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Less Unequal Footing: State Court's Per Se Rules for Juvenile Waivers during Interrogations and the Case for Their Implementation

David T. Huang

NOTE

"LESS UNEQUAL FOOTING"†: STATE COURTS' PER SE RULES FOR JUVENILE WAIVERS DURING INTERROGATIONS AND THE CASE FOR THEIR IMPLEMENTATION

David T. Huang††

† Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (Douglas, J.).

†† B.A., 1997, Yale University; Candidate for J.D. 2001, Cornell Law School.

Miranda *warnings do not adequately protect children from waiving their constitutional rights unwittingly during custodial interrogations because of juveniles' immaturity, lack of comprehension, and special status in the justice system.*

This Note considers two competing standards that have emerged from states to determine the validity of juveniles' waivers of their Miranda *rights. The first and most common test considers the totality of circumstances surrounding the waiver. However, this test has been criticized for its inconsistent application and lack of guidance it gives to police and the courts. The second approach employs a per se rule requiring the presence of or consultation with a competent adult—usually a parent—interested in the child's welfare during the interrogation. Under a per se rule, juveniles' waivers are automatically invalid unless law enforcement investigators meet certain procedural safeguards.*

This Note advocates state implementation of per se rules to protect children during custodial interrogations. Per se rules conserve judicial resources by providing a clear analytical framework for judges. In addition, per se rules dispel uncertainty by furnishing a uniform standard practice to law enforcement, providing incentives to law enforcement to properly Mirandize both the juvenile and the interested adult, and protecting juveniles against coercive police conduct. In summary, per se rules are the best and most fair method of safeguarding juveniles' constitutional rights during custodial interrogations.

INTRODUCTION

> You do not have to make a statement and have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to consult an attorney before interrogation and to have an attorney present at the time of the interrogation. If you cannot afford an attorney, one will be appointed for you.[1]

Imagine that you are a fourteen-year-old of average intelligence. You have heard these words spoken countless times on television and in the movies. But imagine yourself sitting alone in a barren and unfamiliar room, facing one, even two detectives. They recite these words to you. Would you know what they actually meant? What if you didn't understand them? Could you ask the police investigators questions? Even if you did, would you know how to exercise your rights? Would you even know what a legal right was? How susceptible would

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[1] Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1144 (1980) (quoting *Miranda* warning employed by the Juvenile Division of the St. Louis County Police Department in 1980).

you be to a police officer's subtle suggestions that you waive your rights?[2] To whom would you want to turn for help?

Adults often waive their *Miranda* rights during interrogations.[3] Juveniles, because of their impressionability, immaturity, and lack of comprehension, have even greater difficulties understanding their constitutional rights against self-incrimination and their right to counsel.[4] One empirical study of a large, random sample of juveniles ages six to seventeen arrested on felony charges found that only about ten percent of them chose not to waive their *Miranda* warnings or talk to interrogators.[5] Legal scholars,[6] as well as judges,[7] have argued that

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2 Psychological studies argue that juveniles, particularly those of preschool age, are highly susceptible to adults' suggestions. *See, e.g.*, Maggie Bruck & Stephen J. Ceci, *The Suggestibility of Children's Memory*, 50 ANN. REV. PSYCHOL. 419 (1999). Journalists have also recently reported on children's susceptibility to adults' suggestions during interrogations. *See, e.g.*, Alex Kotlowitz, *The Unprotected*, THE NEW YORKER, Feb. 8, 1999, at 46, 48; Margaret Talbot, *The Maximum Security Adolescent*, N.Y. TIMES, Sept. 10, 2000, § 6 (Magazine), at 41, 88.

3 *See* Grisso, *supra* note 1, at 1152-53 (reporting results of a study which show that, out of a sample of 260 adults, only 42.3% fully understood the four *Miranda* warnings); Linda Greenhouse, *Crime, Punishment and the Passions of* Miranda, N.Y. TIMES, Apr. 16, 2000, § 4 (Page the Nation), at 1 (reporting that eighty to ninety percent of adult suspects waive their *Miranda* rights). For a fascinating journalistic account of the psychological forces affecting police and suspects during a custodial interrogation, see DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 204-20 (1991), which describes interrogation techniques that Baltimore homicide detectives use to convince suspects to waive their *Miranda* rights.

4 *See* Grisso, *supra* note 1, at 1153-54 (reporting that only 20.9% of juveniles fully understood their *Miranda* warnings, and that juveniles were more than twice as likely as adults to not understand one or more warnings); *see also* Robert E. Shepherd Jr. & Barbara A. Zaremba, *Juvenile Justice: When a Disabled Juvenile Confesses to a Crime: Should It Be Admissible?*, CRIM. JUST., Winter 1995, at 31, 31-32 (reviewing factors that interfere with juveniles' comprehension of *Miranda* rights); *infra* notes 45-55 and accompanying text (discussing *In re Gault*, 387 U.S. 1 (1967)).

5 J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 327, 333-34 (1977). Less than five percent of the juveniles under the age of fifteen chose not to waive their rights. *Id.* at 337 tbl.6; *cf.* Richard A. Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of Their Rights*, JUV. & FAM. CT. J., Winter 1983-84, at 49, 52 (finding that approximately twenty-five percent of juveniles did not remember or understand their *Miranda* rights).

6 *See, e.g.*, Grisso, *supra* note 1, at 1160; Martin Levy & Stephen Skacevic, *What Standard Should Be Used to Determine a Valid Juvenile Waiver?*, 6 PEPP. L. REV. 767, 781 (1979) (advocating interested-adult rule); Charles H. Saylor, Comment, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543, 560 (1973) (advocating presence-of-parent rule).

7 Judge Fedoroff of the Louisiana Court of Appeals has written: "I cannot fathom how a minor, who lacks the [legal] capacity to sell, mortgage, donate or release (who could not even contract with the lawyer whose services he waives) can be said to possess the capacity to waive constitutional privileges and lose his freedom as a consequence." *In re* Holifield, 319 So. 2d 471, 475 (La. Ct. App. 1975) (Fedoroff, J., concurring); *see also* Lewis v. State, 288 N.E.2d 138, 142 (Ind. 1972) (making a similar point), *superseded by statute as stated in* Whipple v. State, 523 N.E.2d 1363 (Ind. 1988). In *Lewis*, the Indiana Supreme Court noted the inconsistency and injustice of treating a minor, whom "the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their [sic]

juveniles cannot fully comprehend the nature of their *Miranda* rights and how to exercise them.

Since the Supreme Court's decision in *Miranda v. Arizona*,[8] states have been required to notify individuals facing custodial interrogation of their constitutional right against self-incrimination and their right to retained—and, if indigent, appointed—counsel.[9] *Miranda* did not, however, address the special status that the criminal justice system accords to juveniles.

In *In re Gault*,[10] decided a year after *Miranda*, the Supreme Court held that *Miranda* applied to juvenile court proceedings, but did not extend *Miranda*'s protections beyond hearings.[11] Since *Gault*, states have formulated two competing tests to determine the validity of a juvenile's waiver of constitutional rights during custodial interrogation. The first and most common test requires courts to consider the totality of circumstances surrounding the waiver.[12] The second approach employs a per se rule requiring the presence of or consultation with an adult—usually a parent—interested in the child's welfare. States applying per se rules agree that "the spirit of *Miranda* is violated by the giving of a warning, intended for an adult, to a child who cannot reasonably be expected to give an informed response or appreciate the consequences of his decision."[13] Unlike the totality of circumstances test, a per se rule automatically invalidates a juvenile's waiver of rights unless the police meet certain procedural safeguards. Other approaches to testing the validity of a juvenile's waiver of constitutional rights exist as well.[14]

This Note surveys the various approaches state courts have taken to mandate a per se rule for juvenile waivers, delineates the policy considerations for and against their continued use, and concludes that per se rules are the best and most fair method to safeguard

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own blood," as an adult "when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar." *Id.*; *see also infra* Part II.B (discussing Indiana's approach to juvenile waiver).

8 384 U.S. 436 (1966).

9 *Id.* at 471-73.

10 387 U.S. 1 (1967).

11 *See id.* at 55; *infra* note 46 and accompanying text.

12 The Supreme Court first promulgated the totality of circumstances approach in the context of waiver of the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (explaining that courts must determine an intelligent waiver "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"), *overruled in part on other grounds by* Edwards v. Arizona, 451 U.S. 477 (1981).

13 Ann Leslie Bailey, *Waiver of Miranda Rights by Juveniles: Is Parental Presence a Necessary Safeguard?*, 21 J. FAM. L. 725, 731 (1983).

14 *See infra* Part IV.B (discussing the rebuttable presumption rule); *infra* Part IV.C.1 (discussing the youth rights form); *infra* Part IV.C.2 (discussing the proposal to videotape interrogations of juveniles).

juveniles' constitutional rights during custodial interrogations.[15] Part I, a background section, discusses the important Supreme Court decisions that have influenced states' juvenile waiver rules. Part II considers the case law of several states that have promulgated per se rules. Part III examines the experience of three states—Georgia, Pennsylvania, and Louisiana—that adopted per se rules and subsequently abandoned them. Part IV analyzes the public policy considerations for and against per se rules. It also considers the viability of three alternative proposals: the rebuttable presumption rule, the youth rights form, and the videotaping of interrogations of juveniles. This Note argues that the "pure" per se rule provides the greatest assurance that a juvenile detainee understands his constitutional rights and waives them voluntarily. The Note concludes with a brief discussion of the normative and societal values underlying this legal debate.

I
JUVENILES' WAIVER OF *MIRANDA* RIGHTS: SUPREME COURT JURISPRUDENCE

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[16] The Sixth Amendment guarantees the right to counsel: "the accused shall . . . have the Assistance of Counsel for his defence."[17] Until its decision in *Fare v. Michael C.*,[18] the Supreme Court had consistently recognized greater protections for juveniles under the criminal justice system and thus applied these rights with particular care. Although the Court has never mandated explicitly that states apply a per se rule, several of its decisions have emphasized that a juvenile's age and immaturity are paramount in determining whether a juvenile "voluntarily, knowingly and intelligently"[19] waived his rights.[20]

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15 Although several state legislatures have adopted statutes that require courts to apply a per se approach, *see, e.g.*, CONN. GEN. STAT. ANN. § 46b-137 (West 2000) (excluding any statement made to police or juvenile court official unless parent is present and advised of child's *Miranda* rights); KAN. STAT. ANN. § 38-1624(c)(3)(A) (Supp. 1999) (codifying the per se rule in *In re B.M.B.*) (for a discussion of *In re B.M.B.*, see *infra* Part II.E); TEX. FAM. CODE ANN. § 51.09 (Vernon Supp. 2000) (making juvenile's waiver effective only with assistance of counsel), those rules are beyond the scope of this Note.

16 U.S. CONST. amend. V.

17 U.S. CONST. amend. VI.

18 442 U.S. 707 (1979). For further discussion, see *infra* Part I.C.

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

20 *See In re* Gault, 387 U.S. 1, 55 (1967); Gallegos v. Colorado, 370 U.S. 49, 54-55 (1962); Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (plurality opinion).

A. *Haley v. Ohio* and *Gallegos v. Colorado*

In *Haley v. Ohio*,[21] the Court first recognized the special status of juveniles in custodial interrogations. Ohio police arrested the defendant, a fifteen-year-old African American, for participation in a robbery and murder.[22] From midnight until 5 a.m., several police officers took turns questioning the juvenile, after which he signed a written confession.[23] Without advising the defendant of his right to counsel,[24] the police detained him for five days without allowing him to see his mother or the lawyer she had hired for him.[25] The trial court determined that the defendant's confession was voluntary and admitted it over his objection.[26]

The Supreme Court, in a plurality opinion by Justice Douglas, reversed.[27] The plurality disapproved of the interrogation methods and noted that juveniles require more constitutional safeguards than adults. Justice Douglas lamented that

> [w]hat transpired would make us pause for careful inquiry if a mature man were involved. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. 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.[28]

Although the Court relied upon several factors for its reversal, it emphasized the petitioner's age above all. Rejecting the state's contention that police had warned Haley of his constitutional rights prior to confession, Justice Douglas wrote: "That assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions."[29] The expansive langnage of *Haley*, which addressed the plight of all juveniles—and not simply that of John Haley—suggests that the Court would continue to scrutinize juvenile waivers with "special care."[30]

Fifteen years after *Haley*, *Gallegos v. Colorado*[31] again emphasized the need to protect juveniles from the coercive forces of interroga-

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21 332 U.S. 596 (1948) (plurality opinion).

