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When Only a Lawyer Will Do – Lawyers as a Necessity, not a Luxury, for Juveniles Before Waiving Miranda Rights in New Jersey

Philip J. Cranwell

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Introduction

What child has not made mistakes? Parents want their children to be safe and to grow up into productive members of society. Powerful, conflicting interests come into play when a child becomes the focus of a police investigation. Society and victims seek justice. The police seek answers. The accused and their parents seek to avoid being charged or convicted of a crime.

Continue to ask yourself: What if my child was in police custody and accused of a serious crime? What if the police did not have proof, but they had very strong suspicions that your child was guilty of a serious crime? What if the police called you up and told you to come to the police station immediately? What if your child's wealthy friend was also in custody, and her parents immediately summoned a lawyer? Would you think you needed one too?

The importance of parents' and guardians' involvement in the juvenile justice system is certainly vital, but to leave the decision whether or not to waive a juvenile's privilege against self-incrimination up to parents does not satisfy a juvenile's constitutional rights. Parents presumably are motivated to serve the best interest of their child in such situations. But a parent may not comprehend the legal consequences when deciding with their child whether to waive their legal rights. Juveniles who find themselves facing police interrogation often come from dysfunctional homes,[1] where the parent or guardian cannot make a knowing, intelligent and voluntary decision

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[1] Leiber, M.J., and Stairs, J.M., *Race, contexts, and the use of intake diversion*, J. OF RESEARCH IN CRIME AND DELINQUENCY 36(1):56–86.

themselves, and thus perpetuate generational failure to avoid incarceration. When a crime is alleged, behavior and judgment can be clouded by emotion.

There is, however, one actor in the system who can properly counsel an accused juvenile whether to talk to police or not. The Lawyer has the education, experience, objectivity and sworn duty to advocate for the rights of those they represent. Anything less than a requirement that juveniles consult with an attorney before being interrogated by police is an unacceptable half-measure.

Our New Jersey courts have recognized there is no substitute for an attorney's advice in deciding whether to answer questions from police. "Whether it is a minor or an adult who stands accused, *the lawyer is the one person* to whom society, as a whole, looks as the protector of the legal rights of that person in his dealings with the police and the courts."[2]

All juveniles should have a constitutional right to a mandatory consultation with an attorney *before* waiving their *Miranda* rights. The U.S. Constitution grants citizens the right against self-incrimination.[3] The privilege against self-incrimination is a powerful shield against government power when police conduct interrogations.[4] Still, adults and juveniles alike often waive this right at their own peril, without sound legal advice and without fully understanding the consequences.[5] Other times, waiver is strategic, where the first person who talks to police receives leniency, or a promise of a recommendation of leniency, in exchange for information to be used

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[2] State v. Presha, 748 A.2d 1108, 1116-17 (N.J. 2000) (emphasis added).
[3] U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself ").
[4] Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court interpreted the Fifth Amendment protections to encompass any situation outside of the courtroom that involves the curtailment of personal freedom, also known as a custodial interrogation. *Id.* So, any time police take a suspect into custody, they must make the suspect aware of his or her Miranda rights. *Id.* These rights include the right to remain silent, the right to have an attorney present during questioning, and the right to have a government-appointed attorney if the suspect cannot afford one. *Id*.
[5] Richard Rogers & Eric Y. Drogin, *Miranda Rights and Wrongs: Matters of Justice*, CT. REV.: THE J. OF THE AM. JUDGES ASS'N. 509, https://digitalcommons.unl.edu/ajacourtreview/509.

against others. It is very much debatable whether a juvenile can knowingly, intelligently and voluntarily waive this right.[6] The system should work to protect the young more than adults when faced with the momentous decision to waive their rights.

The Legislative Branch and Executive Branch of the federal government are unlikely to spend their political capital to enact a law protecting juvenile criminal suspects. Likewise, the majority conservative Supreme Court is not likely to recognize the right to the consultation. The New Jersey Supreme Court is the ultimate forum with the power and best opportunity to protect our state's juveniles, recognizing this consultation as a constitutional right.

First, Part I examines the privilege against self-incrimination. This paper will detail the protections provided by the U.S. Constitution, as the Supreme Court has defined the contours of the law over time. Likewise, the paper will discuss New Jersey's law regarding the right against self-incrimination. A recent New Jersey Supreme Court case, where a pre-*Miranda* consultation with an attorney would have yielded a more just initial result, will be highlighted.

Much written material supports this conclusion based on science, specifically related to juvenile brain development. Part II of this paper will examine the recurring themes in this area of study, which have been increasingly accepted by courts.

Next, Part III will explore why some may argue against a constitutional requirement for a pre-*Miranda* consultation for juveniles. These include the cost, the potential political pitfalls and roadblocks, and possible prosecutorial and law enforcement opposition.

Part IV will explore arguments likely to tip the scales toward protecting the young, persuading courts to require the consultation. While the science and social studies are powerful

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[6] Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 6, 1134-66, JSTOR, www.jstor.org/stable/3480263.

on their own, basic principles of justice, equality and fairness can carry the consultation from a legal theory to a reality. A juvenile's decision to waive or not can carry consequences of such great magnitude, that a consultation with a lawyer should be required for all juvenile criminal suspects, not just those who can afford it. This paper will explore the potential positive effect the consultation could have on racial disparities that exist in the juvenile justice system.[7]

Part I

The Fifth Amendment to the U.S. Constitution gives a criminal suspect the right to refuse "to be a witness against himself."[8] The right to remain silent was enshrined for criminal suspects by the Supreme Court in *Miranda v. Arizona*, ruling that detained criminal suspects must be informed of their constitutional right to an attorney and against self-incrimination before police begin questioning.[9]

Miranda arose from the 1963 arrest of Ernesto Miranda in Phoenix, AZ, suspected of rape, kidnapping, and robbery.[10] Police did not inform Miranda of his rights before their two-hour interrogation.[11] Police extracted a confession from Miranda on video, without counsel present.[12] Miranda had a history of mental instability and an eighth grade education.[13] After a trial where his confession was the only evidence against him, Miranda was convicted of both rape and kidnapping, receiving a sentence of 20 to 30 years in prison.[14] The Arizona Supreme Court

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[7] This paper does not undertake a specific analysis of the New Jersey Constitution, but instead relies on caselaw as to the protections of the privilege against self-incrimination, and on public policy.
[8] U.S. Const. amend. V.
[9] Miranda, 384 U.S. at 491.
[10] Id. at 491-92.
[11] Id. at 492.
[12] Id.
[13] Id.
[14] Id.

rejected his appeal that the police had unconstitutionally obtained his confession, upholding the conviction.[15]

But, the U.S. Supreme Court concluded that Miranda's confession was inadmissible in his trial because police had violated his Fifth and Sixth Amendment rights when they failed to inform him of his right to an attorney and against self-incrimination.[16] The Court found that the right against self-incrimination is a fundamental right designed to offset the imbalance in power between police and suspects inherent in interrogations, which can lead to false confessions.[17] Likewise, the right to an attorney is also fundamental because the presence of an attorney can help "eliminate the evils in the interrogations process."[18]

