult with an adult").

117 N.M. STAT. ANN. § 32A-2-14(F) (2009).

118 Brief, *supra* note 112, at 10.

119 *Id.*

inadmissible unless made in the presence of a parent or guardian, yet children sixteen and older do not receive similar protections.[120] Kansas has a similar rule to Connecticut, but the protection is only guaranteed for children under fourteen.[121] Most states do not require consultation with an attorney; however, Illinois is unique in that children who are under fifteen and commit certain crimes "must be represented by counsel throughout the entire custodial interrogation."[122]

C. Arguments For and Against Additional Safeguards

There is much debate as to whether the *Fare* totality test and state specific safeguards provide adequate protection for children during custodial interrogations—specifically protecting against involuntary *Miranda* waivers, which leave children exposed to pressures that may lead to a false confession and wrongful conviction. Although states may go further than what is federally required, proponents of additional safeguards at the federal level argue that the current regime has led to a patchwork of laws and inconsistent outcomes based on age and where a juvenile lives.[123] Opponents of additional safeguards at the state and federal level argue that the current *Fare* totality test is sufficient. This Part first explores the arguments for and against the *Fare* totality approach, and then examines the arguments for and against requiring additional safeguards.

As mentioned above, most states do not provide additional safeguards and use the *Fare* totality test to determine whether a juvenile voluntarily waived his or her *Miranda* rights. Because the Court in *Fare* did not provide much guidance as to how the totality test should be applied, lower courts are provided discretion in determining the factors to be considered in the totality test and how each factor should be weighed.[124]

> The most common features of the states' formulations of the totality test are: consideration of the child's age, intelligence, education and mental condition; whether a parent or other adult advisor is present; prior experience with courts or law enforcement, if any; and the nature of the questioning (including the length, tone, accusatory nature, police tactics, and time and place of questioning).[125]

Proponents of the *Fare* totality test argue it is sufficient in protecting juve-

120 CONN. GEN. STAT. §§ 46b-137(a)–(b) (2012).

121 KAN. STAT. ANN. § 38-2333 (2006).

122 705 ILL. COMP. STAT. 405/5–170 (2017).

123 Brief, *supra* note 112, at 14.

124 *See* King, *supra* note 8, at 454 (noting that "each state defines the totality that is relevant" to the determination of whether a *Miranda* waiver was uncoerced "somewhat differently").

125 *Id.* at 455.

niles because it allows full consideration of circumstances particular to juveniles (for example, age, intelligence, and maturity).[126] Opponents argue, however, that despite the fact that a number of courts may take into account age and the particular vulnerability of juveniles, courts may weigh the importance of factors particular to juveniles differently; "[t]here is no assurance, for example, that courts will consider the empirical evidence that juveniles do not comprehend *Miranda* warnings as well as adults."[127] Consequently, the same set of facts may render different outcomes.[128]

Proponents also argue that the totality test minimizes interference with police work, and that the test sufficiently balances the state's interest in effective police investigations with a juvenile's interest in ensuring a *Miranda* waiver is voluntary.[129] In contrast, opponents argue that the test "creates uncertainty and speculation among law enforcement officials about whether a juvenile's statements may be admissible at trial."[130] Opponents also argue that the test leaves juveniles with an after-the-fact remedy because challenging the voluntariness of a waiver would require a motion to suppress the statements made during a custodial interrogation.[131] One scholar argues that in reality, since *Fare* was decided, most courts have found that juveniles voluntarily waive their *Miranda* rights, regardless of the circumstances.[132]

Despite the fact that most states rely on the *Fare* totality test, seventeen

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126 *See* Elizabeth J. Maykut, *Who Is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1372 (1994) (noting that "[p]roponents of the totality of the circumstances approach would argue that it adequately protects the juvenile by taking his or her age and IQ into account").

127 Huang, *supra* note 14, at 448–49 ("The absence of any clear rules arguably places a child in the same situation as an adult."); *see also* Thomas J. Von Wald, *No Questions Asked!* State v. Horse*: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 160–61 (2003) ("[E]ach court has differed in the number of factors it used and the weight that each factor should receive.").

