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2003]

IMPROVING THE "KANGAROO COURTS":
A PROPOSAL FOR REFORM IN EVALUATING
JUVENILES' WAIVER OF *MIRANDA*

I. INTRODUCTION

In recent years, as juvenile crime rates have continued to rise, the public perceives juveniles as more sophisticated and, therefore, similar to their adult counterparts.¹ This new perception of juveniles has led to society's view that juveniles are just as deserving of harsh punishment.² In addition to harsher sentences, increasingly younger and more immature juveniles are now transferred to adult courts.³ With the same amount at

1. See Richard Barnum, *Clinical and Forensic Evaluation of Competence to Stand Trial in Juvenile Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 197 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[I]ncreasing concerns about juvenile violence have led to a general increase in the exposure of juvenile defendants to adult sanctions."); see also BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE* ix (1993) (detailing Federal Bureau of Investigation report of increased violent crime rates among juveniles from 1985 to 1991 and providing example that number of fifteen year olds arrested for murder increased by 217% during this period); Thomas Grisso & Robert G. Schwartz, *Introduction*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 1 (Thomas Grisso & Robert G. Schwartz eds., 2000) (recounting states' responses to perception that juvenile crime rates were rising by decreasing gap between juvenile and adult sentences); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 1, 9-10 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing policymakers and public's recent reactions to juvenile crime through implementing harsher sentencing and increased frequency of transfer to adult court). Furthermore, juveniles can now be sentenced beyond seventeen or eighteen years old into adulthood rather than simply until they become adults, as in previous years. See *id.* (describing extension of juvenile sentences into adulthood); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 *PSYCHOL. PUB. POL'Y & L.* 3, 5 (1997) [hereinafter Grisso, *Competence*] (stating that youth violence in United States has increased, there is no longer much disparity between adult and juvenile sentences, and therefore, adolescents have as much at stake as adults).

2. See Grisso, *Competence*, *supra* note 1, at 5 (stating juveniles receive adult-like punishments). For example, one study of registered voters eligible for the jury pool demonstrated that sixty percent of those polled would recommend execution of a ten year old for committing murder. See C. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality*, 19 *LAW & HUM. BEHAV.* 245, 245-61 (1995) (finding that sixty percent of sample of eligible voters endorsed capital punishment for ten year olds found guilty of murder).

3. See Steinberg & Schwartz, *supra* note 1, at 9-10 (pointing out that juveniles are increasingly transferred for adjudication as adults); Jennifer L. Woolard & N. Dickon Reppucci, *Researching Juveniles' Capacities as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 174 (Thomas Grisso & Robert G. Schwartz eds., 2000) (stating "adult processing and penalties are increasingly directed at larger numbers of juvenile defendants"); Grisso, *Competence*, *supra* note

stake, children deserve the same level of protection afforded adults during interrogation.⁴

While children currently receive the same procedural protections as adults, the psychological literature calls into question whether these protections function as comparable safeguards when applied to juveniles.⁵ As the system metes out harsher punishments, research indicates that under current procedures juveniles' waivers often do not meet the "knowing, intelligent and voluntary" standard set by the courts.⁶ Specifically, juveniles' waivers are often voluntary, but are rarely "knowing" or "intelligent"⁷ and without an informed decision, a "voluntary" waiver is meaningless.⁸ In order to safeguard juveniles' constitutional rights to the same level afforded adults, juveniles need increased protection to compensate for deficiencies present during interrogation.⁹ If our purpose is truly to ensure that juveniles' waiver of *Miranda* rights are "knowing, intelligent, and voluntary" then we must implement changes to ensure that children have sufficient protections during custodial interrogation.¹⁰

1, at 5 (stating that younger juveniles are being transferred to adult courts for adjudication). Several methods are used to accomplish the transfer of younger juveniles to adult courts including: 1) lowering the burden of proof in juvenile court transfer hearings; 2) increasing the types of offenses that result in transfer; 3) lowering the minimum age for transfer; 4) statutory exclusions or automatic transfer for certain offenses; and 5) prosecutor's direct file, or allowing the prosecutor to transfer the case to adult court at their discretion. See Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 84 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing procedures used to transfer juveniles to adult courts); Grisso *Competence*, *supra* note 1, at 5-6 (listing methods used to transfer juveniles to adult courts). As a result of these new devices, transfer of juveniles to adult courts has risen dramatically. See *id.* (noting 100% increase in juvenile transfers from 1988 to 1992); see, e.g., Court TV, *Murdered Dad Case*, at <http://www.courtstv.com/trials/king/> (last visited Oct. 17, 2002) (describing recent case where juveniles were tried as adults for murder of father).

4. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1134 (1980) (suggesting differences between juvenile and adult capacity to understand rights).

5. See *id.* at 1151-60 (providing results of clinical studies).

6. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (instituting "knowing, intelligent, and voluntary" standard for evaluation of *Miranda* waivers and outlining specific rights to be included in *Miranda* warnings, which must be given to suspects before they may validly waive those rights).

7. See Grisso, *supra* note 4, at 1166 (concluding juvenile waivers do not have same effect as those made by adults).

8. See *Miranda*, 384 U.S. at 444-45 (requiring that suspect's waiver of rights be made "voluntarily, knowingly, and intelligently" and specifying that suspect retains these rights during entire interrogation and may later, for example, request attorney even after valid waiver and speaking with police).

9. For a review of the psychological literature outlining the processes unique to juveniles, which interfere with their comprehension of *Miranda*, see *infra* notes 105-73 and accompanying text.

10. See *Miranda*, 384 U.S. at 444 (establishing "knowing, intelligent and voluntary" as standard to evaluate validity of waiver of *Miranda* rights).

This Note applies psychological literature to question the sufficiency of the processes adopted by states to assess the validity of juvenile waivers and proposes a solution to deficiencies in juveniles' waiver of *Miranda*.¹¹ Part II will discuss the background of the interrogation process, the juvenile justice system and the evolution of *Miranda* to provide the reader with a backdrop against which to evaluate the proposal.¹² Part III will outline current solutions to the problem of juveniles' lack of comprehension of *Miranda*.¹³ Part IV will review the relevant psychological data.¹⁴ Part V will propose new solutions in light of the psychological data.¹⁵ Finally, Part VI will provide a brief conclusion suggesting that the legal community must re-evaluate the safeguards afforded to juveniles during interrogations if the law is to coincide with current psychological research.¹⁶

II. TREATMENT OF JUVENILES IN THE JUDICIAL SYSTEM AND THE EVOLUTION OF JUVENILE RIGHTS

Modern interrogation tactics are designed to be coercive. Police are trained to manipulate interrogations to obtain confessions. Part A of this section will outline the psychological tactics used by police to obtain confessions from suspects to enable the reader to understand what juveniles are faced with during interrogation.¹⁷ Part B will then introduce the reader to the basic rights found to apply to suspects in *Miranda v. Arizona*¹⁸ and the inception of the juvenile justice system and subsequent evolution of caselaw that have influenced juveniles' rights in this area.¹⁹

11. For a discussion of the author's proposed solution in light of psychological literature, see *infra* notes 174-217 and accompanying text. This Note focuses on the literature applicable to waiver of *Miranda* by juveniles during the interrogation process, but the effect of juveniles' lowered capacities does not end with interrogation. See generally YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Thomas Grisso & Robert G. Schwartz eds., 2000) (examining juveniles' competence as trial defendants and whether their decreased capacities should lower their punishment proportionally).

12. For a further discussion of the interrogation process and the evolution of juveniles' rights during custodial interrogation, see *infra* notes 20-87 and accompanying text.

13. For a further discussion of current solutions implemented by States to evaluate the validity of juveniles' waiver of their *Miranda* rights, see *infra* notes 88-104 and accompanying text.

14. For a further discussion of the psychological data relevant to juveniles' competence to waive *Miranda* under current procedures, see *infra* notes 105-73 and accompanying text.

15. For a further discussion of the author's proposed improvements to the processes employed by States to evaluate juveniles' waiver of *Miranda* in light of the psychological data, see *infra* notes 174-217 and accompanying text.

16. For a brief overview of the major conclusions of the paper, see *infra* notes 218-19 and accompanying text.

17. For further discussion of police tactics, see *infra* notes 20-39 and accompanying text.

18. 384 U.S. 436 (1966).

19. For further discussion of the history of *Miranda* and the evolution of juveniles' rights, see *supra* notes 40-87 and accompanying text.

A. *The Interrogation Process: The Modern "Third Degree"*

A tiny, grey, barren smoke-filled room with only a light bulb swinging on a cord . . . a bright light shone in the suspect's face . . . the flash of a rubber hose.²⁰ The word interrogation conjures vivid images from popular media, but modern interrogation does not incorporate the tactics found in old police movies.²¹ The modern "third degree" employs psychological tactics which, in some ways, are more insidious.²²

Police learn to manipulate situations to obtain confessions.²³ Police manuals teach officers to create an atmosphere of control by orchestrating

20. See LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, *CONFESSIONS IN THE COURTROOM* 63-64 (1993) (describing images of interrogation from popular culture including "thumbscrew and rack," "a bright light shone on a suspect's face," and "threats of physical force" and explaining that these images contribute to our stereotypes of interrogation).

21. See *id.* (asserting that while "such images were accurate in the past" today they are infrequent in United States); see also RICHARD A. LEO & GEORGE C. THOMAS, III, *THE MIRANDA DEBATE: LAW, JUSTICE & POLICING* 66 (1998) ("Although one occasionally reads or hears about abuses during custodial questioning, police critics agree that use of the third degree during interrogation is now relatively infrequent."). But see KXAN-TV 36, *Deputy to Face Grand Jury Charges*, at <http://www.msnbc.com/local/kxan/m219777.asp> (last visited Aug. 28, 2002) (providing example of physical tactics still being used by one officer with juvenile suspect during interrogation, but implying that physical coercion is not tolerated by other police).

22. See LEO & THOMAS, *supra* note 21, at 65 ("Not only do police now openly and strongly condemn the use of physical force during interrogation, they also believe that psychological tactics are far more effective at eliciting confessions."). While physical interrogation or the "third degree" has become extinct, the modern interrogation process is wrought with purposeful deception. See *id.* (explaining progression of police coercive techniques from physical to psychological and delineating current police techniques including "ploys, tricks, stratagems . . . and methods that rely on manipulation, persuasion, and deception for their efficacy"). One author relates an incident from a Detroit precinct that demonstrates how far police will go:

It seems the detectives, when confronted with a statement of dubious veracity, would sometimes adjourn to the Xerox room and load three sheets of paper into the feeder. "Truth," said the first. "Truth," said the second. "Lie," said the third. Then the suspect would be led into the room and told to put his hand against the side of the machine. The detectives would ask the man's name, listen to the answer, then hit the copy button. Truth. And where do you live? Truth again. And did you or did you not kill Tater . . . ? Lie.

Id. at 61.

23. See FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 3-204 (3d ed. 1986) (teaching police techniques to obtain confessions). In fact, deception and lying by police during interrogations is not only legal, but is considered acceptable. See Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of Miranda*, 18 AM. J. FORENSIC PSYCHOL. 17, 32 (2000) (citing J.H. Skolnick, *Deception by Police*, 1 CRIM. JUST. & ETHICS 40-54 (1982)) (reviewing Skolnick's research on acceptable practices in police interrogative tactics). Even perjury may be considered acceptable behavior in certain police circles when the police believe that "lying is necessary to reach the 'truth' of a suspect's guilt." See *id.* (studying what practices are considered acceptable among police).

the interview down to the dress of the interrogator.²⁴ The officer sets up the room to increase the likelihood of a confession.²⁵

After the proper atmosphere is established, the interrogator must seemingly jump the *Miranda* hurdle, however, in the hands of a skilled interrogator, *Miranda* warnings can even add to the desired atmosphere.²⁶ *Miranda* warnings purport to open the interview with a showing of the fairness and the reasonableness of the interviewer.²⁷ Nevertheless, the interrogator may deliver the warnings in a matter-of-fact way, leaving the impression that they are simply a bureaucratic formality that he or she must dispose of before the interrogation.²⁸ This presentation downplays the significance of the warnings, decreasing the likelihood the suspect will exercise the rights, which now seem trivial.²⁹

Finally, the interrogation begins. From the outset of the interview, a good interrogator ignores assertions of innocence and attempts to keep

24. See INBAU ET AL., *supra* note 23, at 36 (dictating proper interrogator dress, including conservative clothes with long sleeves lacking “conspicuous . . . accessories,” and removal of any police garb such as “the star, gun, and holster”); LEO & THOMAS, *supra* note 21, at 58 (“[A] good interrogator controls the physical environment from the moment a suspect or reluctant witness is dumped in the small cubicle, left alone to stew in soundproof isolation.”).

25. See INBAU ET AL., *supra* note 23, at 29-34 (instructing interrogators to establish sense of privacy, remove distractions, select proper lighting, minimize noise, arrange chairs properly, choose chairs that prevent suspect from being relaxed, set up observation room and also diagramming proper placement of items in room). Interrogators purposely do not provide any items that might relieve tension such as small objects to fiddle with; the interrogator sits face to face with the suspect with no furniture separating them, which might afford the suspect a certain degree of relief. See *id.* at 29-37 (directing interrogators to remove all distractions, especially “small, loose objects” because “tension relieving activities of this sort can detract from the effectiveness of the interrogation” and advising interrogators not to leave too much space between officer and suspect as this may confer psychological advantage). Furthermore, police must not take notes, as this could remind the suspect of the “legal significance” of his situation. See *id.* at 36 (directing officers to keep any pens and paper out of suspect’s view). Above all, the officer should avoid giving the impression that he seeks a confession or conviction. See *id.* (advising it is better to “fulfill the role of one who is merely seeking the truth”).