The Court crafted the *Miranda* warnings.[19] Before any questioning, a suspect must be warned that he or she has a right to remain silent, that any statement made may be used as evidence against him or her, and that he or she has a right to an attorney, either retained or appointed.[20] The suspect may waive these rights, provided the waiver is made voluntarily, knowingly and intelligently.[21] If, however, the suspect indicates in any manner and at any stage of the process that he or she wishes to consult with an attorney there can be no questioning.[22] The fact that he or she may have answered some questions or volunteered some information does not deprive him or her of the right to stop answering questions until he has consulted with an attorney and consents

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[15] Id.
[16] Id.
[17] Id. at 467-69.
[18] Id.
[19] Id. at 479.
[20] Id.
[21] Id.
[22] Id.

to interrogation.[23] Ernesto Miranda's conviction was reversed because he was not afforded these fundamental rights rendering his confession inadmissible.[24]

Miranda strengthened due process protections for adults in the criminal justice system, but juvenile criminal justice was an entirely different experience at that time. In the early 1960's, judges in juvenile court purportedly assumed a role of caretaker for troubled youth whose parents were unable or unwilling to control them.[25] Unfortunately, in practice, juveniles had no due process rights and suffered harsh punishments without any recourse.[26]

A year after *Miranda*, the U.S. Supreme Court extended the right to notice of charges, the right to counsel, the right to confrontation and cross-examination of witnesses, and the right against self-incrimination to juveniles.[27] *In re Gault*, nicknamed "the Magna Carta for juveniles" by Chief Justice Earl Warren,[28] was the result of a nationwide movement toward protecting the rights of juveniles in the criminal justice system.[29]

At fifteen years old, Gerald Gault was sentenced to a six-year term at a "violent, notorious youth detention center" for a crime that, if committed by an adult, would have been punished with a $50 fine and up to two months in jail.[30] Gault allegedly admitted to the judge during an informal hearing that he made an obscene phone call.[31] He did not have a lawyer.[32] He was never told he

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[23] Id.
[24] Id. at 492.
[25] https://jjie.org/2017/05/15/a-look-back-at-the-juvenile-justice-system-before-there-was-gault/
[26] Id.
[27] *In re* Gault, 387 U.S. 1 (1967).
[28] Jessica Lahey, *The Children Being Denied Due Process, Most states fail to protect minors' entitlement to counsel*, THE ATLANTIC (May 22, 2017), https://www.theatlantic.com/education/archive/2017/05/the-children-being-denied-due-process/527448/
[29] Gault, 387 U.S. at 28.
[30] Id. at 29.
[31] Id.
[32] Id.

did not have to answer questions from the judge and his parents were unaware he was accused of a crime until after he allegedly confessed.[33]

Gault's parents filed a petition for a writ of habeas corpus, which was dismissed by both the Superior Court of Arizona and the Arizona Supreme Court.[34] With the help of their local lawyer and lawyers from the American Civil Liberties Union (ACLU), the Gaults next sought relief in the United States Supreme Court.[35] The Court agreed to hear the case to determine any procedural due process rights of a juvenile criminal defendant.[36]

In their petition to the Court, the Gaults acknowledged the good intent of the early movement to reform juvenile justice when juvenile courts were created to protect the young from harsh adult sentences and to put an end to juveniles being housed with adult inmates.[37] But they argued that informal proceedings originally envisioned to apply "kind, wise and fatherly correction to wayward youth" too often imposed cruel punishments on a juvenile guilty of a relatively minor offense, to hard time in youth detention facilities next to rapists and murderers.[38]

The Court ruled that Gault's commitment to the youth house was a violation of the Fifth and Sixth Amendments since he had been denied the right to an attorney, had not been formally notified of the charges against him, had not been informed of his right against self-incrimination, and had not been provided an opportunity to confront his accusers.[39] In his opinion, Justice Fortas observed that "being a boy does not justify a kangaroo court."[40]

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[33] Id.
[34] Id. at 4.
[35] https://jjie.org/2017/05/15/a-look-back-at-the-juvenile-justice-system-before-there-was-gault/
[36] Gault, 387 U.S. at 2.
[37] Appellants' Br. 9, *In re* Gault, 387 U.S. 1 (1967), 1966 WL 87719 (U.S.).
[38] Id. at 12.
[39] Gault, 387 U.S. at 28.
[40] Id.

As to a juvenile's right against self-incrimination, the Court advised, "that admissions and confessions of juveniles require special caution,"[41] and "the greatest care" should be given to assure that the juvenile gives these statements voluntarily with full knowledge of his or her rights.[42]

Gault is significant because it established a baseline of protection for juveniles. The outcome in *Gault* was partially due to the particularly shocking facts of the case.[43] And, notably, the Court was open to expanding due process rights during their tenure.[44] Like any other constitutional right, the Court would be called upon again to define its extent or limitations.

In *Fare v. Michael C.*, the Supreme Court was asked to determine whether a juvenile who confessed to a murder had voluntarily, knowingly, and intelligently waived his rights.[45] Michael C. was almost seventeen years old, with an extensive criminal record, when he was detained by police to question him about a murder.[46] He was fully advised of his rights under *Miranda*, and asked for his probation officer to be present.[47] Police denied his request for his probation officer, but offered to get him a lawyer.[48] He declined to have an attorney present, instead answering detectives' questions and providing incriminating statements and drawings.[49]

At his murder trial in juvenile court, he moved to suppress his incriminating statements and sketches, arguing his request to see his probation officer was an invocation of his Fifth Amendment rights in actuality.[50] The court denied the motion, but the California Supreme Court reversed,

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[41] In re Gault, 387 U.S. at 45.
[42] Id. at 55.
[43] Id.
[44] Id.
[45] Fare v. Michael C., 442 U.S. 707, 724–25 (1979).
[46] Id.
[47] Id.
[48] Id.
[49] Id.
[50] Id.

finding Michael C.'s request for his probation officer to be a per se invocation of his Fifth Amendment rights.[51]

The United States Supreme Court concluded that the trial court did not err in denying the motion to suppress because a probation officer is not in a position to offer the kind of legal advice needed to waive one's Fifth Amendment rights.[52] Probation officers' duty to report wrongdoing to law enforcement disqualifies them from protecting a juvenile's legal interests despite being in a position of trust and cooperation.[53] Further, the Court rejected the idea that Michael C.'s request for his probation officer was a per se invocation of his Fifth Amendment rights.[54]

The Court applied the totality of circumstances test to conclude Michael C. voluntarily waived his Miranda rights.[55] The totality of circumstances analysis includes factors such as the suspect's criminal history, education and intelligence, advice as to constitutional rights, length of detention, whether the police employed unfair tactics to elicit a confession such as sleep deprivation, starvation, threats, etc.[56]

