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WHO IS ADVISING OUR CHILDREN: CUSTODIAL INTERROGATION OF JUVENILES IN FLORIDA

ELIZABETH J. MAYKUT

I. INTRODUCTION

A thirteen-year-old boy called "Man" was arrested last year for the armed robbery of a storage warehouse in Broward County.[1] This was not Man's first visit to the warehouse.[2] He and "a buddy" hit the same warehouse a month earlier.[3] Man had been released from a three-week stay in a juvenile detention center four days before the last warehouse incident.[4] Two days after his release, he was picked up for possession of a stolen motorcycle, but was not recommitted because the crime was not violent enough.[5]

After being arrested for the warehouse robbery, Man was transported to the police station for questioning, where the police discovered that his record showed thirty-five other criminal charges.[6] Before the officers began questioning, Man was told he had the right to remain silent; that anything he said could and would be used against him in court; that he had the right to talk to a lawyer, to have a lawyer with him during questioning, and to have a lawyer appointed if he could not afford one.[7]

Does this troubled youth who has probably heard this same rendition thirty-five times before need any more protection before the police begin asking him if he indeed committed the warehouse robbery? Or, is Man the type of kid who lives to brag about his escapades, who would most likely confess regardless of the type of protection afforded him? How much coercion is inherent in this setting? Would it help Man to have his parents present?[8]

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1. Kevin Davis, *"Man" Arrested in Robbery Case, Boy Has Long Criminal Record*, SUN SENTINEL (Florida), Sept. 19, 1993, at 1B.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. This statement embodies the traditional *Miranda* rights. Miranda v. Arizona, 384 U.S. 436 (1966). *See infra* part III. Mr. Davis' article in the *Sun Sentinel* does not mention the reading of the rights, but this author assumes it occurred.

8. Man eventually confessed to the robbery. Davis, *supra* note 1.

Briana, a seventeen-year-old high school student, was arrested along with three other teens late one Saturday night on drug-related charges.[9] Police found her sitting in a car outside an apartment complex while one of her friends made a drug deal with an undercover officer inside. If asked, Briana would tell you she went to a party that night with friends from school. One of them brought along a guy she didn't know. When they all left the party to get some more beer, they stopped off at this apartment. After Briana's arrest, the police find that she has no record. She has never been to the police station before.

Before being questioned, Briana was also informed of her constitutional right to remain silent and her right to an attorney. Should the police be required to provide Briana with a lawyer before they talk to her? Should her parents be notified or should she be allowed to call any adult she trusts? Should the answers to any of these questions depend on Briana's age or the fact that her record is clean? Is the coercion in this situation increased or decreased because Briana has never been to the police station before? This Comment attempts to answer these questions.

The question of whether juveniles truly understand the consequences of waiving their constitutional rights to remain silent and to receive the assistance of counsel during custodial interrogation has been asked many times over;[10] however, it is a question that has never before been so pressing. Juveniles are now responsible for twenty-six percent of the nation's robberies, fourteen percent of all murders, and

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9. This story is fictional and generally simulates the circumstances and possible issues involved in these situations.

10. Many have written on the subject of what standard should be used in evaluating a juvenile's waiver of constitutional rights and whether it is possible for a juvenile to make a knowing and intelligent waiver. *See* 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 (1992); Larry E. Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534 (1987); Mary A. Crossley, Note, Miranda *and the State Constitution: State Courts Take a Stand*, 39 VAND. L. REV. 1693 (1986); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141 (1984) [hereinafter Feld, *Criminalizing*]; Christopher K. Vogel, *Custodial Interrogation of Juveniles in the United States and Florida*, 9 FLA. ST. U. L. REV. 157 (1981); Martin Levy & Stephen Skacevic, *What Standard Should be Used to Determine a Valid Juvenile Waiver?*, 6 PEPP. L. REV. 767 (1979); Anthony J. Krastek, Comment, *The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule*, 17 DUQ. L. REV. 659 (1978-79); Elaine W. Shoben, Comment, *The Interrogated Juvenile: Caveat Confessor?*, 24 HASTINGS L.J. 413 (1973); Charles H. Saylor, Comment, *Interrogation of Juveniles: The Right to a Parent's Presence*, 77 DICK. L. REV. 543, 550 (1972-73); Note, *Waiver in the Juvenile Court*, 68 COLUM. L. REV. 1149 (1968).

forty-four percent of car thefts.[11] They also commit one-third of the country's burglaries and sixteen percent of all rapes.[12] In Florida, over twelve percent of all arrests made between 1984 and 1992 involved a juvenile.[13] In 1992, 87,000 children were processed through Florida's juvenile justice system.[14] In Broward County alone, arrests of juveniles eighteen years old and under have increased eighty percent in the past ten years.[15] The statistics linking juveniles with guns are even more alarming. Children currently account for one in five weapons arrests; in 1985, they accounted for only one in ten.[16] Last year, 2,515 Florida juveniles were arrested for possessing a gun when committing a crime.[17]

These ever increasing incidents of juvenile crime have prompted a public outcry for a juvenile justice system that focuses on punishment, rather than rehabilitation.[18] Whether Florida's juvenile justice system should be reformed in this manner is beyond the scope of this Comment. Nevertheless, the first step toward any revision of the system must begin with ensuring that juveniles' constitutional rights are not ignored. The immaturity of youth requires that their rights be even more closely guarded than those of adults. The juvenile justice system can work effectively only if juvenile's constitutional rights are respected. Children are getting the message that the system does not care for them and in return, they do not care for the system.[19] If we want children to respect society's values, we must respect them, which includes protecting their constitutional rights.

In attempting to address the issues identified above, this Comment will review the framework under which the nation's juvenile system has operated during the last century and provide a brief overview of the Supreme Court's *Miranda* decision. It will then delve into the application of *Miranda* in the juvenile context, reviewing both Florida law and the laws of other states in an attempt to evaluate Florida's

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11. Warren Richey, *Some Juvenile Crimes Down, but Trends Point Up*, SUN SENTINEL (Florida), Oct. 18, 1993, at 1A (citing the FBI's Uniform Crime Reports released in 1993).

12. *Id.*

13. COMMISSION ON JUVENILE JUSTICE, FLORIDA LEGISLATURE, ANNUAL REPORT 62 (Oct. 27, 1993) (on file with Comm'n).

14. *Id.* at 63.

15. Davis, *supra* note 1.

16. Linda Kleindienst & Diane Hirth, *Special Session's Main Aim: Kid Crime, Chiles Wants Sights Locked on Gun Issue*, SUN SENTINEL (Florida), Oct. 31, 1993, at 1A.

17. *Id.*

18. *Id.* One of the bills proposed during the November 1993 Special Session was dubbed the "High Noon Act of 1994" because of the degree to which it proposed to toughen juvenile punishment.

19. Linda Kleindienst & Diane Hirth, *Youth Violence on Rise, Kids Joke About Justice System*, SUN SENTINEL (Florida), Oct. 17, 1993, at 1A.

current treatment of juveniles. Lastly, this Comment will conclude by recommending that Florida provide juveniles in a custodial interrogation setting with greater protection than that afforded to adults in the same setting.

II. THE JUVENILE JUSTICE SYSTEM AND ITS PHILOSOPHY

At common law, children under seven were believed incapable of possessing criminal intent.[20] Beyond age seven, however, juvenile offenders were subjected to the same arrest, trial, and punishment procedures as adults and were accorded the same procedural protections.[21] In the late 1800s, however, reformers became appalled that children were adjudicated by adult procedures and received long prison sentences served with hardened criminals.[22] The reformers resolved to redesign America's juvenile justice system based on social welfare philosophy.[23]

Social welfare philosophy dictated that the state ask not "whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career[?]'"[24] Under this framework, the juvenile court did not face issues of "criminal culpability, determinations of guilt or innocence, and punishment, but . . . instead sensitivity, understanding, guidance, and protection."[25] The juvenile justice system was designed to make the child feel not that he was under arrest or on trial, but that he was being cared for.[26] Thus, the rigidities of criminal procedure were discarded.[27] In a system that focused on rehabilitation, that used clinical rather than punitive procedures, it was assumed that proceedings should be non-adversarial.[28]

The reformers fashioned a system where juvenile officials took on the role of the child's parent, known as *parens patriae*, rather than prosecutor and judge.[29] This was justified by the idea that a child has

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20. JULIAN MACK, THE CHILD, THE CLINIC, AND THE COURT 310 (1925).