26. See LEO & THOMAS, *supra* note 21, at 67 (asserting *Miranda* can actually work to advantage of police during interrogation). For a description of *Miranda* and suspects’ *Miranda* rights, see *infra* notes 40-49 and accompanying text.

27. See LEO & THOMAS, *supra* note 21, at 67 (describing police delivery of *Miranda* rights).

28. See *id.* (“[P]olice routinely deliver the *Miranda* warnings in a perfunctory tone of voice and ritualistic behavioral manner . . . conveying that these warnings are little more than . . . a triviality.”).

29. See *id.* (explaining that police downplay suspects’ *Miranda* rights). At the end of the interrogation, when the confession is signed, the form will again contain *Miranda* warnings that must be waived in written form. See INBAU ET AL., *supra* note 23, at 179 (stating officers must give *Miranda* second time when formal confession is signed). Again, the police are advised to downplay the importance of the warnings and discourage assertion of the suspect’s rights. See *id.* (“[R]epeat the warnings at the beginning of the written confession, making reference, of course, to the fact that the suspect had received them earlier.”).

the suspect from denying his or her guilt.³⁰ An interrogator learns to use themes that are intended to manipulate the suspect.³¹ These techniques include sympathizing with the suspect, minimizing the seriousness of the crime or suggesting that the suspect's motivation was morally acceptable.³² Police can also lie about the evidence that they have, pretending, for example, that they have the suspect's fingerprints or an eyewitness.³³ Officers may even misrepresent their identities or roles claiming to be psychologists, newspaper reporters or students.³⁴ Additionally, officers are trained to diffuse the confidence of professionals and to flatter those of low socioeconomic status.³⁵

Police learn to use the same themes when addressing juveniles as they use with adults. They are advised that certain types of deceit, such as blaming the child's environment, work most effectively.³⁶ Further, they should also manipulate the parents, if present, limiting the parents' role when possible by giving them the impression that they are merely observers.³⁷ If a parent exhibits a desire to protect his or her child, the interrogator is

30. See INBAU ET AL., *supra* note 23, at 142-43 (warning that after initial denial, interrogators should "prevent the suspect from indulging in further denials" which could provide guilty person with "psychological fortification that would be derived from repetitious disclaimers of guilt").

31. See *id.* at 93-141 (outlining "themes" used with emotional suspects, nonemotional suspects and juveniles).

32. See *id.* (stating that other themes include condemning others who could possibly share responsibility, appealing to "suspect's pride by well-selected flattery" or pointing out fact that victim could exaggerate suspect's actions). These techniques are sometimes implemented using a "Mutt and Jeff" or "good cop, bad cop" approach where one officer will show disdain for the suspect, while the other appears to protect him or her in order to gain his or her trust. See *id.* at 151-53 (describing use of "friendly-unfriendly" tactic and explaining "the psychological reason for the effectiveness of the . . . act is the fact that the contrast between the two methods used serves to accentuate the friendly, sympathetic attitude").

33. See LEO & THOMAS, *supra* note 21, at 70 (stating that police fabricate evidence such as pretending accomplice identified suspect, lying about physical evidence, pretending lie detector test indicated deception or even staging fake lineups).

34. See *id.* at 69-70 (noting that courts have sanctioned misrepresentation of identity technique if constitutional rights or "norms of fairness are violated" and clarifying that legality of deception turns on role interrogator impersonates, for example, in past courts have not allowed police to pose as lawyers or priests).

35. See INBAU ET AL., *supra* note 23, at 39 (stating that addressing those of low Socio-economic Status (SES) formally will appeal to their sense of flattery, while avoiding formality with those of high SES will diffuse their normal sense of "superiority").

36. See *id.* at 137-38 (suggesting, for example, if child's parents were alcoholics interrogator might play upon this fact by blaming parents' alcoholism for child's crime).

37. See *id.* at 139 (advising interrogator of ways of "dealing with a parent who has an overprotective attitude toward his or her child," instructing interrogators that parents "present during the interrogation should be advised to refrain from talking, confining his or her function to that of an observer" and recommending police "proceed with the interrogation as though he were alone with suspect").

told to handle this by eliciting the parent's cooperation.³⁸ Interrogators are taught to tell parents that they only want to find the truth, and not reveal to the parents "all that is known" about the child's participation.³⁹

B. *History of Miranda*

1. *Miranda: The Basic Concept*

In the landmark decision *Miranda v. Arizona*,⁴⁰ the Supreme Court created a system to protect suspects within the purposely-coercive atmosphere of the police station.⁴¹ The Court created a formal process of advising suspects of their constitutional rights during custodial interrogation to ensure that waiver of these rights by a suspect was "knowing, intelligent and voluntary."⁴² *Miranda* held that the accused must be allowed certain rights and, in order for those rights to be effective, the suspect must be informed of those rights and understand their meaning.⁴³ The *Miranda* Court ruled that to consider a confession admissible at trial the police must "demonstrate the use of procedural safeguards effective to secure the privilege against self-incrimination."⁴⁴

38. *See id.* (directing officer to assure parents that no one blames them for their child's crime, remind parents that all children do things to disappoint their parents and tell parents that no one believes they were negligent in their child's upbringing).

39. *See id.* (counseling interrogators to "advise parents that there is a basis for wanting to conduct the interrogation").

40. 384 U.S. 436 (1966).

41. *See id.* at 478-79 (holding that when "an individual is taken into custody or otherwise deprived of his freedom by the authorities . . . [and] is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege"). Historically, the courts did not analyze the admissibility of confessions in terms of due process and the Fifth Amendment. It was not until *Bram v. United States* that the Supreme Court first began to look at the validity of a suspect's confession within the ambit of the Fifth Amendment right against self-incrimination. *See Bram v. United States*, 168 U.S. 532, 542-65 (1897) (analyzing admissibility of confessions under Fifth Amendment and Due Process Clause). Between *Bram* and *Miranda* the Court decided a succession of cases, each adding their own judicial gloss to the "voluntary" standard. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478, 490-92 (1964) (extending rights beyond trial process and into custodial interrogation); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that in criminal cases, states must honor constitutional privilege against self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (holding that Sixth Amendment right to counsel is made obligatory on states by Fourteenth Amendment); *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (determining confession's admissibility based upon Fourteenth Amendment's due process requirements); *see also KAMISAR ET AL., BASIC CRIMINAL PROCEDURE* 439-640 (9th ed. 1999) (discussing *Miranda*, its predecessors and its progeny).

42. *See Miranda*, 384 U.S. at 444 (holding that suspect's waiver must be made "voluntarily, knowingly, and intelligently").

43. *See id.* ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to . . . an attorney.").

44. *See id.* (ensuring Fifth Amendment protections are secured).

The Court found that in order to comply with these safeguards, the interrogator must apprise the accused of: (1) his or her right to remain silent; (2) the fact that any statement can be used against him or her in court; and (3) his or her right to an attorney before and during questioning and at trial, even if he or she cannot afford one.⁴⁵ Only after the interrogator informs him or her of these rights may a suspect validly waive⁴⁶ them and agree to speak with the police.⁴⁷ If at any time the suspect wishes to speak to an attorney, the questioning must cease until his attorney is present.⁴⁸ Any statement obtained by violating these rules is considered inadmissible against the accused in court.⁴⁹

2. *The Evolution of Juvenile Rights*

In the late 1800's,⁵⁰ long before the advent of *Miranda*, reformers expressed shock at the treatment of children within the adult sys-

45. *See id.* (outlining rights of accused during interrogation that must be followed to ensure knowing, intelligent and voluntary waiver of rights).

46. A "waiver" is ordinarily an intentional relinquishment or abandonment of a known right or privilege. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (defining waiver); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Zerbst* definition of waiver).

47. *See Miranda*, 384 U.S. at 479 ("After such warnings have been given, and such opportunity afforded him, the individual may . . . waive these rights and agree to answer questions or make a statement.").

48. *See id.* at 444-45 ("If . . . [the accused] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.").

49. *See id.* at 479. ("Unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the accused].").

50. *See Julian W. Mack, The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (discussing birth of juvenile justice system). Illinois's passage of the Juvenile Court Act in April 1899 created the first separate state system for the adjudication of juveniles; its ideology spread quickly. *See WILLIAM VAUGHN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 1* (1972) (stating that juvenile court began in Illinois in 1899 and revolutionized court system). By 1925 all but two states had enacted similar legislation. *See SOL RUBIN, JUVENILE OFFENDERS AND THE JUVENILE JUSTICE SYSTEM 2* (1986) ("Within a dozen years 22 states had followed the example of Illinois, and by 1925 there were juvenile courts in every state but two."). Ten years later, thirty American jurisdictions as well as several foreign courts had adopted similar separate juvenile systems. *See id.* (describing spread of juvenile court philosophy). A typical statute created during this period stated "the court may conduct the hearing in an informal manner and may adopt any form of procedure in such cases which it deems best suited to ascertain the facts." PAUL R. KFOURY, CHILDREN BEFORE THE COURT: REFLECTIONS ON LEGAL ISSUES AFFECTING MINORS 43 (1987). For the original Illinois Act, see 1899 Ill. Laws, 131-37; *see also MONRAO G. PAULSON, PROBLEMS OF THE JUVENILE COURTS AND THE RIGHTS OF CHILDREN 14-17* (1975) (reprinting excerpt of original statute).

While many states implemented juvenile justice systems during this period, each did so in its own way. *See Steinberg & Schwartz, supra* note 1, at 15 (outlining different ways in which juvenile courts were implemented). Each system has unique methods, programs and policies. *See id.* (delineating variations in juvenile

tem.⁵¹ At that time, children above age seven were adjudicated within adult courts, subject to the same arrest, trial and sentencing, but also provided with the same protections.⁵² Dissatisfied with the current procedures, reformers felt that the legal system should not treat children like their adult counterparts; reformers believed that the justice system needed to instate juvenile procedures with a social welfare philosophy.⁵³

systems). Depending upon the state, children may be diverted to the juvenile justice system as young as seven and as old as ten and the jurisdiction of the juvenile courts may end as young as sixteen or as old as twenty-five. *See id.* (explaining differing ages for diversion to juvenile courts).

51. *See* DOUGLAS J. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 1 (1974) (explicating reasons for creation of juvenile system). While an extensive review of the history of the juvenile courts is beyond the scope of this Note, more thorough treatments of this topic are available. *See id.* (recounting evolution of juvenile courts, failure of juvenile system and Supreme Court decisions concerning juvenile rights); *see also* KRISBERG & AUSTIN, *supra* note 1, at 1-52 (detailing history of disciplining youth beginning with Middle Ages through birth of juvenile court, its philosophy and demise and explaining how social factors such as urbanization, conflicts between races and economic changes influence treatment of children within judicial system). For an interesting discussion of the development of childhood and its status as a malleable, changing sociocultural construct, *see* GENNARO F. VITO & DEBORAH G. WILSON, THE AMERICAN JUVENILE JUSTICE SYSTEM 13-16 (1985) (detailing development of childhood as construct and its changing status over time and explaining that concept of childhood did not exist until Middle Ages); *see also generally* ELLEN RYERSON, THE BEST LAID PLANS (1978) (chronicling history of creation of juvenile courts, assumptions behind them and their deviation from ideal upon which reformers created them).

52. *See* STAPLETON & TEITELBAUM, *supra* note 50, at 1 (“At common law a youth who violated the law was treated much the same as an adult.”); *see also* Mack, *supra* note 50, at 106-07 (stating that, historically, children and adults were treated alike in criminal system).

Generally, at common law, children below age seven were considered incapable of forming the criminal intent required to commit a crime. *See* STAPLETON & TEITELBAUM, *supra* note 50, at 1 (“Children below the age of seven were conclusively presumed incapable of [forming criminal intent].”). Children above age fourteen were treated as fully responsible adults. *See id.* at 1 (“Youths over fourteen were presumed capable of entertaining a criminal intent and were held responsible to the same extent as an adult.”). Between the ages of seven and fourteen a rebuttable presumption exists that the child is capable of forming intent to commit a crime. *See* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 657 (2d ed. 1999) (citing LAFAVE & SCOTT, CRIMINAL LAW 398 (2d ed. 1986)) (stating between seven and fourteen children could be considered culpable for their crimes).

53. *See* Mack, *supra* note 50, at 107 (discussing underlying aspirations of advocates for juvenile court system, specifically that juveniles would not be “punished, [but] reformed”); *see also* BESHAROV, *supra* note 51, at 1 (1974) (asserting that creation of juvenile courts “is generally accepted to have been the product of a reform movement concerned with the welfare of children”). *But see id.* at 1 (citing Sanford Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1195 (1970)) (providing alternative perspective of development of juvenile courts, expounding revisionist view of origins of court system and concluding that courts were “not simply a manifestation of humanitarian concern for children needing help” but instead sprang from “(1) a retrenchment in correctional practice, (2) a regression in poor-law policy, (3) a reaction to the phenomenon of immigration, and (4) a reflection of the repressive side of Quaker education”); PAULSON, *supra*

Under this new policy, since the parents failed in their custodial role, the justice system would act as *parens patriae*.⁵⁴ The courts would develop an entirely separate system to try a child, the goal of which was not to punish, but to reform the child.⁵⁵ Judges and prosecutors would act in the child's interest, with understanding and protection so that the child felt cared for rather than disciplined.⁵⁶ Because the system was intended to help rather than punish, even though juveniles were often deprived of their freedom, reformers thought juveniles did not need the same procedural protections afforded adults.⁵⁷

note 50, at 1-2 (suggesting A.M. PLATT, *THE CHILD SAVERS* 98-99, 135 (1969) as alternative view of juvenile justice reform movement).