More recently, the Supreme Court was asked to determine whether a juvenile's age is a factor in determining whether the circumstances satisfy *Miranda's* custody requirement.[57] According to *Miranda*, the duty to issue warnings only attach where there has been such a restriction on a person's freedom as to render him "in custody."[58] Courts must examine all the circumstances surrounding the interrogation in determining whether there was a "formal arrest or

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[51] Id.
[52] Id. at 719-22.
[53] Id. at 722-23.
[54] Id. at 723-24.
[55] Id. at 725.
[56] Id.
[57] J.D.B. v. North Carolina, 564 U.S. 261, 264–65 (2011).
[58] Miranda, 384 U.S. at 491.

restraint of freedom of movement of the degree associated with a formal arrest" to determine whether an individual was in custody.[59]

The Supreme Court laid out a number of factors to consider in determining whether a defendant is in custody, including (1) the language or tone used when initially confronting or later questioning the suspect; (2) the physical surroundings or location of the questioning; (3) the duration of the interview; (4) the extent to which the defendant is confronted with evidence of guilt; and (5) the degree of pressure applied to detain the individual, including whether the officers brandished weapons or touched the suspect.[60]

J.D.B. was thirteen years old when a police officer removed him from class and proceeded to interrogate him in a conference room in the presence of another officer and two administrators.[61] They questioned J.D.B. for 30 to 45 minutes about some recent neighborhood break-ins.[62] J.D.B. confessed after the investigator grilled him about his presence in the neighborhood and after the assistant principal urged him to tell the truth.[63]

After he confessed, the investigator told J.D.B. that he could refuse to answer questions and was free to leave.[64] J.D.B. continued to provide details and gave the investigators a written statement.[65] J.D.B. was charged with breaking and entering and larceny.[66] J.D.B. moved to suppress his statements and the evidence gathered as a result of those statements, arguing he was in custody and should have been given *Miranda* warnings before he was questioned.[67]

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[59] Id.
[60] J.D.B. v North Carolina, 564 U.S. 261, 270-71 (2011).
[61] Id. at 266.
[62] Id.
[63] Id.
[64] Id. at 267.
[65] Id.
[66] Id.
[67] Id. at 268.

The trial court ruled that J.D.B. was not in custody and denied the motion to suppress the statements and evidence.[68] The North Carolina Court of Appeals and the North Carolina Supreme Court affirmed the trial court.[69] The North Carolina Supreme Court held that the test for custody did not include consideration of the age of an individual subjected to questioning by police.[70]

The Supreme Court disagreed, concluding "[i]t is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave," and remanded the case for the state court to determine whether J.D.B. was in custody, considering all the circumstances, including J.D.B.'s age at the time.[71] According to the Court, it is common sense that a child's age would affect how a reasonable person "in the suspect's position would perceive his or her freedom to leave."[72]

The law protects people from more than just standard interrogation. Even though suspects can waive their rights and give incriminating statements to police voluntarily, sometimes police subject suspects to conditions that become the "functional equivalent" of an interrogation.[73] In *Innis*, police arrested the suspect on suspicion of a robbery, but he refused to waive his rights, after repeated *Miranda* warnings.[74] During the ride back to the police station, Innis volunteered to show police the weapon he hid after they discussed how bad it would be if a student at a nearby school found his weapon and hurt someone with it.[75] The police advised Innis of his rights once again

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[68] Id.
[69] Id.
[70] Id.
[71] Id. at 265.
[72] Id. ("Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.").
[73] Rhode Island v. Innis, 446 U.S. 291, 293-94 (1980).
[74] Id. at 294.
[75] Id. at 295.

but he insisted on showing them where the weapon was because he didn't want any children to be hurt.[76]

The Supreme Court of the U.S. determined that the officers did not know their words and actions were reasonably likely to elicit an incriminating response from Innis, and were not the functional equivalent of an interrogation.[77] The Court concluded that Innis' rights were not violated because the "subtle compulsion" by police did not amount to an interrogation or the functional equivalent.[78]

Years later, the Court applied the *Innis* standard when a suspect made a voluntary statement in front of police after initially invoking his right to remain silent.[79] In *Mauro*, the suspect admitted killing his son and told investigators where they could find the body before he decided not to say more without a lawyer.[80] The suspect's wife asked to speak to him, and the police allowed her to do so, but an officer sat in the room and conspicuously recorded the conversation.[81] The Court concluded that in the absence of "compelling influences, psychological ploys, or direct questioning," the suspect's statement was voluntary and not the result of the functional equivalent of an interrogation.[82]

The Fifth Amendment applies to the states by way of the Fourteenth Amendment.[83] Nevertheless, states protect juveniles' rights to differing degrees. Although seventeen states provide protections for juveniles in custody that exceed those required federally, the other thirty-

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[76] Id.
[77] Id. at 301.
[78] Id. at 303.
[79] Arizona v. Mauro, 481 U.S. 520 (1987).
[80] Id. at 521-22.
[81] Id. at 523.
[82] Id. at 529.
[83] Malloy v. Hogan, 378 U.S. 1, 8 (1964) (noting the right against self-incrimination applies to the States through the Fourteenth Amendment).

three have no extra statutory or judicially imposed protections for juveniles.[84] These states apply the totality of the circumstances test from *Fare* in determining the voluntariness of a juvenile's statements in a custodial interrogation.[85] Most states who provide additional protections do so in an age-based scheme, either barring statements for suspects under a certain age or requiring the presence of an interested adult.[86]

New Jersey codified the privilege against self-incrimination in N.J.S.A 2A:84A-19.[87] Although the state constitution does not contain a provision similar to the Fifth Amendment privilege against self-incrimination, the privilege pre-dates New Jersey's constitution, through common law.[88] Furthermore, the privilege is written into the Rules of Evidence.[89]

The New Jersey Supreme Court has interpreted N.J.S.A. 2A:84A-19 and N.J.R.E. 503 to grant broader protection than the federal privilege against self-incrimination. The Court has adopted the *Innis* standard, embracing the view that interrogation includes not only direct interrogation but also words or actions by police that they should know are reasonably likely to elicit an incriminating response.