21. *Id.*

22. *In re* Gault, 387 U.S. 1, 15 (1967).

23. Kent v. United States, 383 U.S. 541, 554 (1966).

24. *Gault*, 387 U.S at 15 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

25. Holtz, *supra* note 10, at 535 (citing Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, WISC. L. REV. 7 (1965)).

26. *Gault*, 387 U.S. at 15.

27. *Id.*

28. *Id.* at 16; Kent v. United States, 383 U.S. 541, 554 (1966); *see also* Handler, *supra* note 25.

29. *Kent*, 383 U.S. at 554-55.

a right not to liberty, as an adult has, but to custody.[30] Thus, if a child's parents were negligent in their duty and the child became delinquent, the state should step in and provide the custody to which the child was entitled.[31] According to reformers, in taking on this role, the state did not deprive the child of any rights because he possessed none.[32] On this basis, juvenile proceedings were classified as civil, not criminal, and accordingly, the state was not bound to afford a juvenile the same protections it did when it deprived an adult of his or her liberty.[33]

Society's attitude and opinion on the juvenile justice system, however, have changed dramatically since its reform in the late nineteenth century. Now, most people believe that children commit a disproportionate percentage of crimes, that children have become more mature and more violent, and that children in the juvenile justice system are not really punished.[34] This attitude is exemplified by Florida Attorney General Bob Butterworth's statement to two committees of the Florida House of Representatives: "When it comes to juvenile justice, we are using a 'Leave it to Beaver' approach for 'Terminator'-type criminals."[35] Perhaps reflecting the changing views of society, in the past thirty years, the United States Supreme Court has afforded juveniles many of the procedural protections previously denied them.

In the landmark decision of *In re Gault*,[36] the Supreme Court dramatically changed the character of the juvenile justice system. The Court held that a child in an adjudicatory stage of a delinquency proceeding is entitled to the constitutional protections of assistance of counsel and the privilege against self-incrimination.[37] *Gault* mandated the right to counsel because "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."[38] The Court emphasized the role of counsel in the juvenile jus-

30. *Gault*, 387 U.S. at 17.

31. *Id.*

32. *Id.*

33. *Id.* This situation caused Judge Abe Fortas to remark: "There is evidence . . . that . . . the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent*, 383 U.S. at 556 (citations omitted).

34. Dale, *supra* note 10.

35. Attorney General Bob Butterworth, Address at the Joint Meeting of the House Committees on Education & Criminal Justice (Feb. 8, 1993) (transcript available in the Attorney General's office).

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

37. *Id.*

38. *Id.* at 36.

tice system: "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings . . . . The child 'requires the guiding hand of counsel at every step in the proceedings against him.'"[39]

Later, in *Fare v. Michael C.*,[40] the Court reiterated the crucial role of counsel in the juvenile justice process, but refused to give juveniles greater procedural protections than those extended to adults:

> [T]he lawyer occupies a critical position in our legal system.
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> . . . .
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> Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.[41]

In three other landmark decisions, the Court also ruled against extending to juveniles constitutional rights currently afforded to adults.[42]

III. *MIRANDA*: THE BASIC CONCEPT

In *Miranda v. Arizona*,[43] the Supreme Court held that the State may not use an accused's statements made during custodial interrogation against him or her unless, before being questioned, the accused was made aware of the rights to remain silent and to counsel. Thus, the Court mandated that specific warnings be read to each accused prior to being questioned.[44] The police must inform the accused that he or she: (1) "has the right to remain silent";[45] (2) has "the right to consult with a lawyer and to have the lawyer with him [or her] during interrogation.";[46] (3) has the right to have a lawyer appointed if he or she is indigent;[47] and (4) that anything revealed "can and will be used

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39. *Id.* (footnotes omitted).

40. 442 U.S. 707 (1979).

41. *Id.* at 719.

42. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (juveniles need not be given the option of a jury trial in delinquency proceedings); Schall v. Martin, 467 U.S. 253 (1984) (although preventive detention of adults has been held unconstitutional, it is constitutionally acceptable as applied to juveniles); New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of juvenile's purse by school officials in a school setting without probable cause held constitutionally acceptable because juvenile rather than adult was involved).

43. 384 U.S. 436 (1966).

44. *Id.*

45. *Id.* at 468.

46. *Id.* at 469.

47. *Id.* at 471.

against the individual in court."[48] After receiving these warnings, if the accused "indicates *in any manner*" that he or she wants to remain silent, the accused has invoked the Fifth Amendment privilege, and interrogation must cease.[49] According to the Court, "any statement taken after the person invokes his [or her] privilege cannot be other than the product of compulsion, subtle or otherwise."[50] Lastly, if the accused asks for an attorney, interrogation must cease until he or she has consulted with one.[51] Consulting with an attorney is viewed as a protective device that "dispel[s] the compulsion inherent in custodial surroundings"[52] and allows the attorney to ensure that any statements given are accurately preserved for presentation to the court.[53] "[S]tatements obtained during custodial interrogation conducted in violation of these rules may not be admitted against the accused, at least during the State's case in chief."[54]

Although *Miranda*'s requirements are rigid, its virtues are thought to outweigh its defects, in that it "inform[s] police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and [informs] courts under what circumstances statements obtained during such interrogation are not admissible."[55]

If the State wants to use an accused's statement given after being apprised of the *Miranda* rights and without the advice of counsel, it must "demonstrate [by a preponderance of the evidence] that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[56] Thus, the determination whether statements made during custodial interrogation are admissible should be "made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."[57]

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48. *Id.* at 473.
49. *Id.* at 473-74 (emphasis added).
50. *Id.* at 474.
51. *Id.*
52. *Id.* at 458.
53. *Id.* at 470.
54. Fare v. Michael C., 442 U.S. 707, 718 (1979) (citing Miranda v. Arizona, 384 U.S. 436, 479 (1966) and Harris v. New York, 401 U.S. 222, 224 (1971)).
55. *Id.*
56. *Miranda*, 384 U.S. at 475; Colorado v. Connelly, 479 U.S. 157 (1986) (the voluntariness of a defendant's statement must be proved by a preponderance of the evidence).
57. *Fare*, 442 U.S. at 725 (citing *Miranda*, 384 U.S. at 475-77).

IV. MIRANDA RIGHTS AS APPLIED TO JUVENILES

In 1948, the Supreme Court first addressed the issue of a juvenile's due process rights in *Haley v. Ohio*.[58] In *Haley*, a fifteen-year-old boy, who was questioned by five or six police officers for five hours throughout the night, admitted to a crime without being advised of his constitutional rights and signed a written confession without the presence of a parent or attorney.[59] The Supreme Court held that the confession was obtained in violation of the boy's Fourteenth Amendment due process rights[60] and strongly stated its belief that special care should be used in evaluating the voluntariness of a juvenile's confession:

> And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we 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, may not crush him.[61]

The Court did not attempt to formulate a procedure that should be used with all juveniles in custodial interrogation settings. Indeed, in his concurring opinion, Justice Frankfurter stated that there was no mathematical formula that may be used in determining whether a confession was voluntary.[62] He stated that whether a child's confession was voluntary "invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society."[63]

In 1962, the Court decided *Gallegos v. Colorado*,[64] which also involved a juvenile's confession to a crime without the presence of a

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58. 332 U.S. 596 (1948) (5-4 decision). Chief Justice Vinson and Justices Burton, Reed, and Jackson dissented in *Haley*.

59. *Id.* at 598.

60. *Id.* at 599.

61. *Id.* at 599-600.

62. *Id.* at 603 (Frankfurter, J., concurring).