128 *See supra* Introduction (discussing how two judges came to differently conclusions as to the voluntariness of Dassey's Miranda waiver with the same set of facts); *see also* Huang, *supra* note 14, at 449 ("Additionally, a totality of circumstances approach increases the likelihood of inconsistent rulings, even on the same record.").

129 *See* McGuire, *supra* note 9, at 1381 (recognizing the two major concerns of custodial interrogations: adequately protecting juveniles while not inhibiting police trying to solve serious crimes); *see also* Veto Message from Gov. Brown on Senate Bill 1052 (Sept. 30, 2016), https://www.gov.ca.gov/docs/SB_1052_Veto_Message.pdf [hereinafter Veto Message] (noting that "police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow"). California Governor Brown's veto message represents an argument that the ability of law enforcement to solve serious crimes must not be disrupted.

130 Huang, *supra* note 14, at 449; *see* McGuire, *supra* note 9, at 1383 ("Most police officers do not have advanced clinical psychological training and generally have no relationship with the juvenile aspect. As such, an average police officer is likely unprepared to make complicated psychological evaluations.").

131 Huang, *supra* note 14, at 449 ("The totality approach only protects the juvenile *after* he or she has confessed to the police; it does nothing to help the juvenile make the decisions confronting him or her in the interrogation room." (quoting Maykut, *supra* note 126, at 1372–74)).

132 *See* McGuire, *supra* note 9, at 1376 ("As a practical matter, these states have held that, regardless of the circumstances, a juvenile's waiver is almost always voluntary").

states provide additional procedural safeguards during custodial interrogations of juveniles.[133] A number of these per se rules were adopted on the assumption that juveniles are cognitively different from adults and therefore should be afforded special protections.[134] Proponents of additional procedural safeguards argue that unlike the *Fare* totality test, which provides an after-the-fact remedy, additional safeguards would provide law enforcement and courts with clear rules from the start. For example, requiring the presence of an attorney or parent would provide an absolute prerequisite for admitting statements into evidence.

Opponents to additional safeguards argue that requiring more rules would hinder the "interests of society and of justice."[135] For example, critics of requiring a juvenile to consult with an attorney before waiving *Miranda* rights argue that this would result in more juveniles remaining silent per their attorneys' advice, which would deprive police with "an important crime-fighting tool" and ultimately result in a "net loss for public safety."[136] Some even argue that additional rules could lead to a guilty juvenile getting away on a technicality.[137] One scholar counters the cost to society and justice argument by challenging two of the argument's assumptions—"[t]he first is that children will follow the advice of their counsel," and "second is that a child's confessions yield reliable evidence."[138] In fact, as explored above, the reliability of statements by juveniles is problematic because juveniles often submit to police pressure and will sometimes make false confessions.

Additionally, opponents argue that more rules would add costs to an already burdened criminal justice system.[139] They reason that rules requiring the presence of an attorney or interested adult would leave police with the financial and administrative burden of having to find these individuals before

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133 Brief, *supra* note 112, at 8.

134 *See* Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 656 (Mass. 1983) (requiring a "meaningful consultation with an informed adult" before waiving *Miranda* rights and noting that additional protections are supported by the fact that it has been the "legal system's traditional policy . . . . [to] afford[ ] minors a unique and protected status"). *But see* State v. Fernandez, 712 So. 2d 485, 489 (La. 1998) (noting that additional protections are unnecessary because the "needs of juveniles can be accommodated by the totality of circumstances standard").

135 *Fernandez*, 712 So. 2d at 489.

136 King, *supra* note 8, at 475.

137 *See Fernandez*, 712 So. 2d at 489 ("Excluding an otherwise valid confession of guilt just because the accused was a few months away from achieving non-juvenile status is simply too high a price to pay for the arguable benefit of more easily administering a per se rule that neither the framers of the Constitution nor the redactors of the Code of Criminal Procedure considered necessary.").

138 King, *supra* note 8, at 476.

139 *See* Huang, *supra* note 14, at 462 (noting that there were fears "that requiring the presence and consultation of an interested adult 'adds one more costly burden to our already heavily burdened justice system'" (quoting *In re* Dino, 359 So. 2d 586, 599 (La. 1978) (Sanders, C.J., concurring in part and dissenting in part))).

every juvenile interrogation.[140] However, proponents of per se rules argue that clear rules would actually minimize costs over time because it "provides courts a clear analytical framework to assess juvenile waivers."[141] Judicial resources could be conserved because clear rules would prevent numerous appeals and challenges to the application of the *Fare* totality test.