54. See STAPLETON & TEITELBAUM, *supra* note 50, at 9-23 (discussing doctrine of *parens patriae* and its application to juvenile system to supplant what was seen as ineffective family unit); see also Mack, *supra* note 50, at 109 (asserting that state should intervene when "parent is either unwilling or unable to train the child properly").

According to Black's Law Dictionary *parens patriae* is defined as "the state regarded as a sovereign; the state in its capacity of provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). This Latin term, which literally means "father of his country," was originally used to justify the English kings' intrusion into the lives of children of their vassals, under the guise of looking after their welfare. See BESHAROV, *supra* note 51, at 2 (discussing history and meaning of term *parens patriae*). Eventually, it became synonymous with the need to intervene for the child's welfare and currently it means the state's need to interfere to protect the young, incompetent or helpless. See *id.* (explaining meaning of *parens patriae* today). For a further discussion of *Gault* and how the Supreme Court in *Gault* would come to view this *parens patriae* justification for withholding juvenile's rights during adjudication as dubious, see *infra* notes 76-82 and accompanying text.

55. See Mack, *supra* note 50, at 119-20 (focusing on "what is [the child], 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" rather than on "whether the child is guilty or innocent"); see also BESHAROV, *supra* note 51, at 2 (stating mutual aim of courts and reformers was to help juveniles in trouble).

56. See Mack, *supra* note 50, at 120 (making child feel cared for should be goal of juvenile courts). This new system was conceptualized as civil rather than criminal due to its non-adversarial nature. See STAPLETON & TEITELBAUM, *supra* note 50, at 2 ("The hearing itself was to be as . . . non-adversary as possible with the emphasis on determining what disposition would best suit the child's particular needs."). It was also intended to lack the formality of traditional adult courts. See KFOURY, *supra* note 50, at 43 ("[A]n informal, flexible process replaced the rigidity of the adult criminal court."). To reduce the stigma associated with the criminal system, a new vocabulary was also invented. See RUBIN, *supra* note 50, at 1 ("*Petition* instead of *complaint*, *summons* instead of *warrant*, *initial hearing* instead of *arraignment*, *finding of involvement* instead of *conviction*, *disposition* instead of *sentence*.").

57. See Mack, *supra* note 50, at 109-10 (justifying denial of constitutional rights to children in juvenile court system); see also KFOURY, *supra* note 50, at 43 (stating reformers thought procedural protections would interfere with helping child with problems and were "an unnecessary vestige of the adversary system"). Early constitutional challenges to the juvenile system focused on this lack of procedural protections, justified by the parental nature of the system. See *id.* at 43-45 (giving examples of early constitutional challenges to juvenile court system such as *Ex parte Sharp*, 96 P. 563 (1908) and *Commonwealth v. Fischer*, 62 A. 198 (1905), which focused on lack of procedural protections for juveniles compared to adults); see also

Despite its well-intentioned beginnings, the juvenile justice system failed to meet its laudable goals of providing children with rehabilitation rather than discipline.⁵⁸ Straining under the pressures of understaffed agencies and an abundant caseload, the system envisioned by reform-minded advocates did not come to fruition.⁵⁹ Rather than the envisioned fatherly judge putting his arm around a child and getting to the bottom of his troubles, a harsh adversarial process developed in which punishment was meted out without the procedural safeguards afforded adults.⁶⁰ The juvenile court was not the therapeutic panacea that reformers had envisioned.⁶¹

Accordingly, at least eighteen years before *Miranda*, the Supreme Court began a succession of cases that afforded juveniles protection during interrogation.⁶² As early as 1945, in *Haley v. Ohio*,⁶³ the Court recognized the special protections that the justice system needed to afford children due to their immaturity and, consequently, their detrimental position during interrogation.⁶⁴ The Court stated that when a child is before the court “special care in scrutinizing the record must be used” because “a

STAPLETON & TEITELBAUM, *supra* note 50, at 16 (stating juveniles’ lack of procedural protections became primary challenge to juvenile courts).

58. See BESHAROV, *supra* note 51, at 4-5 (discussing demise of juvenile court system); see also STAPLETON & TEITELBAUM, *supra* note 50, at 23 (chronicling heightening criticism of philosophy behind juvenile system and eventual revision by Supreme Court decisions conferring rights upon juveniles, such as *In re Gault*, 387 U.S. 1 (1967) and *Kent v. United States*, 383 U.S. 541 (1966)); Birch Bayh, *Juveniles v. Justice, in LEGAL RIGHTS OF CHILDREN: STATUS, PROGRESS, AND PROPOSALS 21-30* (1973) (detailing failures of juvenile justice system).

59. See BESHAROV, *supra* note 51, at 4 (“From the start, juvenile courts have been denied the necessary staff, operating hands, auxiliary services and facilities to fulfill their rehabilitative purpose.”).

60. See ELLEN RYERSON, *THE BEST-LAID PLANS 147* (1978) (noting that juvenile justice system lacked procedural protections of adult system).

61. See *id.* (noting juvenile system’s imperfections).

62. See generally *Fare v. Michael C.*, 442 U.S. 707, 728 (1979) (deciding that probation officer did not stand in same position as attorney when minor invoked Fifth Amendment rights under *Miranda*); *In re Gault*, 387 U.S. 1, 30-59 (1967) (requiring juvenile court adjudication of delinquency to “measure up to the essentials of due process . . .”); *Kent v. United States*, 383 U.S. 541, 556 (1966) (holding that basic due process applied to waiver decisions); *Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962) (concluding 14-year old needed adult protection against inequality between minor and police); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (holding methods used to obtain 15-year old defendant’s confession violated due process requirements).

63. 332 U.S. 596 (1948).

64. See *Haley*, 332 U.S. at 596 (recognizing need for increased protection for juveniles during interrogation). In *Haley*, a fifteen-year-old boy was interrogated at the police station from midnight until five a.m. See *id.* at 598 (stating facts of case). Five or six police officers grilled him in teams of one or two at a time. See *id.* During the entire time of the questioning, the Court points out that the boy was allowed to confer with “no friend or counsel.” *Id.* At five a.m., Haley signed a confession after being confronted with the alleged confessions of the other suspects. See *id.* He was not advised of his right to counsel, other than a brief statement at the top of the confession form which stated:

mere child” is an “easy victim of the law.”⁶⁵ Thus, the Court determined it could not hold a child to adult standards of maturity in stressful situations.⁶⁶ To the contrary, what “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.”⁶⁷ While a mature adult might withstand lengthy questioning in the middle of the night, a child was not “a match for the police in such a contest.”⁶⁸

Due to the juvenile’s youth and lack of maturity, the *Haley* Court suggested that the child needed the help of a trusted adult, like a parent, “during the critical hours of questioning” so that the “overpowering presence of the law . . . [may not] crush him.”⁶⁹ In addition, the Court implied that a lawyer may be necessary to help a juvenile understand his or her rights.⁷⁰

[W]e want to inform you of your constitutional rights, the law gives you the right to make this statement or not as you see fit. It is made with the understanding that it may be used at a trial in court either for or against you or anyone else involved in this crime with you, of your own free will and accord, you are under no force or duress or compulsion and no promises are being made to you at this time whatsoever.

Id. Following the confession, Haley was put in jail on October 20, 1948 and held incommunicado for three days. *See id.* Police did not allow his mother or his lawyer to confer with him. *See id.* He was not taken before a magistrate until October 23rd, three days after he signed the formal confession. *See id.* at 598-99 (describing procedure government subjected Haley to during and after interrogation). At trial the judge allowed the jury to hear the confession, but instructed them to disregard it if they felt the boy had not made it voluntarily. *See id.* at 599 (stating judge’s instructions to jury). The jury convicted him. *See id.* (noting conviction later overruled).

The Supreme Court overturned the conviction declaring that the methods used to obtain the confession violated the due process clause requirements of the Fourteenth Amendment. *See id.* at 601 (holding that pressure exerted upon juveniles, to extent that police effectively withhold their rights, violates Fourteenth Amendment). The Court held that considering the boy’s age, the time and duration of his interrogation, and the fact that he had no adult present to advise him led to the conclusion that the confession was coerced. *See id.* (prohibiting “police from using the private, secret custody of either man or child as a device for wringing confessions from them”).

65. *Id.* at 599.

66. *See id.* (“Age 15 is a tender and difficult age for a boy [A child] cannot be judged by the more exacting standards of maturity.”).

67. *Id.*

68. *See id.* at 600 (maintaining that children are at disadvantage compared to adults during interrogation).

69. *See id.* (asserting that presence of parents or another trusted adult would provide protection for juveniles during questioning). The interested adult rule, later implemented by some States as a method of assessing the validity of juvenile waivers of *Miranda*, mirrors this Supreme Court comment. *See id.* (asserting adult should be present during interrogation). For further discussion of the interested adult rule, see *infra* notes 96-99 and accompanying text. For a discussion of the psychological literature indicating the ineffectiveness of the interested adult rule; see *infra* notes 135-62 and accompanying text.

70. *See Haley* 332 U.S. at 601 (indicating children may need counsel to understand their rights). The Court discussed the claim that the boy was supposedly advised of his rights before signing the confession, however, it then said that this

In 1962, the Court again considered the rights of juveniles during interrogation in *Gallegos v. Colorado*.⁷¹ The Court, analogizing to *Haley*, recognized that the immaturity, suggestibility and inequality of a child compared to the police put the juvenile on “unequal footing with his interrogators.”⁷² The Court again reiterated its belief that an adult, present during questioning, would aid the child in comprehending his rights and the consequences of waiving them.⁷³ Consequently, to compensate for youth and immaturity, the Court held that, in cases involving juveniles, it should evaluate the “totality of the circumstances.”⁷⁴ Under this test, to determine whether due process was violated, the courts would examine factors including “the youth of the petitioner, the long detention, the fail-

assumes that “a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and . . . he had a freedom of choice.” *Id.* (stating children may need counsel to effectively utilize their rights).

71. 370 U.S. 49, 54-55 (1962). In *Gallegos*, a fourteen-year-old boy, was arrested on January 1, 1959. *See id.* at 50 (describing facts of case). The following day his mother tried to visit him, but was denied entry. *See id.* Police questioned the suspect and he confessed on the next day. *See id.* (describing circumstances of confession). The police held the suspect at a Juvenile Hall until January 7, 1959 when the formal confession was signed; he had been separated from any friendly adult for five consecutive days. *See id.* (recounting facts of case). This confession became the key piece of evidence in the boy’s conviction, which was later overturned by the Supreme Court. *See id.* (stating procedural history).

72. *See id.* at 54 (finding juvenile was in inferior position during interrogation). The Court stated:

[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 [W]e 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 protest his own interests or how to get the benefits of his constitutional rights He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.

Id. Further, it would be “callous disregard of this boy’s constitutional rights” not to take account of the boy’s youth, immaturity and the length of his detention. *Id.*

73. *See id.* (asserting trusted adult might aid children during interrogation). Unless a child had the benefit of the advice of an adult friend such as a parent or lawyer to give them the “protection which [their] own immaturity could not[,]” then a child could not understand, let alone assert, his constitutional rights. *See id.* (implying children need guidance of trusted adult in order to make rational decisions). The Court stated:

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 Without some adult protection against this inequality, [a child] would not be able to know, let alone assert, such constitutional rights as he had.

Id. The rule implied by the Court is similar to the interested adult standard implemented by some states to assess the validity of juveniles’ waiver of *Miranda*. For a further discussion of the interested adult standard, see *infra* notes 96-99 and accompanying text.

74. *See id.* at 55 (using totality of circumstances to evaluate juveniles’ *Miranda* waiver).

ure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, [and] the failure to see to it that he had the advice of a lawyer or friend.”⁷⁵

In *In re Gault*,⁷⁶ the Court began to officially take notice of the adversarial nature and special protections needed for juveniles in light of the failure of the juvenile justice system.⁷⁷ Condemning the frequent practice of denying juveniles the rights granted to adults, the Supreme Court declared that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁷⁸ The Court recognized that the unfettered discretion of juvenile court judges, no matter how well intentioned, did not provide

75. *Id.*

76. *See In re Gault*, 387 U.S. 1, 31-59 (1967) (granting additional protection to juveniles at adjudicatory stage of trial process including notice of charges, right to counsel, right to confrontation and cross-examination of witnesses and privilege against self-incrimination). In *Gault*, police picked up the juvenile for making “lewd or indecent remarks” over the phone during prank telephone calls to his neighbor. *See id.* at 4 (stating charge against Gault). His mother later discovered his absence and, upon arriving at the station house to look for her son, was informed that there would be a hearing the next day. *See id.* (describing parents’ discovery of arrest). At the hearing in the judge’s chambers, the complainant was not present, the proceedings were not recorded and no witnesses were sworn in. *See id.* at 5 (describing lack of normal safeguards). During the hearing, Gault was questioned regarding the phone call, and then was taken back to the Detention Home. *See id.* at 6 (describing child’s detention). After being held for three or four days after his initial detainment, Gault was released without explanation. *See id.* (stating facts of case). At a second hearing, Gault was later committed to the State Industrial School until the age of twenty-one “unless sooner discharged by due process of law[.]” essentially a six year sentence. *See id.* at 7-8 (explaining sentence). An adult, at worst, would have suffered a fine of five to fifty dollars or up to two months in jail for the same offense. *See id.* at 9 (comparing adult and juvenile sentences for same offense).

77. *See id.* at 14-31 (outlining juvenile court goals of rehabilitating juvenile delinquents, but clarifying that these goals never came to fruition and condemning actual process that has resulted for procedural arbitrariness and lack of protection for juveniles).