63. *Id.*

64. 370 U.S. 49 (1962).

lawyer or other adult advisor. In *Gallegos*, a fourteen-year-old boy was held incommunicado for five days, after which he signed a formal confession.[65] The Supreme Court held that, based on the totality of the circumstances, the confession was obtained in violation of the defendant's constitutional rights.[66] It stated:

> But 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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> . . . .
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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.[67]

Despite the Court's tough language, its holding that this confession violated due process was not based solely on the defendant's youth: "There is no guide to the decision of cases such as this, except the totality of circumstances . . . ."[68] Here, the Court was convinced that the combination of several factors, including the age of the defendant, the long period during which he was detained, that his parents were not notified, that he was not promptly brought before the juvenile judge, plus the absence of advice from a lawyer or other advisor, constituted a violation of due process.[69]

The Supreme Court's first opportunity after *Miranda* to address the juvenile's right to remain silent came in 1979. In *Fare v. Michael C.*,[70] a sixteen-year-old boy asked to see his probation officer after being fully advised of his *Miranda* rights.[71] After the police denied his re-

65. *Id.* at 50.
66. *Id.* at 55.
67. *Id.* at 54.
68. *Id.* at 55.
69. *Id.*
70. 442 U.S. 707 (1979).
71. *Id.* at 710.

quest, the juvenile made statements and drew sketches implicating himself in a murder.[72] Later, he moved to suppress the statements and sketches on the ground that his *Miranda* rights had been violated because his request to see his probation officer was an invocation of his Fifth Amendment right to remain silent just as if he had requested the assistance of an attorney.[73]

The California Supreme Court agreed that Michael's request for his probation officer was a per se invocation of his privilege against self-incrimination just as if it were a request for an attorney.[74] It based its decision on *People v. Burton*,[75] where it had held that a juvenile's request to see his parents during custodial interrogation was an invocation of his Fifth Amendment rights. Because it found that the probation officer was "a trusted guardian figure who exercises the authority of the state as *parens patriae*," the court held that the minor's request was the same as a request for his parents, which constituted an invocation of his Fifth Amendment rights.[76] As the court held that Michael's request for his probation officer was an exercise of his Fifth Amendment privilege, it refused to evaluate considerations of capacity, coercion, or voluntariness.[77]

The Supreme Court reversed, holding that Michael's request to see his probation officer did not invoke either his right to remain silent or his right to counsel.[78] It emphasized that the rule in *Miranda* was based on a perception that a lawyer has a unique ability, not possessed by a probation officer, to protect an accused's Fifth Amendment rights.[79] The Court further found that the probation officer was not able to offer independent advice such as that that could be given by an attorney because, as an employee of the State, he had a conflict of interest based on his obligation to both the State and the juvenile.[80]

The Court reiterated its *Miranda* rule that the government could not use a juvenile's statement obtained during custodial interrogation unless it demonstrated that the youth "knowingly and intelligently" waived his rights.[81] In evaluating a waiver, the totality of the circumstances should be considered:

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72. *Id.* at 711.
73. *Id.* at 711-12.
74. *Id.* at 709.
75. 491 P.2d 793 (Cal. 1971).
76. *In re* Michael C., 579 P.2d 7, 10 (Cal. 1978), *rev'd sub nom.* Fare v. Michael C., 442 U.S. 707 (1979).
77. *Id.* at 10-11.
78. *Fare*, 442 U.S. at 728.
79. *Id.* at 719-20.
80. *Id.* at 720-21.
81. *Id.* at 724 (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966)).

> We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.
> . . . At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation.[82]

Four justices dissented in *Fare*. Justice Marshall, with whom Justices Brennan and Stevens joined, stated that "the coerciveness of the custodial setting is of heightened concern where, as here, a juvenile is under investigation."[83] Justice Powell would have affirmed because he did not believe that Michael, whom he saw as "immature, emotional and uneducated,"[84] received a "fair interrogation free from inherently coercive circumstances."[85]

A. Totality of the Circumstances v. the Per Se Approach

Most state courts continue to apply the totality of the circumstances test enunciated in *Fare* in evaluating a juvenile's waiver of Fifth Amendment rights.[86] Although courts have identified and applied additional factors other than those listed by the Supreme Court, they have generally declined to give controlling weight to any one particular factor. Some commentators believe this tends to give the trial court almost unfettered discretion.[87] Applying the test in this manner also makes it practically impossible for police to determine whether a juvenile's waiver will be admissible at trial.[88]

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82. *Id.* at 725-26.

83. *Id.* at 729 (citing Haley v. Ohio, 332 U.S. 596 (1948) and Gallegos v. Colorado, 370 U.S. 49 (1962)). For a discussion of *Haley*, see *supra* notes 58-63 and accompanying text; for a discussion of *Gallegos*, see *supra* notes 64-69 and accompanying text.

84. *Fare*, 442 U.S. at 733.

85. *Id.* at 734.

86. Barry C. Feld, *The Right to Counsel in Juvenile Court: Fulfilling* Gault*'s Promise*, CENTER FOR THE STUDY OF YOUTH POLICY MANUAL 8 (1989); Feld, *Criminalizing*, *supra* note 10; Christopher K. Vogel, Comment, *Custodial Interrogation of Juveniles in the United States and Florida*, 9 FLA. ST. U. L. REV. 157, 165 (1981); *see, e.g.*, *In re* M.A., 310 N.W.2d 699 (Minn. 1981); *In re* S.W.T., 277 N.W.2d 507 (Minn. 1979).

87. Feld, *Criminalizing*, *supra* note 10, at 169-90.

88. *Id.*

The other option for evaluating juvenile waiver is commonly referred to as the per se approach. The per se approach excludes any waiver or confession made by a juvenile without adherence to the requisite procedural safeguards. As previously discussed, the Supreme Court has flatly refused to adopt a per se rule for evaluating the voluntariness of a juvenile's confession,[89] although it has repeatedly recognized the need for taking great care in accomplishing this task.

> 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, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[90]

B. Florida Law

In Florida, an accused is protected by the Florida Constitution as well as the United States Constitution. Article I, section 9 of the Florida Constitution protects an accused from conviction based upon a coerced confession.[91] Thus, before introducing a defendant's statement at trial, the state must show by a preponderance of the evidence that the statement was voluntarily made.[92]

The Florida Constitution also specifically provides for a separate juvenile justice system, if authorized by law, which need not include a jury or "other requirements applicable to criminal cases."[93] Florida's juvenile justice system is outlined in chapter 39, *Florida Statutes*, "Proceedings Related to Juveniles." Under this Act and the Constitution, a juvenile who elects to be classified a delinquent and tried in the

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89. Fare v. Michael C., 442 U.S. 707 (1979) (absence of parent or other interested adult at juvenile's waiver of privilege against self-incrimination was not a per se invalidation of waiver and subsequent confession); *see supra* notes 70-85 and accompanying text.

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

91. "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." FLA. CONST. art. I, § 9.

92. Balthazar v. State, 549 So. 2d 661, 662 (Fla. 1989); DeConingh v. State, 433 So. 2d 501, 503 (Fla. 1983), *cert. denied*, 465 U.S. 1005 (1984); Brewer v. State, 386 So. 2d 232, 236 (Fla. 1980); Wilson v. State, 304 So. 2d 119, 120 (Fla. 1974); McDole v. State, 283 So. 2d 553, 554 (Fla. 1973), *overruled by* Antone v. State, 382 So. 2d 1205 (Fla.), *cert. denied*, 449 U.S. 913 (1980).

93. "When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases." FLA. CONST. art. I, § 15(b). The *Constitution* also gives juveniles the option to be tried as an adult: "Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult." *Id.*

juvenile system is completely removed from the criminal system. Once classified delinquent, the Department of Health and Rehabilitative Services is responsible for providing the juvenile with assistance.[94]

Although Florida's Constitution and laws allow the state to provide juveniles with less protection than adults, Florida courts have shown a strong desire to protect the state's children.[95] Infants have been treated as wards of the court, and the courts have been charged with a duty and obligation to preserve and protect them.[96] Waiver has not been allowed in circumstances that could hardly compare to the ramifications of a juvenile's waiver of constitutional rights.[97] The Florida Supreme Court has categorized the well-being of children as a subject that is within the "state's constitutional power to regulate."[98] The Florida Legislature also affords juveniles specific privileges and protections based solely on age.[99]

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94. FLA. STAT. § 39.041(1) (1993).