Finally, proponents of additional safeguards argue that they are necessary because most states do not require interrogations to be recorded in their entirety and therefore examining the totality of circumstances after-the-fact becomes problematic. Figuring out what happened during an interrogation inevitably becomes very subjective. Without the objectivity provided by a video recording, discovering what actually took place during interrogations can be difficult, especially when determining the key factors to be used in a *Fare* totality test, such as the presence of coercion and promises of leniency.[142]

III. AN ATTORNEY CONSULTATION SHOULD BE MANDATORY BEFORE JUVENILES WAIVE THEIR *MIRANDA* RIGHTS

Although the *Fare* totality test and the patchwork of additional safeguards provide a framework for analyzing whether a juvenile voluntarily waived his or her *Miranda* rights, these federal and state requirements are inadequate in protecting juveniles. Instead, mandatory rules requiring a juvenile to consult with an attorney before waiving *Miranda* rights would better prevent involuntary waivers and risks of false confessions. Part A critiques the decision in *Fare* and analyzes how the Supreme Court departed from its earlier decisions that considered age as a fundamental factor.[143] Part B explains why the current framework of allowing states to provide additional procedural safeguards is insufficient in guaranteeing protections for juveniles.[144] Finally, Part C argues that the Court or each state should adopt a new, per se rule requiring an attorney consultation before a juvenile can waive his or her *Miranda* rights.[145]

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140 *See* State v. Benoit, 490 A.2d 295, 302 (N.H. 1985) ("A *per se* approach would require mandating interested adult presence in *every* case . . . . Law enforcement agencies would have to adhere to this requirement in every case . . . . Adopting such an approach would result in onerous financial and administrative burdens. . . ."); Huang, *supra* note 14, at 466 ("A second disadvantage of the per se rule is that it increases the administrative burden on police to secure an interested adult's presence prior to the juvenile's interrogation.").

141 Huang, *supra* note 14, at 467.

142 *See id.* at 470–71 (recommending that police videotape interrogations of juveniles because it avoids the disadvantages of the totality test by giving "courts 'a complete picture of what actually took place during the interrogation,' and 'largely eliminate[s] frivolous claims of police misconduct.'" (alternation in original) (footnote omitted) (quoting Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 925 (1995)).

143 *See infra* notes 146–54 and accompanying text.

144 *See infra* notes 155–67 and accompanying text.

145 *See infra* notes 168–87 and accompanying text.

A. A Critique of Fare v. Michael C.

In the Court's earlier decisions in *Haley* and *Gallegos*, the Court recognized age as providing a special status for juveniles in custodial interrogations; youth was the "crucial factor."[146] Additionally, both *Haley* and *Gallegos* seemed to support additional procedural safeguards for juveniles in custodial interrogation—requiring the advice or presence of a parent, guardian, or attorney. In *Haley*, the Court stated that juveniles should receive "special care," such as having counsel or someone else looking out for their interests during an interrogation.[147] The Court stated that providing additional safeguards for juveniles is important because a juvenile "needs counsel and support" and "needs someone on whom to lean."[148] Similarly, the Court in *Gallegos* reiterated the need to have an adult present to ensure that juvenile interests were represented.[149] A juvenile needs the "aid of more mature judgment" because he or she "would have no way of knowing what the consequences of [a] confession were without advice."[150] Even in *In re Gault*, the Court stated, "[T]he greatest care must be taken to assure that [a juvenile's] admission was voluntary."[151]

Despite the Court's emphasis in *Haley*, *Gallegos*, and *In re Gault* on the importance of treating juveniles with "special" and "the greatest care," the Court provides a test in *Fare* that seems to depart from its reasoning in these earlier cases. Yes, the Court in *Fare* recognized that juveniles might not have the maturity and experience to voluntarily waive *Miranda* rights; however, unlike earlier cases, the Court in *Fare* explicitly emphasizes the weighty interest of law enforcement.[152] Instead of ensuring the protection of juvenile interests, the *Fare* totality test shifts protections to benefit courts and police through unlimited discretion in applying the test. It is completely up to a judge in determining how much weight should be given to the fact that a juvenile, as opposed to an adult, waived his or her rights.[153] By providing no