Prior to *Gault*, the Supreme Court decided a similar case, *Kent v. United States*, 383 U.S. 541 (1966) and recognized the need for protections within the juvenile system; the Court decided that case on statutory, rather than constitutional grounds, thereby limiting its holding. *See Kent*, 383 U.S. at 556 (stating rationale for holding). Consequently, that case did not have the far-reaching effects of *Gault*, but did foreshadow the *Gault* decision. *See id.* (declining to address issues later tackled in *Gault*).

78. *Gault*, 387 U.S. at 13 (stressing importance of procedural rights for juveniles). The Court listed the procedural deficiencies of the juvenile courts and explained their roots in the juvenile justice reform movement of the early 1900s, however, the Court also explained that while the intentions of reformers were enlightened, the result was not the compassionate treatment desired. *See id.* at 14-17 (describing failure of juvenile courts). Additionally, the Court delineated the importance of procedural protections within the justice system and clarified that revisions through the addition of protections will not supplant any benefits to children, but will augment them. *See id.* at 19-27 (justifying procedural protections for juveniles).

the protection envisioned by the juvenile justice system's creators.⁷⁹ Consequently, the Court needed to implement procedural protections because "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court."⁸⁰

To remedy the "kangaroo courts," the decision in *Gault* greatly increased the rights of juveniles.⁸¹ Juveniles were granted the right to notice of the charges against them, the right to an attorney even if they could not afford one when their freedom may be curtailed and the right against self-incrimination.⁸²

Fare v. Michael C.,⁸³ decided in 1979, marks the Supreme Court's most recent word on the rights afforded juveniles during police interrogation.⁸⁴ In *Fare*, the Court reiterated and applied its "totality of the circumstances"

79. *See id.* at 18 (criticizing juvenile courts for their lack of procedural protection for juveniles and explaining that child status does not mean that one does not receive Constitutional protection).

80. *See id.* at 28 (finding procedural protections were needed for juveniles during custodial interrogation).

81. *See id.* at 30-31. (reiterating that Fourteenth Amendment Due Process is required during juvenile court adjudications of delinquency). *Gault* specifically limited the rights granted to adjudicatory proceedings and intentionally did not extend these rights to custodial interrogation. *See id.* at 31 (limiting holding to adjudication). Nevertheless, despite the fact that *Gault* specifically left open the question of whether the rule expounded applied to pre-trial procedures, most states interpreted *Gault* as extending the rights granted in *Miranda* to juveniles. *See* Thomas Grisso & Sam Manoogian, *Juveniles' Comprehension of Miranda Warnings*, in *NEW DIRECTIONS IN PSYCHOLEGAL RESEARCH* 127, 128 (Paul D. Lipsitt & Bruce Dennis Sales, eds. 1980) (discussing interpretation of *Gault* by states to extend *Miranda* rights, previously only granted to adults, to juveniles). For further discussion of *Miranda* and the procedural protections that it granted, see *supra* notes 40-49 and accompanying text.

82. *See Gault*, 387 U.S. at 31-59 (granting rights to juveniles including assistance of counsel, appellate review and transcript of proceedings, written notice of charge, allegations and date of hearing in time to prepare for proceeding).

83. 442 U.S. 707 (1979).

84. *See id.* at 728 (discussing juvenile's rights during custodial interrogation and applying totality of circumstances test). In *Fare*, during interrogation, the detained sixteen-year-old boy requested to speak to his probation officer. *See id.* at 710 (describing interrogation). This request was denied. *See id.* (describing isolation of juvenile). Police did offer to let him speak to an attorney, to which the boy replied "[h]ow I know you guys won't pull no police officer in and tell me he's an attorney?" *Id.* at 711.

At trial, the child's attorney argued that the boy's request for his probation officer was an invocation of his Fifth Amendment right to remain silent. *See id.* at 712-13 (describing attorney's defense strategy). The Supreme Court disagreed, holding that the child did not invoke his Fifth Amendment rights by requesting to speak to his probation officer. *See id.* (holding question of waiving right to remain silent is "one of fact to be determined on a case-by-case basis"). The Court explained that the right to counsel under *Miranda* is based on the unique position of an attorney as "protector of . . . legal rights." *See id.* at 719 (asserting attorney holds important position in society). Furthermore, unlike a parent, the probation officer is an employee of the state with obligations averse to the juvenile's best interests. *See id.* at 720 (explaining reasons probation officer differs from attorney). Probation officers are required to report offenses by the juvenile to the state, thus

test,⁸⁵ but declined by a 5-4 margin to extend *Miranda* beyond its existing bounds.⁸⁶ Nonetheless, the Court did note the crucial role that attorneys play in our legal system:

[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation . . . [T]he 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.⁸⁷

III. THREE APPROACHES DEvised TO ASSESS THE VALIDITY OF JUVENILES' WAIVER OF *MIRANDA*: THE IMPLEMENTATION OF *GAULT* BY THE STATES

While the *Gault* Court laid out the bare minimum constitutional requirements to protect juveniles during the custodial interrogation process, the states were free to implement the standard in their own ways, as long as they did not go below the minimum.⁸⁸ While some states retained the "totality of the circumstances," other states invoked the spirit of *Gault* to implement more creative plans.⁸⁹ These creative plans

creating a conflict of interest. *See id.* (clarifying rationale for denial of extension of *Miranda*).

85. *See id.* at 725 (applying totality of circumstances test). The Court stated that the waiver should be weighed in light of all the factors laid out implicitly in *Gault* including the child's age, experience, education, background, intelligence and whether he understood the warnings and the implications of waiving his rights. *See id.* (delineating factors for court to consider). Applying all of these factors, the Court concluded that the child's waiver of his rights was "knowing, intelligent, and voluntary" in light of the lack of evidence of coercion. *See id.* at 728 (holding rights were voluntarily waived).

86. *See id.* (declining to extend *Miranda* beyond its current boundaries). The Court, however, expressly assumed that *Miranda* applied in *Fare*. *See id.* at 717 ("[W]e assume without deciding that the *Miranda* principles were fully applicable to the present proceedings."). The Court then declined to say that a request for a probation officer was equivalent to a request for an attorney under *Miranda*. *See id.* at 728 (distinguishing roles of probation officer and attorney).

87. *Id.* at 719.

88. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."). Additionally, "a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." *Id.*

89. *See, e.g.,* COLO. REV. STAT. § 19-2-511 (2002) (implementing interested adult standard). While the three approaches discussed in this section represent the major ways the states implemented protections for juveniles in their *Miranda* waivers, other methods were implemented in conjunction with them in certain instances. Two examples of solutions devised by the states are videotaping of confessions and juvenile waiver forms. *See* Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 925-34 (1995) (discussing use of videotaped confessions and advocating their use); *see also* Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Mi-*

were intended to provide more protection to juveniles during interrogations.⁹⁰

A. The "Totality of the Circumstances" Approach

The totality of the circumstances, in the majority of jurisdictions, determines the validity of juveniles' waiver of their *Miranda* rights.⁹¹ In this

randa, and the Right to Counsel, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 118 (Thomas Grisso & Robert G. Schwartz eds., 2000) (discussing use of simplified waiver forms).

Juvenile waiver forms provide a standardized statement of *Miranda* in an easier to understand form so that the child is more likely to comprehend their rights. *See id.* (explaining simplified form for children). Two studies address whether juveniles' comprehension is improved by using simplified words, but neither study provides evidence that these forms aid juveniles' understanding. *See* A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 *SAN DIEGO L. REV.* 39, 54 (1970) (concluding there was no difference in understanding between standard *Miranda* warning and simplified form); *see also* Grisso, *Competence, supra* note 1, at 30 (citing S. Manoogian, *Factors Affecting Juveniles' Comprehension of Miranda Rights* (1978) (unpublished Ph.D. dissertation, St. Louis University, Missouri) (on file with author)).

Johnson & Hunt advocate the use of taped interrogations to secure juveniles constitutional rights. *See* Johnson & Hunt, *supra* note 23, at 32-33 (advocating electronic recording of interrogations). They state that the entire period of custodial questioning should be recorded, not simply the confession itself, in order to aid courts in determining the suspect's competence to waive *Miranda* and resolve any questions about the reliability of a defendant's statement. *See id.* at 33 (discussing positive aspects and arguments and counterarguments for proposal to videotape interrogations of juveniles); *see also* Feld, *supra* at 118 (discussing use of videotape in drunk driving cases and suggesting its application to juvenile confessions); Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?* J. CTR. FOR CHILD. & CTS. 151, 158 (1999) (promoting use of videotaped interrogations and confessions, but clarifying that care must be taken not to use biasing camera angles).

90. *See* Feld, *supra* note 89, at 117 (delineating states' rationales for interested adult rule).

91. *See generally* ALA. JUV. P. 11 (2002) (using totality of the circumstances test); *Ex parte* Whisenant, 466 So. 2d 1006 (Ala. 1985) (same); *State v. J.R.N.*, 861 P.2d 578 (Alaska 1993) (same); *State v. Scholtz*, 791 P.2d 1070 (Ariz. Ct. App. 1990) (same); *In re Bonnie H.*, 65 Cal. Rptr. 2d 513 (Cal. Ct. App. 1997) (same); *State v. S.L.W.*, 465 So. 2d 1231 (Fla. 1985) (same); *Riley v. State*, 226 S.E.2d 922 (Ga. 1976) (same); *State v. Doe*, 963 P.2d 392 (Idaho Ct. App. 1998) (same); *In re L.L.*, 693 N.E.2d 908 (Ill. App. Ct. 1998) (same); *State v. Nicholas S.*, 444 A.2d 373 (Me. 1982) (same); *McIntyre v. State*, 526 A.2d 30 (Md. 1987) (same); *State v. Scott*, 584 N.W.2d 412 (Minn. 1998) (same); *McGowan v. State*, 706 So. 2d 231 (Miss. 1997) (same); *In re A.D.R.*, 603 S.W.2d 575 (Mo. 1980) (same); *Elvik v. State*, 965 P.2d 281 (Nev. 1998) (same); *State v. Gibson*, 718 P.2d 759 (Or. Ct. App. 1985) (same); *State v. Lambert*, 705 A.2d 957 (R.I. 1997) (same); *In re Williams*, 217 S.E.2d 719 (S.C. 1975) (same); *State v. Caffrey*, 332 N.W.2d 269 (S.D. 1983) (same); *State v. Callahan*, 979 S.W.2d 577 (Tenn. 1998) (same); *Grogg v. Commonwealth* 371 S.E.2d 549 (Va. Ct. App. 1988) (same); *Therault v. State*, 223 N.W.2d 850 (Wis. 1974) (same); *Rubio v. State*, 939 P.2d 238 (Wyo. 1997) (same).

approach, courts weigh a variety of factors to determine whether the juvenile's waiver was "knowing, intelligent and voluntary."⁹²

Nine factors are generally considered in the totality standard: (1) age of the child; (2) education level; (3) the juvenile's knowledge of the "substance of the charge and nature of his right to consult with an attorney"; (4) whether the child was held incommunicado; (5) whether the child was "interrogated before or after formal charges had been filed"; (6) methods of interrogation; (7) length of interrogation; (8) whether the accused previously refused to give voluntary statements; and (9) whether the juvenile recanted his "extrajudicial statement at a later date."⁹³ Age is only one factor considered by the court and no single factor is controlling.⁹⁴ If, by balancing these factors, the court determines the statement was "knowing, intelligent and voluntary," then it is admissible against the defendant.⁹⁵

92. See, e.g., *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968) (restating standard set by Supreme Court in *Gault* that juveniles' waivers of *Miranda* must be "knowing, intelligent and voluntary").

93. See *id.* at 469 (listing factors considered in totality of circumstances standard).

94. See *id.* (expounding application of factors considered under totality of circumstances test). Commentators often point out that one deficiency of this test is that it is difficult to determine from court decisions how these factors are weighed. See Grisso & Manoogian, *supra* note 81, at 130 (noting "judicial assumptions regarding any single variable . . . as an index of competence[,] how much weight was given to each factor and "which [factors] were viewed as critical to the conclusion" is "difficult to discern from . . . case law").

95. See *West*, 399 F.2d at 469-70 (applying totality test to facts of case to find confession could be introduced at trial). Legal commentators have criticized this approach for a variety of reasons. Their primary concerns are: (1) it leaves too much discretion to judges; (2) it only protects juveniles retrospectively; (3) police have no clear rule to follow; (4) courts are overly conservative in its application; and (5) factors are not applied consistently. See Schlam, *supra* note 89, at 912-14 (listing concerns such as substantial discretion of judges, courts conservative application and failure to provide guidance for police); Penelope Alyssa Brobst, Note, *The Court Giveth and the Court Taketh Away: State v. Fernandez—Returning Louisiana's Children to the Adult Standard*, 60 LA. L. REV. 605, 623 (2000) (noting unbridled discretion of judges); David T. Huang, Note, *Less than Unequal Footing: State Courts' Per Se Rules for Juveniles Waivers During Interrogations and the Case for their Implementation*, 86 CORNELL L. REV. 437, 448-49 (2001) (condemning totality test for creating speculation among police about admissibility of statements and only protecting juveniles retrospectively); Lisa M. Krzewinski, Note, *But I Didn't Do it: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 370-71 (2002) (voicing problems including only protecting juveniles retrospectively and inconsistency of application); Elizabeth Maykut, Note, *Who is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1355-56 (1994) (expressing concern over lack of guidance for police and unfettered discretion of judges); Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1377-78 (2000) (criticizing inflexible application of *Fare* test).