95. This is also evident from the purposes of the Florida Juvenile Justice Act, codified at section 39.001, *Florida Statutes*. Specifically, with regard to juvenile delinquency, the Act states: "The purposes of this chapter are: (a) [t]o protect society more effectively by substituting for retributive punishment, whenever possible, methods of offender rehabilitation and rehabilitative restitution, recognizing that the application of sanctions which are consistent with the seriousness of the offense is appropriate in all cases." FLA. STAT. § 39.001(2)(a) (1991).

96. Cornelius v. Sunset Golf Course, 423 So. 2d 567, 569 (Fla. 1st DCA 1982) (citing Turner v. Andrews, 196 So. 449 (Fla. 1940)).

97. Romish v. Albo, 291 So. 2d 24, 25-26 (Fla. 3d DCA 1974) (neither a minor nor his father could waive the minor's right to file a compulsory counterclaim in an automobile negligence personal injury case filed against him), *overruled by* Venus Labs., Inc. v. Katz, 573 So. 2d 993 (Fla. 3d DCA 1991).

98. Griffin v. State, 396 So. 2d 152, 155 (Fla. 1981) (citing Ginsburg v. New York, 390 U.S. 629 (1968)).

99. The *Florida Statutes* provide that a minor, defined as anyone under the age of 18, FLA. STAT. §§ 1.01, 743.07 & 847.001(4) (1993), cannot do the following:

a. Make a will. *Id.* § 732.501.
b. Buy cigarettes or other tobacco products. *Id.* § 859.06.
c. Watch, buy or rent "harmful" (explicit) videos. *Id.* § 847.013.
d. Place a wager at a horse race. *Id.* § 550.0425.
e. Visit dance halls. *Id.* § 562.48.
f. Register to vote. *Id.* § 97.041.
g. Serve on a jury. *Id.* § 40.01.

The *Florida Statutes* also place the following age limitations upon children under a specific age:

a. Under 17, cannot donate blood. *Id.* § 743.06.
b. Under 16, cannot consent to sex. *Id.* § 800.04.
c. Under 16, cannot use BB or similar type gun without adult supervision. *Id.* § 790.22.
d. Under 13, cannot give consent to confinement to negate kidnapping charge without consent of parent. *Id.* § 787.01.
e. Under 14, cannot be employed, with certain exceptions. *Id.* § 450.021(3).
f. Under 21, cannot possess alcohol. *Id.* § 562.111. It is also unlawful to sell, give or

According to Florida law, "[a] juvenile may waive his rights under *Miranda*, but the state bears a heavy burden in establishing that the waiver was intelligently made."[100] Florida courts have repeatedly refused to hold a confession involuntary simply because it was made by a juvenile.[101] In refusing to adopt a rule that would exclude all confessions made by a defendant under the jurisdiction of the juvenile court, the Florida Supreme Court stated:

> We feel, too, that "self-confessed criminals should be punished, not liberated on the basis of dubious technicalities" even though they may be young. Untenable exclusionary rules of evidence do not promote the solving of transgressions against the welfare of society and the apprehension of those responsible therefor, which too often constitute a miscarriage of justice.[102]

In determining the admissibility of a juvenile's statement, Florida courts examine the totality of the circumstances under which it was made.[103] In applying the totality test, courts follow the general rule set forth in *People v. Lara*:[104]

> [A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.[105]

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serve alcoholic beverages to anyone under 21. *Id.* § 562.11(1).

g. Under 16, cannot obtain drivers' license. *Id.* § 322.05.

h. Between ages 6-16 must attend school. *Id.* § 232.01(1)(a).

i. Under 17, cannot be employed where alcohol is served. *Id.* § 450.021(4).

100. T.B. v. State, 306 So. 2d 183, 185 (Fla. 2d DCA 1975) (citing Arnold v. State, 265 So. 2d 64 (Fla. 3d DCA 1972), *cert. denied*, 272 So. 2d 817 (Fla. 1973)). The proper standard for demonstrating the voluntariness of a defendant's waiver of the *Miranda* rights is preponderance of the evidence. Balthazar v. State, 549 So.2d 661 (Fla. 1989) (defendant's allegation of a limited understanding of English does not change the standard from preponderance of the evidence to clear and convincing); *see also* Ross v. State, 386 So. 2d 1191, 1194 (Fla. 1980) ("State met its burden of demonstrating by a preponderance of the evidence that [the seventeen-year-old's] confession was freely and voluntarily given and that [he] knowingly and intelligently waived his right to remain silent and his right to counsel.").

101. *T.B.*, 306 So. 2d at 185; State v. Francois, 197 So. 2d 492, 495 (Fla. 1967) ("[T]o rule out all statements merely because of the youth of the maker, would unduly restrict law enforcement" (quoting People v. Magee, 31 Cal. Rptr. 658 (1963), *cert. denied*, 376 U.S. 925 (1964)), *cert. denied*, 390 U.S. 982 (1968).

102. *Francois*, 197 So. 2d at 495.

103. *T.B.*, 306 So. 2d at 185 (citing Gallegos v. Colorado, 370 U.S. 49 (1962)).

104. 432 P.2d 202, 215 (Cal. 1967), *cert. denied*, 392 U.S. 945 (1968).

105. *Id.* at 215.

The Florida Supreme Court also considers age but one factor among many to be considered in evaluating a juvenile's statement: "[T]he age of the person should be considered, but to rule out all statements merely because of the youth of the maker, would unduly restrict law enforcement."[106]

A survey of Florida cases evaluating confessions by juveniles reveals that Florida courts overwhelmingly find that a juvenile's statement obtained after a waiver of *Miranda* rights was freely and voluntarily made.[107] Even in cases where the juvenile was relatively young, the courts generally admit his or her statement.

In *Postell v. State*,[108] the Third District Court of Appeal held that substantial, competent evidence supported the trial court's finding that Postell, a thirteen-year-old female, knowingly and intelligently waived her right to remain silent and to consult with an attorney. The defendant argued that her videotaped confessions were wrongfully admitted because she did not understand her *Miranda* rights and therefore could not have intelligently waived them.[109] Although the court did not discuss all the evidence considered by the trial court in finding a knowing and intelligent waiver, it seemed convinced by a videotape of the confession which showed that ten minutes were spent discussing the defendant's rights, after which she gave an "uninterrupted narrative of the crimes."[110] Interestingly, the juvenile's mother was present during the questioning; but the court disregarded this fact, despite the defendant's contention that her mother's admonition to "tell the police everything" made her confession involuntary.[111]

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106. *Francois*, 197 So. 2d at 495 (quoting People v. Magee, 31 Cal. Rptr. 658 (1963)).

107. Ross v. State, 386 So. 2d 1191, 1194 (Fla. 1980); Rimpel v. State, 607 So. 2d 502, 503 (Fla. 3d DCA 1992) (fifteen-year-old's confession to murder was voluntary, despite fact that defendant was intermittently questioned for approximately nine hours), *review denied*, 614 So. 2d 503 (Fla. 1993); K.W. v. State, 600 So. 2d 566 (Fla. 3d DCA 1992) (statements were freely and voluntarily given under the totality of the surrounding circumstances where child initiated the phone call to the police); Brown v. State, 565 So. 2d 412 (Fla. 3d DCA 1990) (confession by sixteen-year-old after waiver of *Miranda* rights was voluntary); Zamot v. State, 375 So. 2d 881 (Fla. 3d DCA 1979). *But see* B.S. v. State, 548 So. 2d 838 (Fla. 3d DCA 1989) (confession of juvenile at police station was improperly admitted because it was the product of a nonconsensual confinement); M.L.H. v. State, 399 So. 2d 13 (Fla. 1st DCA 1981) (sixteen-year-old's confession invalidated because waiver form was not signed by two witnesses as required by FLA. R. JUV. P. 8.290 and defendant was illiterate).

108. 383 So. 2d 1159 (Fla. 3d DCA 1980).

109. *Id.* at 1160.

110. *Id.* at 1161 n.4.