22 *Id.* at 597 (plurality opinion).

23 *Id.* at 598 (plurality opinion).

24 *See id.* (plurality opinion).

25 *Id.* (plurality opinion).

26 *Id.* at 599 (plurality opinion).

27 *See id.* at 601 (plurality opinion).

28 *Id.* at 599-600 (plurality opinion).

29 *Id.* at 601 (plurality opinion).

30 *Id.* at 599 (plurality opinion). The Supreme Court decided *Haley* exclusively on Fourteenth Amendment grounds. *See id.* (plurality opinion). The Court did not begin applying the Fifth and Sixth Amendments to the states until subsequent decisions.

31 370 U.S. 49 (1962).

tion. In *Gallegos*, Colorado authorities picked up the fourteen-year-old defendant, who immediately admitted to committing assault and battery.[32] The victim subsequently died, and the state charged the defendant with first degree murder.[33] Although the defendant did not face prolonged questioning by authorities, the state held him in custody for five days and did not allow him to see his mother.[34] The trial court admitted the confession.[35]

The Supreme Court, in another opinion by Justice Douglas, reversed the conviction.[36] Although the Court applied a totality of circumstances test,[37] it relied heavily on *Haley*'s rationale.[38] In an extended discussion that echoed *Haley*, the Court explained:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.
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> . . . 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. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. 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. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.[39]

In seeming contrast to the tone of this discussion, however, the court concluded *Gallegos* by observing:

> There is no guide to the decision of cases such as this, except the totality of circumstances . . . . The youth of the petitioner, the long detention, the failure to send for his parents, the failure imme-

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32 *Id.* at 49-50.
33 *Id.* at 50.
34 *Id.*
35 *Id.*
36 *Id.* at 55.
37 *See id.*
38 *See id.* at 53 (calling the age of the defendant in *Haley* a "crucial factor" in that decision).
39 *Id.* at 54-55.

> diately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.[40]

Thus, *Gallegos* can be read in two ways. Proponents of the totality of circumstances test have emphasized that the *Gallegos* court explicitly applied this test in its determination.[41] On the other hand, *Gallegos* includes strong language to support a case for a per se rule.

B. *Miranda v. Arizona* and *In re Gault*

In the mid-1960s, the Supreme Court handed down two decisions that broadened the constitutional due process protections given to juveniles. In *Miranda v. Arizona*,[42] the Supreme Court required states to notify criminal suspects of their constitutional right to remain silent and their right to counsel prior to arrest and interrogation.[43] Absent these safeguards, any statement made by the defendant after his arrest would be excluded by the trial court.[44]

A year later, in *In re Gault*,[45] the Court held that juvenile courts must follow procedural due process safeguards in adjudicatory proceedings, including notifying the child of his right to counsel and his right against self-incrimination.[46] Arizona officials took custody of Gerald Gault, a fifteen-year-old, for making a lewd phone call.[47] At the delinquency proceeding, the court failed to swear any witnesses, make a transcript or record of the proceedings, call for counsel to represent the defendant, or require the presence of the complain-

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40 *Id.* at 55 (citations omitted).

41 *See* Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1035, 1052 & n.148 (1999) (arguing in favor of the totality of circumstances test).

42 384 U.S. 436 (1966).

43 *Id.* at 479.

44 *Id.*

45 387 U.S. 1 (1967).

46 *See id.* at 55. Although the *Gault* Court specifically limited its holding to adjudicatory proceedings before a juvenile court, *see id.* at 44, states have nevertheless construed the decision to apply *Miranda* to preadjudicatory proceedings as well. *See, e.g.*, *In re* Creek, 243 A.2d 49, 50-51 (D.C. 1968); Leach v. State, 428 S.W.2d 817, 819-21 (Tex. Civ. App. 1968). Language in *Gault* itself suggests that a juvenile's right against self-incrimination applies to all proceedings: "[I]t is . . . clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *Gault*, 387 U.S. at 49. Some scholars, however, have argued that the scope of *Gault*'s holding is unclear. *See, e.g.*, Larry E. Holtz, Miranda *in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 539-40 (1987).

47 *Gault*, 387 U.S. at 4.

ant.[48] The juvenile court found Gault delinquent and committed him to a state institution until his majority, or a maximum of six years.[49]

In reversing the state's determination that Gault's delinquency proceedings did not violate due process,[50] the Supreme Court was critical of the rationale of *parens patriae*,[51] noting that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without exception."[52] Relying on its own decision in *Haley*, as well as recent state juvenile cases,[53] the Court concluded:

> [T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults. We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children . . . . The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary . . . .[54]

Although *Gault* unequivocally concluded that the Fifth and Sixth Amendments apply to juveniles with equal force as they do to adults, the Supreme Court failed to construct concrete guideposts to aid lower courts in determining the voluntariness of juvenile confessions. Thus, *Gault* casts some uncertainty over the importance that an accused's age should have in determining the validity of a waiver of rights.[55]

C. *Fare v. Michael C.*

After *Gault*, the Supreme Court did not explicitly address the issue of juvenile waivers of *Miranda* rights until *Fare v. Michael C.*[56] By 1979, when *Michael C.* was decided, the composition of the Court had

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48 *See id.* at 5.

49 *Id.* at 7-8. In contrast, an adult convicted under the same state statute faced a maximum fine of fifty dollars or a maximum sentence of two months. *Id.* at 8-9.

50 *Id.* at 4.

51 *See id.* at 16-28 (highlighting the disparity between the rhetoric and the realities of the juvenile court system and concluding that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court").

52 *Id.* at 47.

53 *See id.* at 52-54 (discussing *In re* Gregory W., 224 N.E.2d 102 (N.Y. 1966), and *In re* Carlo, 225 A.2d 110 (N.J. 1966)).

54 *Id.* at 55.

55 *See* Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 905 (1995) ("*Gault* serves as a basis for both the current totality test, as well as subsequent state *per se* rules.").

56 442 U.S. 707 (1979).

changed dramatically. Only three members of the *Miranda* and *Gault* majorities—Justices Stewart, White, and Brennan—still sat on the Court.

In *Michael C.*, authorities interrogated the sixteen-year-old defendant as a murder suspect.[57] After the police gave him his *Miranda* warnings, the defendant asked to see his probation officer.[58] The police refused this request but reiterated that he had a right to consult an attorney.[59] Subsequently, the defendant made incriminating statements to the police.[60] Relying on its decision in *People v. Burton*,[61] the California Supreme Court held that the confession was a per se violation of *Miranda*, because the defendant's request to see his probation officer was an exercise of his Fifth Amendment privilege.[62]

The Supreme Court reversed, concluding that the juvenile defendant's request to see his probation officer was not tantamount to a request to speak to an attorney and was thus an ineffective exercise of his right to counsel.[63] The Court stated unequivocally that the validity of a juvenile's waiver must be determined by the totality of circumstances: "This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."[64] The Court added that a reviewing judge must consider all of the circumstances surrounding the interrogation, including "the juvenile's age, experience, education, background, and intelligence."[65]

Whereas *Haley*, *Gallegos*, and *Gault* focused almost exclusively on the procedural rights of the juvenile, *Michael C.* explicitly considered the needs of law enforcement as well.[66] The Court noted that the totality of circumstances test best recognized the balance of interests judges must consider in determining the validity of waivers and allowed them to separate genuine invocations of Fifth Amendment privileges from instances when the police interrogated "an experienced older juvenile with an extensive prior record."[67] Applying the totality of circumstances test to the facts of the case, the Court determined that the juvenile knowingly and voluntarily waived his rights.[68]

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57 *Id.* at 710.

58 *Id.*

59 *Id.*

60 *See id.* at 711.

61 491 P.2d 793 (Cal. 1971). For further discussion, see *infra* Part II.A.

62 *See Michael C.*, 442 U.S. at 714-15.

63 *Id.* at 719, 724 (comparing the "unique role the lawyer plays in the adversary system" with the role of a probation officer, who is not "a trained advocate").

64 *Id.* at 725.

65 *Id.*

66 *See id.* at 725-26.

67 *Id.* at 725.

68 *See id.* at 726.

In his dissent, Justice Marshall advocated a reading of *Miranda* that would permit a per se assertion of Fifth Amendment rights. Relying on language in the Court's previous decisions in *Haley*, *Gallegos*, *Miranda*, and *Gault* that emphasized the unique quandary juveniles face during interrogation, Justice Marshall wrote: "*Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests. Such a request, in my judgment, constitutes both an attempt to obtain advice and a general invocation of the right to silence."[69] Justice Powell also dissented, albeit on different grounds.[70] Implicitly applying the totality of circumstances test, he determined that the defendant did not receive an interrogation free from coercion.[71]

Michael C. is the last major Supreme Court decision to address juvenile waivers and represents the Court's implicit rejection of per se rules. Although *Michael C.* did not address the role of parents explicitly, the Supreme Court cautioned that *Miranda* was based on the "pivotal role" attorneys play in counseling the accused in custody.[72] Thus, the Court was staving off what it perceived to be an unwarranted extension of *Miranda*:

> Such an extension would impose the burdens associated with the rule of *Miranda* on the juvenile justice system and the police without serving the interests that rule was designed simultaneously to protect. If it were otherwise, a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of *Miranda*.[73]

At least until the Supreme Court revisits the issue of juvenile waiver, *Michael C.* effectively forestalls the possibility of a federal version of the per se rule.

D. Criticisms of the Totality of Circumstances Test

Many scholars have criticized *Michael C.* and the totality of circumstances approach.[74] Professor Feld, for example, acknowledges

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69 *Id.* at 729-30 (Marshall, J., dissenting). Justice Marshall also added: "I do not believe a case-by-case approach provides police sufficient guidance, or affords juveniles adequate protection." *Id.* at 731 n.2 (Marshall, J., dissenting).

70 *See id.* at 732-34 (Powell, J., dissenting).

71 *See id.* at 734 (Powell, J., dissenting).

72 *Id.* at 722.

73 *Id.* at 723.

74 *See, e.g.*, Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 173-77 (1984); Schlam, *supra* note 55, at 912-14; Penelope Alysse Brobst, Note, *The Court Giveth and the Court Taketh Away:* State v. Fernandez*—Returning Louisiana's Children to an Adult Standard*, 60 LA. L. REV. 605, 621-25 (2000); *Juvenile Confessions: Whether State Procedures Ensure Constitutionally Permissible Confessions*, 67 J. CRIM. L. & CRIMINOLOGY 195, 202 (1976) [hereinafter *Juvenile Confessions*]. *But cf.* Anthony J. Krastek, Comment, *The Judicial Response to Juvenile Confessions: An Examination of the Per Se*

that courts have established relevant factors for identifying knowing and voluntary waivers[75] but decries the fact that they have not given any particular factor controlling weight,[76] thus leaving the determination to the "unfettered discretion of the trial court."[77] The absence of any clear rules arguably places a child in the same situation as an adult.[78] There is no assurance, for example, that courts will consider the empirical evidence that juveniles do not comprehend *Miranda*

Rule, 17 DUQ. L. REV. 659, 685 (1979) (advocating a totality of circumstances approach, but one that is liberally applied to approach the rigor of a strict scrutiny standard of review); Elizabeth J. Maykut, Comment, *Who Is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1372-74 (1994) (advocating Massachusetts's two-tiered rule); Meyer, *supra* note 41, at 1069-75 (enumerating the advantages of the totality of circumstances rule).

75 *Compare* West v. United States, 399 F.2d 467, 469 (5th Cir. 1968) (nine factor test), *with* State v. Benoit, 490 A.2d 295, 302, 303 (N.H. 1985) (fifteen factor test), *and* State v. Young, 552 P.2d 905 (Kan. 1976) (five factor test).