B. *The Per Se Approach or "Interested Adult" Standard: A Creative Solution*

While states must provide the minimal amount of protection mandated by the Constitution, they are free to provide more protection.⁹⁶ As an attempt to provide this additional protection to minors during custodial interrogation, some states have implemented "per se" rules.⁹⁷ States using this formula, automatically exclude any statement made by a juvenile without an opportunity to consult with an "interested adult," such as a parent, close family member or attorney.⁹⁸ These states believe that the

96. See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."). Further, "a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." *Id.* (citations omitted); see also *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (reiterating standard set in *Hass*).

97. At least thirteen states have adopted some form of the per se approach. See, e.g., COLO. REV. STAT. § 19-2-511 (2002) (adopting per se approach); CONN. GEN. STAT. § 46b-137 (2002) (same); IND. CODE § 31-32-5-1 (2002) (same); IOWA CODE §§ 232.11, 232.45 (2002) (same); MONT. CODE ANN. § 41-5-331 (1999) (same); N.M. STAT. ANN. § 32A-2-14 (Mitchie 1999) (same); N.C. GEN. STAT. § 7A-595 (2002) (same); OKLA. STAT. TIT. 10, §7303-3.1 (2002) (same); TEX. FAM. CODE ANN. §§ 51.09-51.10 (Vernon 2002) (same); W. VA. CODE § 49-5-2(1) (2002) (same); see also generally *In re Doe*, 978 P.2d 684, 686 (Haw. 1999) (same); *Commonwealth v. A Juvenile*, 449 N.E.2d 654 (Ma. 1983) (same); *In re ETC*, 449 A.2d 937 (Vt. 1982) (same).

98. See *Feld*, *supra* note 89, at 118-19 (outlining varying ways in which states apply interested adult rule). Some states mandate that law enforcement officials give juveniles the opportunity to consult with an interested adult, inform both parent and child of the child's *Miranda* rights and that the adult and child consent to the waiver of the child's rights. See *id.* at 117 (reviewing differences among states' interested adult standards). Other states add the additional requirement that the adult be present for questioning. See *id.* (differentiating between interested adult rules adopted by states). Some states have a bifurcated system where children below fourteen must consult with an interested adult, but children above that age need only be afforded the opportunity to consult. See *id.* at 118 (discussing differences between states' interested adult standards). Compare CONN. GEN. STAT. § 46b-137 (requiring presence of parent or guardian only), with W. VA. CODE § 49-5-2 (requiring presence of counsel or parent). Legal commentators have also voiced concerns regarding this approach. Objections include: (1) it may allow guilty persons to go free; (2) it increases uncertainty about whether the waiver will be admissible in court; (3) it is inflexible; (4) it may increase collateral litigation; (5) it does not allow judges to consider the interests of society; (6) it is too stringent in cases of older, more mature juveniles; (7) it hampers police investigations; (8) it still requires discretion of the court in deciding who should be an interested adult; and (9) it is too cumbersome or costly. See, e.g., Schlam, *supra* note 89, at 917-23 (noting problems with interested adult approach including failure to adequately consider interest of society in protecting itself from juvenile crime and parent's incompetence in advising their children during interrogation); see also Brobst, *supra* note 95, at 625-27 (voicing concerns regarding increase of uncertainty about whether waiver is valid, and increased pressures on child created by parents' presence); McGuire, *supra* note 95, at 1380 (expressing concern over unclear expression of who qualifies as interested adult); Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 KAN. L. REV. 1035, 1076-77 (1999) (criticizing interested adult rule for

adult could act as an advisor to the child and reduce coercive pressures of the interrogation atmosphere.⁹⁹

C. *Two-Tiered Rules: The Minority Approach*

A minority of courts have adopted a two-tiered scheme, sometimes referred to as “the rule of fourteen.”¹⁰⁰ Under this bifurcated plan, states divide juveniles into two groups by age, with children below a specified age receiving more protection than those above that age.¹⁰¹ If the child is below the specified age, usually fourteen, any statement that he or she has made is inadmissible per se unless the child has had the opportunity to consult with an “interested adult.”¹⁰² Children above the specified age either undergo the totality-balancing test or the prosecution must overcome a presumption that the confession was involuntary.¹⁰³ Under the latter approach, the prosecution must demonstrate by a preponderance of the evidence that the confession was not coerced.¹⁰⁴

IV. PSYCHOLOGICAL RESEARCH: EMPIRICAL STUDIES RELATING TO THE VALIDITY OF JUVENILES’ *MIRANDA* WAIVERS

If we accept adult interrogation procedures as the gold standard for comparison, one would expect that if *Miranda* procedures hold equal meaning for juveniles, they would result in similar rates of utilization and waiver of rights for both groups.¹⁰⁵ In other words, if juveniles’ competence to waive their rights is comparable to that of adults, we would expect to see similar rates of utilization and waiver of rights by adults and juveniles. Nevertheless, research demonstrates that compared to adults, juveniles rarely exercise the constitutional rights conferred upon them by

preventing juveniles from confessing and focusing process on will of interested adult).

99. See Feld, *supra* note 89, at 117 (delineating states’ rationales for interested adult rule). Other rationales have included that the interested adult rule will: [m]itigate the dangers of untrustworthiness, reduce coercive influences . . . provide an independent witness who can testify about any coercive practices that police used . . . assure the accuracy of any statements obtained, involve parents in the process, . . . ensure that police fully advise and a juvenile Actually understand those advisories [sic], and relieve police of the burden of making judgments about a youth’s competency.

Id.

100. See, e.g., MONT. CODE ANN. § 41-5-331 (2002) (providing example of two-tiered approach).

101. For a further discussion of the implementation of the interested adult standard, see *supra* notes 96-99 and accompanying text.

102. See, e.g., MONT. CODE ANN. § 41-5-331 (providing example of statute requiring that child confer with interested adult when below specified age).

103. See, e.g., N.C. GEN. STAT. § 7A-595 (2002) (invoking two-tiered rule).

104. See *id.* (providing example of interested adult rule).

105. See THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS 106 (1981) (comparing juveniles’ and adults’ levels of *Miranda* comprehension).

the Court in *Gault*.¹⁰⁶ In fact, children have only availed themselves of their right to remain silent in nine to eleven percent of cases, while adults have avoided self-incrimination in forty percent of cases.¹⁰⁷

This finding begs the question: Is there something unique to juveniles that might affect their competency to waive *Miranda* under existing procedures and, if so, what procedures might better ensure that juveniles' waivers are "knowing, intelligent and voluntary?"¹⁰⁸ The psychological literature may offer some answers.

A. *Juveniles Lack of Comprehension of Miranda*

Children are not born with the ability to reason logically, use abstract concepts, weigh consequences of actions and evaluate hypothetical situations.¹⁰⁹ All of these skills, which are needed for effective decision-making and comprehension, continue to develop throughout early adolescence.¹¹⁰ Nevertheless, by age fifteen, children have acquired basic intellectual abilities akin to those of adults.¹¹¹ In fact, researchers have found

106. See Thomas Grisso & C. Pomiciter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 339 (1977) (demonstrating enormous disparity between adults' and juveniles' utilization of *Miranda* rights).

107. See *id.* at 339 (comparing adult and juvenile rates of *Miranda* waiver). Younger juveniles are even less likely to exercise their rights. See *id.* (stating that younger children are less likely to assert their rights than older children or adults).

While much of this research was performed during the late 1970s, more recent research has confirmed that Grisso's results hold true for adolescents today. See Naomi E. Goldstein et al., Risk Factors for False Confessions in Adolescent Offenders, Address at the European Association of Psychology and Law Conference, Lisbon, Portugal (June 2001) (paper on file with author) (recreating and building upon Grisso's original research from 1970s and concluding that "adolescent offenders' *Miranda* comprehension in the early 21st century is similar to the levels of understanding of delinquent boys in 1970s. Despite speculation that youth are more knowledgeable about police interactions and *Miranda* rights than children . . . three decades ago, this research suggests . . . children's *Miranda* comprehension has not significantly improved").

108. See *Miranda v. Arizona*, 384 U.S. 436, 498-99 (1966) (establishing knowing, intelligent and voluntary as standard for evaluation of validity of waiver of *Miranda* rights).

109. See Grisso, *Competence*, *supra* note 1, at 18 (asserting that problem solving abilities and formal reasoning continue to develop throughout adolescence, for example, one study reviewed by Grisso demonstrated that older adolescents were more likely than younger adolescents to think strategically in hypothetical legal cases).

110. See *id.* (examining development of cognitive capacities).

111. See *id.* (reviewing literature on cognitive development of adolescents and concluding that "at least by age 15 adolescent-adult differences in cognitive capacities to make choices are minimal" and attributing these differences to "differences in motivation, in functioning under stress, and in individual differences in rates of cognitive development"). But see Steinberg & Schwartz, *supra* note 1, at 25 (stating juvenile's cognitive abilities are like those of adults by age 17).

that their ability to comprehend *Miranda* rights as compared to adults plateaus around the same time.¹¹²

Nevertheless, simple understanding of the rights themselves is not the only component of a competent waiver of *Miranda*.¹¹³ Understanding the meaning of the rights is only one element of a knowing, intelligent and voluntary waiver.¹¹⁴ Juveniles also need to appreciate the significance of their rights in the legal context.¹¹⁵

Miranda warnings advise suspects that they have options, but knowledge of these options is meaningless without an understanding of their function.¹¹⁶ One study examining juveniles found that juveniles often have misconceptions about the function and significance of *Miranda* rights.¹¹⁷ Compared to both adults with and without experience in the judicial system, juveniles were significantly less likely to understand the significance and function of their rights.¹¹⁸ Consequently, they were less competent to waive both the right to remain silent and the right to counsel.¹¹⁹

112. See GRISSE, *supra* note 105, at 106 (“*Miranda* scores at juvenile ages increase through the 14-year-old group, beyond which mean scores do not increase appreciably with successive age groups into adult years.”). Because this Note is arguing that protections for minors be increased so that their constitutional rights have meaning equivalent to those of adults, the appropriate comparison group for the purposes of this Note is an adult population. Nevertheless, other research has evaluated juveniles against an absolute standard. See *id.* at 88 (comparing juveniles’ comprehension of *Miranda* to absolute standard and demonstrating that when this slightly different question is asked, children fare much worse).

113. See *id.* at 44-45 (asserting that necessary components for valid waiver include juveniles’ comprehension of their rights, juveniles’ problem solving capacity and their beliefs about legal context and role these rights play in legal arena).

114. See *id.* at 109 (explaining informing juvenile suspects of *Miranda* rights themselves is not sufficient for “knowing, intelligent and voluntary” waiver of rights and stating that “to know one has choices is of limited value if one does not also have an understanding of the significance and function of those choices within the legal system”).

115. See *id.* at 109-10 (clarifying that “knowing, intelligent and voluntary” waiver requires understanding of function of rights within legal process and defining this component with two subparts: (1) “juveniles’ expectancies about the personal consequences of waiving or asserting *Miranda* rights” and (2) “juveniles’ perceptions of the intended functions of the rights to silence and legal counsel”).

116. See *id.* at 109 (differentiating between knowledge of *Miranda* rights and understanding their function within legal process).

117. See *id.* at 128 (explaining finding that juveniles misunderstand function and significance of their *Miranda* rights is especially true for those with IQ scores below 90).

118. See *id.* (finding that only exception to this rule was juveniles with numerous contacts with legal system, defined as juveniles “referred for felony charges three or more times” and explaining this group understood their rights as well as adults who had no previous personal contact with legal system).

119. See *id.* (concluding “juveniles’ competence to waive their rights to silence and counsel is seriously diminished by their inferior understanding of the function and significance of those rights”).

For example, nearly one-third of juveniles endorsed the belief that attorneys defend the innocent, but not the guilty.¹²⁰ With respect to their right to silence, juveniles sixteen and under consistently scored poorly when compared to either an absolute standard or to their adult counterparts.¹²¹ Nearly a third of juveniles thought that police could try to persuade them to give up their right to silence and over half believed that judges could revoke this right even if they had previously asserted it.¹²² Further, nearly two-thirds of juveniles did not adequately understand that they could not be punished for asserting their rights.¹²³

Another key component of understanding the function of *Miranda* rights is understanding the concept of a right itself.¹²⁴ Children, unlike adults, often fail to think of a right as an entitlement that cannot be revoked.¹²⁵ Unlike adults, delinquent juveniles believed a right was some-

120. *See id.* at 129 (finding one-third of children “with few or no prior felony referrals believed that defense attorneys defend the interests of the innocent but not the guilty” and suggesting one solution would be to allow the public defenders themselves to explain their role prior to interrogation).

121. *See id.* at 123 (finding adjudicated juveniles below age 16 did not understand their rights adequately compared to those 17 and above, while sixteen year olds understanding was inadequate compared to those over age 20 and demonstrating their understanding is poor compared to absolute standard as evidenced by the large percentage of inadequate responses).

122. *See id.* (revealing only 36.7 percent of juveniles did not understand that police could not revoke their right to silence and 55.3 percent did not understand judges could not revoke this right).

123. *See id.* (demonstrating only 33.2 percent of juveniles adequately understood they could not be penalized for asserting their rights).

124. *See* Grisso, *Competence*, *supra* note 1, at 10-11 (discussing children’s conception of right). Psychological theory indicates that there are several ways one might conceive of a right. Those with a preconventional view believe that a right is controlled by authority figures and a person may exercise this right only when someone in control allows them. *See id.* (explaining preconventional view of rights). The more advanced conventional view sees a right as a social compact for the collective benefit of the group. *See id.* (explaining conventional view of rights). Generally, research demonstrates that preadolescents view rights in a preconventional way, which during adolescence gives way to conventional views. *See id.* (concluding at least one third of juveniles have “conventional” view of right, as controlled by authority figures, until around age fifteen or sixteen; it is only later that juveniles develop adult-like conceptions that right is agreement between members of society for their common benefit). A third, more advanced or complex view of a right is also possible. *See id.* (explaining third conception of rights). Under this conceptualization, called the postconventional view, a right is seen as derived from universal principles, however, research shows that even few adults develop a postconventional conceptualization of a right. *See id.* (clarifying that people rarely hold most complex view of right).