111. *Id.* at 1160 n.2. This argument has been used before. In *Anglin v. State*, the fifteen-year-old appellant argued that his confession was the product of undue threat or coercion because his mother told him at the time of his arrest to "tell the truth" or she "would clobber him." 259 So. 2d 752 (Fla. 1st DCA 1972). The court held:

It may well be that an admonition by a parent to her teen-age son to tell the truth is

Recently, the Fourth District Court of Appeal upheld a trial court's decision that a ten-year-old voluntarily waived his *Miranda* rights.[112] Notwithstanding, the court began its discussion by noting:

> We have some difficulty with the proposition that a 10-year-old child could ever understand, in the sense that a mature adult could, the consequences of waiving his constitutional rights to silence and counsel, and of giving a statement about the crimes charged against him. However, we do not believe that we are free under the legal standards of review to substitute our own conclusions for those of the trial court, and we cannot say that, as a matter of law, the trial court was wrong.[113]

The court was so convinced by the trial court's "thorough and comprehensive" order that it reproduced it in its entirety.[114] The trial court noted the following factors in finding that the child comprehended and understood the *Miranda* warnings: (1) the warnings were given to him several times in language a child could understand; (2) this was the second time the juvenile had been arrested and read the warnings; (3) the child had the ability to understand and comprehend the warnings despite his relatively low IQ (70) and attendance at classes for the learning disabled; (4) all procedures were explained to the child's grandmother; and (5) there were no threats made against the child and the conditions surrounding the child's statements were not coercive.[115]

In his dissent, Judge Farmer began by saying:

> Let us be clear about what the court does today. It holds that a 10 year old boy with an I.Q. of 69 or 70, who had been placed by school authorities in a learning disability program and was described by one of his teachers as having difficulty in understanding directions, who had no prior record with the police, who was crying

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> upbringing of a child to be a useful citizen necessarily encompasses advice by a parent for the child to be truthful. The motherly concern of this parent for her offspring and at the same time her concern for the basic precepts of morality are to be commended. We find no element of a threat or coercion on the part of this mother and hold that the controverted confession was freely and voluntarily given by the appellant.

Id. at 752. *See also* Vasil v. State, 374 So. 2d 465, 468 (Fla. 1979) (sufficient evidence existed to support trial court's decision that waiver of *Miranda* rights was knowing and intelligent and the confession was voluntary where interrogation and confession took place in presence of appellant's father), *cert. denied*, 446 U.S. 967 (1980); Hallihan v. State, 226 So. 2d 412 (Fla. 1st DCA 1969).

112. W.M. v. State, 585 So. 2d 979 (Fla. 4th DCA 1991), *review denied*, 593 So. 2d 1054 (Fla. 1991).

113. *Id.* at 980.

114. *Id.* at 981-83.

115. *Id.* at 983.

> and upset when taken into custody, and who was then held by the police for nearly 6 hours (some in a police car but mostly in the station) without any nonaccusatorial adult present, could in the end knowingly and voluntarily confess to nearly every unsolved burglary on the police blotter. Because I am unable to square such a decision with my constitutional obligations, I respectfully dissent.[116]

Judge Farmer emphasized that the totality of the circumstances test mandated inquiry into *all* the circumstances surrounding the interrogation.[117] He stated that he was unable to find the confessions voluntary because, apart from the officers' testimony, there were no nonsubjective factors that favored a finding that it was voluntary.[118] In closing, Judge Farmer advocated an age-related exclusionary rule: "Even recognizing that there is no per se rule against juvenile confessions, at the lowest end of the age spectrum there must be some ages where no confession will ever be admissible."[119]

Despite their overwhelming opposition to an exclusionary rule, Florida courts have applied a per se rule to juvenile confessions when presented in the context of a parental notification statute originally passed by the Florida Legislature in 1951[120] and frequently amended.[121] In *Roberts v. State*,[122] the Florida Supreme Court construed a predecessor of this statute, which read:

> The person taking and retaining a child in custody shall notify the parents or legal custodians of the child and the principal of the school in which said child is enrolled at the earliest practicable time, and shall, without delay for the purpose of investigation or any other purpose, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody.[123]

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116. *Id.*
117. *Id.* at 984-85.
118. *Id.* at 984.
119. *Id.* at 985.
120. Ch. 26880, § 1, Fla. Laws (1951).
121. Section 39.037(2) currently provides:

> When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to an intake counselor . . . .

FLA. STAT. § 39.037(2) (1993). This provision was originally codified at section 39.03 and has been amended at least 18 times since originally enacted. Significant revisions were made between 1971 and 1973. Ch. 71-130, § 2, 1971 Fla. Laws 335, 337; Ch. 71-355, § 10, 1971 Fla. Laws 1593, 1597; Ch. 73-231, §§ 4-9, 1973 Fla. Laws 518, 525-29.
122. 285 So. 2d 385 (Fla. 1973).
123. FLA. STAT. § 39.03(3) (1971).

Describing the statutory language as explicit and mandatory, the court held the sixteen-year-old defendant's confession, obtained after he was advised of his Miranda rights, inadmissible because the state had not complied with this statute.[124]

Following *Roberts*, the First District Court of Appeal construed an amended version of section 39.03(3)(a)[125] to require that a juvenile's parents be notified immediately after the youth is taken into custody and before he or she is questioned.[126] In *Dowst v. State*, a sixteen-year-old defendant asked before he was questioned if he could call his parents, but was not permitted to do so until after he had given statements to the police.[127] Taking the *Roberts* holding a step further, the First District held not only that this amounted to a statutory violation, but that the defendant's request to speak to his parents "constituted a continuous assertion of his privilege against self incrimination and that any confession given by him before either (1) he [was] granted the right to make such call, or (2) the officer [made] a good faith effort to so advise his parents, [was] inadmissible in evidence."[128]

The Florida Supreme Court next visited the issue of the requirements imposed by section 39.03 in *Doerr v. State*.[129] In deciding that notification of a child's parents was not a statutory prerequisite to interrogation, the court emphasized that the statute now required that the child's parents be notified "only *after* it is determined that the child will be detained or placed in shelter care."[130] It distinguished this case from its earlier holding in *Roberts* by pointing to the deletion from the statute of language that required that the child be delivered "*without delay for the purpose of investigation or any other purpose* . . . to the court of the county or district where the child is taken into custody."[131] The court stated that the purpose of the notification was simply to advise the child's parents of his whereabouts and not to

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124. *Roberts*, 285 So. 2d at 385-86.

125. "If the person taking the child into custody determines, pursuant to paragraph (c), that the child should be detained or placed in shelter care, he shall immediately notify the parents or legal custodians of the child . . . ." FLA. STAT. § 39.03(3)(a) (1975).

126. Dowst v. State, 336 So. 2d 375, 376 (Fla. 1st DCA), *cert. denied*, 336 So. 2d 1172 (Fla. 1976).

127. *Id.*

128. *Id.*; *see also* Sublette v. State, 365 So. 2d 775, 777 (Fla. 3d DCA 1978) ("Where an officer who arrests a child fails to comply with this procedure [(notification of parent)], particularly, as in this case, after being specifically requested to do so, and interrogates a child, any statements obtained from him are inadmissible."), *review dismissed*, 378 So. 2d 349 (Fla. 1979).

129. 383 So. 2d 905 (Fla. 1980).

130. *Id.* at 907.

131. *Id.*

"prohibit interrogation after the child is taken into custody but before a determination is made to release or detain."[132]

Justice Adkins wrote a dissenting opinion in *Doerr*, with which Justices Boyd and Sundberg concurred. He stated that the parental notification was not only to let the parents know the location of their child, but to "assure the voluntary nature of any *confession* made by the juvenile."[133] He pointed to the change in the statutory language that required any person taking the child into custody to "*immediately* notify the parents or legal custodians,"[134] and interpreted this as "a legislative directive to the courts and other law enforcement agencies that juveniles shall be treated differently from other suspected criminals in that they shall not be interrogated until the parents or legal custodian shall be notified."[135] He expressed his doubt in a juvenile's ability to understand the *Miranda* rights by stating: "In many instances *Miranda* warnings would mean nothing to the juvenile defendant."[136]

In the most recent decision construing this section, *State v. Paille*,[137] the Second District Court of Appeal followed *Doerr* in holding that, based on the totality of the circumstances, a seventeen-year-old knowingly and intelligently waived his rights and voluntarily gave a confession despite the absence of his mother.[138] The court emphasized that the defendant had told the officer that he did not want his mother to be contacted and concluded by stating: "Given that he was an 'old' juvenile and that he requested his mother not be notified, his age and her absence are insufficient to establish that the statement was involuntary."[139] In following the *Doerr* decision, however, the Second District completely overlooked the broadening of the statutory language that had occurred since 1980. The statute now requires that a juvenile's parents be notified *anytime* he or she is taken into custody.[140]

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132. *Id.*
133. *Id.* at 908.
134. *Id.*
135. *Id.* at 908-09.
136. *Id.* at 909.
137. 601 So. 2d 1321 (Fla. 2d DCA 1992).
138. *Id.* at 1324-25.
139. *Id.*
140. When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to an intake counselor pursuant to s. 39.047, whichever occurs first. If the child is delivered to an intake counselor before the parent, guardian, or legal custodian is notified, the intake counselor or case manager shall continue the attempt to notify until the parent, guardian, or legal custodian of the child is notified.