76 Feld, *supra* note 74, at 173. For an illustration of how a defendant's immaturity can be discounted when a judge considers a myriad of factors, see *In re B.M.B.*, 955 P.2d 1302, 1306 (Kan. 1998). In considering the admissibility of a juvenile's confession at a suppression hearing, the trial judge reasoned:

> When I apply the factors outline[d] in *[State v.] Young* to this factual situation, I find the following: That the length of questioning weighs toward admitting the statement . . . , as it appears it was approximately thirty-one minutes in length, if you take out the time that the Detective left the room. There certainly have been many interrogations that have lasted a matter of hours, closer to half a day, actually, off and on, with meal breaks, et cetera, and this is nowhere near that. [His] mental state appears to be relatively calm. Although he was described as tearful or crying as he left the school, that was apparently a situation that corrected itself upon getting into the Detective's car. I'm more impressed, however, with [his] comment that he would simply do his homework while waiting for paperwork to be processed, rather than being described as tearful or overwrought. There is no indication at this point that [he] had any hesitation with regard to speaking to this Detective. I know nothing about [his] maturity, other than he obviously can write and has signed the document. . . . *On the other hand, he is ten years old—or was ten years old at the time.* I find significant that the Detective did, indeed, attempt to reach [his] mother and that apparently he only took the action of picking [him] up at school when it appeared [he] was going to be leaving the jurisdiction of the Court. The total circumstances would indicate that this is a voluntary statement. If, after hearing the statement, I see anything or hear anything in there to indicate otherwise, on my own I would exclude it. At this time it comes in. It's in.

Id. (emphasis added). This excerpt demonstrates how easily a judge could—intentionally or unintentionally—downplay the defendant's age when considering other factors. On review, the Kansas Supreme Court reversed the admission of the confession, arguing, inter alia, that the trial court improperly weighed certain factors and did not make any findings for other factors. *See id.* at 1307-10 ("[The defendant's] age . . . seems not to have been considered material to the trial court's other findings.").

77 Feld, *supra* note 74, at 173 (footnote omitted); *see also* Grisso, *supra* note 1, at 1138 n.24 (concluding, after surveying relevant juvenile waiver decisions between 1948 and 1979, that no single variable was determinative in courts' rulings on the validity of waivers); Schlam, *supra* note 55, at 913 ("Inconsistent applications of the totality test . . . can be attributed to the lack of any criteria indicating the weight a court should give to the various circumstances surrounding a custodial interrogation." (footnote omitted)).

78 *Juvenile Confessions*, *supra* note 74, at 202.

warnings as well as adults.[79] Indeed, one major shortcoming of the totality of circumstances test is that a judge can emphasize or downplay any factor she wishes, if indeed she articulates any factors at all. Without some aid to assist juveniles in comprehending their constitutional rights, the recitation of *Miranda* warnings threatens to be hollow and ritualistic.[80]

From a more practical perspective, the totality of circumstances test creates uncertainty and speculation among law enforcement officials about whether a juvenile's statements may be admissible at trial.[81] Additionally, a totality of circumstances approach increases the likelihood of inconsistent rulings, even on the same record.[82]

Finally, the totality of circumstances test protects a juvenile's constitutional rights only in retrospect. One astute commentator has observed that 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 decision confronting him or her in the interrogation room."[83] The per se rule, then, embodies a value judgment that the justice system should protect juveniles prospectively, before any constitutional violations might occur, rather than leaving such protections to post hoc judicial review.

II
STATES' PER SE RULES TO DETERMINE VALID JUVENILE WAIVERS

To date, most states have followed *Michael C.* and applied a totality of circumstances test to judicial assessments of juvenile waiver.[84] A minority of states, however, have instituted rules, either through the courts or the legislature, that require juveniles have the opportunity to consult with a parent, guardian, attorney, or other "interested adult."[85]

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79 *See supra* notes 4-5 and accompanying text. Indeed, at least one state court has acknowledged the validity of these empirical studies but nevertheless proceeded to apply a totality test. *See* State v. Fernandez, 712 So. 2d 485, 489 (La. 1998).

80 *See* Feld, *supra* note 74, at 173-75.

81 *See* Maykut, *supra* note 74, at 1373.

82 *See infra* notes 279-85 and accompanying text.

83 Maykut, *supra* note 74, at 1372.

84 For a recent survey of states that employ the totality approach, see Meyer, *supra* note 41, at 1072 n.299 (listing thirty-six states following the totality test). The Supreme Court has extended constitutional protections to state criminal proceedings via the Fourteenth Amendment. *E.g.*, Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (extending Sixth Amendment protection to states' custodial proceedings); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (applying Fifth Amendment right against self-incrimination to state criminal prosecutions); Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963) (applying Sixth Amendment right to counsel to state criminal proceedings).

85 *See* Brobst, *supra* note 74, at 614 n.81 (noting that at least thirteen states have adopted the per se approach, including Colorado, Connecticut, Hawaii, Indiana, Iowa,

State courts may, of course, accord greater liberties to their citizens under state constitutions, so long as state courts provide a clear statement that their decisions rest on state law and not federal law.[86] Several state courts have echoed the criticisms of the totality of circumstances approach already discussed and promulgated per se approaches.[87] Other states, such as Massachusetts and Kansas, have applied different rules, depending on the juvenile's age. This section discusses the case law in five states: California, Indiana, Vermont, Massachusetts, and Kansas.[88]

A. California

California instituted the earliest precursor to the modern version of the per se rule. In *People v. Burton*,[89] decided in 1971, the Supreme Court of California held that a juvenile's request to see a parent during an interrogation was an invocation of his Fifth Amendment rights.[90] Police interrogated the defendant, sixteen-year-old Bozzie Bryant Burton III, on charges of assault and murder, refusing his repeated requests to see his parents.[91] The defendant subsequently confessed to the crimes.[92] Relying on state precedent and *Miranda*, the California Supreme Court reasoned that "'[t]o strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity . . . would subvert *Miranda's* prophylactic intent.'"[93] The court continued: "It is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks—a parent or guardian."[94] Because the police did not stop the interrogation after the

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Massachusetts, Montana, New Mexico, North Carolina, Oklahoma, Texas, Vermont, and West Virginia).

86 *See* Michigan v. Long, 463 U.S. 1032, 1038-42 (1983) (delineating independent and adequate state grounds doctrine); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) (same); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875) (same); Schlam, *supra* note 55, at 930-33 (listing several examples of state courts granting greater protection to their citizens than mandated by the federal Constitution).

87 In addition, several state legislatures have written statutes that adopt per se rules. This approach is beyond the scope of this Note, which explores only judicial responses. *See supra* note 15.

88 This discussion is not intended to be a comprehensive survey of various states' approaches to per se rules. The states discussed, however, are representative of various states' approaches.

89 491 P.2d 793 (Cal. 1971).

90 *Id.* at 798.

91 *Id.* at 794-96.

92 *See id.* at 795.

93 *Id.* at 797 (quoting People v. Randall, 464 P.2d 114, 118 (Cal. 1970)).

94 *Id.* at 797-98.

defendant asked to see his parents, the court reversed the defendant's conviction.[95]

Although *Burton* does not mandate a per se rule, it represents a broad conception of *Miranda* that the Supreme Court rejected in *Michael C.*[96] The *Burton* court also held that, during custodial interrogation, a juvenile's request to see his parents "must, *in the absence of evidence demanding a contrary conclusion,* be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege."[97] Thus, *Burton* can fairly be read as a predecessor to the so-called rebuttable presumption rule, much like the one that Massachusetts has adopted.[98] Under that approach, the absence of an interested adult during a juvenile's interrogation creates a rebuttable presumption that any incriminating statements made are per se excludable.

B. Indiana

Indiana's per se rule was one of the earliest to incorporate the idea of an interested adult and served as a model for other states adopting similar rules. In *Lewis v. State*,[99] officers took a seventeen-year-old to the police station and questioned him about a murder and robbery.[100] After waiving his *Miranda* rights, the defendant made incriminating statements.[101] The police began taking a written statement from the defendant but stopped when the defendant said he wanted to speak to an attorney.[102] The police had attempted to contact the defendant's mother when they took him into custody, but she did not arrive at the police station until after the defendant had already confessed.[103] The State introduced the confession at trial, and the jury convicted the defendant of murder.[104]

The Supreme Court of Indiana reversed, remanded for a new trial, and mandated a per se rule. The court noted that authorities "enter into an area of doubt and confusion" when they try to determine whether or not a child has waived his Fifth and Sixth Amendment rights.[105] Lamenting the lack of judicial guidelines for

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95 *Id.* at 798.

96 *See* Fare v. Michael C., 442 U.S. 707, 724 (1979). Indeed, the Supreme Court of California had relied on *Burton* to hold that a juvenile defendant's request to see his probation officer was a per se invocation of his Fifth Amendment rights. *See In re* Michael C., 579 P.2d 7, 9-10 (Cal. 1978), *rev'd sub nom.* Fare v. Michael C., 442 U.S. 707 (1979).

97 *Burton*, 491 P.2d at 798 (emphasis added).

98 *See infra* Part II.D.

99 288 N.E.2d 138 (Ind. 1972).

100 *Id.* at 139.

101 *Id.* at 139-40.

102 *Id.* at 140.

103 *See id.* at 139-40.

104 *See id.*

105 *Id.* at 141.

authorities, the court added that police must speculate about whether a judge will consider their procedures for treating juvenile waivers constitutionally adequate.[106] Such second-guessing by law enforcement, the court continued, "is harmful to the system of criminal justice."[107] The court concluded that there must be "[c]learly defined procedures" to encourage efficient enforcement of laws and to protect the constitutional rights of the accused.[108] The *Lewis* court therefore promulgated a per se rule for determining juvenile waivers:

> We hold . . . that a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent. Furthermore, the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights. . . . Having a familiar and friendly influence present at the time the juvenile is required to waive or assert bis fundamental rights assures at least some equalization of the pressures borne by a juvenile and an adult in the same situation.[109]

Such a per se rule is but another "special precaution[ ]" the law should accord to juveniles, following a "long termed tradition" of similar safeguards.[110] The rule in *Lewis* was later codified by state statute.[111]

C. Vermont

The Supreme Court of Vermont relied on the reasoning in *Lewis* to initiate its own per se rule for juvenile custodial interrogations.[112] Although the Supreme Court had decided *Michael C.* after the Indiana Supreme Court decided *Lewis*, the Vermont court explicitly anchored *In re E.T.C.* on state law and the state constitution.[113] Police interrogated the fourteen-year-old defendant, a resident of a group home, about a breaking and entering incident.[114] The troopers read the defendant his *Miranda* warnings and stated that he could have a custodian present.[115] The home's director, who was present at the interrogation, insisted that he was the defendant's custodian and encouraged the defendant to cooperate and be "'straight'" with the po-

106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.* at 142.
110 *Id.* at 143.
111 *See* IND. CODE ANN. §§ 31-32-5-1 to 31-32-5-7 (Michie 1997).
112 *See In re* E.T.C., 449 A.2d 937, 939-40 (Vt. 1982).
113 *See id.* at 939.
114 *Id.* at 938.
115 *Id.*

lice.[116] The defendant and the director did not confer privately about the juvenile's *Miranda* rights.[117] The defendant subsequently made inculpatory statements that were later admitted at a delinquency hearing.[118]

In its reversal, the Vermont Supreme Court held that a minor accused of a crime cannot waive his Fifth and Sixth Amendment rights during police interrogation without a guardian or interested adult present.[119] The court recognized "the inability of a juvenile to choose, without advice, among alternative courses of legal action."[120] Relying heavily on the Indiana Supreme Court's reasoning in *Lewis*, the Vermont court instituted a three-part, per se rule for juvenile custodial interrogations:

> (1) [the juvenile] 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.[121]

The court further suggested that a juvenile is entitled to consult with an interested adult "in the absence of police pressures"[122] and criticized the group home director's statements to the juvenile to "'come clean.'"[123]

D. Massachusetts

Massachusetts's approach to analyzing juvenile waivers presents one of the alternatives to the totality of circumstances approach and a per se rule. In *Commonwealth v. A Juvenile*,[124] the Supreme Judicial Court adopted a per se rule for juveniles under fourteen years old.[125] However, for juveniles fourteen and older, a waiver's presumed invalidity could be rebutted.[126] In that case, police interrogated a thirteen-year-old defendant in the presence of his father.[127] After the

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116 *Id.* at 938-39.
117 *Id.* at 938.
118 *Id.* at 939.
119 *Id.* at 940.
120 *Id.* at 939.
121 *Id.* at 940 (citing Commonwealth v. Barnes, 394 A.2d 461, 464 (Pa. 1978), Commonwealth v. Roane, 329 A.2d 286, 288 (Pa. 1974), and Lewis v. State, 288 N.E.2d 138, 142 (Ind. 1972)).
122 *Id.*
123 *Id.*
124 449 N.E.2d 654 (Mass. 1983).
125 *See id.* at 657.
126 *See id.*
127 *Id.* at 655.