125. *See* Emily Buss, *The Role of Lawyer’s in Promoting Juvenile’s Competence as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 244 (Thomas Grisso & Robert G. Schwartz eds., 2000) (stating children often do not understand that their rights are “within their exclusive control to assert or waive”); *see also* Grisso, *supra* note 105, at 130 (finding majority of juveniles as well as adults “view[ed] a right as an allowance which is bestowed by and can therefore be revoked by the authorities” and explaining the “majority in this study” took this view); Thomas Grisso, *What We Know About Youth’s Capacities*, in *YOUTH ON TRIAL: A*

thing they were allowed to do, not an entitlement guaranteed by social contract.¹²⁶ To children, rights are not absolute but, instead, are doled out by authority figures that may arbitrarily retract them at their discretion.¹²⁷

For example, several studies have found that most adolescents between fifteen and sixteen years old did not conceive of their rights as an entitlement.¹²⁸ Further, children did not interpret attempts at coercion as a violation of their rights, but rather a change in the rules by the person in authority who granted the rights.¹²⁹ This research leads to the conclusion that minors who do not believe that *Miranda* rights are meaningful or who have learned through experience that they are not significant, are unlikely to assert these rights during interrogation.¹³⁰

Even after children have acquired adult-like cognitive abilities, they may not consistently employ these skills because of other incomplete developmental processes.¹³¹ Under stress or in new situations, both of which

DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 148-49 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Grisso, *Capacities*] (finding children believe their rights are retractable).

126. See Grisso, *Competence*, *supra* note 1, at 10-11 (reviewing literature on adolescents' understanding of abstract concept of right and concluding that juveniles conceive rights as controlled by authority rather than as legal entitlement).

127. See Grisso, *supra* note 105, at 130 (finding juveniles and adults believe their rights are bestowed upon them by authority figures and, therefore, may be revoked by authorities); see also Buss, *supra* note 125, at 259-60 (stating children believe adults may revoke their constitutional rights during interrogation and explaining that this may be tied to juveniles' views of adults' authority over them); Grisso, *Capacities*, *supra* note 125, at 148-49 (reviewing research illustrating that juveniles believe their rights are conditional and not absolute); Grisso *Competence*, *supra* note 1, at 10-11 (reviewing literature finding that children believe that authorities may revoke their rights).

128. See Grisso, *Capacities*, *supra* note 125, at 148-49 (discussing research showing juveniles age fifteen to sixteen believed their rights were irrevocable and explaining most juveniles, at this age, were likely to conceive of right as something one is "allowed to do"). *But see id.* (comparing Melton's research demonstrating by age fourteen children endorsed belief that rights were irrevocable entitlements, but pointing out that Melton inappropriately used sample from general population of adolescents rather than delinquent adolescents to whom he wished to generalize his results); see also Grisso, *Competence*, *supra* note 1, at 310-11 (comparing Read's and Melton's research on tendency of adolescents to misunderstand concept of rights and believe that their rights are revocable by authority figures and concluding that Read's findings were more reliable due to superior design using juvenile delinquent population, which was the group about which both researchers were trying to draw conclusions).

129. See Buss, *supra* note 125, at 245 (discussing finding that attempt at coercion of confession is not interpreted as violation of rights by juvenile but rather as "a change in, or explication of, the rules, which is perceived as coming straight from the rulemaker").

130. See *id.* (explaining children may come to believe rights are not meaningful through experience with courts).

131. See Grisso, *Competence*, *supra* note 1, at 18 (discussing fact that juveniles do not utilize their newly attained skills uniformly across situations and explaining

occur during interrogation, invoking these skills is even less likely.¹³² Further, it is also possible that children apply these abilities inconsistently because they lack experience, which would inform an older individual of the appropriate times to use these abilities.¹³³ Thus, while they have the raw ability to use these skills, this deficiency leaves them bereft of the underlying fund of information that would inform the decision of an older individual.¹³⁴

B. *The Failures of the Interested Adult*

Since *Haley*, the Supreme Court has not mandated an interested adult's presence, but has suggested that the presence of an interested adult would aid a juvenile during custodial interrogations.¹³⁵ Numerous law review articles also recommend the adoption of the per se or "interested adult" rule, often criticizing the "totality of the circumstances"

that exhibiting effective use of these skills is less likely in new, ambiguous or stressful situations).

132. *See id.* (explaining that juveniles are less likely to use new skills uniformly in novel or demanding situations); Grisso, *Capacities*, *supra* note 125, at 158-59 (reviewing literature on juvenile's cognitive abilities and effect of emotion on their capacity to reason as compared to adults).

133. *See* Steinberg & Schwartz, *supra* note 1, at 26 (explaining that prior experience may account for differences between adults' and juveniles' use of skills).

134. *See id.* (explaining adults' experience may aid them in making decisions). One final characteristic of juvenile delinquents may hinder their competence to waive *Miranda*. Among the juvenile delinquent population there is a higher incidence of mental illness, cognitive deficits, learning disabilities and emotional disorders that hinder juvenile development. Goldstein et al., *supra* note 107, at 5-6 ("[A]pproximately 27% of males and more than 80% of females in juvenile facilities meet current diagnostic criteria for mental disorders, even when conduct disorder is excluded."). This means that while many youths develop their cognitive abilities by the age of fourteen or fifteen, others lag behind and will not obtain these skills until later adolescence. *See* Bonnie & Grisso, *supra* note 3, at 87 (discussing lack of understanding, even among psychologists, of effects of mental illness on perceptions of juvenile adjudicative competence and explaining mental illnesses among juveniles may not be detected due to differences in way same disorders manifest themselves in adults). *See generally* R. Otto et al., *Prevalence of Mental Disorders Among Youth in the Juvenile Justice System*, in *RESPONDING TO THE MENTAL HEALTH NEEDS OF YOUTH IN THE JUVENILE JUSTICE SYSTEM* 7-48 (J. Cocozza ed., 1992) (examining frequencies of mental disorders among juvenile delinquents).

135. *See, e.g., In re Gault*, 387 U.S. 1, 56 (1967) (suggesting presence of parents during interrogation would be beneficial to child); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (implying that children need benefit of parent or counsel in order to assert their rights).

test.¹³⁶ Some states have also legislatively or judicially required the presence of an interested adult for juveniles' statements to be valid at trial.¹³⁷

The expected benefits of the interested adult rule are twofold. Proponents of this approach expect that, during interrogation, an adult should protect the interests of the child by (1) helping him or her understand and weigh the option of waiving rights and (2) decreasing the coercive atmosphere of the interrogation.¹³⁸ Advocates of the interested adult rule believe that by having a parent or other interested adult present, the child will feel less coerced to speak to the police and will either exercise his or her rights or validly waive them more often.¹³⁹

Psychological research calls into question whether this standard actually achieves the desired purpose.¹⁴⁰ In fact, for many years, psychologists have recognized that the presence of an interested adult may not help the child and may actually hurt the child's chances of understanding and asserting his or her rights.¹⁴¹ In fact, research conducted shortly after the creation of the interested adult rule found a trend toward a decrease in the assertion of rights when parents were present.¹⁴²

136. See, e.g., Raymond Chao, Note, *Mirandizing Kids: Not as Simple as A-B-C*, 21 WHITTIER L. REV. 521, 547 (2000) (advocating interested adult standard); Huang, *supra* note 95, at 473-76 (supporting per se rules); Krzewinski, *supra* note 95, at 370-83 (advocating abandonment of totality test in favor of interested adult or per se rule); McGuire, *supra* note 95, at 1383-86 (supporting interested adult rule). *But see* Brobst, *supra* note 95, at 634 (advocating two-tiered approach and criticizing totality standard); Meyer, *supra* note 98, at 1035 (advocating totality of circumstances approach).

137. For a listing of states that have invoked the interested adult standard for evaluation of juveniles' waiver of *Miranda* rights and explanation of that standard, see *supra* notes 96-99 and accompanying text.

138. See Feld, *supra* note 89, at 117 (delineating states' rationales for interested adult rule).

139. See *id.* at 117 (articulating rationale for interested adult rule). Other rationales have included that the interested adult rule will:

[m]itigate the dangers of untrustworthiness, reduce coercive influences, . . . provide an independent witness who can testify about any coercive practices that police used, . . . assure the accuracy of any statements obtained, involve parents in the process, . . . ensure that police fully advise and a juvenile actually understand those advisories [sic], and relieve police of the burden of making judgments about a youth's competency.

Id. (outlining reasons for interested adult standard).

140. See, e.g., Grisso, *supra* note 105, at 161-90 (finding interested adult rule does not aid children in exercising their rights).

141. See Grisso & Pomiciter, *supra* note 106, at 340 (finding parental presence did not increase frequency of children's assertion of rights to same level found with adults).

142. See *id.* at 340-41 (citing P. Keith-Spiegel, *Children's Rights as Participants in Research*, in CHILDREN'S RIGHTS AND THE MENTAL HEALTH SYSTEM 53-81 (G.P. Koocher ed., 1976) for proposition that parents actually contribute to coercive atmosphere and explaining that their study found that "court monitoring and parent advice during interrogation did not significantly alter [past] patterns" of juveniles consistently waiving their rights).

While it may seem counterintuitive, psychologist Thomas Grisso found that parents do not help, and sometimes hurt, children's chances of asserting their rights or validly waiving them.¹⁴³ Researchers have asked parents what advice they would give their children in hypothetical interrogation situations.¹⁴⁴ The majority of parents felt that children should not be able to remain silent, as their *Miranda* rights would allow.¹⁴⁵ Grisso inferred that 55-60 percent of the parents who opposed juveniles withholding information would instruct their children to cooperate with police.¹⁴⁶ Only about half of parents indicated they would advise their children to exercise their right to an attorney.¹⁴⁷

Parental advice is even worse in actual interrogation situations.¹⁴⁸ In a related study, a juvenile court tested parents' reactions under actual interrogation conditions.¹⁴⁹ Parents generally offered no advice to their

143. See GRISSE, *supra* note 105, at 168-90 (describing study finding that majority of time parents offer no advice to their children during interrogation, or instruct their children to speak to police and not to obtain attorney).

144. See *id.* at 171-72 (describing directions given to parents and form used to query parents as to what type of advice they would give if their child were interrogated).

145. See *id.* at 175 (discussing results of study on parents' attitudes toward juveniles' *Miranda* rights). Parents read a statement asserting that children "should be allowed to withhold information from police when suspected of a crime." See *id.* (describing study methodology). In sample one, 53.6 percent of parents disagreed with this statement, 25.5 percent were neutral and 20.9 percent agreed. See *id.* (finding parents endorsed belief that children cannot withhold information from police). In sample two, 55.0 percent disagreed, 25.8 percent were neutral and 19.2 percent agreed with the statement. See *id.* (replicating study with second sample).

146. See *id.* at 180 (inferring that parents who believe their children should not withhold information from police would also advise their children to speak with police). Overall, one third of parents thought their child should cooperate, while two-thirds believed their child should remain silent. See *id.* (discussing findings of study). But, despite their endorsement of their child's silence, Grisso found evidence that many parents only intended temporary silence to avoid an inaccurate statement and that they expected their child to eventually speak with the police. See *id.* at 182 (summarizing studies about parents' reasoning and advice to their children during interrogation).

Researchers categorized the rationale of the one-third of parents that gave advice to speak to the police about their involvement. See *id.* at 180-81 (explaining and giving examples of categories). The percentage of parents in sample one and sample two, respectively, giving the following reasons were: (1) moralistic (40.5, 27.8); (2) responsibility (18.3, 21.1); (3) strategic (37.7, 46.7); (4) other (3.2, 3.3). See *id.* at 180 (presenting results of categorization of parents' reasons for advising children to speak with police).

147. See *id.* at 181 (finding parent's advised children to obtain lawyer in 57 percent and 58 percent of cases for samples one and two, respectively, and finding all parents who advised obtaining attorney also advised silence).

148. See *id.* at 183 (studying parents and their children under actual interrogation conditions).

149. See *id.* (examining actual interrogation conditions). The juvenile court designed and conducted the study. See *id.* (explaining methodology of study). Grisso aided court personnel with the statistics and published the results. See *id.* (describing process for obtaining data). In this study, the court monitored and

children or did not even speak with their children.¹⁵⁰ When parents did speak with their children during interrogation, they recommended waiver of rights.¹⁵¹ Further, parents often failed to seek additional information for their children or to ask to speak with their children privately.¹⁵²

These results imply that, in interrogation situations, parents frequently fail to provide the advice and assistance envisioned by states when they implemented interested adult rules.¹⁵³ Parents do not offer the advice and counsel the Supreme Court thought would protect children from their own immaturity.¹⁵⁴ In fact, Grisso's research revealed that parental presence does not serve as a substitute for representation.¹⁵⁵

While parents offer no advice in many situations, they often put additional pressure on their children during interrogation.¹⁵⁶ Children may feel pressured to make up stories in front of their parents or, even worse, parents may put direct pressure on them to confess.¹⁵⁷ Parents may co-

recorded parent-child communications during the interrogation process. *See id.* (stating methods for data collection). In this jurisdiction, parents must be notified, and decisions regarding the minor's rights must be recorded before the child can be questioned. *See id.* at 184 (recounting jurisdiction's requirements for juveniles' waiver of *Miranda*).