For a suspect's incriminating statements to law enforcement to be admissible at trial, the State must demonstrate beyond a reasonable doubt that a suspect's waiver was knowing, intelligent, and voluntary.[90] The same standard applies to confessions by juveniles.[91] New Jersey

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[84] Hana M. Sahdev, *Juvenile Miranda Waivers and Wrongful Convictions*, 20:5 U. PA. J. C. L. 1211, 1225 n. 112 (2018) (discussing the various approaches taken to address the voluntariness of statements made by juveniles across the nation).
[85] Id.
[86] *Id.* at 1225-26.
[87] N.J.S.A 2A:84A-19 ("[E]very natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him . . . .").
[88] State v. O'Neill, 936 A.2d 438, 454 (N.J. 2007) ("New Jersey's privilege against self-incrimination is so venerated and deeply rooted in this state's common law that it has been deemed unnecessary to include the privilege in our State Constitution.").
[89] N.J.R.E. 503.
[90] O'Neill, 936 A.2d at 449 n.12.
[91] State in Interest of A.S., 999 A.2d 1136, 1145 (N.J. 2010).

courts apply a totality of the circumstances test to gauge the voluntariness of a suspect's incriminating statement to police.[92]

The New Jersey Supreme Court has recognized that juveniles should receive extra protections, particularly in custodial interrogations.[93] In *State in Interest of S.H.*, the Court observed that a juvenile is especially vulnerable to police interrogation without a parent present.[94] The Court instructed, "whenever possible and especially in the case of young children, no child should be interviewed except in the presence of his parents or guardian."[95]

Later, the New Jersey Supreme Court built on the principle from *S.H.* that parents play in indispensable role during the critical stage of custodial interrogation. *Presha* was the New Jersey Supreme Court's seminal case defining juveniles' privilege against self-incrimination.[96] *Presha* reflected the evolution of the juvenile justice system from a system that was primarily rehabilitative, correcting "errant" behavior, into a system where punishment was increasingly important,.[97]

Presha arose from a violent burglary in an elderly couple's home, leaving the victims with their throats slashed.[98] Police located and transported the juvenile suspect and his mother to the police station.[99] Police informed the suspect of his rights in the presence of his mother in

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[92] Id. (citing Fare).
[93] State in Interest of S.H., 293 A.2d 181 (N.J. 1972).
[94] Id. at 184.
[95] Id.
[96] State v. Presha, 748 A.2d 1108 (N.J. 2000).
[97] Id. at 1113 (discussing society's demand that juvenile crime problems required a more punitive approach to deter it).
[98] Id. at 1111.
[99] Id.

compliance with the law.[100] The juvenile suspect was nearly 17 at time of his arrest, he had been arrested on 15 prior occasions.[101]

After the suspect's mother witnessed the signing of the *Miranda* card, the suspect requested that she leave the interrogation room and she agreed.[102] Over the course of the next few hours, officers successfully interrogated the suspect, extracting a full confession.[103] The police were careful to document their activities and treatment of the suspect, taking breaks for water and the restroom as needed.[104] However, sometime during the interrogation, the mother requested and was denied the opportunity to again speak to her son and tell him he needed a lawyer.[105]

Applying a totality of the circumstances analysis, the Court determined that the suspect's incriminating statements were voluntary.[106] The suspect's age and criminal history, his mother's presence at the outset, as well as the satisfactory conduct of the police during the interrogation informed their decision.[107] Nevertheless, the Court recognized the importance of procedural safeguards unique to juveniles and their parents.[108]

The Court held that "special circumstances" apply if there is custodial questioning of juveniles younger than fourteen outside the presence of their parents.[109] When a parent or legal guardian is absent from an interrogation involving a juvenile under the age of fourteen, any confession resulting from the interrogation should be deemed inadmissible as a matter of law,

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[100] Id.
[101] Id.
[102] Id.
[103] Id. at 1112
[104] Id.
[105] Id.
[106] Id. at 1115.
[107] Id.
[108] Id. at 1112–15.
[109] Id. at 1110.

unless the adult was unwilling to be present or truly unavailable.[110] If an adult is unavailable or declines to participate in the interrogation, the police must question the juvenile "with the utmost fairness and in accordance with the highest standards of due process and fundamental fairness."[111] A parent or guardian's absence is a highly significant factor among all other facts and circumstances, carrying added weight when balancing it against all other factors in determining the voluntariness of a confession.[112]

The Court envisioned the parent or guardian in the context of a juvenile interrogation "as advisor to the juvenile, someone who can offer a measure of support in the unfamiliar setting of the police station."[113] The support of a parent, however, is not enough to protect a child from the full power of the government when faced with the decision to answer questions by police. Parents are not on equal footing with police when their child is a criminal suspect. Parents are unable to recognize unfair coercion or improper conduct.

A recent New Jersey Supreme Court decision, *State in the Interest of A.A.*,[114] highlights the need for bold change to the law to ensure the fair administration of justice when juveniles are subject to custodial interrogation by requiring a consultation with an attorney before waiving their rights.[115] On a midsummer night in Jersey City, NJ, police officers on patrol observed three black males on bicycles ride past, and moments later, the officers heard 8-10 gunshots ring out into the

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[110] Id. ("Whenever possible, and especially in the case of young children, no child should be interviewed except in the presence of his parents or guardian.").
[111] Id.
[112] Id. at 1115.
[113] Id. at 1114.
[114] State in Interest of A.A., 222 A.3d 681 (N.J. 2020).
[115] Zoom interview of Laura Cohen, the Director of the Criminal and Youth Justice Clinic at Rutgers Law School. Professor Cohen spearheaded the amicus brief before the New Jersey Supreme Court in A.A. and continues in her commitment to juvenile justice reform.

air.[116] The officers radioed to dispatch a report along with a description of the three males on bikes. Two victims were found with gunshot wounds to their legs.[117]

Later, a detective detained two people on bikes matching the officers' description. Another officer who initially responded to the scene positively identified them as the suspects he witnessed on bikes before the shooting.[118] A search did not find any weapons, ammunition, or gunpowder residue on the two suspects.[119] Shell casings and one projectile were recovered at the crime scene. One of the suspects was fifteen-year-old A.A., who the officers recognized from prior encounters in the area for curfew violations.[120]

A.A. was taken into custody and put into a juvenile holding cell, awaiting the arrival of his mother.[121] When his mother arrived, the police explained why A.A. was arrested, and allowed her to speak to her son through the gate of the holding cell.[122] With several officers nearby, A.A. admitted to his mother that he had been on Wilkinson Avenue, adding, "they jumped us last week."[123] Investigators concluded they no longer needed to interrogate A.A. since he admitted his presence at the crime scene and provided a motive, within earshot of detectives.[124]

Immediately afterwards, detectives explained to A.A.'s mother that he was being detained and she was free to leave.[125] At no time was A.A. questioned or advised of his *Miranda* rights.[126] A.A. was charged with two counts of attempted murder, possession of a firearm for an unlawful

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[116] Id. at 684.
[117] Id.
[118] Id.
[119] Id.
[120] Id.
[121] Id.
[122] Id. at 685.
[123] Id.
[124] Id.
[125] Id.
[126] Id.

purpose, unlawful possession of a weapon, and possession of a firearm by a minor.[127] He was adjudicated delinquent on two counts of second-degree aggravated assault – lesser-included offenses of attempted murder – and all three weapons charges.[128] The family judge relied heavily on A.A.'s admission to his mother.[129] He was sentenced to two years confinement.[130]