police read the father the standard *Miranda* warnings, the father encouraged his son to tell the police what he knew.[128] The defendant subsequently confessed to the theft.[129] On review, the Supreme Judicial Court held that the police improperly obtained the boy's confession, because there was no showing that the father explained the *Miranda* rights to the defendant or that the defendant understand and subsequently waived his rights.[130]

In contrast to *In re E.T.C.*, which anchored Vermont's per se rule in the state's constitution, the Massachusetts court derived its per se rule from *Gault*.[131] After quoting language from *Gault* that addressed the special status of juvenile defendants, the Supreme Judicial Court concluded that although "the Supreme Court has not specified a procedure for informing juveniles of their right against self-incrimination, the Court has implied that some form of warning must be given and that the presence of an informed adult, either a parent or lawyer, to counsel the juveniles on their rights" is important in determining whether a waiver is valid.[132] The court reasoned that a per se rule establishes an ascertainable basis for valid waiver for prosecutors and police,[133] is consistent with "traditional policy which affords minors a unique and protected status,"[134] and "prevent[s] the [*Miranda*] warnings from becoming merely a ritualistic recitation wherein the effect of actual comprehension by the juvenile is ignored."[135]

Despite these arguments for a per se rule, the Massachusetts court created two tiers for its application. For the prosecution to show that a juvenile under fourteen years old made a valid waiver, it must show that an interested adult was present, understood the warnings, and had the opportunity to explain to the juvenile his rights so that the juvenile understood the significance of a waiver.[136] In other words, not only must a juvenile have the *opportunity* to consult with an interested adult, but that consultation must be *meaningful* as well. For juveniles fourteen and older, however, the prosecution may rebut this presumption of invalidity if it demonstrates that the juvenile possesses a "high degree of intelligence, experience, knowledge, or sophistication" to understand and waive his rights.[137] The court, however, did

128 *Id.*
129 *Id.*
130 *See id.* at 658.
131 *See id.* at 655-56. The Massachusetts court also implicitly discounted the precedential value of *Michael C.* in its decision. Although the court cited *Michael C.* in a footnote, *see id.* at 656 n.1, it did not discuss the impact *Michael C.* had in limiting *Gault*'s scope.
132 *Id.* at 656.
133 *See id.* at 656-58.
134 *Id.* at 656.
135 *Id.* (citing Commonwealth v. Smith, 372 A.2d 797, 799 (Pa. 1977)).
136 *Id.* at 657.
137 *Id.*

not explain why a two-tiered rule would be more effective than a categorical, per se rule.

E. Kansas

Like Massachusetts, Kansas does not rely exclusively on either the per se or the totality of circumstances rule. Rather, it splits the difference, applying a per se rule to children under fourteen and a totality of circumstances test to juveniles fourteen years and older.

In *In re B.M.B.*,[138] a direct review of a trial court decision, the Supreme Court of Kansas held that the trial court's admission of a ten-year-old defendant's confession was not supported by substantial evidence.[139] Following the factors outlined in *State v. Young*,[140] the trial court had admitted the juvenile rape suspect's incriminating statements.[141] The Supreme Court of Kansas criticized the trial court's decision, asserting that the trial judge made findings "not supported by the record,"[142] "assigned weight to factors that should not have been in the equation,"[143] and, overall, "gave only lip service to the *Young* factors."[144]

After surveying the laws of other states and acknowledging empirical studies, the Supreme Court of Kansas promulgated a per se rule for juveniles under fourteen years of age, reasoning that such an exclusion is consistent with the state's policy of rehabilitating juveniles.[145] In Kansas, a juvenile under fourteen "must be given an opportunity to consult with his or her parent, guardian, or attorney."[146] Unlike other states, Kansas did not explicitly require that the adult be interested or understand the warnings. The totality of circumstances rule remained unchanged for juveniles fourteen and older.[147]

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138 955 P.2d 1302 (Kan. 1998).

139 *See id.* at 1314.

140 552 P.2d 905 (Kan. 1976). The factors outlined in *Young* are (1) the age of the minor; (2) the length of questioning; (3) the youth's education; (4) the youth's prior experience with the police; and (5) the youth's mental state. *Id.* at 910-11.

141 *See In re B.M.B.*, 955 P.2d at 1306.

142 *Id.* at 1308.

143 *Id.*

144 *Id.* at 1312.

145 *See id.* at 1312-13.

146 *Id.*

147 *See id.* at 1312. The per se rule of *In re B.M.B.* was later codified by the Kansas legislature in KAN. STAT. ANN. § 38-1624(c)(3)(A) (Supp. 1999).

III
CRITICISMS OF PER SE RULES: STATE DECISIONS TO OVERTURN PER SE RULES

In considering the rationales for and against per se rules, the experience of three states—Georgia, Pennsylvania, and Louisiana—are especially valuable. All three states had judicially-created per se rules, but each abandoned them years later. In the case of Pennsylvania, it moved from a per se rule to a rebuttable presumption test before returning to a totality of circumstances test. The experiences of these three states show the susceptibility of any rule to the individual cases before a court. A primary, albeit understated, motivation for state courts to overturn their own per se rules is a fear that these rules permit guilty offenders to escape punishment because of procedural technicalities.

A. Georgia

Georgia was the first state to eliminate its own court-mandated per se rule. Unfortunately, the state's decisions to create and eliminate its per se rule are meagerly reasoned. In *Freeman v. Wilcox*,[148] the Georgia Court of Appeals ostensibly promulgated a per se rule.[149] Like Massachusetts in *In re E.T.C.*, the *Freeman* court relied heavily on *In re Gault* for its decision.[150]

The police picked up the fourteen-year-old defendant for his suspected role in a burglary.[151] The youth had signed a waiver of rights and made an incriminating statement on the fifth day of detention.[152] At the delinquency hearing, the defendant testified that the police had not informed him of his right to an attorney during questioning.[153] The investigator had contacted the defendant's mother and spoken to her while her son was in custody, but did not advise her of his right to counsel.[154] In reversing the decision to admit the statement, the court highlighted this fact.[155] Relying on *Gault*, the court held that "*[b]oth must be advised.*"[156] The court implicitly relied on *Gault*'s emphasis on due process standards in juvenile proceedings

148 167 S.E.2d 163 (Ga. Ct. App. 1969), *disapproved of by* Riley v. State, 226 S.E.2d 922 (Ga. 1976).

149 *See id.* at 166-67.

150 *See id.* at 165-67.

151 *Id.* at 164.

152 *See id.*

153 *Id.*

154 *Id.* at 165.

155 *See id.* at 167.

156 *Id.*

and read it liberally to extend to all "'critical' stages of the criminal process."[157]

Seven years later, however, in *Riley v. State*,[158] the Supreme Court of Georgia overruled *Freeman*, despite the fact that both cases shared similar facts.[159] In *Riley*, authorities arrested the defendant, a fifteen-year-old, for shooting and killing a bus driver.[160] His mother was present when the police read him his rights, but she was not advised separately of his constitutional rights pursuant to *Freeman*.[161] The defendant confessed after the police confronted him with a coconspirator's incriminating statement.[162]

The Georgia Supreme Court reversed the trial judge's admission of the confession, adding that "age alone is not determinative of whether a person can waive his rights."[163] Unfortunately, the court made no attempt to distinguish *Gault*. Instead, it adopted the nine factor test outlined in a Fifth Circuit case, *West v. United States*[164] and concluded that "[t]o the extent *Freeman v. Wilcox* can be read to require an automatic exclusion, if the parent is not separately advised, it is disapproved."[165] The two Georgia cases are distinguishable on the nature of parental involvements. In *Freeman*, the mother was not present during the interrogation,[166] whereas in *Riley*, a parent was present and had the opportunity to speak to the defendant.[167] Perhaps the *Riley* court felt that exclusion of the defendant's statements because of a procedural technicality was unjust. Such reasoning violates the letter and purpose of a per se rule, which does not treat defendants differently simply because a parent is present during interrogation. Rather, the key issue is whether the defendant understands his rights

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157 *Id.* at 165-66.

158 226 S.E.2d 922 (Ga. 1976). *Riley* marked the first time that the Georgia Supreme Court considered *Freeman*.

159 *See id.* at 926.

160 *Id.* at 924.

161 *See id.* at 925.

162 *Id.*

163 *Id.* at 926.

164 399 F.2d 467 (5th Cir. 1968). The nine factors outlined in *West* are:

> 1) the age of the accused; 2) education of the accused; 3) knowledge of the accused as to both the substance of the charge . . . and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether vel non the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extra judicial statement at a later date.

Id. at 469.

165 *Riley*, 226 S.E.2d at 926.

166 *See Freeman*, 167 S.E.2d at 167.

167 *See Riley*, 226 S.E.2d at 925.

and the significance of his waiver. In *Riley*, there is no evidence that he did.

B. Pennsylvania

In contrast to the Georgia courts, the Pennsylvania Supreme Court had a robust and contentious debate over the appropriateness of its per se rule. The state originally had a totality of circumstances rule,[168] but beginning with *Commonwealth v. Roane*,[169] the state moved toward a per se approach. In a series of decisions,[170] Pennsylvania adopted a per se rule "in recognition of the immaturity, lack of understanding, and susceptibility to influence, of youth."[171] Eventually, Pennsylvania established a rule that no juvenile under eighteen could waive his *Miranda* rights unless he was "provided an opportunity to consult with an interested adult, who is informed of the juvenile's rights and is interested in the welfare of the juvenile."[172]

In 1983, however, the Pennsylvania Supreme Court changed its direction. *Commonwealth v. Christmas*[173] marked the court's retreat from its per se rule. The facts of *Christmas* are significant. Authorities arrested the defendant, who was four months from reaching eighteen, for possession of 744 packets of heroin.[174] His extensive criminal record included seventeen prior arrests, three adjudications of delinquency, and commitments to two youth detention facilities.[175] Although the defendant made an incriminating statement only after privately consulting with his father, the defendant's father—himself a police officer—was apparently not informed of his son's constitutional rights, in violation of Pennsylvania's per se rule.[176] The trial court admitted the statement and convicted the defendant.[177]

On appeal, the Pennsylvania Supreme Court upheld Christmas's conviction.[178] Responding to criticisms that the per se rule effectively shielded defendants who gave knowing and voluntary confessions, the court shifted from a per se rule to one in which the court would pre-

168 *See* Commonwealth v. Moses, 287 A.2d 131, 133 (Pa. 1971).

169 329 A.2d 286, 289 (Pa. 1974) (invalidating defendant's waiver because authorities denied mother's request to speak to defendant privately).

170 *See* Commonwealth v. Smith, 372 A.2d 797, 803 (Pa. 1977); Commonwealth v. Webster, 353 A.2d 372, 379 (Pa. 1975); Commonwealth v. McCutchen, 343 A.2d 669, 670 (Pa. 1975); Commonwealth v. Starkes, 335 A.2d 698, 703 (Pa. 1975).

171 Commonwealth v. Christmas, 465 A.2d 989, 991 (Pa. 1983), *rejected by* Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984).

172 *Williams*, 475 A.2d at 1286-87.

173 465 A.2d 989 (Pa. 1983).

174 *Id.* at 991.

175 *Id.* at 993.

176 *See id.* at 991.

177 *See id.* at 990-91.