FLA. STAT. § 39.037(2) (1993).

C. *The States Get Creative: Adoption of Per Se Exclusionary Rules*

The uncertainty of the totality of the circumstances test and the results of two studies concluding that many juveniles do not have the ability to knowingly and intelligently waive their Fifth Amendment rights[141] have led some states to require that juveniles receive additional protections not available to adults in a custodial interrogation setting. A number of states have adopted per se exclusionary rules either judicially or legislatively. As previously mentioned, the per se approach excludes any waiver or confession made by a juvenile without adherence to the requisite procedural safeguards.

1. *Adoption by the Courts*

In formulating a rule that gives juveniles greater protection than adults, states must carefully consider the basis for the rule. According to the United States Supreme Court: "[A] State may not impose . . . greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[142] California confronted this doctrine in *Fare v. Michael C.*[143] when the United States Supreme Court struck down the holding that a minor's request for his probation officer was an invocation of his Fifth Amendment rights.[144] However, "[e]ach state has power to impose higher standards governing police practices under state law than is required by the Federal Constitution."[145] Thus, states may require greater protection of juveniles' rights in a custodial interrogation setting based either on its state constitution or its power to govern police practices.

States have taken interesting and varying approaches in formulating exclusionary rules for juvenile waiver. Many have adopted some version of what has been termed "the interested adult rule." At least one has designed a simplified form for use by police officers dealing with juveniles, and some have created a separate rule for juveniles based on age, with older juveniles receiving less protection than their younger counterparts.

Indiana appears to be the first state to require that a juvenile's waiver of his or her Fifth Amendment rights be excluded unless the juvenile was given the opportunity to consult a parent or another

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141. *See infra* notes 174-202 and accompanying text.

142. Oregon v. Hass, 420 U.S. 714, 719 (1975).

143. *In re* Michael C., 579 P.2d 7, 10 (Cal. 1978), *rev'd sub nom.* Fare v. Michael C., 442 U.S. 707 (1979).

144. *See supra* notes 70-85 and accompanying text.

145. Michigan v. Mosley, 423 U.S. 96, 120 (1976) (Brennan, J., dissenting).

adult. In *Lewis v. State*,[146] the Indiana Supreme Court held that a juvenile's statement or confession could not be used against him or her unless he or she and his or her parents were informed of the right to counsel and to remain silent. Under Indiana's rule, a juvenile may then waive his or her rights if there are "no elements of coercion, force or inducement present" and the youth has been given an opportunity to consult with "his parents, guardian or an attorney representing the juvenile."[147]

In formulating its rule, the court in *Lewis* questioned whether a minor has the capacity to waive constitutional rights.

> [T]he juvenile is perhaps in the most serious predicament of his short life. . . .
>
> Many times he faces his accusers alone and without benefit of either parent or counsel. It is in these circumstances that children under eighteen are required to decide whether they wish to give up the intricate, important and long established fifth and sixth amendment rights. It indeed seems questionable whether any child falling under the legally defined age of a juvenile and confronted in such a setting can be said to be able to voluntarily, and willingly waive those most important rights.[148]

In justifying the need to treat juveniles and adults differently, the court further stated:

> The concept of establishing different standards for a juvenile is an accepted legal principle since minors generally hold a subordinate and protected status in our legal system. . . . It would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, [or] purchase alcoholic beverages . . . should be compelled to stand on the same footing 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.[149]

Indiana's rule was eventually superseded by statute.[150]

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146. 288 N.E.2d 138, 142 (Ind. 1972).

147. *Id.* The court did not specifically state whether this rule was based upon the Indiana state constitution, the federal constitution, the state's common law, or something else.

148. *Id.* at 141.

149. *Id.* at 141-42.

150. Whipple v. State, 523 N.E.2d 1363 (Ind. 1988), *cert. denied*, 113 S. Ct. 218 (1992). Indiana law provides that a child's constitutional rights or rights guaranteed any other law may be waived only (1) by the child's counsel with the child's consent; (2) by the child's parent or guardian as long as that person has no interest adverse to the child and has consulted with the child, and both the child and parent or guardian's waiver is knowing and voluntary. IND. CODE § 31-6-7-3(a) (1982). A child also has the ability to waive his or her right to consultation. *Id.* § 31-6-7-3(b).

Following in Indiana's steps, Louisiana rejected the totality of the circumstances test and adopted a per se exclusionary rule in 1978. Louisiana's rule is specifically based on its state constitution. In *In re Dino*,[151] the Louisiana Supreme Court stated:

> Because most juveniles are not mature enough to understand their rights and are not competent to exercise them, the concepts of fundamental fairness embodied in the Declaration of Rights of our [state] constitution require that juveniles not be permitted to waive constitutional rights on their own.[152]

In supporting its rule, the court quoted an appeals court judge who stated: "I cannot fathom how a minor, who lacks the 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."[153] Under the court's rule, for a juvenile's waiver to be valid, the State must establish that before waiving his or her rights, the juvenile consulted with an attorney or adult who was interested in the juvenile's welfare, and that any adult who was not an attorney was fully advised of the rights of the juvenile.[154] The court did not specify an age limit for this rule.

Vermont has adopted an almost identical rule based on its constitution. Vermont's rule varies only in that a juvenile must be given an *opportunity* to consult with an adult, but is not specifically *required* to consult with an adult before waiver.[155]

Massachusetts has adopted a modified approach to juvenile waiver. Instead of interpreting its state constitution to require the safeguards it mandates, the Supreme Judicial Court of Massachusetts couches its rule in the rubric of the "knowing and intelligent waiver." In *Commonwealth v. A Juvenile*,[156] the court concluded that to demonstrate a knowing and intelligent waiver by a juvenile, the Commonwealth must show that "a parent or interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights."[157] Even so, statements made by juveniles fourteen and

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151. 359 So. 2d 586 (La.), *cert. denied*, 439 U.S. 1047 (1978).

152. *Id.* at 594 (footnotes omitted).

153. *Id.* at 594 n.25 (quoting *In re* Holifield, 319 So. 2d 471, 475 (La. Ct. App. 1975) (Federoff, J., concurring)) (citations omitted).

154. *Id.*

155. *In re* E.T.C., 449 A.2d 937 (Vt. 1982).

156. 449 N.E.2d 654 (Mass. 1983).