On January 15, 2020, the Supreme Court of New Jersey affirmed the Appellate Division in reversing A.A.'s juvenile delinquency adjudication because police violated A.A.'s right against self-incrimination.[131] The Court found that police improperly failed to issue *Miranda* warnings before allowing A.A., to speak to his mother,[132] and used his incriminating statements as evidence at his delinquency hearing.[133] The Court concluded that the family court judge should not have admitted the statements because the police, in effect, used the mother to interrogate him, in violation of the *Innis* standard.[134]

When the Court granted the State's petition for certification, it also granted the American Civil Liberties Union of New Jersey (ACLU) and the Association of Criminal Defense Lawyers of New Jersey (ACDL) leave to appear as amici curiae.[135] The ACLU argued children require more robust protections than adults during custodial interrogations and the Court should require consultation with counsel before a juvenile may waive his or her *Miranda* rights. [136] The ACDL asserted that parents and juveniles should have a meaningful opportunity to consult in private

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[127] Id.
[128] Id. at 686.
[129] Id.
[130] Id.
[131] Id. at 686 ("Officers listened to the conversation between mother and son . . . and the State later presented the comments at trial. At no point did the police advise A.A. of his rights. Nor did they question him after he made admissions to his mother.").
[132] Id. (citing *Miranda*, 384 U.S. 436 (1966)) ("A.A. should have been advised of his rights . . . in the presence of his mother.").
[133] Id.
[134] Id.
[135] Id. at 687.
[136] Id.

before a juvenile is asked to waive his or her *Miranda* rights.[137] Ultimately, the Court declined to discuss the ACLU's proposal to require consultation with a lawyer because the appellant did not raise the same arguments on his own.[138]

The Court's holding sought to prevent similar situations from occurring in the future, by instructing police to advise juveniles in custody of their *Miranda* rights – in the presence of a parent or legal guardian – before the police question, or a parent speaks with, the juvenile.[139] The Court further advised police to allow a parent and juvenile to consult in private to decide whether to waive those rights.[140] Failure to adhere to this guidance would "weigh heavily" in a court's totality of the circumstances analysis of the voluntariness of the waiver of *Miranda*.[141]

Before A.A. confessed to his mother in front of the police, strong evidence proving he committed a crime did not exist.[142] An attorney would have almost certainly advised A.A. not to say anything to anyone, possibly sparing him from being charged. Or, perhaps a lawyer would have negotiated a cooperation agreement, sparing him from jail time. We will never know.

A mandatory consultation with an attorney before waiver would ensure a fair and just system of law and order, protecting the rights of the accused as it administers justice. Conversely, a system that allows the State to cut corners imperils the liberty of the guilty and innocent alike.

Presha assumes that the presence of a parent or "interested adult" acts as a buffer against police coercion or over-reaching during juvenile interrogations.[143] For the reasons that will be set forth below, that assumption often is misplaced because parents cannot provide the sophisticated

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[137] Id.
[138] Id.
[139] Id. at 688-89
[140] Id.
[141] Id.
[142] Id. at 690.
[143] Presha, 748 A.2d at 1111.

legal protection juvenile suspects often need. The *A.A.* court's holding, that requires issuance of *Miranda* warnings before parents consult with a juvenile in custody, serves more to merely check a procedural box for the State than to offer a robust protection for juveniles. This is so because police still can unfairly exploit a post-*Miranda* waiver and interrogation to unfairly reap confessions or other incriminating statements. Evidence shows juveniles are still more susceptible to police interrogations and more likely to falsely confess, despite the presence of a parent.[144]

When police comply with *A.A.*, juveniles will have the appearance of Constitutional protection, even if a parent mistakenly allows them to waive their right against self-incrimination. It is reasonable to assume that some less scrupulous police will still manipulate and elicit incriminating statements from naïve, inexperienced juveniles, albeit *after* they have waived their rights. New Jersey can and should do better, by requiring the counsel of an attorney before a juvenile waives his or her rights.

Part II

Scientific and legal scholarly work demonstrate that children require stronger protections than adults in custodial interrogations. Juveniles lack the maturity and agency to make decisions that might have long term consequences. Interrogations are consequential events that juveniles are not equipped to fully comprehend. New Jersey's self-incrimination policies should account for these vulnerabilities by requiring counsel for juveniles who are subject to custodial interrogation.

Juveniles are less able to intelligently, knowingly and voluntarily waive their rights than adults. First of all, studies show juveniles are not likely to understand *Miranda* warnings. "*Miranda* warnings provide a choice, but a choice based on misunderstanding the options is not

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[144] Id.

an 'intelligent" choice.'"[145] Annually, ninety percent of juveniles who are read their *Miranda* warnings waive their rights, which is significantly higher than adults.[146] Studies consistently show that the vast majority of juveniles do not comprehend all or part of the *Miranda* warnings.[147]

A juvenile's inability to understand *Miranda* is often rooted in reading or oral comprehension deficiencies.[148] Significant percentages of juvenile offenders have undiagnosed learning disabilities requiring special education, or resulting from drug problems or mental illness.[149] Systemic influences beyond a child's control also play an important role in a his or her comprehension, such as educational quality, poverty and family life.[150]

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[145] Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1463 (2013) [hereinafter Ferguson] (proposing an alternative approach to make *Miranda* warnings more understandable to all criminal suspects).
[146] Id. at 1463 n. 227 (citing Richard Rogers et al., The Comprehensibility and Content of Juvenile Miranda Warnings, 14 PSYCHOL. PUB. POL'Y & L. 63, 63 (2008)) ("Overall, the striking rarity would seem to suggest that comparatively few adolescent suspects make informed decisions, which take into account the potentially negative consequences of their choices.").
[147] Id. at 1463 (citing several studies with data from the early 1980's to the present).
[148] Id.
[149] Id. at 1463-67 (estimates as high as seventy percent of juveniles arrested have diagnosable mental problems).
[150] Id.

Even if a juvenile understands the *Miranda* warnings, the decision to waive or not to waive is likely to be beyond a juvenile's decision-making capacity. The juvenile brain is not sufficiently developed to make such a momentous decision.[151] Laurence Steinberg, a respected expert in juvenile neuroscience, has found that the adolescent brain lacks the neural connections within the prefrontal cortex, the area of the brain responsible for impulsivity, risk assessment, planning, and susceptibility to outside influences.[152] In other words, the same characteristics of immaturity that lead some juveniles to commit crimes, prevent juveniles from making wise decisions whether to submit to custodial interrogation.

This area of the brain continues to develop into the twenties,[153] so it follows that even a seventeen-year-old suspect deserves the same procedural protections as younger suspects. A juvenile's susceptibility to outside influence supports the idea that a minor might waive his or her rights, driven by a desire to please police or even a parent, possibly in direct conflict with his long-term legal interests.[154] This weakness inherent in adolescents supports the argument that representation by a defense lawyer is the best, fairest and most logical solution to the issue.