178 *Id.* at 993.

sume that a statement made without the opportunity to consult with an interested and informed adult would be excluded.[179] This presumption could be rebutted, however, "where the evidence *clearly demonstrates* that the juvenile was in fact competent to make a knowing, intelligent, and voluntary waiver of his rights."[180] The *Christmas* court reasoned that this move "affords more adequate weight to the interests of society, and of justice, while avoiding *per se* applications of the interested and informed adult rule that serve, in an overly protective and unreasonably paternalistic fashion," the interests of the juvenile.[181] The court expressed its concern that, when the totality of circumstances clearly indicates that the juvenile knowingly and voluntarily made an incriminating statement, the confession should not be excluded merely because of the per se rule.[182]

In a concurring opinion, Justice Larsen agreed with the majority's assessment that the per se rule was "paternalistic and unnecessarily protective" but argued that the new rule would "confuse and muddle the analysis."[183] Noting that "[t]he *per se* rule which today we reject sacrifices too much of the interests of justice," he advocated a complete return to a totality of circumstances test.[184]

The compromise inherent in *Christmas*, however, proved short lived. One year later, in *Commonwealth v. Williams*,[185] the Pennsylvania Supreme Court overturned *Christmas* and returned to a totality of circumstances test. Eric Williams, a seventeen-year-old accused of robbery, successfully suppressed his confession because the police had failed to advise his father of the defendant's *Miranda* rights *prior* to a private conference.[186] The father was, however, informed of his son's rights after the conference ended.[187]

On appeal, the Pennsylvania Supreme Court ruled that the statements should have been admitted.[188] Writing for the court, Justice Larsen—who had advocated returning to a totality of circumstances test in *Christmas*—made good on his promise to reinstitute a totality of circumstances test. A per se rule, Justice Larsen argued, downplayed factors that would be relevant under the totality of circumstances test[189] and "shunned the real issue of the voluntariness of a confes-

179 *Id.* at 992.
180 *Id.*
181 *Id.*
182 *See id.*
183 *Id.* at 993 (Larsen, J., concurring).
184 *Id.* at 993-94 (Larsen, J., concurring).
185 475 A.2d 1283 (Pa. 1984).
186 *Id.* at 1285.
187 *Id.* at 1284.
188 *Id.* at 1288.
189 *Id.* at 1287.

sion."[190] Justice Larsen clearly disliked the rebuttable presumption rule as well, observing that it "serves no useful analytical purpose" and that "[t]he so-called presumption is not a presumption at all since it merely verifies the Commonwealth's established burden of proving a knowing, intelligent and voluntary waiver on the part of a juvenile."[191] In contrast, the totality of circumstances test does not "sacrifice[ ] too much of the interests of justice" and satisfies the requirements of due process.[192]

Writing separately in *Williams*, one justice advocated retaining the *Christmas* approach while two other justices advocated a return to the per se rule. Justice Flaherty, recognizing the special status of juveniles, argued that the rebuttable presumption rule in *Christmas* provided the necessary focus for analysis.[193] In criticizing the majority's decision, he argued that the totality of circumstances test "provides an inadequate analytical framework for addressing the suppression issue, for it accords no recognition to the need, in the typical case, to afford the juvenile an opportunity to consult with an interested and informed adult."[194] Given the facts of the case, Justice Flaherty would have applied the rebuttable presumption test and allowed the confession into evidence.[195]

Chief Justice Nix and Justice Zappala, each of whom had joined the *Christmas* majority, dissented separately. Both admitted that they went along with *Christmas*'s rebuttable presumption rule in order to preserve a minimal level of protection greater than the totality of circumstances test.[196] In *Williams*, each advocated reinstating the per se rule.[197] Chief Justice Nix pointed out that, under Pennsylvania law, the state has the burden of proving a knowing and intelligent waiver of constitutional rights.[198] A return to the totality of circumstances test, according to Chief Justice Nix, would shift the burden to the defendant to show that his confession was *not* knowing and intelligent.[199] Notably, he cautioned that the majority's attack on the per se rule

190 *Id.*

191 *Id.* at 1287-88 (citing his own concurring opinion in *Christmas*, 465 A.2d at 993 (Larsen, J., concurring)).

192 *Id.*

193 *Id.* at 1288-89 (Flaherty, J., concurring).

194 *Id.* at 1289 (Flaherty, J., concurring).

195 *See id.* (Flaherty, J., concurring).

196 *See id.* at 1290 (Nix, C.J., dissenting) ("I reluctantly joined the majority in [*Christmas*] believing that this compromise would nevertheless be better than reverting to the former totality standard."); *id.* at 1290-91 (Zappala, J., dissenting) ("I joined the majority decision in *Christmas* in order to preserve the modicum of protection that the presumption of incompetency would provide.").

197 *See id.* at 1290 (Nix, C.J., dissenting); *id.* at 1291 (Zappala, J., dissenting).

198 *Id.* at 1290 n.* (Nix, C.J., dissenting) (citing Commonwealth v. Fogan, 296 A.2d 755 (Pa. 1972)).

199 *Id.* at 1290 (Nix, C.J., dissenting).

"has in large measure been inspired by the heinous nature of the crimes the juvenile is capable of committing."[200] He warned, however, that "regardless of the nature of the crime, the procedure by which we adjudicate his guilt should not ignore the impediment of immaturity."[201]

In his dissenting opinion, Justice Zappala stressed the fact that a per se rule provides an easy means of protecting juveniles' rights while at the same time compensating for their immaturity.[202] Criticizing the lack of "readily applicable criteria" under a totality of circumstances test, Justice Zappala argued that a per se rule "provides a definite and easily applicable means of protecting the interests of a juvenile suspect."[203]

C. Louisiana

Louisiana is the latest state to abandon a per se rule. In *In re Dino*,[204] as in *Williams*, the judges disagreed over which test to apply. The majority, in a break from Louisiana law, mandated a per se test requiring the juvenile defendant to have actual and meaningful consultation with an adult fully apprised of the juvenile's rights.[205] Three dissenters would have applied the totality of circumstances test.[206] Notably, however, they arrived at different conclusions about the statements' admissibility.

In *Dino*, a thirteen-year-old defendant made incriminating statements to police officers after the police gave him *Miranda* warnings.[207] Although the defendant's mother was present at the station house, detectives did not ask her whether she wished to be present when they spoke to the defendant.[208] The police did not tell her that her son had become a suspect, nor did they notify her of her son's constitutional rights or give her a chance to confer with him.[209]

In suppressing the statement, the Louisiana court first noted that, under *Miranda*, the state faces a heavy burden of proving that a statement taken without the presence of counsel was made after a knowing and intelligent waiver.[210] Criticizing the totality of circumstances test,

200 *Id.* (Nix, C.J., dissenting).
201 *Id.* (Nix, C.J., dissenting).
202 *See id.* at 1291 (Zappala, J., dissenting).
203 *Id.* (Zappala, J., dissenting).
204 359 So. 2d 586 (La. 1978), *overruled by* State v. Fernandez, 96-2719 (La. 4/14/98), 712 So. 2d 485 (La. 1998).
205 *See id.* at 594.
206 *See id.* at 600 (Sanders, C.J., concurring in part and dissenting in part); *id.* at 601 (Summers, J., concurring in part and dissenting in part).
207 *Id.* at 587-89.
208 *Id.* at 588.
209 *Id.*
210 *Id.* at 590.

the court argued that "exclusive use of the . . . test in relation to waivers by juveniles tends to mire the courts in a morass of speculation similar to that from which *Miranda* was designed to extricate them in adult cases."[211] The Supreme Court of Louisiana, analogizing the case to *Miranda*'s absolute requirement that the police give warnings before any interrogation, created a similar requirement that juveniles cannot waive their constitutional rights on their own.[212] The court reasoned that a per se rule requiring the assistance of an interested adult "is indispensable to overcome the pressures of the interrogation and to insure that the juvenile knows he is free to exercise his rights."[213]

Moreover, the *Dino* court acknowledged that the presence of an interested adult serves "siguificant subsidiary functions," including "mitigat[ing] the dangers of untrustworthiness" and police coercion, aiding the accused in giving a fully accurate statement, and ensuring that the prosecution reports the statement correctly at trial.[214] A per se rule also ends speculation among police over whether a juvenile's waiver is valid.[215] Emphasizing that "the concepts of fundamental fairness embodied in . . . our [state] constitution require that juveniles not be permitted to waive constitutional rights on their own,"[216] the court held that, for juveniles under seventeen, the state must show: "that the juvenile engaged in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his welfare before he waived his right to counsel and privilege against self-incrimination."[217]

Three justices dissented from the *Dino* majority's per se rule.[218] Chief Justice Sanders, with whom Justice Marcus agreed, feared that requiring the presence and consultation of an interested adult "adds one more costly burden to our already heavily burdened justice system."[219] Chief Justice Sanders also expressed concern that the per se rule raises the legal question of what is an "interested adult."[220] Con-

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211 *Id.* at 591.

212 *Id.*

213 *Id.* at 592.

214 *Id.*

215 *Id.* The court quoted with approval the reasoning in *Lewis v. State*, 288 N.E.2d 138, 141 (Ind. 1972), *superseded by statute as stated in* Whipple v. State, 523 N.E.2d 1363 (Ind. 1988). *Dino*, 359 So. 2d at 592; *see also supra* text accompanying note 106 (discussing the *Lewis* court's treatment of this issue).

216 *Dino*, 359 So. 2d at 594 (footnotes omitted).

217 *Id.* at 599.

218 *See id.* at 600 (Sanders, C.J., concurring in part and dissenting in part); *id.* at 601 (Summers, J., concurring in part and dissenting in part).

219 *Id.* at 599 (Sanders, C.J., concurring in part and dissenting in part).

220 *See id.* (Sanders, C.J., concurring in part and dissenting in part).

sidering the totality of circumstances in this case, he would have admitted the defendant's statements.[221]

Justice Summers, in a separate opinion, also applied the totality of circumstances test.[222] However, he would have suppressed the statements because the state had not met its "heavy burden" of proving that the defendant waived his rights.[223] Thus, the two judges who advocated the totality of circumstances test undermined its usefulness by drawing different conclusions from the same record. Their divergence demonstrates the amorphous nature of the totality of circumstances test.

Despite the possibility of such discrepancies, the Louisiana Supreme Court reversed itself and returned to a totality of circumstances test. Twenty years after *In re Dino*, it decided *State v. Fernandez*.[224] As in *Christmas* and *Williams*, the facts of *Fernandez* are important. There, police arrested and Mirandized the sixteen-year-old defendant after an armed robbery victim positively identified him.[225] Following the identification, the defendant immediately expressed remorse and offered to show the officer the location of the victim's belongings.[226] The Louisiana Supreme Court noted that, under the per se rule of *Dino*, the defendant's statements would be suppressed because he did not have the opportunity to consult with an interested adult.[227] The court went on, however, to reexamine the continuing validity of *Dino*.

Noting that the federal system, pursuant to *Fare v. Michael C.*,[228] applied a totality of circumstances test, the court determined that the "Louisiana Constitution requires no more."[229] A per se rule that excludes incriminating statements based solely on the defendant's age would be a "rigid invalidation" that had "no federal or state constitutional basis."[230] Although the *Dino* majority apparently rested its decision on the Louisiana Constitution,[231] the *Fernandez* court did not explain why its constitutional jurisprudence had changed. Instead, the court cited three additional reasons for returning to a totality of circumstances approach. First, it noted that Pennsylvania's per se rule, which the *Dino* court had relied upon to create a per se rule, had

221 *See id.* at 601 (Sanders, C.J., concurring in part and dissenting in part).

222 *See id.* at 601-02 (Summers, J., concurring in part and dissenting in part).

223 *Id.* at 601 (Summers, J., concurring in part and dissenting in part).

224 96-2719 (La. 4/14/98), 712 So. 2d 485 (La. 1998).

225 *Id.* at 485-86.

226 *Id.* at 486.

227 *Id.* at 487.

228 442 U.S. 707 (1979).

229 *Fernandez*, 96-2719 (La. 4/14/98), 712 So. 2d at 487.

230 *Id.*

231 *See Dino*, 359 So. 2d at 594.

been abandoned.[232] Second, the *Fernandez* court acknowledged that "[t]he empirical evidence to date arguably continues to demonstrate that 'most juveniles . . . fail to comprehend the language traditionally employed in *Miranda* warnings and the concepts embodied in the warnings,'"[233] but concluded nonetheless that the totality of circumstances test could accommodate the needs of juveniles, much like the needs of individuals with mental deficiencies.[234] Finally, the court made a frank acknowledgment of the "sharp shift" in public attitudes toward juveniles in the twenty years since *Dino*:

> [Exclusion of] 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.[235]

One critic of the *Fernandez* decision concluded that its effect was "to subject [juveniles in Louisiana] to an outdated, unpredictable, discretionary standard by which courts will determine their futures."[236]

As the experiences of Georgia, Pennsylvania, and Louisiana demonstrate, state courts are often motivated by the specific facts of a case to promulgate or overturn a per se rule. These were cases in which the defendant immediately confessed his guilt or in which the parents were not informed of their child's *Miranda* rights until after the interrogation. More specifically, a common underlying motivation in *Riley*, *Christmas*, *Williams*, and *Fernandez* was the fear that a per se rule would suppress a juvenile's highly probative statement and perhaps allow a young offender to walk free on procedural grounds. As Chief Justice Nix warned, however, "regardless of the nature of the crime, the procedure by which we adjudicate [a juvenile suspect's] guilt should not ignore the impediment of immaturity."[237] The underlying purpose of a per se rule is not to help courts determine guilt or innocence but to guarantee that a juvenile's waiver is truly knowing, intelligent, and voluntary.