150. *See id.* at 185-86 (finding in 71.3% of cases, parents told child nothing about his or her right to silence and in 81.3% of cases, parents told him or her nothing about his or her right to attorney).

151. *See id.* (discussing finding that in 16.7% of cases, parent told child to waive his or her right to silence and in 11.3% of cases parent told child to waive his or her right to representation). In only 5.6% of cases, the parent advised the child not to talk and in 2.3% of cases, parents advised the child to assert their right to an attorney. *See id.* (recounting paucity of cases in which parents advise children to assert their rights). Finally, in 66.2% of cases parents did not communicate at all with their child. *See id.* (revealing that majority of interrogations occur without parents communicating anything to child).

152. *See id.* (asserting that parents generally do not ask for additional information or private consultation with their child and providing example that only 4.4% of parents asked court officer for more information and only 8.7% asked to speak to their child privately).

153. *See, e.g.,* *Haley v. Ohio*, 332 U.S. 596, 596 (1948) (suggesting child needs help of trusted adult such as parent during interrogation).

154. *See Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962) (stating children need protection of parents during interrogation due to their immaturity).

155. *See* GRISSE, *supra* note 105, at 190 (expressing agreement with court's decision in *K.E.S. v. State*, 216 S.E.2d 670, 673 (Ga. 1975), that "we cannot equate physical presence of a parent with meaningful representation").

156. *See* GRISSE, *supra* note 105, at 167 (stating that parents may put additional pressure on their children during interrogation).

157. *See* Lawrence Schlam, *Police Interrogation and "Self" Incrimination of Children by Parents: A Problem Not Yet Solved*, 7 CLEARINGHOUSE REV. 619, 620 (1973) (stating children may feel pressured by parent's presence); *see also* GRISSE, *supra* note 105, at 167 (citing P. Piersma et al., *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, 20 ST. LOUIS L. J. 1, 1-99 (1975), *K.E.S.*, 216 S.E.2d at 670, 673, and *In re Carter*, 318 A.2d 269, 272 (1974)) (stating that parents may coerce children to confess during interrogation, which increases pressure on child, or may even have interests averse to child's needs). Grisso also notes that avoidance of attorney fees may be an additional motive for parents to assert pressure on

erce their children to make a statement because of embarrassment at being called to the police station, anger with their children or a desire for their children to be truthful or learn a lesson.¹⁵⁸ Further, adult status does not make one immune to coercion.¹⁵⁹ Parents themselves may feel intimidated by the atmosphere of the interrogation and, consequently, exert pressure on their children.¹⁶⁰

While the underlying rationale for the interested adult standard is that a parent understands *Miranda* rights and, therefore, can explain the rights to their child, this may not be the case.¹⁶¹ Studies of adult comprehension of *Miranda* have illustrated that, while faring better than their adolescent counterparts, adult comprehension was far from perfect.¹⁶² Without a reasonable understanding of these rights, parents cannot provide meaningful counsel to their children.

C. Suggestibility and Compliance Among Adolescents

Children's compliance¹⁶³ and suggestibility¹⁶⁴ also work against them in interrogation.¹⁶⁵ Psychological research demonstrates that children are more compliant and suggestible than adults.¹⁶⁶ Children are not only more likely to change their stories under pressure, but stressful situations

their children. *See id.* (describing parental motivations for encouraging child's confession).

158. *See* Grisso & Pomiciter, *supra* note 106, at 340 (listing parents' reasons for forcing their children to confess including anger, teaching obedience to authority, emphasizing responsibility for one's actions or belief that confession will result in leniency).

159. *See* Schlam, *supra* note 157, at 620 (stating parents themselves may feel pressured when their child is interrogated).

160. *See id.* (discussing fact that parents may provide additional pressures because they directly compel child to cooperate, therefore, child may feel need to make up stories in front of parent or parent may even feel coerced themselves).

161. *See* GRISSE, *supra* note 105, at 98-101 (demonstrating adults' comprehension of *Miranda* may be inadequate).

162. *See id.* at 98-105 (describing study demonstrating adults' poor *Miranda* comprehension).

163. Compliance is "a subject's tendency to go along with instructions and directions without actual acceptance of the premises." Johnson & Hunt, *supra* note 23, at 24 (defining compliance as used in psychological literature).

164. Suggestibility is "how a subject's memory and beliefs are influenced and manipulated during interrogation." *Id.* (defining suggestibility as used in psychological literature).

165. *See* Gerald P. Koocher, *Different Lenses: Psycho-legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992) (stating that children comply with desires of police during interrogation because they are socialized to follow directions of authority figures); *see also* Goldstein et al., *supra* note 107, at 9 (stating juveniles are more easily coerced due to suggestibility).

166. *See* Goldstein et al., *supra* note 107, at 9 ("[J]uveniles are also more suggestible [than adults] and, therefore, may be more easily coerced by police during interrogations.") (citations omitted).

may actually change their perception of an event.¹⁶⁷ This means that they may come to believe a distorted version of the events if enough coercive pressure is placed upon them.¹⁶⁸

Some commentators have linked this suggestibility and compliance in children with extreme stress such as the pressure exerted during interrogation.¹⁶⁹ Additionally, this phenomenon is particularly pronounced with children and younger adolescents.¹⁷⁰ Delinquent adolescents are particularly susceptible to these effects when questions are repeated or negative feedback is given by an authority figure such as a police officer during an interrogation.¹⁷¹ This effect is present even when IQ and memory scores are statistically controlled, revealing that age is a determining factor in the

167. See Johnson & Hunt, *supra* note 23, at 29, 32 (reviewing literature on ability of coercive police techniques including implanting leading information in questions and forcing yes/no answers to cause false confessions and also discussing fact that juveniles are more susceptible to these techniques, which may cause implantation of false information into juvenile's account of events). When pressed by adult disapproval of their version of events, children will change their story and are more likely than adults to incorporate false or leading information into a new story even without coercive pressure. See *id.* at 29 (citing G. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY* (1992) for proposition that when juveniles are repeatedly asked leading questions they are more likely to submit to pressure than adults). For example, in several studies, children were found to incorporate facts known to be false into their story even without coercive pressure. This occurs by the adult simply infusing the question with misleading information. See Grisso, *Competence*, *supra* note 1, at 16 (discussing that "younger adolescents were significantly more likely than adults to change their stories"); see also Rachel Sutherland & Harlene Hayne, *Age-Related Changes in the Misinformation Effect*, 79 *J. EXPERIMENTAL CHILD PSYCHOL.* 338, 338-404 (2001) (studying effect of infusing question with misleading information and concluding that children are more likely than adults to incorporate this information into their version of events even though information infused was false).

168. See Johnson & Hunt, *supra* note 23, at 29 (showing that use of coercive techniques may change person's perception of event, even if new version is actually false, and finding that children are more likely to be susceptible to interrogative pressure).

169. See Goldstein et al., *supra* note 107, at 3 (stating that "previous research suggests that stress is related to suggestibility").

170. See *id.* ("[T]he risk [of increased suggestibility] is particularly pronounced with younger adolescents.").

171. See G. Richardson et al., *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 *J. ADOLESCENCE* 211, 215 (1995) ("The present study indicates that an adolescent forensic sample . . . may be inherently suggestible. This has implication [sic] for police interviewing techniques, in that interviewers should be careful not to place adolescent witnesses and suspects under undue pressure by criticizing their answers."). Further, "even repeating the same questions on a number of occasions may act as negative feedback and result in subjects altering their answers merely to agree with the interviewer." *Id.* Additional research has specifically demonstrated the ability of the police tactics, described earlier in this Note, to produce confessions from innocent suspects. See Johnson & Hunt, *supra* note 23, at 24 (reviewing H. Wakefield & R. Underwager, *Coerced or Nonvoluntary Confessions*, 16 *BEHAV. SCI. & L.* 423-40 (1998) to demonstrate that techniques advocated by most widely used police manual can induce confessions in innocent suspects).

tendency for juveniles to submit to coercive pressure.¹⁷² Further, children's socialization to comply with authority figures makes them even less likely to assert their rights.¹⁷³

V. PROPOSAL

The studies reviewed above, taken together, cast doubt on whether juveniles are competent to waive their constitutional rights during interrogation.¹⁷⁴ If the goal of the strategies currently used by state governments is truly to ensure a "knowing, intelligent and voluntary" waiver of *Miranda*, states need to adjust current procedures to provide better protection for juveniles. However, any revised procedures should be balanced to provide for the interests of society in punishing the guilty. In other words, an increased level of protection for juveniles is needed, but only to the extent

172. See Richardson et al., *supra* note 171, at 215 (noting that, when participants are matched on memory scores and IQ, age is more likely responsible than criminality in causing respondents to change their answers between trials); Goldstein et al., *supra* note 107, at 11 ("Holding IQ and *Miranda* Comprehension constant, only age significantly predicted false confessions.").

173. See Grisso, *Competence*, *supra* note 1, at 16 (asserting that when authority figures suggest disapproval with children's stories, children are more likely to change their version of events than adults and are more prone to offer inaccurate information if pressed); see also Koocher, *supra* note 165, at 716 (asserting that children may feel requests are actually commands, despite how they are phrased and are more likely to comply with police requests, or at least are more reluctant to assert their rights during interrogation because of their socialization to follow directives of authority figures).

174. For a review of psychological evidence suggesting that current procedures used to evaluate juveniles' waivers of *Miranda* may be deficient, see *supra* notes 105-73 and accompanying text. Evidence is also mounting that juveniles' lack of future perspective may also affect their ability to competently waive their rights. Children, especially delinquent youths, often do not consider the future consequences of their behavior. Often immediate gratification is chosen rather than short-term sacrifice in order to achieve long-term gain. See Koocher, *supra* note 165, at 716 (stating that juveniles have difficulty sacrificing in short term for long term gain due to developmental stage).

Grisso found that when children were asked to imagine waiving their rights, they discussed the immediate gratification of the promise they could go home if they confessed. See Grisso, *Competence*, *supra* note 1, at 20 (illustrating that children value short term gain over long term gain). Those fourteen years old and younger were more likely to focus solely on short-term gains. See *id.* (discussing findings). This finding is further complicated by delinquents' regular surroundings. See *id.* (offering explanations for juvenile delinquents preference for short term over long-term gain). Often living in poor neighborhoods where violence is frequent, the youth has feelings of a foreshortened future or an inability to escape violence. See *id.* (giving reasons for observed phenomenon). This leads to a lack of careful consideration of options and long-term consequences. See *id.* (demonstrating kids chose short-term gain over long-term gain and proposing developmental and environmental explanations for this phenomenon). But see Grisso, *Capacities*, *supra* note 125, at 162 (urging caution in interpreting findings that juveniles value short term over long term gain due to lack of comparison to adults in adjudication process and noting that "gaps in our knowledge in this area are considerable").

necessary to provide protection at least equivalent to that afforded adults.¹⁷⁵

Research demonstrates that the current approaches fail to provide juveniles with a meaningful equivalent of the protection guaranteed adults.¹⁷⁶ We have seen that the interested adult rule fails because parents, who most frequently function as the interested adult, are not providing the guidance the court envisioned.¹⁷⁷ Thus, if the purpose is truly to protect children, and is no longer to view the juvenile court system as a benevolent process designed to help them, then advocacy of the interested adult standard is misplaced.

The totality standard would work only if the trier of fact was apprised of current psychological research, which he/she frequently is not.¹⁷⁸ Further, the totality test does not weigh the suggestibility of children, the failures of the interested adult or children's lack of understanding of their rights.¹⁷⁹ Thus, the question remains, what may be done to aid juveniles in either exercising or validly waiving their rights?

To afford juveniles equal protection, states should adopt a two-tiered approach, but in a different form than current versions.¹⁸⁰ Under the proposed approach, children under sixteen years would receive the added protection of the "per se" or "interested adult" rule, but in an altered

175. For a discussion of the adult *Miranda* standard, see *supra* notes 40-49 and accompanying text.

176. For a further discussion of research demonstrating deficiencies of current standards for evaluating *Miranda* waiver, see *supra* notes 105-73 and accompanying text.

177. For a further discussion of psychological literature concerning the failure of the interested adult standard, see *supra* notes 135-62 and accompanying text.

178. See Richardson, *supra* note 171, at 215 (stating awareness that juveniles' suggestibility during interrogation is deficient).

179. For a further discussion of totality of the circumstances test factors, see *supra* notes 91-95 and accompanying text.

180. This author acknowledges that the desire for a bright-line approach in the juvenile justice system does not fit neatly into the developmental framework of children. See Steinberg & Schwartz, *supra* note 1, at 28 (finding children's development does not mesh with bright-line legal approaches). This author, therefore, has erred on the side of caution in protecting the child rather than proposing more extensive individual evaluations of capacity to waive *Miranda* for each child entering the juvenile justice system, which would likely prove impractical and unworkable.