Juveniles are more vulnerable than adults to standard interrogation methods, which leads to false confessions. Waiving *Miranda* rights subjects juveniles to coercive police questioning. "Immaturity, inexperience, and lower verbal competence than adults render youths especially

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[151] See Brief of Amici Curiae Juvenile Law Center, Center on Wrongful Convictions of Youth, and Center for Law, Brain and Behavior in Support of Petitioner at 10-11, Terrell v. Ohio, 139 S. Ct. 240 (2018) (No. 18-5239) [hereinafter Terrell Brief] (citing Laurence Steinberg, The Science of Adolescent Brain Development and Its Implication for Human Rights and Responsibilities, in HUMAN RIGHTS AND ADOLESCENCE 59, 64 (2014) *available at* https://www.supremecourt.gov/DocketPDF/18/18-5239/54684/20180718145000548_Terrell%20Amicus%20Brief%20FINAL%20Filed.pdf).

[152] Id.

[153] See Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) ("Longitudinal studies using magnetic resonance imaging have revealed a neurological basis for these psychological traits: the pre-frontal cortex of the brain, which controls the 'executive' functions of judgment and decision-making, continues to mature well beyond the teenage years.").

[154] Barry C. Feld, *Waiver of Legal Rights*, in YOUTH ON TRIAL, 105 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Feld, Waiver].

vulnerable to police interrogation tactics."[155] In *J.D.B. v. North Carolina*, the Court determined that juveniles cannot be held to the same standards as adults in *Miranda* situations.[156] *J.D.B.* marked an acceptance that there need to be special protections for juveniles regarding confessions and custodial interrogations.[157] According to Justice Sotomayor, "[N]o matter how sophisticated, a juvenile subject to police interrogation 'cannot be compared' to an adult subject."[158] Although the Court acknowledged this vulnerability, *J.D.B.* sidestepped the issue of "ineffectiveness of *Miranda* warnings when directed at children."[159]

Juveniles' vulnerability to standard police interrogation practices produces false confessions in an alarming number of cases. According to the National Registry of Exonerations, from 1998 to 2013, 38 percent of exonerations for crimes alleged to have been committed by youth involved false confessions, compared to just 11 percent for adults.[160]

Standard interrogation tactics including coercion, false promises of leniency and deception about evidence are particularly effective when employed on minors because they are designed to be used against experienced criminals.[161] In fact, experts say the imbalance of power in juvenile interrogations is so great that it makes the practice questionable because police can too easily break down a juvenile's defenses, producing false confessions.[162]

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[155] Id.
[156] Jeffrey W. Stowers Jr., *Misunderstood: A Juvenile's Ability to Be Competent Enough to Understand the Consequences of A Guilty Plea*, 19 New Crim. L. Rev. 1, 7 (2016) (discussing J.D.B. v. North Carolina, 564 U.S. 261 (2011)).
[157] Id.
[158] J.D.B., 564 U.S. at 273.
[159] Abigail Kay Kohlman, Kids Waive the Darndest Constitutional Rights: The Impact of J.D.B. v. North Carolina on Juvenile Interrogation, 49 AM. CRIM. L. REV. 1623, 1632 (2012) [hereinafter Kohlman].
[160] Why are Youth Susceptible to False Confessions?, INNOCENCE PROJECT (Oct. 16, 2015), https://www.innocenceproject.org/why-are-youth-susceptible-to-false-confessions/
[161] *Id.* (according to interview with Laura Nirider and Locke Bowman from the MacArthur Justice Center at Northwestern University's Law School about why even common interrogation techniques lead youth to confess to crimes they did not commit).
[162] *Id.*

Knowing that police employ standard tactics to manipulate people into confessions and knowing they are trained in advanced interrogation techniques to accomplish their mission, juveniles, and even their parents, are woefully under-matched when police bend the rules.[163] A requirement for juveniles to consult with counsel before waiving their rights is the logical and just solution to fill gaps in the law, where parents simply fall short, through no fault of their own.

Police can create an environment they know is likely to produce incriminating statements, just as they did in *A.A.*, and a parent may not perceive the legal reality of the circumstances. A.A.'s mother, his natural authority figure, was unwittingly thrust by the police into the role of interrogator, and both parent and child were unaware of just how unfair the process was.[164] It was a lawyer who ultimately recognized the injustice they were subjected to by the police, whether the police acted intentionally or not. It was a lawyer who waged a years-long battle in the appellate courts on A.A.'s behalf. Had the law required A.A. and his mother to consult with an attorney before anything else, the outcome would have been more just – even if he was adjudicated delinquent for the exact same crimes.

Unethical situational manipulations by police have drawn the ire of legal scholars.[165] Some police are trained to use parents as a tool to extract information from juveniles by intentionally increasing the parents' anxiety, or pressuring parents to encourage the child to confess after keeping them apart from children.[166]

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[163] Kohlman at 1633 (discussing a 13-hour interrogation of a juvenile, where police exploited the suspect's exhaustion and sleep deprivation).
[164] A.A., 222 A.3d at 685.
[165] Naomi E. S. Goldstein, et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2018) (criticizing police who trick children into revealing incriminating information through their parents).
[166] *Id.* at 54.

Even private consultation between parent and child, as *A.A.* requires, is insufficient to protect children's legal rights. In *Gault*, the U.S. Supreme Court held that children "need the guiding hand of counsel" throughout their entire journey through the juvenile justice system.[167] Notably, the Court also acknowledged children's unique vulnerability to police questioning and signaled a strong preference for the presence of counsel during interrogations.[168] Despite the mountain of scientific evidence and data, coupled with courts' strong words and professed commitment to protecting juveniles' rights, courts have yet to recognize juveniles' right to a mandatory consultation before waiving their right to remain silent.

Part III

Implementation of these procedures will not come cheaply. The cost of providing legal counsel to juveniles will certainly be significant, that much is undeniable. Justice should not be assigned a price tag, and Appellate Division articulated this principle in the context of administrative hearings that adjudicate parental abuse and neglect.[169] In *New Jersey Dep't of Children & Families v. L.O.*, the Court held that the right to counsel attaches for indigent defendants facing termination of their parental rights because the consequences were of "sufficient magnitude" in the context of administrative hearings and appeals for child-abuse.[170] The State Bar argued against the appellant and the ACLU in *L.O.*, pointing to the cost of providing counsel.[171] The Court determined counsel was required but declined to solve the cost problem, noting "that

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[167] Gault, 387 U.S. at 36.
[168] Id. at 55 ("The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege [against self-incrimination]".)
[169] New Jersey Dep't of Children & Families v. L.O., 213 A.3d 187, 192 (N.J. Super. Ct. App. Div. 2019).
[170] Id. at 192-98 (holding that: "(1) the consequences of a child-abuse substantiation are of sufficient magnitude to warrant the appointment of counsel for an indigent defendant; (2) that right attaches not only to the administrative proceedings . . . but also when a final agency decision has been appealed to this court as of right and it further includes the right to free transcripts; and (3) until such time as the Legislature makes provision, the right to counsel shall be enforced by courts and agencies through the appointment of pro bono counsel from the *Madden* list.")
[171] Id.

the Legislature has in the past 'acted responsibly' in providing counsel for the poor when constitutionally required."[172] The Court quoted the United States Supreme Court in *Griffin v. Illinois*, "there is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance."[173] Furthermore, the Appellate Division concluded the existence of a right to counsel does not turn on a "cost analysis."[174]

When considering the potential cost of providing counsel for juveniles in custodial interrogation, context is important. The cost of incarceration of juveniles in New Jersey is nearly $200,000 annually for each young person.[175] As of 2014, New Jersey spent more per young person each year than thirty-seven other states.[176] The cost of ensuring that juveniles' rights are protected may not be calculable, but in view of the staggering amount the State currently pays to punish them, the cost is likely to be offset by reducing the number of juvenile suspects who become inmates. In light of the rate of false confessions, the cost of providing an attorney early in the process would likely reduce the cost to the state and judiciary of later legal challenges and appeals.