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232 *Fernandez*, 96-2719 (La. 4/14/98), 712 So. 2d at 488 (excerpting Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984)).

233 *Id.* at 489 (quoting RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURTS § 24.10(b) (1991)).

234 *Id.* The *Fernandez* court's analogy between juveniles and the mentally disabled is inconsistent with Supreme Court jurisprudence, under which mentally disabled suspects face an arguably more difficult burden of proof of showing lack of waiver than juveniles. In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court held that the mentally disabled defendant must show police misconduct before a court would find a *Miranda* waiver invalid. *Id.* at 169-70.

235 *Fernandez*, 96-2719 (La. 4/14/98), 712 So. 2d at 489.

236 Brobst, *supra* note 74, at 634.

237 Commonwealth v. Williams, 475 A.2d 1283, 1290 (Pa. 1984) (Nix, C.J., dissenting).

IV
THE CASE FOR PER SE RULES

In both the state and federal cases examined, courts have considered constitutional, policy, administrative, and even moral arguments for and against per se rules. This part of the Note summarizes the advantages and disadvantages of the per se rule. It will also consider the rebuttable presumption rule and why it would prove no better than the totality of circumstances test. Finally, the discussion turns to alternatives to the totality of circumstances and per se approaches: the youth rights form and the videotaping of interrogations of juveniles. It concludes that states should implement a "pure" per se rule—one without the assistance of videotaping—because it is the most protective of juveniles' constitutional rights. The price society must pay for a per se approach—excluding the incriminating statements of "sophisticated" juveniles—is outweighed by the assurances that per se rules provide to the courts, prosecutors, law enforcement officials, and society that any juvenile waiver of constitutional rights is truly the product of an informed, free choice.

A. Disadvantages of Per Se Rules

Many states have rejected per se rules. First, a number of courts and commentators have argued that per se rules are merely prophylactic and are not mandated by either the federal or state constitutions.[238] This is perhaps the strongest argument for proponents of the totality of circumstances approach, yet it is not one always underscored. Per se rules require the presence and assistance of an interested adult to help the juvenile understand his *Miranda* rights, which some have argued are only prophylactic.[239] In *Michael C.*, the Supreme Court squarely rejected the California Supreme Court's interpretation of *Miranda* that would have expanded the invocation of Fifth Amendment privilege to a juvenile asking for his probation officer.[240] For the *Michael C.* majority, this interpretation extended *Miranda*'s protections too far.[241] Moreover, "[m]ost courts have

238 *See, e.g.*, *Fernandez*, 96-2719 (La. 4/14/98), 712 So. 2d at 487; State v. Benoit, 490 A.2d 295, 303 (N.H. 1985); Krastek, *supra* note 74, at 681. *But cf.* Saylor, *supra* note 6, at 550-53 (advancing the theory that a constitutional right to a parent's presence exists by extension of *Haley*, *Gallegos*, and *Gault*).

239 *E.g.*, Brief of Petitioner at 22, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525). The Supreme Court rejected this argument, however, by holding that *Miranda* was a constitutional decision which Congress could not overrule by statute. *Dickerson*, 120 S. Ct. at 2336-37.

240 *See* Fare v. Michael C., 442 U.S. 707, 723 (1979).

241 *See id.* ("Such an extension would impose the burdens associated with the rule of *Miranda* on the juvenile justice system and the police without serving the interests that rule was designed simultaneously to protect.").

consistently refused to hold that juveniles are incapable of competently waiving constitutional rights as a matter of law."[242] In addition to the Supreme Court in *Fare*, state courts, like those in *Williams* and *Fernandez*, have argued that the totality of circumstances test satisfies due process.[243]

This argument, however, ignores the assertion that the per se rule focuses the court's attention on *police conduct*. In contrast, a totality of circumstances test is more likely to consider the characteristics and behavior of the juvenile, such as the youth's criminal record and the nature of the alleged crime. Arguably the purpose of the Fifth and Sixth Amendments, however, is to protect citizens from government action, not to consider the force of those rights in light of an individual's characteristics.[244] The per se rule best protects juveniles against coercive police conduct.

Even if per se rules were not constitutionally mandated at the federal level, states can protect constitutional rights to a greater extent than the minimum level required by the federal Constitution.[245] Moreover, simply because a judicially created rule is not constitutionally mandated does not mean that it is not sound policy. Consider, for example, the hearsay doctrine in evidence law or the exclusionary rule in criminal procedure.[246]

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. In his separate opinion in *In re Dino*, Chief Justice Sanders feared that imposing an interested adult requirement "adds one more costly burden to our already heavily burdened justice system."[247] The New Hampshire Supreme Court has also rejected the per se rule, reasoning that it "would result in onerous financial and administrative burdens which are unwarranted."[248]

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242 Saylor, *supra* note 6, at 560.

243 *See Fernandez*, 96-2719 (La. 4/14/98), 712 So. 2d at 487; Commonwealth v. Williams, 475 A.2d 1283, 1288 (Pa. 1984).

244 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131-32 (1991) (arguing that the "protection of the people against self-interested government" was "first in the minds of those who framed the Bill of Rights").

245 *See supra* note 86 and accompanying text.

246 Because these two doctrines are not constitutionally mandated, however,they have been the target of vocal criticism and subject to numerous judicial exceptions. In the exclusionary rule context, for example, see *Arizona v. Evans*, 514 U.S. 1, 10-16 (1995), *Massachusetts v. Sheppard*, 468 U.S. 981, 990-91 (1984), and *United States v. Leon*, 468 U.S. 897, 907-08 (1984), *superseded by rule as stated in In re* Search of Kitty's East, 905 F.2d 1367 (10th Cir. 1990).

247 *In re* Dino, 359 So. 2d 586, 599 (La. 1978) (Sanders, C.J., concurring in part and dissenting in part), *overruled by* State v. Fernandez, 96-2719 (La. 4/14/98), 712 So. 2d 485 (La. 1998).

248 State v. Benoit, 490 A.2d 295, 302 (N.H. 1985).

This argument, however, marginalizes the fact that per se rules dispel uncertainty among police officers over whether a confession will later be admissible in court. While the per se rule might increase the financial burdens on law enforcement, it minimizes the speculation engendered under the totality of circumstances test. The per se rule's bright line test also conserves judicial resources and provides courts a clear analytical framework to assess juvenile waivers.

A third disadvantage of the per se rule is that it increases the likelihood of collateral litigation, including issues over whether the juvenile had the opportunity to meet with an "interested adult," whether that consultation was truly meaningful, whether the consultation occurred in private, and whether the adult received notice of and understood the juvenile's rights.[249] At least one commentator has suggested that courts already exercise vast discretion in determining whether these requirements are met, in effect reintroducing the totality of circumstances test into its determination of a valid waiver, resulting in the very approach the per se rule rejects.[250] While this argument has some merit, these very issues are already litigated under the totality of circumstances test. Reviewing courts, in determining the myriad of factors under the totality of circumstances test, must already consider whether an adult was present and, if so, whether that adult was interested in the child's welfare and whether any meaningful consultation took place. The per se rule guides judges' review to particular issues, rather than subjecting these questions to the vagaries of the totality of circumstances test, under which a judge may or may not consider these questions at all.[251]

A final disadvantage of the per se rule is that it encourages false negatives; in other words, courts are more likely to exclude truly voluntary confessions simply because of procedural noncompliance.[252] As one observer noted, "[a] per se rule has the advantage of providing clear boundaries, but it does not take into account the individual characteristics of the child."[253] Courts applying a per se rule may not consider other relevant factors that a totality of circumstances test accounts for, including the sophistication and intelligence of the juvenile. This was perhaps the motivation behind states abandoning their own per se rules and returning to a totality of circumstances test.[254] Critics of this result argue that society's need to solve crimes and protect the public "outweighs the exclusion of a juvenile's confession on

249 Krastek, *supra* note 74, at 682-83.

250 *See id.* at 684 (arguing that "the specific guidelines introduced through the per se rule have not supplanted the traditional 'totality of circumstance' test").

251 *See supra* note 76.

252 Krastek, *supra* note 74, at 685.

253 Maykut, *supra* note 74, at 1374.

254 *See supra* notes 234-37 and accompanying text.

the basis of youth alone" and that the per se rule undervalues this objective.[255] As the conclusion will explain, this argument is essentially a normative one that cannot be adequately addressed by policy considerations alone.[256]

B. Consideration of the Rebuttable Presumption Rule

The rebuttable presumption rule, while initially appealing, does not solve many of the problems inherent in the totality of circumstances approach. On first consideration, the rebuttable presumption rule—like the one briefly adopted by Pennsylvania in *Commonwealth v. Christmas*[257] and still used by Massachusetts for juveniles over thirteen years of age[258]—offers a reasonable compromise to the debate. Under this rule, courts would still apply a per se rule, yet the prosecution could rebut the presumption if it made a substantial showing that the child voluntarily and knowingly waived his or her constitutional rights. This rule has the advantage of protecting juveniles in most instances, but does not allow the sophisticated or recidivist juvenile who understands the *Miranda* warnings to escape punishment on a procedural technicality. The rebuttable presumption approach seems to temper the harshness of the per se approach while at the same time acknowledge the particular needs of juveniles in custodial situations.

On further consideration, however, the rule loses much of its luster. In most states, the prosecution already bears the heavy burden of proving the validity of a juvenile's waiver. The Pennsylvania Supreme Court, in rejecting a rebuttable presumption rule, argued that the rule "is not a presumption at all since it merely verifies the [state's] established burden of proving a knowing, intelligent and voluntary waiver."[259] Moreover, the rule reintroduces unguided discretion into a judge's decisional calculus and does not eliminate the possibility of inconsistent determinations of waiver. Finally, the fact that a juvenile is sophisticated or a recidivist should not preclude her from receiving the procedural safeguards that other juveniles receive. If she made incriminating statements after consulting with an interested adult, it bolsters the prosecution's argument that her waiver was knowing and voluntary.

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255 Bailey, *supra* note 13, at 730; *see also* Krastek, *supra* note 74, at 682, 684 (criticizing the inflexibility of a per se rule).

256 *See infra* notes 301-03 and accompanying text.

257 465 A.2d 989, 992 (Pa. 1983), *rejected by* Commonwealth v. Williams, 475 A.2d 1283 (Pa. 1984).

258 *See* Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983). For further discussion, see *supra* Part II.D.

259 *Williams*, 475 A.2d at 1288.

C. Alternative Proposals to the Per Se, Rebuttable Presumption, and Totality of Circumstances Rules

Although a full consideration of alternative proposals to the per se, rebuttable presumption, and totality of circumstances rules are beyond the scope of this Note, a brief overview of two proposals—the simplified youth form and videotaping juvenile interrogations—provides a useful counterpoint to the current discussion. Neither proposal, however, should replace or supplement the per se rule.

1. *Youth Rights Form*

The per se rule requires an interested adult to explain the *Miranda* warnings to the juvenile and advise her on how to exercise them. Some state courts, while acknowledging that juveniles have special difficulty fully comprehending their rights without assistance, have instead instructed police officers to explain the *Miranda* warnings in language understandable by juveniles.[260] Proponents of this approach explain that a "[y]outh [r]ights [f]orm" will increase a juvenile's understanding; moreover, a completed form bolsters a police officer's testimony with corroborating documentary evidence.[261] Several specifically worded proposals have been advocated by both state courts[262] and scholars.[263]

Notably, however, no state has *mandated* the use of a youth rights form. In *State v. Benoit*, for example, the New Hampshire Supreme Court only recommended that authorities use a simplified rights form. While failure to do so would not automatically preclude a juvenile's statement, the court would create a presumption "that the juvenile's explanation of his or her rights was inadequate."[264] However, this approach raises the same questions as the rebuttable presumption rule: If the failure to use the youth rights form only creates a presump-

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260 *See, e.g.*, *In re* M., 450 P.2d 296, 308 n.13 (Cal. 1969); State v. Nicholas S., 444 A.2d 373, 378 (Me. 1982); State v. Benoit, 490 A.2d 295, 304 (N.H. 1985).

261 Holtz, *supra* note 46, at 549.

262 *See Benoit*, 490 A.2d at 306 app.; *infra* Appendix A.