157. *Id.* at 657.

over without compliance with this rule may still be admitted if it can be shown that "the circumstances . . . demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile."[158]

New Hampshire has implemented another innovative approach to safeguard juveniles' procedural rights. In *State v. Benoit*,[159] the New Hampshire Supreme Court adopted a new twist on the traditional totality of the circumstances test. It designed a "simplified juvenile rights form" for use by police officers dealing with juveniles.[160] Although the court did not require that a confession be excluded if the simplified form was not used, it indicated that a court should presume a nonsimplified explanation of rights to be inadequate.[161]

2. *Legislation*

Quite a few state legislatures have passed per se exclusionary rules.[162] In Connecticut, a child's confession is inadmissible in a proceeding for delinquency unless it was made in the presence of a parent or guardian and when both parent and child have been advised of the child's *Miranda* rights.[163] Oklahoma has a similar law, but it is not limited to delinquency proceedings.[164]

Wisconsin has legislatively mandated that any child under the age of fifteen who is alleged to be delinquent be represented at all stages of the proceedings and not be allowed to waive that right.[165] A child fifteen or over may waive the right to counsel if "the court is satisfied such waiver is knowingly and voluntarily made and the court accepts the waiver."[166]

Iowa law prohibits a child from waiving the right to be represented by counsel at hearings associated with the delinquency process.[167] Yet a child over sixteen may waive the right to counsel in a custodial interrogation setting if a good faith effort has been made to notify the child's parent, guardian, or custodian that the child has been taken into custody and of the alleged delinquent act, the location of the child, and the right of the parent to visit and confer with the child.[168]

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158. *Id.*
159. 490 A.2d 295 (N.H. 1985).
160. *Id.* at 304. The form is appended to the opinion. *Id.* at 306.
161. *Id.*
162. The author did not attempt to survey all fifty states in compiling this Comment.
163. CONN. GEN. STAT. § 46b-137(a) (1992).
164. OKLA. STAT. tit. 10, § 1109(a) (Supp. 1994).
165. WIS. STAT. § 48.23 (1987 & Supp. 1993).
166. *Id.*
167. IOWA CODE § 232.11 (1993).
168. *Id.* § 232.11(2).

Texas provides that a juvenile may waive the right to an attorney only if "the waiver is made by the child and the attorney for the child."[169] This, however, is qualified by a rule that allows the admission of a child's *written* statement if the child received a *Miranda*-type warning from a *magistrate* before making the statement.[170]

Lastly, West Virginia's rule was formulated by both the legislature and the courts. West Virginia's code prohibits the interrogation of a juvenile without the presence of a parent or counsel.[171] In *State ex. rel. J.M. v. Taylor*, the West Virginia Supreme Court held that a juvenile may only waive his or her right to counsel upon the advice of counsel.[172] The Court felt this rule was necessary to ensure that the juvenile's waiver was knowing:

> Juvenile waiver of constitutional rights obviously must be more carefully proscribed than adult waiver because of the unrebuttable presumption, long memorialized by courts and legislatures, that juveniles lack the capacity to make legally binding decisions. No juvenile legal status is treated the same as that of an adult, to our knowledge.[173]

D. Empirical Studies on Juveniles' Comprehension of the Miranda *Warning*

Two studies have been undertaken to specifically evaluate juveniles' capacity to waive their *Miranda* rights. Although neither were conducted within the last decade, they still represent the most current source available.

In 1969, a study was conducted with ninety juveniles to determine whether the *Miranda* warning should be revised for the juvenile offender and whether a minor has the capacity to knowingly and intelligently waive his or her *Miranda* rights.[174] The subjects ranged in age from thirteen to seventeen, but the majority were age fourteen, an age the researchers focused on because, under California law, a child under fourteen was presumed incompetent to commit a crime.[175] The researchers used a simplified *Miranda* warning and a formal *Miranda*

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169. TEX. FAM. CODE ANN. § 51.09(a) (West 1992 & Supp. 1994).
170. *Id.* § 51.09(b).
171. W. VA. CODE § 49-5-8(d) (1991).
172. 276 S.E.2d 199, 204 (W. Va. 1981).
173. *Id.* at 203.
174. A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 44 (1970).
175. *Id.*

warning and tested the subjects' understanding of each.[176] During interviews with the subjects, the interviewers attempted to create "the mentally distracting atmosphere of police field interrogation" to assure accurate results.[177] The juveniles were scored on a scale of one to ten for understanding, with each being eligible to receive two points for each element of the Miranda warning (i.e. right to silence, use of statement in court, right to attorney, right to attorney during questioning, and no cost for attorney if indigent).[178]

Of the ninety juveniles interviewed, only five received a perfect score of ten and eighty-six waived their right to silence.[179] Those who had been adjudicated juvenile delinquents exhibited a greater understanding of the warning than did non-delinquents.[180] Surprisingly, results indicated that the simplified warning was generally less understood by the overall group than the formal warning.[181] Contrary to the overall group, however, among non-delinquent fourteen-year-olds, the simplified warning was better understood.[182] Among the group of fourteen-year-olds studied, the least understood element was the right to have an attorney present during questioning while the right to silence and general right to an attorney were the best understood.[183]

The researchers concluded that a small percentage of juveniles is capable of knowingly and intelligently waiving their rights.[184] Based on the low overall index of understanding among fourteen-year-olds, and the failure of the simplified form to significantly increase understanding, the researchers concluded: "Perhaps 14-year-olds as a group are not capable of knowingly and intelligently understanding their rights."[185]

In a more extensive study, Thomas Grisso analyzed juveniles' comprehension of *Miranda* rights as compared to that of adults.[186] Grisso broke the warning down into four elements, with each subject eligible to receive two points of credit on every warning by demonstrating an

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176. *Id.*
177. *Id.* at 42.
178. *Id.* at 43.
179. *Id.* at 44.
180. *Id.*
181. *Id.* at 48.
182. *Id.*
183. *Id.* at 50.
184. *Id.* at 54.
185. *Id.*
186. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

adequate understanding of the element.[187] The study found "striking and consistent differences" between the juveniles' and adults' comprehension.[188] A perfect score of eight, representing adequate understanding, was achieved by only 20.9% of the juveniles, compared to 42.3% of the adults.[189] Amazingly, 55.3% of the juveniles, compared to 23.1% of the adults manifested inadequate (zero-credit) understanding of at least one of the four warnings.[190] On their understanding of six key words used in the *Miranda* warning, the highest possible scores were attained by 60.1% of the adults, but by only 33.2% of the juveniles.[191]

The study found a significant relationship between juveniles' scores and their age, race, and IQ, but none between scores and the juveniles' sex, socioeconomic status (when controlled for IQ differences) or prior criminal experience.[192] It also found that age was related to *Miranda* comprehension at ages ten through fourteen, beyond which scores were similar for fifteen- and sixteen-year-olds.[193] The author summarized that juveniles younger than fifteen manifested significantly poorer comprehension than adults of comparable intelligence.[194] His summary also included the finding that sixteen-year-olds understood their rights as well as seventeen- to twenty-two-year-old adults.[195]

In testing the subjects' understanding of the function and significance of the *Miranda* rights, the study revealed that:

* 28.6% of juveniles attributed friendly or apologetic feelings to the police;
* 28% of juveniles assumed that lawyers owed a duty to the juvenile court that interfered with the confidentiality of the attorney-client relationship;
* 61.8% of juveniles did not know that a judge cannot penalize someone for invoking the right to silence;
* 55.3% believed they would have to explain their criminal involvement in court if questioned by a judge.[196]

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187. *Id.* at 1144-47.
188. *Id.* at 1151-52.
189. *Id.* at 1153.
190. *Id.* at 1153-54.
191. *Id.* at 1154.
192. *Id.* at 1155.
193. *Id.*
194. *Id.* at 1157.
195. *Id.* at 1160.
196. *Id.* at 1157-59.

Grisso concluded that in light of these results, waivers made by juveniles under age fifteen cannot be considered meaningful.[197] He stated: "[T]he project findings are bolstered by the fact that while the research subjects were questioned under optimal circumstances, juveniles actually interrogated by the police would not be immune from comprehension inhibitions that stem from a pressure-packed setting."[198]

Lastly, Grisso analyzed four options for structuring a per se exclusionary rule and concluded that "the requirement that counsel be present affords the best protection for juveniles under the age of fifteen."[199] He asserts that giving young juveniles a nonwaivable right to counsel is a "feasible and effective" means of protection, and that an attorney would "assist the youth in asserting his rights and would help to ensure that a waiver or confession, if made, is voluntary and knowing."[200] Grisso also proposes a per se exclusionary rule for older juveniles based on extrinsic considerations.[201] He points to the fact that many fifteen- and sixteen-year-olds, particularly those with a low IQ score, showed no better comprehension than the younger juveniles, and that the study didn't measure juveniles' abilities to waive their rights with the added pressure of an actual interrogation setting.[202]

E. Recommendations for a Rule that Prohibits Waiver

At least two organizations that have spent a considerable amount of time researching juvenile rights have recommended that a juvenile not be permitted to waive the right to counsel during interrogation. The President's Crime Commission recommended that to assure procedural justice, "Counsel should be appointed as a matter of course wherever coercive action is a possibility, without requiring any affirmative choice by child or parent."[203]

The Institute of Judicial Administration and American Bar Association Juvenile Justice Standards Project has recommended that, "[i]n delinquency cases, the juvenile should have the effective assistance of counsel at all stages of the proceeding," and that this right to counsel should be mandatory and nonwaivable.[204]

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197. *Id.* at 1161.
198. *Id.*
199. *Id.* at 1161-62.
200. *Id.* at 1163.
201. *Id.* at 1164.
202. *Id.* at 1164-65.
203. *In re* Gault, 387 U.S. 1, 38 n.65 (1967) (quoting Nat'l Crime Comm'n Report 86-87).
204. Standard 5.1, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS (1980).