Some may argue a law requiring consultation is politically impossible because the political climate is too divided. When the NJ Legislature passed its latest round of juvenile justice reform, it came to reality through a process of political compromise.[177] These reforms showed the

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[172] Id. at 199.
[173] *Id.* at 198 ("[T]he ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial") (quoting Griffin v. Illinois, 351 U.S. 12, 17–18 (1956)).
[174] Id.
[175] *The Costs*, YOUTH JUSTICE NEW JERSEY (2020) http://www.youthjusticenj.org/the-problem/the-costs/ (citing a 2014 study comparing the costs of incarcerating juveniles across the U.S.).
[176] Id.
[177] Press Release, Governor Phil Murphy, On Martin Luther King, Jr. Day, Governor Murphy Signs Juvenile Justice Reform Legislation, (Jan. 20, 2020), https://www.nj.gov/governor/news/news/562020/20200120b.shtml.

Legislature has the ability to create effective reforms without producing watered-down, meaningless laws that only pay lip service to problems. On the federal level, The First Step Act, which contained major criminal justice reforms, was signed into law during a Presidency and era marked by civil unrest and fierce division.[178]

The Legislature is faced with countless issues and powerful forces exerting their influence to compete for the State's resources. Juvenile criminal suspects are unlikely to wield much influence around the Statehouse, so the Supreme Court would more likely be the impetus to require counsel for juveniles facing custodial interrogation. The New Jersey Supreme Court has a strong tradition of protecting constitutional rights and the most vulnerable members of the State.

Police and prosecutors may not like the idea of providing counsel early in the process. Police and prosecutors want to preserve the status quo. After all, there is not much better evidence for proving crimes than confessions. Police who regularly come into contact with juvenile offenders believe such a requirement could unfairly delay investigators, embolden criminals, and take away an indispensable tool from their crime-fighting resources.[179]

According to a detective in NJ, experienced in juvenile investigations, well-trained juvenile investigators fully understand the stakes when they "Mirandize" and interrogate a juvenile.[180] Although "old school" cops may cut corners, modern, sophisticated interrogators rely on documentation, video and audio recording, and strict adherence to protocol when they question

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[178] Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES, (Dec. 18, 2018), https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html (detailing the bipartisan effort to pass the Act including support from President Trump and Senators Booker and Grassley, as well as some of the provisions that were not included because lawmakers could not garner enough support).

[179] Zoom interview of Detective Ray Boulard, of the Roseland Police Department, (August 3, 2020) Detective Boulard has been a police officer for twenty years and was a juvenile officer for nine years in Essex County, NJ. We discussed *A.A.*, *Miranda*, and the idea that juveniles should require counsel before being subjected to custodial interrogation.

[180] Id.

juveniles.[181] This entails a careful explanation of *Miranda* rights in the presence of a parent or guardian as a first step, making sure each and every word is understood.[182] Conscientious law enforcement officers attend cutting edge seminars where they learn how to employ advanced interrogation techniques adhering to the latest legal standards.[183]

In their eyes, police can sometimes effectively gather valuable information from juveniles to quickly solve crimes in the communities they serve.[184] Police believe mandatory consultation with an attorney before permitting questioning would needlessly slow down the process, allowing the trail to go cold on important investigations.[185]

Experienced law enforcement officers believe each case is fact specific, and there cannot be a one-size-fits-all approach to juvenile suspects.[186] The intensity of an investigation is relative to the seriousness of the crime committed, and juveniles do commit very serious crimes.[187]

In Essex County particularly, car theft syndicates utilize juveniles.[188] The geography, infrastructure and demographics put valuable targets in close proximity to juvenile car thieves and violent carjackers who can quickly sell, hide and ship stolen vehicles without capture.[189] From an investigator's viewpoint, police would rarely be able to extract confessions and useful information from juvenile suspects because lawyers would usually advise them to say nothing.[190] In this context, according to the detective, a mandatory consultation with an attorney hurts society and

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[181] Id.
[182] Id.
[183] Id.
[184] Id.
[185] Id.
[186] Id.
[187] Id.
[188] Id.
[189] Id.
[190] Id.

juveniles generally, because it effectively protects the adult leaders who exploit juvenile car thieves in the first place.[191]

Police fear such a requirement could embolden juvenile criminals who are more experienced in criminal activity.[192] In their eyes, such a requirement would risk decreasing public safety because they would be forced to release more juvenile criminals due to a lack of evidence.[193] The detective interviewed considers that an unfair advantage to guilty juveniles, and a limitation on the police's ability to do more than transport suspects to a meeting between prosecutors and defense attorneys.[194] It is an interesting proposition to consider whether law enforcement would respond to a mandatory consultation with an attorney for juvenile defendants by also mandating the presence of a prosecutor with the authority to make deals in exchange for information.

Notably, when asked if, as a parent, he would want a lawyer if his child was wanted for questioning about a serious crime, the same police detective answered, "I would want a lawyer."[195] Nevertheless, law enforcement's perspective is important to consider because society relies on the protection of the criminal justice system. After all, juveniles do commit crimes and society demands an efficient system of law and order.

After viewing the scientific evidence that courts have begun to accept and the arguments that weigh against recognizing a right to counsel before waiver, it is important not to overlook additional considerations that could tip the scales in either direction. Fundamental principles of fairness and justice favor protecting juveniles' rights.

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[191] Id.
[192] Id.
[193] Id.
[194] Id.
[195] Id.

Part IV

Presha envisioned parents as the "buffer" between their child and the police, effectively advising and protecting the juvenile's rights.[196] Unfortunately, most parents cannot fulfill this role because they lack legal knowledge, or, their vision of "doing the right thing" conflicts with the legal interests of the juvenile suspect.[197] In other instances, some parents lack the intellectual ability or education to understand *Miranda*.[198] Even an intelligent, high-functioning parent is unlikely to be aware of the complexities of the law without a legal education and experience in criminal defense.

