BYU Law Review

Volume 2017 | Issue 1 Article 8

May 2017

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INTRODUCTION

The Supreme Court emphasized in *In re Gault* "that admissions and confessions of juveniles require special caution,"[1] noting that "the *greatest* care" should be given to assure that the juvenile gives these statements voluntarily with full knowledge of his or her rights.[2] Unfortunately, the standard used today by juvenile courts to decide whether juveniles have made a "voluntary, knowing, and intelligent"[3] *Miranda* waiver often does not meet the requirements set forth in *Gault*.

This Comment will explore the safeguards that are currently in place to ensure juveniles' Fifth Amendment right against self-incrimination is protected. Part I gives a brief history of the juvenile court system, including its origin and the philosophy behind its creation. Part II looks at the approach taken by today's juvenile courts to guarantee that *Miranda* waivers given by juveniles are "knowing, intelligent, and voluntary."[4] The next three parts identify and explore three problems with the current approach to juvenile *Miranda* waivers. Part III explores why treating a juvenile's waiver of rights the same as that of an adult may not be the best approach. Part IV explains that juveniles lack the mental abilities needed to make a valid waiver, and Part V assesses how the current approach used to ensure a valid waiver is inconsistently applied throughout the juvenile court system. Finally, Part VI will suggest a new approach that will better protect juveniles' *Miranda* rights: Juveniles should be guaranteed the opportunity to consult an attorney before waiving their rights. This approach will provide juveniles a heightened degree of protection and ensure juvenile *Miranda* waivers are valid.

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1. *In re* Gault, 387 U.S. 1, 45 (1967).
2. *Id.* at 55 (emphasis added).
3. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
4. *Id.*

I. A BRIEF HISTORY OF THE JUVENILE COURT

The idea that the law should protect children and treat them different than adults is an old concept. Blackstone's *Commentaries* state that in order to commit a crime, a person must both (1) intend to commit a crime and (2) do an unlawful act.[5] According to Blackstone, children under the age of seven were too young to have the intent necessary to commit a crime, while children older than fourteen were treated the same as adults in criminal convictions.[6] Blackstone further explained that for children between the ages of seven and fourteen, criminal liability depended on whether the court determined that the child understood the difference between right and wrong.[7] Children who possessed such an understanding were deemed to be capable of having the intent necessary to commit a crime and could be sentenced as an adult, even if that sentence included execution.[8]

The American legal system followed Blackstone's ideas on age and intent until the late nineteenth century, when the legal treatment of children began to change as part of an expanding child-saving movement. In 1891, the Chicago Women's Club recommended to the Illinois legislature that a separate juvenile court system be created to deal with problem children.[9] However, it was not until 1899 that the Club, with the sponsorship of the Chicago Bar Association, presented a juvenile court bill to the Illinois legislature.[10] The Club's efforts were successful, and the Illinois juvenile code passed in 1899, mandating the following provisions for the legal processing of problem children:

5. A.B.A., PART 1: THE HISTORY OF JUVENILE JUSTICE 4 (2007), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

6. *Id.*

7. *Id.*

8. *Id.*

9. DAVID MUSICK, AN INTRODUCTION TO THE SOCIOLOGY OF JUVENILE DELINQUENCY 25 (1995).

10. *Id.*

- The state could intervene and act as *parens patriae*,[11] or guardian, of the child.[12]
- A new tribunal would be created to "hear cases involving problem children under the age of sixteen."[13]
- Informal and noncriminal procedures were to be used by the court so that remedial, preventative, and non-punitive justice could be given on an individual basis.[14]
- Judges would "furnish 'parent-like' care, custody, and discipline" to the children.[15]

The idea of this new juvenile court was well-received, and within twenty-five years of the establishment of the first juvenile court in Cook County, Illinois, "most states had set up [similar] juvenile court systems."[16] The driving philosophy behind the juvenile court system was that cases involving adolescents should be civil (rather than criminal) in nature, and that the legal system should guide and rehabilitate juveniles into responsible and law-abiding adults.[17]

It is important to note that because early juvenile courts took on a parental role in guiding wayward juveniles, the courts were informal and had few mandatory procedural rules. At the same time, juvenile courts exercised tremendous power—judges had the right to remove children from their homes and place them in juvenile reform "schools" as part of the rehabilitation process.[18] Indeed, this informal and

11. The doctrine of *parens patriae* means that the state steps in and acts as the "provider of protection to those unable to care for themselves." *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. MUSICK, *supra* note 9, at 25.