Barry C. Feld, a commentator who writes extensively on juvenile rights, also recommends making the right to counsel and to silence nonwaivable.[205] While he does not specify a specific age group that would be covered by his rule, he would require "consultation with counsel and the presence of an attorney at *every* interrogation of a juvenile and prior to any waiver of the right to counsel."[206]

V. CONCLUSION

Florida faces a juvenile crime crisis. It is a crisis that is being confronted by every branch of government, in the legislature, in executive agencies, and in the courtrooms of this state. Although Florida spends $241 million on juvenile justice programs annually,[207] its juvenile justice system has been in constant flux, being reorganized three times in as many years.[208] In striving to reform this crumbling system, legislators and other policy-making groups must first make a commitment to protecting children's constitutional rights. As previously mentioned, if the system does not respect juveniles, they will not respect the system.

Although it seems that nearly everyone agrees on a certain level that minors should be treated different from adults, this has not translated into special protection in the custodial interrogation arena. Although the Legislature has granted specific protections to children not available to adults and has withheld certain privileges from children until they attain a specified age,[209] it has not seen fit to mandate that children being questioned by police regarding their involvement in criminal activity receive special protection. In formulating a solution, we must ask ourselves: Why is a child of *any* age treated exactly as an adult in the pressure-packed and potentially life-changing setting of a police interrogation room?

Proponents of the totality of the circumstances approach would argue that it adequately protects the juvenile by taking his or her age and IQ into account in determining whether his or her statement is admissible. This approach, however, 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. Proponents would further argue that the totality test is necessary because some juveniles are hardened criminals that thoroughly understand the system and possess the capacity to knowingly and vol-

205. Feld, *Criminalizing*, *supra* note 10, at 184-90.
206. *Id.* at 184 (emphasis added).
207. Kleindienst & Hirth, *supra* note 16.
208. Kleindienst & Hirth, *supra* note 19.
209. *See supra* note 99.

untarily waive their rights. Although the flexibility of the totality approach works well in theory, it has proven to be unworkable in practice. The totality approach gives law enforcement little guidance in evaluating a juvenile's waiver and, as Judge Farmer expressed in *W.M. v. State*,[210] its subjective nature gives courts virtually unfettered discretion in ruling on a juvenile's statement.

Accepting the premise then, that the totality approach is unworkable in practice, what approach should Florida adopt? In formulating a new rule, common sense dictates that, at the very least, a young child's parent should be given the opportunity to be present throughout the questioning. Most parents would be appalled to learn that their child could be arrested, taken into custody, given the *Miranda* rights, and after waiving those rights, interrogated for hours,[211] all without their knowledge, and more importantly, without their advice. Because there are valid arguments against the presence of a parent,[212] however, it may be desirable to relax this requirement for older juveniles for whom parental authority is generally more relaxed.

The approach adopted by the Commonwealth of Massachusetts seems to fairly embody both of these concepts.[213] That rule provides that in order for the court to find a juvenile's waiver knowing and intelligent, the juvenile must have consulted with a parent or other interested adult who was present during the questioning and understood the juvenile's *Miranda* warnings. The exclusionary rule is relaxed, however, if the child is fourteen or over and if it can be shown that "the circumstances . . . demonstrate a high degree of intelligence,

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210. W.M. v. State, 585 So. 2d 979 (Fla. 4th DCA) (Farmer, J., dissenting), *review denied*, 593 So. 2d 1054 (Fla. 1991).

211. Although section 39.037(2), *Florida Statutes*, requires that a child's parents be notified anytime the child is taken into custody, it does not prohibit the police from interrogating the child before the parent arrives. *See supra* notes 120-28 and accompanying text.

212. A rule that requires parental presence before allowing a juvenile to waive his rights gives rise to several problems, many of which concern the ability of laypeople to provide effective assistance. Many parents do not care, and often are "only equal in capacity to, the child and therefore poorly equipped to comprehend the complexities confronting them." Grisso, *supra*, note 186 at 1163 (quoting Theodore McMillian & Dorothy L. McMurty, *The Role of the Defense Lawyer in the Juvenile Court: Advocate or Social Worker*? 14 ST. LOUIS U. L.J. 561, 570 (1969)). Further, the child and his or her parent(s) may have conflicting interests or the emotional reaction of the parent(s) to the child's detention may render the parent(s) unable to provide the child with the type of support and counsel he or she needs. Jan Kirby Byland, Comment, *Louisiana Children's Code Article 808: A Positive Step on Behalf of Louisiana's Children*, 52 LA. L. REV. 1141, 1155 (1992). In a survey of middle-class parents of adolescents, Professor Grisso found that about one-third would advise their children to confess to police, and about one-half said that youth should remain silent temporarily until things "cool down." THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 180-82 (1981).

213. *See supra* notes 156-58 and accompanying text.

experience, knowledge, or sophistication on the part of the juvenile."[214] In adopting this approach, however, Florida should extend the parental presence requirement to include fourteen-year-olds in light of Mr. Grisso's research. Thus, the rule would only be relaxed if the juvenile was fifteen or over and the other factors were shown.[215]

The Massachusetts approach has many advantages. First, it forces the parents of younger children to get involved. Although requiring the presence of a parent has some disadvantages,[216] its advantages outweigh them, especially at the younger years. The presence of a parent at a custodial interrogation is helpful in:

> mitigating the dangers of untrustworthiness, reducing coercive influences, providing an independent witness who can testify in court as to any coercion that was present, assuring the accuracy of any statements obtained, and relieving police of the burden of making subjective judgments on a case-by-case basis about the competency of the youths they are questioning.[217]

Further, forcing a parent to be present at the police station with his or her child is valuable in itself. It may give an uninterested parent the incentive to expend more effort to keep his or her child out of trouble, in addition to informing the parent of his or her child's actions and their ramifications.

A per se rule has the advantage of providing clear boundaries, but it does not take into account the individual characteristics of the child. The second part of Massachusett's approach provides this flexibility. It allows a court to look at an older juvenile's intelligence, experience, knowledge, or sophistication in determining whether his or her statement obtained as a result of a waiver should be admissible. Although this rule has the disadvantage of requiring the courts to determine whether a juvenile demonstrated sufficient intelligence, experience, knowledge or sophistication to allow the police to bypass the parental presence rule, it seems to embody a balance that should be acceptable to both juveniles and law enforcement.

Applying this rule to the stories that introduced this Comment, the police would have been forced to include a parent or other interested adult in their interrogation of the boy called "Man." Although he would have demonstrated sufficient experience with the justice system

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214. Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983).

215. *See supra* notes 192-98 and accompanying text (study found that juveniles younger than fifteen manifested significantly poorer comprehension than adults of comparable intelligence).

216. *See supra* note 212.

217. Feld, *Criminalizing*, *supra* note 10, at 178.

for his statement to be admitted without the presence of a parent at interrogation had he been over fourteen, his age (thirteen) would have automatically prompted a call to his parent or guardian. Briana's case would also have required a call to her parents. Although Briana was over fourteen, the police could probably not demonstrate that she possessed a high degree of intelligence, experience, knowledge, or sophistication as she had no criminal record or experience with the police. In these situations, the new rule would overprotect "Man," but would give Briana the additional protection she probably needs.

Although this may not be a perfect solution, the Massachusetts approach would be a solid step forward toward protecting juveniles' constitutional rights to remain silent and to the assistance of counsel, and it could be an integral part of an overall revision of Florida's juvenile justice system.

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