263 *See* Holtz, *supra* note 46, at 553 app.; *infra* Appendix B. Another proposal consists of the following simplified warning:

> You don't have to talk to me at all, now or later on, it is up to you.
> If you decide to talk to me, I can go to court and repeat what you say, against you.
> If you want a lawyer, an attorney, to help you to decide what to do, you can have one free before and during questioning by me now or by anyone else later on.
> Do you want me to explain or repeat anything about what I have just told you?
> Remembering what I have just told you, do you want to talk to me?

A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 40 (1970).

264 *Benoit*, 490 A.2d at 304.

tion that waiver was invalid, it does not guarantee that all youths will fully comprehend their rights. Even the New Hampshire Supreme Court later held that the youth rights form was not necessary when the defendant had an extensive criminal record.[265]

The youth rights form presents other problems as well. Although the proposals presented in the appendices enjoy the advantage of offering standardized language, surely the comprehension level of an eleven-year-old is not the same as that of a fifteen-year-old. On the other hand, requiring the police to tailor their *Miranda* readings to each juvenile may be unreasonable and could lead to inconsistent application.[266] Furthermore, a youth rights form makes the most sense in a juvenile justice system steeped in *parens patriae*.[267] However, state juvenile justice systems have become increasingly punitive,[268] and police should not be expected to counsel the very juveniles they have a possible interest in prosecuting. Finally, requiring use of a youth rights form does not address the problem of coercion. Professor Grisso has remarked that "even an extensive explanation would not diminish the potentially intimidating nature of a police interrogation to which children are particularly susceptible."[269]

2. *Videotaped Interrogations of Juveniles*

Another proposal, advanced by Professor Schlam, argues that, in addition to greater judicial scrutiny of interrogations and opportunities for adult consultation, the police should systematically videotape interrogations of juveniles.[270] He suggests several advantages of this

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265 *See* State v. Dandurant, 567 A.2d 592, 593 (N.H. 1989). There, a seventeen-year-old defendant confessed to a robbery after receiving only the standard *Miranda* warnings, in violation of *Benoit*. *Id.* at 592. The Supreme Court of New Hampshire held, however, that the case did not implicate the underlying concerns of *Benoit*. *Id.* at 593. Because the defendant had an extensive criminal record, the court determined that she was not disadvantaged by receiving only the standard *Miranda* warnings. *See id.*

266 Grisso, *supra* note 1, at 1162 n.102. A further potential danger arises if detectives are required to give customized *Miranda* warnings to help juvenile suspects understand their rights: a child's perception that the detective is trying to help him could induce the child to please the adult and say what he thinks the detective wants to hear. *See supra* note 2; *cf.* Donna M. Praiss, *Constitutional Protection of Confessions Made by Mentally Retarded Defendants*, 14 AM. J.L. & MED. 431, 432-33, 444 (1989) (explaining this tendency among mentally challenged suspects).

267 At the time *Benoit* was decided, the New Hampshire Supreme Court explicitly reaffirmed the rehabilitative goals of the state's juvenile justice system. *See Benoit*, 490 A.2d at 299.

268 A vast literature discusses this trend. *See generally* Symposium, *Symposium on the Future of the Juvenile Court*, 88 J. CRIM. L. & CRIMINOLOGY 1 (1997) (discussing different "proposals about how our society should deal with children who commit crimes"); *see also* Talbot, *supra* note 2, at 44 ("In this new and far harsher view, child criminals are virtually indistinguishable from adult criminals: they are just as capable of forming criminal intent, just as morally responsible, just as autonomous in their actions.").

269 Grisso, *supra* note 1, at 1162.

270 Schlam, *supra* note 55, at 902, 924-35.

practice: it avoids some of the disadvantages of the totality of circumstances and per se tests, gives courts "a complete picture of what actually took place during the interrogation," and "largely eliminate[s] frivolous claims of police misconduct."[271] Professor Schlam notes that a few states, notably Alaska and Minnesota, have already implemented videotaping in other law enforcement contexts.[272] This proposal would work in conjunction with the current approaches to create a "more accurate and meaningful totality test *or* 'interested adult' *per se* rule."[273]

Videotaping interrogations would seem to assist courts in determining whether a juvenile's waiver was knowing and intelligent. If combined with a per se rule, videotaping would mitigate some of the disadvantages of the per se rule—judges would have a clear record of whether an interested adult was present, whether she understood the *Miranda* rights, and whether she was able to meaningfully consult with the juvenile.

Combining a per se rule with videotaping, however, also decreases some of the advantages of applying a pure per se rule: videotaping increases the likelihood that a judge will subsume the importance of the juvenile's age to other factors, increases the administrative costs of law enforcement, and increases the judicial resources needed to review the validity of juvenile waivers. More fundamentally, the underlying principle of the per se rule is to create an irrebuttable presumption that juveniles cannot validly waive their rights until they first consult with an interested adult. Requiring courts to consider videotaped interrogations reintroduces the idea that the surrounding circumstances of the interrogation could negate the need for the presence of an interested adult, and it nudges courts back—however subconsciously—toward a totality of circumstances standard.

D. Advantages of Per Se Rules

Of all the proposals considered, a "pure" per se rule—one without videotaped interrogations—best protects a juvenile's constitutional rights, recognizes the precarious situation juveniles face in the interrogation room, and decreases the burdens on police and the courts.[274] The opportunity to consult with an interested adult who

271 *Id.* at 925 (footnote omitted).

272 *Id.* at 927-29.

273 *Id.* at 926.

274 I express no opinion about whether states should adopt a two-tiered per se rule based on age, as in Massachusetts and Kansas. Further empirical research is needed. Professor Grisso, for example, found that juveniles ages fifteen and older comprehend *Miranda* warnings at a rate similar to adults. Grisso, *supra* note 1, at 1165. Nevertheless, Grisso argues that a "pure" per se rule should also be applied to juveniles ages fifteen and older. *Id.* at 1165-66.

understands the child's rights is the central requirement of the rule. This adult would usually be the juvenile's parent, but if there is evidence that the parent does not understand the *Miranda* warnings or might be antagonistic toward the child's interest, then another adult—such as a juvenile counselor or an attorney—must be available.

Notwithstanding *Fare v. Michael C.*,[275] the per se rule is consonant with the Court's consistent recognition of a juvenile's special needs during the interrogation process. Numerous state court decisions have invoked the "spirit of *Gault*" as a reason for instituting a per se rule.[276] Unlike the totality of circumstances test, the per se rule unequivocally treats a juvenile's age as the touchstone for determining a valid waiver; it can never be discounted or outweighed by other factors.

In addition, the per se rule poses several administrative and judicial advantages. First, it provides a clear analytical framework for judges considering the validity of juvenile waivers, thereby conserving judicial resources. Although judges must still carefully examine the facts of each case to determine whether the police have met the requirements of the per se rule, they do not have to engage in the ad hoc balancing imposed by the totality of circumstances approach.

Second, the per se rule aids law enforcement officers in their interrogation practices and helps them predict the validity of waivers. Put another way, the per se rule deters officers and investigators from using coercive interrogation techniques. This deterrence works in two ways: the exclusionary effect of the per se rule gives the police an incentive to properly Mirandize both the juvenile and the interested adult. Moreover, Professor Feld suggests that the per se rule, by requiring the presence of an adult during interrogation, provides an additional witness to testify about the coerciveness of the interrogation.[277] Unlike the youth rights form,[278] the mere presence of an interested adult during interrogation reduces its coercive nature.

Third, a per se rule is less likely to result in disparate determinations of the validity of a waiver. Consider the conflicting opinions presented in each of the following cases: *Fare v. Michael C.*,[279] *In re Dino*,[280] and *In re B.M.B.*[281] In *Michael C.*, both the majority and Jus-

275 442 U.S. 707 (1979); *see supra* Part I.C.

276 Commonwealth v. A Juvenile, 449 N.E.2d 654, 656 (Mass. 1983) (citing several state court opinions).

277 Feld, *supra* note 74, at 178; *see also* Haley v. Ohio, 332 U.S. 596, 600 (1948) (implying that the presence of an interested adult or attorney would have eliminated or mitigated the coercive atmosphere of the interrogation room).

278 *See supra* Part IV.C.1.

279 442 U.S. 707 (1979); *see supra* Part I.C.

280 359 So. 2d 586 (La. 1978), *overruled by* State v. Fernandez, 96-2719 (La. 4/14/98), 712 So. 2d 485 (La. 1998); *see supra* notes 204-24 and accompanying text.

281 955 P.2d 1302 (Kan. 1998); *see supra* Part II.E.

tice Powell's dissent applied the totality of circumstances test to the same record but arrived at different conclusions.[282] In *Dino*, two justices of the Louisiana Supreme Court wrote opinions dissenting from the majority's promulgation of a per se rule. Although both considered the totality of circumstances, they too reached different results.[283] Finally, in *In re B.M.B.*, the Supreme Court of Kansas overturned the trial court's determination that a juvenile's incriminating statements were admissible in light of the totality of circumstances, noting that the lower court "identified the relevant factors to be considered . . . but failed to consider the significance of those factors."[284] The problem, of course, is that the totality of circumstances approach never indicates how much significance a particular factor should be given. The resulting disparities, Professor Grisso observed, "underscore the extensive discretion the [totality of circumstances approach] vests in the courts" and "foster[ ] distrust" of it.[285]

Finally, the Supreme Court has refused to expand what would qualify as an invocation of Fifth and Sixth Amendment privileges.[286] Thus, the presence and advice of an interested adult is necessary to prevent juveniles from falling victim into a procedural trapdoor, whereby failing to say the precise words to invoke one's constitutional rights is tantamount to waiving them.

Although the proponents of the totality of circumstances rule imply—sometimes not so subtly—that the per se rule increases the likelihood that young, dangerous offenders will go free, the per se rule is exclusionary, not outcome determinative. Authorities, for example, may still gather enough evidence independent of the defendant's incriminating statement to convict the defendant or help find him delinquent.

CONCLUSION: *MIRANDA* REDUX?

In June 2000, the Supreme Court decided *Dickerson v. United States*,[287] a case that reaffirmed *Miranda* and held that a federal statute mandating a totality of circumstances test to determine the voluntariness of confessions was unconstitutional.[288] Although *Dickerson* did

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282 *See Michael C.*, 442 U.S. at 724-28; *id. at* 732-34 (Powell, J., dissenting).

283 *See Dino*, 359 So. 2d at 598-601 (Sanders, C.J., concurring in part and dissenting in part); *id.* at 601 (Summers, J., concurring in part and dissenting in part).

284 *In re B.M.B.*, 955 P.2d at 1309.

285 Grisso, *supra* note 1, at 1140.

286 *See, e.g., Michael C.*, 442 U.S. at 724 (rejecting claim that a juvenile's request to see his probation officer is an exercise of Fifth Amendment rights).

287 120 S. Ct. 2326 (2000).

288 *See id.* at 2336. In *Dickerson*, the Court ruled that Congress could not statutorily overrule *Miranda* with 18 U.S.C. § 3501. *Id.* at 2332-33. The statute provided, in relevant part:

not address the status of juveniles' waivers, the Court's renewed commitment to *Miranda* bolsters the case for per se rules for juveniles. The Court noted that a totality of circumstances test "raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt."[289] Moreover, the Court recognized the ease of administering per se rules, noting that "experience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda*['s per se rule] for law enforcement officers to conform to, and for courts to apply in a consistent manner."[290]

The central purpose of per se rules for juvenile waivers, like the *Miranda* warnings themselves, is to ensure that juvenile defendants are not coerced during interrogations and that they fully understand their rights and the consequences of their decisions. Only through meaningful consultation with an interested adult is there ascertainable assurance that the juvenile made a voluntary and knowing waiver of his rights.[291] Not surprisingly, then, the debate over juvenile waivers resurrects many of the argnments made after the Warren Court handed down *Miranda v. Arizona*.[292] Back then, the law enforcement commu-

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> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

18 U.S.C. § 3501(a), (b) (1994), *declared unconstitutional by* United State v. Dickerson, 120 S. Ct. 2326 (2000).

289 *Dickerson*, 120 S. Ct. at 2335 (citation omitted).

290 *Id.* at 2336.

291 *Cf.* Miranda v. Arizona, 384 U.S. 436, 471-72 (1966) ("No amount of circumstantial evidence that the person may have been aware of [the] right [to counsel] will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.").