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146 *See* Gallegos v. Colorado, 370 U.S. 49, 53 (1962) ("The youth of the suspect was the crucial factor in *Haley*" and "[t]he fact petitioner was only 14 years old puts this case on the same footing as *Haley*"); *see also* Huang, *supra* note 14, at 442 (noting that although the Court in *Haley* "relied upon several factors for its reversal, it emphasized the petitioner's age above all").

147 Haley v. Ohio, 332 U.S. 596, 599–600 (1948).

148 *Id.* at 600.

149 *See Gallegos*, 370 U.S. at 54 ("Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.").

150 *Id.*

151 *In re* Gault, 387 U.S. 1, 55 (1967).

152 *See* Fare v. Michael C., 442 U.S. 707, 725–26 (1979) (explaining that a totality of circumstances test does not "impos[e] rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation").

153 *See supra* note 127 and accompanying text (explaining that "despite the fact that a number of courts may take into account age and the particular vulnerability of juveniles, courts may weigh the importance of factors particular to juveniles differently; '[t]here is no assurance for example, that

guidance on how a factor like age should be weighed, the *Fare* totality test is simply too weak to protect children. Thus, the Court appears to retreat from its earlier rationale that recognized age as providing a special status for juveniles in custodial interrogations. One could argue that some judges will use the totality test to find that a *Miranda* waiver was involuntary, however, it is troubling that under the current test, a child as young as ten could be found to knowingly and intelligently waive his *Miranda* rights.[154]

B. Current Federal and State Requirements Are Inadequate at Protecting Juveniles

The most concerning aspect of the current regime is that depending on the age of a child and where a child lives, the same set of facts can produce different outcomes.[155] As outlined above, the *Fare* totality test ultimately provides the same protections as those provided to adults because the Court does not provide clear rules as to how age should factor into the test.[156] Furthermore, although a number of states have made steps to protect juveniles through additional safeguards, states differ in the type of protection provided and the age at which it is guaranteed.[157] Many of the state safeguards are applied in a tiered-approach, leaving older juveniles unprotected and forced into using the *Fare* totality test.

Some argue that the safeguards in place, even applied to all juveniles, would remain insufficient at protecting children. For example, a number of states require the advice or presence of a parent, guardian, or attorney before a child can waive his or her *Miranda* rights.[158] Though the presence of a parent or guardian may seem promising, researchers have found that parents

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courts will consider the empirical evidence that juveniles do not comprehend Miranda warnings as well as adults.'").

154 *See In re* Joseph H., 367 P.3d 1, 1 (Cal. 2015) (Liu, J., dissenting) (dissenting from a denial of a petition for review of a lower court's decision that a ten-year-old defendant validly waived his *Miranda* rights).

155 *See* Brief, *supra* note 112, at 14 (explaining that the "picture that emerges from this survey of state laws [on juvenile *Miranda* rights] is of a patchwork of inconsistent, inadequate, and unpredictable rules"); McGuire, *supra* note 9, at 1376 ("Case law illustrates that the totality test can yield different results for similarly situated juveniles, which makes the admissibility of confessions—and possibly the prospect of life imprisonment—turn on where a juvenile committed the crime.").

156 *See* Huang, *supra* note 14, at 448–49 (arguing that "[t]he absence of any clear rules arguably places a child in the same situation as an adult").

157 *See supra* Part II.B.