Further, this Note primarily focuses on children between the ages of twelve and seventeen. Statistically, pre-adolescent crimes do occur, but are rare. See Steinberg & Schwartz, *supra* note 1, at 22 (finding children do not often commit crimes before adolescence). For those children eighteen and older, the notion that they may fairly be treated as adults is firmly imbedded in our judicial system and the psychological literature supports their adjudication in the adult system. See *id.* (asserting that society has generally accepted proposition that those above age eighteen may be treated as adults).

form.¹⁸¹ For juveniles over sixteen, but under the age of majority, the proposed rule would function similar to current two-tiered rules.¹⁸²

For those under age sixteen, two methods of implementing the proposed two-tiered approach are possible. In the first approach, because the psychological research has shown that the “interested adult” standard does not have its intended effect, the standard would be used in a modified form.¹⁸³ These children would still be accorded “interested adult” protection, but a lawyer would act as the adult present.¹⁸⁴ As the Court acknowledged in both *Gallegos* and *Fare*, the lawyer occupies a unique position in our society in guarding the rights of the accused.¹⁸⁵ Thus, rather than simply offering the attorney as an option, as the current standard allows, children under age sixteen would automatically be required to consult with an attorney before they could validly waive their rights.¹⁸⁶

This proposal would remedy the problems of allowing parents, who often do not comprehend *Miranda* themselves or who provide no guidance, to serve as advisors to their children during interrogation.¹⁸⁷ Further, consultation with a lawyer would not hinder interrogation any more than the current standard, which provides the option of consultation with a lawyer.¹⁸⁸

States attempting to invoke this protection will likely encounter opposition, which is demonstrated by examining the experiences of states that have tried to implement legislation protecting children’s rights.¹⁸⁹ For

181. For further discussion of the “per se” or interested adult rule, see *supra* notes 96-99 and accompanying text.

182. For further discussion of two-tiered approaches see *supra* notes 100-04. For discussion of how the current proposal differs and the benefits of the proposed approach see *infra* notes 207-09.

183. For a further discussion of the failure of the interested adult standard, see *supra* notes 135-62 and accompanying text.

184. See Kaban & Tobey, *supra* note 89, at 158 (arguing that providing lawyer would best protect children’s rights during questioning); see also Schlam, *supra* note 157, at 620 (advocating presence of lawyer for interrogation considering that ninety percent of juveniles waive rights voluntarily, but without understanding).

185. For a further discussion of *Gallegos* and *Fare*, see *supra* notes 71-75, 83-87 respectively and accompanying text (discussing evolution of juveniles’ *Miranda* rights).

186. See Jennifer Walters, Note, *Illinois Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogation of Some Juveniles*, 33 LOYOLA U. CHI. L.J. 487, 522-23 (2002) (proposing methods to provide lawyers to juveniles).

187. See GRISSE, *supra* note 105, at 199-200 (reviewing literature finding that presence of interested adult does not provide protection for juveniles intended by courts and legislatures).

188. See Feld, *supra* note 89, at 120 (asserting that requiring an attorney’s presence would be detrimental to police’s ability to interrogate children, “however, *Gault* and *Miranda* already assume juveniles’ access to counsel during interrogation”).

189. See Walters, *supra* note 186, at 513-14 (relating opposition encountered by Illinois legislators attempting to require that child suspects be afforded counsel during interrogation).

example, when Illinois legislators proposed laws that would require an attorney to be present during juvenile interrogation, police groups adamantly opposed the bill and the opposition resulted in the passing of a watered down version.¹⁹⁰ In light of resulting political pressure, a plan such as this might be unrealistic.¹⁹¹

If political pressure were to make the requirement of an attorney's presence for interrogations impossible, a second option for those under age sixteen exists. An alternative proposal, for this younger group, is to automatically provide the juvenile suspect with a child advocate familiar with the interrogation process who would discuss *Miranda* with the child.¹⁹² If the government failed to allow this advocate access to the child, the waiver of rights would be considered invalid and any statements held inadmissible.¹⁹³

Depending upon the type of jurisdiction, the mechanism for providing an advocate would differ. In an urban setting, where adjudications of juveniles occur frequently, police stations might be required to have an advocate available twenty-four hours a day.¹⁹⁴ In less populated areas, an advocate could simply be on-call. In very rural areas, where juveniles are

190. *See id.* (discussing political pressures by police advocacy groups in order to prevent additional protections for juveniles during custodial interrogations). Proposed versions of the bill required additional protections, including counsel, during interrogation for suspects under age seventeen. *See id.* at 510-12 (laying out legislative history of bill and tracking revisions made before it became law).

191. *See id.* (discussing reasons offered by police as to why children should not be provided counsel during interrogation). Another interesting proposal encompassed in the literature involves the adoption of interviewing techniques currently used with child victims for use with child suspects. *See Kaban & Tobey, supra* note 89, at 158 (proposing applying child witness interviewing procedures by explaining *Miranda* warnings in detail "with developmentally appropriate language"). This has been omitted from the author's proposal because it is unlikely that police would adjust their interrogation procedures to avoid "manipulation, rewards and intimidation" that "may unduly pressure children." *See id.* (discussing proposal that police adjust interview techniques with child suspects to avoid false confessions).

192. The author knows of no one who has made this specific proposal, however, Grisso does suggest that because juveniles' understanding of the function of defense attorneys, when an inexperienced juvenile is interrogated, the public defender should first be allowed to explain their role in interrogation proceedings. *See Grisso, supra* note 105, at 129 (suggesting possible remedial measure for juveniles' inadequate understanding of the role of defense attorneys as demonstrated by Grisso's research which demonstrated that one third of juveniles' with "few or no prior felony referrals" believed that "defense attorneys defend the interests of the innocent but not the guilty").

193. This procedure would be similar to how courts currently handle cases where *Miranda* warnings were not administered to adults by holding that statements obtained prior to administering *Miranda* warnings to the suspect inadmissible. *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding unless prosecution proves warnings were given no statements obtained from defendant are admissible). For further discussion of *Miranda* standards, see *supra* notes 40-49 and accompanying text.

194. This author knows of no one who has proposed this idea as a possible procedure for handling how an advocate might be provided.

not frequently arrested and the distances between potential advocates' homes and police stations are too far to travel quickly, a telephone advocacy service could be established. Before an interrogation could begin, juveniles would be required to call the advocacy line and have their rights explained.

These child advocates would need to be sure that the children they are speaking with understand their *Miranda* rights.¹⁹⁵ One solution is to adopt *Miranda* comprehension instruments, such as the one created by Thomas Grisso, for use in custodial settings.¹⁹⁶ If the child scored below the average adult score on the Grisso instruments, then he or she would have access to an attorney; if the child scored above a minimum score, he or she would be considered to have the capacity to undergo interrogation. It is critical that the instrument may not be administered by a police officer.¹⁹⁷ A child advocate must administer it because even the most well-meaning police officer could encounter a conflict of interest or bias in scoring comprehension.¹⁹⁸

The advocate would utilize only the portions of the Grisso instrument that correspond to the legal standard of *Miranda*.¹⁹⁹ The legal standard requires a "knowing, intelligent and voluntary waiver,"²⁰⁰ however, psychological research indicates that the "knowing and intelligent" portions are of most concern.²⁰¹ Thus, advocates would administer only the sections of the instrument that would inform the advocate if a waiver could be given (1) "knowingly" (i.e., basic understanding of the words and phrases in the warnings) and (2) "intelligently" (i.e., the suspect can apply these warnings to legal situations).²⁰² The first requirement, "knowingly," is best explored through the section of Grisso's instrument asking juveniles to paraphrase their rights in their own words.²⁰³ The second requirement,

195. For further discussion of factors bearing on juveniles' comprehension of *Miranda* rights, see *supra* notes 105-73 and accompanying text.

196. See generally THOMAS GRISSE, INSTRUMENTS FOR ASSESSING UNDERSTANDING AND APPRECIATION OF MIRANDA RIGHTS (1998) (providing instruments widely used by psychologists in assessment of *Miranda* comprehension).

197. For further discussion of police tactics during questioning and the atmosphere police are trained to create during interrogation, see *supra* notes 20-39 and accompanying text.

198. For further discussion of the methods police are trained to use to conduct interrogations, see *supra* notes 20-39 and accompanying text.

199. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring waiver of rights be made "voluntarily, knowingly, and intelligently").

200. See *id.* (discussing standard for valid waiver of *Miranda* rights).

201. For a discussion of juveniles' *Miranda* comprehension and a review of psychological literature regarding that comprehension, see *supra* notes 105-73 and accompanying text.

202. See *Miranda*, 384 U.S. at 498-99 (establishing "knowing, intelligent, and voluntary" standard for valid waiver of rights).

203. See GRISSE, *supra* note 105, at 221-44 (describing Grisso's Comprehension of *Miranda* Rights measure, which is objective method for assessing individual's understanding of standard *Miranda* warnings).

“intelligently,” is best explored through the Function of Rights in Interrogation (FRI), which asks children to apply those rights and potential consequences of waiving the rights to hypothetical situations.²⁰⁴

These two *Miranda* instruments would only take seven to ten minutes to administer and would provide the child’s level of comprehension relative to normative data.²⁰⁵ This would inform the assessor whether the child is of likely competence to waive *Miranda* or whether the child may need assistance in order to ensure that his or her waiver is “knowing, intelligent and voluntary.”

For suspects over the age of sixteen, the statute would implement a rule similar to the current two-tiered rules.²⁰⁶ A presumption of the waiver’s invalidity would exist. The burden would be on the prosecution to prove by a preponderance of the evidence that the waiver was in fact voluntary.

This proposal differs from current two-tiered rules in its recommendation that the cutoff age cannot fall below sixteen.²⁰⁷ Research indicates that, as a class, juveniles under fifteen years old do not understand their *Miranda* rights, while children over this age often comprehend a large portion of their rights.²⁰⁸ Thus, the cutoff should, at a minimum, be raised to meet this standard of age fifteen, however, further psychological research encourages raising the age to sixteen.²⁰⁹

Studies indicate that despite the adult-like level of comprehension by juveniles over age fifteen, additional protection is warranted.²¹⁰ Juveniles, while well developed enough cognitively to understand the warnings read to them, are not as emotionally developed, are more suggestible and compliant and do not fully comprehend the function of their rights.²¹¹ Thus, older teens still need some form of additional protection that differs from

204. See *id.* at 249-72 (explaining use of Grisso Function of *Miranda* Rights instrument, which is method to assess juveniles’ understanding regarding significance of *Miranda* rights in context of interrogations).

205. See *id.* (describing use of Grisso instruments).

206. For further discussion of the two-tiered standard, see *supra* notes 100-04 and accompanying text.

207. For an explanation of the two-tiered standard, see *supra* notes 100-04 and accompanying text.

208. For a further discussion of development of juveniles’ comprehension of rights and cognitive development, see *supra* notes 109-34 and accompanying text.

209. For a further discussion of studies about juveniles’ misunderstanding of the concept of a right and their suggestibility, see *supra* notes 124-30, 163-73 and accompanying text.

210. For a review of psychological literature concerning juveniles’ lack of understanding of the concept of a right and suggestibility during interrogation, see *supra* notes 124-30, 163-73 and accompanying text.

211. See Richardson, et al., *supra* note 171, at 215 (“[T]his is an important vulnerability of juveniles that should no longer be ignored by interviewers.”). For discussion of the suggestibility and compliance of children, which are especially pronounced among delinquent populations and during periods of stress, see *supra* notes 163-73 and accompanying text. Additionally, juveniles age fifteen and sixteen with IQs below 80, as is typical for most juvenile offenders, do not understand

the adult standard.²¹² For this reason, the states should implement a preponderance of the evidence standard for children in this age range.²¹³

Finally, a two-tiered approach may alleviate fears of reduced confession rates even if these fears may be unwarranted.²¹⁴ When *Miranda* was first introduced in the 1960's, a public outcry arose for fear that *Miranda* rights would eliminate confessions altogether, however, this expectation did not pan out.²¹⁵ It is possible that implementing the type of law suggested in this Note would follow a similar pattern and would not actually reduce the likelihood of confessions.²¹⁶ Nonetheless, the two-tiered proposal would increase the likelihood that obtained confessions result from a "knowing, intelligent, and voluntary" waiver, as the Supreme Court envisioned, rather than the product of impressionable children in a coercive atmosphere.²¹⁷

VI. CONCLUSION

While the psychological literature has amassed increasing evidence that current procedures for assessing juveniles' *Miranda* waivers are deficient, the legal system has remained stagnant.²¹⁸ If the goal is truly to ensure a "knowing, intelligent and voluntary" waiver by juveniles, current procedures need revamping. It is time to reconsider the type of protec-

their rights any better than do children under age fifteen. See GRISSE, *supra* note 105, at 90 (describing comprehension levels of juveniles ages fifteen to sixteen).

212. For further discussion of coercive techniques used by police and psychological studies showing juveniles' vulnerabilities under the current standards for judging their *Miranda* comprehension, which justify increased protection for juveniles, see *supra* notes 20-39 and 105-73, respectively, and accompanying text.

213. For a further discussion of the function of two-tiered rules, see *supra* notes 100-04 and accompanying text.

214. See LEO & THOMAS, *supra* note 21, at 75-76, 95-105 (describing fears after advent of *Miranda*).

215. See *id.* (describing police, political, and public outcry against *Miranda* and its failure to significantly affect confession rates).

216. See *id.* at 76 ("The creation [of *Miranda* rights] has not appreciably affected the confession rate.").

217. It is beyond the scope of this Note to fully discuss implications for other sensitive populations such as those with mental retardation. For a discussion of this topic, see generally G. Bargoff, & S. Freedman, *Mental Retardation and Miranda*, THE CHAMPION, April 6-8, 1988; Fulero, Solomon & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 LAW & HUM. BEHAV. 533 (1995) (discussing *Miranda* waiver by mentally retarded persons).

218. For a further discussion of current approaches used to assess juveniles' waiver of *Miranda*, and research demonstrating deficiencies in these approaches, see *supra* notes 88-173 and accompanying text.

tions afforded juveniles during custodial interrogation, in light of current and past empirical evidence, and adjust procedures accordingly.²¹⁹

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219. For a further discussion of psychological evidence that current approaches are deficient, see *supra* notes 105-73 and accompanying text.