Furthermore, the consequences of waiver can subject a juvenile to experiences so extreme they justify a requirement of counsel beforehand. In view of young people's special status in our society, it is important to protect them because their future could be ruined by the very decision to answer investigators' questions. From a juvenile criminal defendant's financial perspective, it is notable that courts have commanded representation for those who cannot afford it in other legal situations where consequences of magnitude existed.[199] A lack of wealth should not subject one

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[196] Presha, 748 A.2d at 1111.

[197] Richard Rogers et al., The Comprehensibility and Content of Juvenile Miranda Warnings, 14 PSYCHOL. PUB. POL'Y & L. 63, 66 (2008) [hereinafter Rogers].

[198] Id.

[199] See e.g., L.O., 213 A.3d at 192 citing Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971), in which the Supreme Court concluded "no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other *consequence of magnitude* without first having had due and fair opportunity to have counsel assigned without cost." (emphasis added)); See also Pasqua v. Council, 892 A.2d 663, 670 N.J. (2006) (indigent defendants must be assigned counsel in civil matters when incarceration may be a consequence of the defendant's willful failure to pay child support); N.J. Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034, 1037 (N.J. 2007) (actions seeking the termination of parental rights); Doe v. Poritz, 662 A.2d 367, 382-83 (N.J. 1995) (right to counsel also attaches to Megan's Law tier classification matters); In re S.L., 462 A.2d 1252, 1259 (N.J. 1983) (involuntary civil commitment proceedings); State v. Moran, 202 N.J. 311, 325 (N.J. 2010) (motor vehicle matters when license suspension is at issue); State v. Ashford, 864 A.2d 1122, 1125-26 (N.J. Super. Ct. App. Div. 2004) (contempt proceedings alleging a violation of a restraining order); State v. Hermanns, 650 A.2d 360, 366 (N.J. Super Ct. App. Div. 1994) (matters in which a significant fine may be imposed).

to an inferior experience in the context of a custodial interrogation in a juvenile criminal matter.[200] The fact that a wealthy parent of a juvenile suspect would not hesitate to hire a lawyer before waiving their rights suggests the same kind of consultation should be mandatory for all juvenile criminal suspects.

It is already settled law that juveniles have the right to an attorney, and one will be appointed if they cannot afford one.[201] However, a consultation at the critical stage of a custodial interrogation is elusive for too many juveniles. Many minors ill-advisedly waive their right to counsel at exactly this stage. In some jurisdictions, as many as 80 to 90 percent of youth waive their right to an attorney because they do not know the meaning of the word "waive" or understand its consequences.[202] This phenomenon has a "disproportionately large effect on youth from poor, minority, immigrant and single-parent families."[203] In effect, juvenile suspects who cannot afford a lawyer often suffer consequences of great magnitude in a custodial interrogation by going it alone or relying on the advice of parents, while more financially endowed peers enjoy the services of a paid criminal defense attorney at the same critical juncture. This unfortunate outcome should be mitigated by requiring a consultation with an attorney to truly uphold the promises of *Gault* and *Presha*. After all, in the criminal setting, lawyers are "necessities, not luxuries."[204]

The prospect of being charged as an adult and serving a term in adult prison justifies enhanced protections. New Jersey has enacted legislation to protect juveniles' rights, but waiver

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[200] L.O., 213 A.3d at 192.
[201] In re Gault, 387 U.S. at 36-42.
[202] U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ACCESS TO COUNSEL, (2004), https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf.
[203] Id. (citing Leiber, M.J., and Stairs, J.M., *Race, contexts, and the use of intake diversion*, J. OF RESEARCH IN CRIME AND DELINQUENCY 36(1):56–86.).
[204] L.O., 213 A.3d at 198 (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

to adult court and a potential term in adult prison remain real and serious potential consequences that justify enhanced protections against self-incrimination for juveniles.[205]

The specter of recidivism is a consequence for minors and society alike. Despite legislative efforts to improve outcomes for juvenile offenders,[206] it is unquestionable that some juveniles become trapped in the system and go on to a life of crime as adults.[207] Nearly eighty percent of youth imprisoned in NJ will reoffend within three years, and one-third will be imprisoned again.[208] Worse yet, children in youth detention are more likely to be imprisoned and to live in poverty as adults.[209] For a juvenile defendant, the best reforms would be reforms that prevent criminal charges to begin with. Legal representation before interrogation would help ensure that only juvenile criminal cases with sufficient merit make it past the police station.

Racial disparities exist that support the need to provide enhanced protections for juvenile criminal suspects.[210] Despite being only fourteen percent of the population, black youth make up seventy-four percent of the juvenile inmates in NJ.[211] A requirement for consultation with a lawyer before deciding to answer questions would overwhelmingly benefit black youth because they comprise the majority of juveniles in custody.[212] Consultation with an attorney before waiver would benefit juveniles because it would allow defense counsel to become familiar with their clients earlier and give them a chance to gather information while it is still fresh in the defendant's

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[205] See State v. Zuber 152 A.3d 197 (N.J. 2017).
[206] Press Release, Governor Phil Murphy, On Martin Luther King, Jr. Day, Governor Murphy Signs Juvenile Justice Reform Legislation, (Jan. 20, 2020), https://www.nj.gov/governor/news/news/562020/20200120b.shtml.
[207] New Jersey Institute for Social Justice, *150 Years is Enough Campaign: FAQ*, (August 10, 2020, 2:30:00 PM), https://www.njisj.org/150faq.
[208] Id.
[209] Id.
[210] Elizabeth Pelletier & Samantha Harvell, *Data Snapshot of Youth Incarceration in New Jersey*, URBAN INSTITUTE, https://www.urban.org/sites/default/files/publication/91561/data_snapshot_of_youth_incarceration_in_new_jersey_0.pdf.
[211] Id.
[212] Id.

memory.[213] In turn, a vigorous and zealous defense early in the case could prevent unnecessary pretrial detention, which more often leads to post-trial imprisonment.[214] Criminal defense lawyers occupy a unique position in society, and their presence at interrogations would prevent some juvenile suspects being caught in the system. Such a policy would also help build marginalized communities' confidence in a system in which they currently have little faith.[215]

Conclusion

A juvenile's entire future success or failure in life could hinge on the decision whether or not to answer questions from an investigator. The legal calculus to make that decision is too complex for parents and juveniles alone and is best suited for a lawyer. In order to keep the promises of *Gault* and *Presha*, the right to consult with a defense attorney before waiving the right to remain silent must be recognized for juveniles in police custody. Only a lawyer can objectively protect the legal interests of a juvenile facing custodial interrogation.

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[213] U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ACCESS TO COUNSEL, (2004), https://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf.
[214] Id.
[215] Nahgol Ghandoosh, *How Defense Attorneys Can Eliminate Racial Disparities in Criminal Justice*, THE CHAMPION, June 2018, at 36-47, https://www.sentencingproject.org/wp-content/uploads/2018/08/How-Defense-Attorneys-Can-Eliminate-Racial-Disparities-in-Criminal-Justice-System.pdf.