158 *See, e.g.*, COLO. REV. STAT. § 19-2-511(1) (2017) ("No statements or admissions of a juvenile made as a result of the custodial interrogation of such juvenile by a law enforcement official concerning delinquent acts alleged to have been committed by the juvenile shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation and the juvenile and his or her parent, guardian, or legal or physical custodian were advised of the juvenile's right to remain silent and that any statements made may be used against him or her in a court of law, of his or her right to the presence of an attorney during such interrogation, and of his or her right to have counsel appointed if he or she so requests at the

and/or guardians "often lack the experience and understanding necessary to advise the child of the risks and benefits of waiving or asserting his or her rights."[159] By not necessarily having the juvenile's best interest in mind, the presence of a parent may not help protect a child being interrogated.[160] In fact, parental presence may harm a child's situation.[161]

Even more troubling is the fact that—as more research proves that children are cognitively different from adults, and as studies demonstrate that children cannot fully understand the legal implications of a *Miranda* waiver—some states are eliminating procedural safeguards that they once had, and returning to the *Fare* totality test.[162] For example, in *State v. Fernandez*, the Louisiana Supreme Court reversed a twenty-year-old rule that required consultation with an attorney or informed parent before a juvenile could waive

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time of the interrogation; except that, if a public defender or counsel representing the juvenile is present at such interrogation, such statements or admissions may be admissible in evidence even though the juvenile's parent, guardian, or legal or physical custodian was not present."); IND. CODE § 31-32-5-1 (2017) ("Any rights guaranteed to a child under the Constitution of the United States, the Constitution of the State of Indiana, or any other law may be waived only: . . . (2) by the child's custodial parent, guardian, custodian or guardian ad litem if: (A) that person knowingly and voluntarily waives the right; (B) that person has no interest adverse to the child; (C) meaningful consultation has occurred between that person and the child; and (D) the child knowingly and voluntarily joins with the wavier . . . ."); Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 657 (Mass. 1983) ("[F]or the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his [*Miranda*] rights to the juveniles so that the juvenile understands the significance of waiver of these rights."); *In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982) ("[T]he following criteria must be met for a juvenile to voluntarily and intelligently waive his right against self-incrimination and right to counsel under chapter I, article 10 of the Vermont Constitution: (1) he must be given the opportunity to consult with an adult; (2) that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile." (citing Commonwealth v. Barnes, 482 Pa. 555, 560 (1978))).

159 King, *supra* note 8, at 467 ("Many parents may feel that it is best for their child to talk to the police regardless of the risk and thereby be seen as cooperative. In some cases, it is the parent who turned the child in to police or provided information leading the police to interview the child.").

160 *See* Sandra Eismann-Harpen, *Kentucky Should Mandate Attorney Consultation Before Juveniles Can Effectively Waive Their* Miranda *Rights*, 40 N. KY. L. REV. 201, 215 (2013) ("Parents and guardians may have interests that conflict with the juvenile's legal interests.").

161 King, *supra* note 8, at 468 ("From [parents'] anger and justifiable need to understand what is going on, they may unwittingly encourage the child to answer questions, not anticipating how the child may incriminate him or herself."); *see also* Eismann-Harpen, *supra* note 160, at 215 (noting that a child may be victim to abuse by a parent, that a parent may encourage a child to confess in order to get back to work, and that a parent may encourage a child to waive their right to counsel because of the potential financial burden of hiring an attorney). A parent may even encourage their child to confess, whether false or not, "due to a belief that a confession will result in reduced or dismissed charges, a desire to punish the child for the alleged misconduct, or a belief that a confession is in the family's best interests." *Id.* at 216 (citing Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 531 (2006)).

162 *See supra* Part I.B (describing how science has proven that children are cognitively different from adults).

his or her *Miranda* rights.[163] Louisiana abandoned these special protections for juveniles and returned to the *Fare* totality test.[164] Pennsylvania also abandoned a longstanding rule requiring a consultation with an attorney, parent, or interested adult. In *Commonwealth v. Christmas*, the Pennsylvania Supreme Court replaced the per se rule with a rebuttable presumption "that a statement derived in the absence of such an opportunity for consultation is inadmissible."[165] The court stated that the per se rule was "overly protective and unreasonably paternalistic."[166] A few years later in *Commonwealth v. Williams*, the court abandoned the rebuttable presumption rule and also returned to the totality test.[167]