292 *See supra* Part IV.A.

nity decried the decision, arguing that it would increase the number of guilty criminals who would go free.[293] Far from crippling prosecutions, however, *Miranda* has aided police officers in carrying out their duties while at the same time avoiding charges that they violated a defendant's constitutional rights.[294] Indeed, the *Dickerson* Court recognized that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[295]

In contrast to the Court's recent recognition of the utility and advantages of per se rules, the cases in Georgia, Pennsylvania, and Louisiana overturning their per se rules are disturbing.[296] These cases reflect a broader trend in the courts and the juvenile justice system toward a more punitive conception of juvenile justice.[297] Professor Dale, for example, calls this perspective a "reformulated disciplinary *parens patriae*."[298] While the Supreme Court, in cases like *Michael C.*, has expressed a more authoritarian view towards children's rights, it has failed to strengthen concomitantly their constitutional protections.[299] The Court cannot treat youths on the same level as adults, as in *Michael C.*, yet fail to provide them with the procedural due process requirements it stressed in *Gault*. The New Hampshire Supreme Court has argued that per se rules "chill the rehabilitative function of the juvenile justice system by restricting the flexibility of action."[300] Of course, if the juvenile justice system's primary goal is no longer rehabilitative, but instead punitive, then the rationale for implementing per se rules becomes more persuasive.

At bottom, two normative considerations emerge in determining which legal standard states should choose to assess the validity of juvenile waivers. First, states must deliberate over the appropriate balance

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293 *Cf.* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda, 85 CORNELL L. REV. 883, 894-95 (2000) (discussing negative reactions to the *Miranda* decision).

294 Brief for the United States at 9-10, 33-34, *Dickerson* (No. 99-5525).

295 *Dickerson*, 120 S. Ct. at 2336.

296 *See supra* Part III.

297 *See generally* Symposium, *supra* note 268 (emphasizing the differences between juvenile and adult offenders).

298 Michael J. Dale, *The Supreme Court and the Minimization of Children's Constitutional Rights: Implications for the Juvenile Justice System*, 13 HAMLINE J. PUB. L. & POL'Y 199, 222 (1992).

299 Professor Dale has observed:

> [T]he juvenile justice system has come to mirror the Supreme Court in that it holds a child accountable as an adult where it perceives the need to do so (often based upon the belief that children are more mature than they used to be), while at the same time denying full constitutional protections to juveniles in compliance with Supreme Court mandates.

Id.

300 State v. Benoit, 490 A.2d 295, 302 (N.H. 1985).

between children's constitutional rights, law enforcement's needs, and the courts' scarce resources.[301] As Professor Feld has noted:

> The totality approach allows courts discretion to consider a youth's maturity, but imposes minimal interference with police investigative work. . . . Although the per se requirement greatly simplifies the role of courts in the administration of the juvenile process, . . . it may provide unnecessary protection for the occasional sophisticated youth in order to afford adequate protection for the vast majority of unsophisticated juveniles.[302]

The second concern for states is to determine the proper level of trust in law enforcement officials to interrogate youths fairly and in judges to determine waivers of rights competently and carefully. A totality of circumstances test leaves greater discretion to police investigators and to juvenile court judges; a per se rule, in contrast, cabins their discretion. Not surprisingly, the Supreme Court—like the states—has straddled both sides of this issue.[303] These two normative considerations are difficult questions with no clear and definitive answer.

In the meantime, however, the realities of *parens patriae* in the juvenile justice system have clashed with its well-intentioned theories. This disparity strengthens the argument for implementing a per se rule. Per se rules best protect the constitutional rights of juveniles, give police officers guidance on how to conduct interrogations, inform youths of their rights *prior* to any confessions, provide a framework to courts on how to review confessions, prevent inconsistent determinations on the same record, treat all juveniles equally, and affirm the special circumstances that juveniles face when questioned by authorities. To be sure, a per se rule embodies value judgments about the juvenile justice system. As this Note has demonstrated, however, so does the totality of circumstances test.

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301 *See* Feld, *supra* note 74, at 177 n.123.

302 *Id.*

303 *Compare In re* Gault, 387 U.S. 1, 18 (1967) ("Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."), *with* Fare v. Michael C., 442 U.S. 707, 725 (1979) ("There is no reason to assume that . . . juvenile courts, with their special expertise[,] . . . will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons . . . are involved.").

APPENDIX A[304]

Juvenile Rights Form
Child in Custody_____
Place_____
Date _____ Time child taken into custody _____
Time this form was read _____
(the following is to be read and explained by the officer, and the child shall read it before signing.)

Before I am allowed to ask you any questions, you must understand that you have certain rights, or protections, that have been given to you by law. These rights make sure that you will be treated fairly. You will not be punished for deciding to use these rights. I will read your rights and explain them to you. You may ask questions as we go along so that you can fully understand what your rights are. Do you understand me so far? Yes ___ No ___.

1. You have the right to remain silent. This means that you do not have to say or write anything. You do not have to talk to anyone or answer any questions we ask you. You will not be punished for deciding not to talk to us. Do you understand this right? Yes ___ No ___.

2. Anything you say can and will be used against you in a court. This means that if you do say or write anything, what you say or write will be used in a court to prove that you may have broken the law. Do you understand this? Yes ___ No ___.

3. You have the right to talk to a lawyer before any questioning. You have the right to have the lawyer with you while you are being questioned. The lawyer will help you decide what you should do or say. The things you say to the lawyer cannot be used in court to prove that you may have broken the law. If you decide you want a lawyer, we will not question you until you have been allowed to talk to the lawyer. Do you understand this right? Yes ___ No___.

4. If you want to talk to a lawyer and you cannot afford one, we will get you a lawyer at no cost to you before any questioning begins. This means that if you want a lawyer and you cannot pay for one, you still may have one. Do you understand this right? Yes ___ No ___.

5. You can refuse to answer any or all questions at any time. You also can ask to have a lawyer with you at any time. This means that if you decide, at any time during questioning, that you do not want to talk, you may tell us to stop and you cannot be asked any more questions. Also, if you decide you would like to talk to a lawyer at any time during

304 *Benoit*, 490 A.2d at 306 app.

questioning, you will not be asked any more questions until a lawyer is with you. Do you understand this right? Yes ___ No ___.

6. (In felony cases only) There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to a county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system. Do you understand this? Yes ___ No ___.

7. Do you have any questions so far? Yes ___ No ___.

(This portion is now to be read by the child.) I can read and understand English. Yes ___ No ___. I have been read and I have read my rights as listed above. I fully understand what my rights are. I do not want to answer any questions at this time and I would like to have a lawyer.

Signature of child _____ Date _____ Time ____

Waiver of Rights

(This portion is to be read by the child.) I can read and understand English. Yes ___ No ___. I have been read and I have read my rights as listed above. I fully understand what my rights are. I have been asked if I have any questions and I do not have any. I am willing to give up my right to silence and answer questions. I give up my right to have a lawyer present. I do not wish to speak to a lawyer before I answer any questions. No promises or threats or offers of deals have been made to me to make me give up my rights. I understand that I may change my mind at any time and say that I want my rights if I choose. However, if I change my mind, it will not affect what I have already done or said.

Signature of child _____ Date _____ Time _____

Signature of witness _____ Date _____ Time _____

APPENDIX B[305]

YOUTH RIGHTS FORM

Youth in custody: _____. Age: ____. DOB: _____.
Place: _____. Date: _____.
Day of week: _____. Time child taken into custody: _____.
Time this form was read: _____. Official: _____.
Parent (Guardian or Custodian) present: _____.
[If other than parent, indicate relationship.]

Parent (Guardian or Custodian) *not* present. _____
[Check].

Unable to contact after _____ attempts [See last page for
[Number]
times and places of contact attempts.]; or, _____ contact made,
[Check]
unwilling to attend.

[The following must be read and explained by the officer, and, the youth (and parent, guardian, or custodian) shall read it before signing.]

Before I am allowed to ask you any questions, you must understand that you have certain important rights, or protections, that have been given to you by our laws in these situations. These rights will make sure that you will be treated fairly. You will not be punished for deciding to use these rights. I will read these rights to you, and explain each of them to you if you don't understand them, or think you may not understand them. You may ask questions as we go along so that you can completely understand what your rights are.

Do you understand me so far? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

1. You have the right to remain silent or the right to talk to us about this matter. This means that you do not have to write or say anything; not with me or anyone else, not now or later on. You will not be punished for deciding not to talk to us.

Do you understand this right? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

2. If you give up your right to remain silent, anything you say can be and may be used against you in court. This means that if you decide to talk to me or answer questions, I can go to court and tell the judge what you said. This also means that if you say or write any-

305 Holtz, *supra* note 46, at 553 app.

thing, what you say or write can be used in a court to prove that you may have broken the law.

Do you understand this? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

[Note: The following provision has been included for those jurisdictions which include the presence of a parent or interested adult as a prerequisite to any constitutional questioning of a juvenile.]

2a. You have the right to have your parent, guardian, or custodian present here with you before we talk to you or ask you any questions. This means that before we ask you anything about this matter, you can, and should, call your parents (guardian or custodian) so they can be here with you to help you.

Do you understand this right? Yes ____. No ____.

3. You have a right to talk to an attorney, a lawyer, before any questioning. You have the right to have the lawyer here with you while you are being questioned. The lawyer will help you. If you decide that you want a lawyer, we will not question you or talk to you at all until you speak to the lawyer.

Do you understand this right? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

4. You have the right to stop talking to us at any time. You also have the right to ask for a lawyer to be here with you at any time. This means that if you decide, at any time during questioning, that you do not want to talk any more, you may tell us to stop and we will not ask you any more questions. Also, if you decide you would like to talk to a lawyer at any time during questioning, you will not be asked any more questions until a lawyer is here with you and you have talked with him.

Do you understand this right? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

5. If you want to talk to a lawyer and you and your family do not have the money to pay for one, you can still have a lawyer for free before any questioning about this matter begins.

Do you understand this right? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

6. [*For serious crimes only*] There is a possibility that you may not be brought to juvenile court, but, instead, will be treated as an adult in an adult criminal court. If that happens, the procedures — the way your case will be handled — will be different. However, you will still

keep and have all the rights I have explained to you. You must also understand that anything you may say to me by talking with me or answering my questions could be used to decide whether you are treated as a juvenile or as an adult. If you are to be treated as an adult, we, or the court, will explain the adult procedures and results which could include jail or prison if you are found guilty.

Do you understand this right? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

7. You must always understand that if you decide to exercise or use any or all of your rights, you will not be hurt or punished in any way at all. These are your rights and my rights and our laws given them to you and I in the same way.

Do you have any questions so far? Yes ____. No ____.
Parent (Guardian or Custodian) Yes ____. No ____.

If yes (nature of question): _____.

[The Official should make sure the following portion is read by the youth.]

8. I can read and understand English. Yes ____. No ____.

I go to school. No ____. Yes ____; Present Grade _____.

ATTORNEY REQUEST

After listening to my rights and reading my rights, I fully understand what my rights are. At this time I would like to have a lawyer.

Signature of Youth: _____. Date ____. Time ____.
Signature of Parent (Guardian or Custodian): _____.
Signature of Official: _____.

GUARDIAN OR CUSTODIAN

EXPLAIN NATURE OF RELATIONSHIP AND SOURCE OF THE GUARDIAN'S OR CUSTODIAN'S AUTHORITY TO "GUIDE" OR "COUNSEL" THE YOUTH IN THIS CASE, AND, WHETHER THE GUARDIAN OR CUSTODIAN HAS "LEGAL CUSTODY" OF THE YOUTH.

WAIVER

I have been read and I have read my rights as listed above. I fully understand what my rights are. I am willing to give up my right to remain silent. I am willing to answer questions. I give up my right to have a lawyer present. I do not wish to speak to a lawyer before I answer any questions. No promises or threats or special offers have been made to me to make me give up my rights. I understand that I may change my mind at any time and say that I want

to use my rights. I also understand that if I change my mind, it will not effect what I have already said or done.

Signature of Youth: _____.
Signature of Parent (Guardian or Custodian): _____.
Witness [Type or Print]: _____.
Signature of Witness: _____. Telephone: _____.
Official's Name [Type or Print]: _____. Date: _____.
Signature of Official: _____. Time: _____.

DOCUMENTATION OF OFFICIAL ATTEMPTS TO CONTACT PARENT (GUARDIAN OR CUSTODIAN) OF YOUTH

Date: _____. Time: _____.
Method: _____.
Response: _____.

Date: _____. Time: _____.
Method: _____.
Response: _____.

Date: _____. Time: _____.
Method: _____.
Response: _____.

Date: _____. Time: _____.
Method: _____.
Response: _____.