C. Requiring a Consultation with an Attorney Before Waiving Miranda *Rights Would Better Protect Juveniles*

Seeing that the *Fare* totality test and state requirements do not adequately protect juveniles' *Miranda* rights, the Supreme Court, if given the opportunity, should adopt a new, per se rule requiring a juvenile to consult with an attorney before waiving his or her rights.[168] If a juvenile is not provided an attorney and waives his or her rights, these statements should be inadmissible into evidence. By providing a new federal requirement, states like Louisiana and Pennsylvania would not be able to add and remove additional safeguards as they please. Although a federal requirement is ideal, it may be some time before an appropriate case reaches the Supreme Court. Thus, each state should adopt similar per se rules requiring an attorney consultation.[169]

Requiring an attorney consultation is important for a number of reasons. First, studies show that juveniles are unable to meet the adult standard for adequately comprehending *Miranda* rights.[170] This is problematic because in

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163 State v. Fernandez, 712 So. 2d 485, 486 (La. 1998).

164 *See id.* at 490.

165 465 A.2d 989, 992 (Pa. 1983).

166 *Id.*

167 475 A.2d 1283, 1288–89 (Pa. 1984) (Flaherty, J., concurring).

168 *See* Brief, *supra* note 112, at 16 ("Scientific data supports, at a minimum, a rule requiring that a child consult with an attorney before waiving his Fifth Amendment rights. . . . Modern scientific data would also support other prophylactic measures, such as the presence of an attorney during the entire custodial interrogation or a complete exclusion of children's custodial statements.").

169 *See, e.g.*, S.B. 1052, 2015–2016 Leg., Reg. Sess. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1052 (providing that "[p]rior to a custodial interrogation, and before the waiver of any Miranda rights, a youth under 18 years of age shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived"). California Senate Bill 1052, a law that would have ensured juveniles access to an attorney before being interrogated by law enforcement, was passed by the Assembly and Senate, but was eventually vetoed by the governor. Veto Message, *supra* note 129. Nevertheless, S.B. 1052 could be used as model legislation by other states.

170 Grisso, *supra* note 65, at 1152–54.

order for statements to be admissible, a juvenile must voluntarily, knowingly, and intelligently waive his or her *Miranda* rights.[171] This means that a juvenile must waive his or her rights "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[172] So, if a juvenile cannot even comprehend his or her rights, assistance by someone more knowledgeable is necessary.[173] As discussed above, requiring a parent, guardian, or interested adult may be insufficient in protecting juveniles because these adults may not fully understand the legal ramifications of a *Miranda* waiver, or they may not necessarily have the juveniles' legal interests in mind.[174] Instead, an attorney is in the best position to provide juveniles with guidance, counsel, and advantageous legal advice.

The Court missed an opportunity to potentially create a new federal requirement by refusing to grant a petition of certiorari in *Joseph H. v. California*. If the Court heard the case, it would have been able to rule on the specific facts presented in the case, specifically whether a ten-year-old could voluntarily waive his *Miranda* rights. In addition, the Court could have framed its holding broadly by adopting a new, categorical rule for all juveniles requiring an attorney consultation.[175] At the very least, the Court could have clarified *Fare* by requiring lower courts to give significant weight to age as a factor in the totality test.

Given another opportunity, the Court should revisit the *Fare* totality test, especially given the fact that the case was decided over thirty years ago.[176] Since the 1979 *Fare* decision, science and other areas of Supreme Court jurisprudence have recognized the importance of differentiating between juveniles and adults.[177] Science proves that because juveniles' brains are not fully developed until the end of adolescence, they are not able to assess risks as well as adults, they favor immediate reward over long-term consequences, and they are vulnerable to external pressures.[178] Relying on these facts, the Supreme Court has

171 Fare v. Michael C., 442 U.S. 707, 724–25 (1979).

172 Moran v. Burbine, 475 U.S. 412, 421 (1986).

173 *See* Petition, *supra* note 114, at 27 ("A regime in which children are interrogated without appropriate guidance ensures that the rights of those children will be systematically violated.").

174 *Supra* Part III.B.

175 *See* Petition, *supra* note 114, at 19 (arguing that the Court should grant review to determine whether a ten-year-old could voluntarily waive his Miranda rights and that in hearing the case, the Court should "adopt a prophylactic rule requiring the presence of, and meaningful consultation with, an attorney or appropriate adult").

176 *See* Brief, *supra* note 112, at 14 ("This Court, as the interpreter of the Constitution, should not leave to the states decisions of such constitutional import as the protections offered by the Fifth Amendment, especially when . . . state laws are failing to adequately protect children's rights.").

177 *See supra* Part I.B (describing the science behind juvenile brain development and recent Supreme Court decisions that recognize the unique status of juveniles).

178 Police Report: REDUCING RISKS, *supra* note 40, at 4.

time and again reasoned that juveniles are therefore less culpable than adults.[179] Accordingly, the Supreme Court in *Roper*, *Graham*, and *Miller* held the following unconstitutional: subjecting a juvenile to the death penalty,[180] sentencing a juvenile to life without the possibility of parole for a non-homicide,[181] and mandatory life without parole sentences for juveniles.[182] Although these cases deal with sentencing, the *Miranda* waiver analysis should align itself "with other areas of American jurisprudence that apply different rules to juveniles under the age of eighteen."[183] If, however, the *Fare* totality test is left untouched, it will remain inconsistent with other areas of law by preserving a test that does not safeguard the particular vulnerabilities of juveniles.

Although opponents of additional safeguards argue that per se rules would increase financial and administrative costs while interfering with effective police investigations, many of these concerns can be mitigated and are outweighed by a number of benefits.[184] As described above, one of the most compelling reasons for requiring an attorney consultation is the unacceptable risk of wrongfully convicting a juvenile due to incriminating statements or a false confession. The benefit of preventing the wrongful conviction of juveniles should counteract the weight given to speedy and low-cost investigations.

Also, the attorney consultation requirement could have an exception for outlier situations where there is an imminent threat to society. For example, if California Senate Bill 1052 passed, it would have required an attorney consultation prior to a custodial interrogation and before a juvenile could waive his or her *Miranda* rights.[185] However, the bill provided an exception to this rule for situations where an officer "believed the information he or she sought was necessary to protect life or property from a substantial threat."[186] Additionally, clear rules could over time cut costs because challenges to the application of the *Fare* totality test could be avoided. For example, when *Miranda v. Arizona* was decided, similar concerns of costs and police interference were outweighed by the fact that a rigid rule had the "virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."[187]

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179 *See e.g.*, Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding that "juvenile offenders cannot with reliability be classified among the worst offenders").

180 *Id.* at 570–71 (extending the prohibition of the death penalty to offenders under eighteen).

181 Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that a juvenile offender who did not commit a homicide cannot be sentenced to life without parole).

182 Miller v. Alabama, 567 U.S. 460, 470 (2012) (stating juveniles cannot receive "mandatory life-without-parole sentences.").

183 Eismann-Harpen, *supra* note 160, at 226.

184 *Supra* Part II.C.

185 S.B. 1052, 2015–2016 Leg., Reg. Sess. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1052.

186 *Id.*

187 Fare v. Michael C., 442 U.S. 707, 718 (1979).

CONCLUSION

The current federal and state mechanisms are inadequate at protecting juveniles. By analyzing this issue through the lens of juvenile *Miranda* waivers and wrongful convictions, this Article exposes the need for more safeguards to ensure protections for vulnerable juveniles, specifically a mandatory rule requiring a juvenile to consult with an attorney before waiving his or her rights. Science proves that children are cognitively different than adults. Studies demonstrate that children do not adequately understand *Miranda* rights and the legal implications of waiving those rights. Absent an attorney consultation, juveniles often involuntarily waive their rights, leaving them completely vulnerable to interrogators. Left unprotected, juveniles are more likely to succumb to coercive pressures that are hard for adults to even overcome. Consequently, during interrogations, juveniles will sometimes make incriminating statements or false confessions. In most cases, the only protection left for a juvenile trying to prevent incriminating statements from being used against him or her is through challenging the voluntariness of a *Miranda* waiver. Despite the fact that a juvenile may challenge the voluntariness of a waiver with the *Fare* totality test, a juvenile more often than not ends up facing an almost impossible uphill battle. By failing to prove a *Miranda* waiver is involuntary, the admissibility of statements can in the worst scenarios lead to a wrongful conviction and many unjustifiable years in prison. Attorney consultation will not solve all of the systemic failures contributing to the wrongful conviction of juveniles; however, it does provide a promising procedural protection against incriminating statements being unfairly used against vulnerable children.