13. *Id.*

14. *Id.*

15. *Id.*

16. A.B.A., *supra* note 5, at 5.

17. *Id.*

18. *Id.* Judge Julian Mack, one of the first judges to preside over the juvenile court, described the goals of the juvenile court:

> The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion

unregulated approach to the juvenile courts continued until the Supreme Court agreed to hear *In re Gault* in 1967.

Gerald Gault was a fifteen-year-old boy who was found to have made "Lewd Phone Calls" to Mrs. Cook, his neighbor.[19] Mrs. Cook made a verbal complaint to the police about the phone calls, which resulted in Gerald being picked up by the police and "taken to the Children's Detention Home."[20] Gerald's parents were never notified that he had been arrested, nor were they served a petition about the hearing that was to be held to decide Gerald's fate.[21] Mrs. Cook, the complainant, was not present at the hearing, no one was sworn in, and "no transcript or recording was made."[22] At the end of the hearing, the judge said he would "think about" the issues of the case and sent Gerald back to the Detention Home.[23] In the end, the judge committed Gerald to the State Industrial School, a juvenile reform school, until the age of twenty-one.[24] If Gerald had been an adult and convicted of the same crime, he would have been fined between five and fifty dollars, or he could have been sentenced to no more than two months of imprisonment.[25]

Gerald's parents petitioned for his release, arguing that Gerald had been denied due process of law and that his constitutional right to a fair trial had been violated.[26] The Supreme Court ruled in the Gaults' favor and held that juveniles subject to delinquency hearings were entitled to a notice of charges against them, the right to legal counsel, the right against self-incrimination, the right to confront and cross-examine witnesses, the right to a transcript of the proceedings, and the right to appellate review to ensure due process and fair hearings.[27] Justice Black emphasized in his concurring opinion that

> put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909).

19. *In re* Gault, 387 U.S. 1, 7 (1967).
20. *Id.* at 4–5.
21. *Id.* at 5.
22. *Id.*
23. *Id.* at 6.
24. *Id.* at 7.
25. *Id.* at 8–9.
26. *Id.* at 9–10.
27. *Id.* at 10.

> [w]here a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.[28]

The *Gault* decision brought several sweeping changes to the juvenile court system, causing some advocates of less rigid and informal juvenile hearings to fear that the *Gault* decision blurred the lines between juvenile and criminal court proceedings. Time would demonstrate that these fears proved unfounded, as the juvenile courts have continued to operate as civil courts post-*Gault*, with a focus on rehabilitation and acting in the best interest of the child. Among the rights guaranteed to juveniles through *Gault*, is the right against self-incrimination, also known as the right to remain silent.[29] Today, courts use the totality of the circumstances approach to decide the validity of a juvenile's waiver of the right to remain silent.

II. The Totality of the Circumstances Approach

As stated above, the decision of *In re Gault* brought several sweeping changes to the Juvenile Court system. In deciding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[30] the Supreme Court held that juveniles have constitutionally protected rights to a notice of the charges, counsel, confrontation and cross-examination, protection against self-incrimination, "a transcript of the proceedings," and appellate review.[31] With regard to a juvenile's right against self-incrimination, the Court further "emphasized that admissions and confessions of juveniles *require special caution*."[32] Additionally, the Court admonished that confessions given without the presence of counsel should be given "the greatest care . . . to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights."[33] To

28. *Id*. at 61 (Black, J., concurring).
29. *Id*. at 42–49.
30. *Id*. at 13 (majority opinion).
31. *Id*. at 10.
32. *Id*. at 45 (emphasis added).
33. *Id*. at 55.

safeguard against juveniles waiving the right to counsel and confessing without understanding their rights, the juvenile court implemented the same waiver procedures that are currently in place for adults.

The year before the *Gault* decision, in *Miranda v. Arizona*, the Supreme Court established police procedural guidelines that protected a person accused of a crime from self-incrimination during a custodial interrogation.[34] The *Miranda* Court established that before questioning starts in a custodial interrogation, accused persons must be made aware of their right to remain silent, that anything they say can be used against them, their right to have counsel present during the questioning, and their right to have counsel appointed to them if they cannot afford to retain counsel for themselves.[35] These *Miranda* warnings, intended to protect the Constitutional rights set forth in the Fifth Amendment, have become a fundamental part of criminal jurisprudence with guaranteed protection. To determine whether statements made by the accused during interrogation are admissible, courts investigate the totality of the circumstances encompassing the interrogation to assess whether the accused "voluntarily, knowingly, and intelligently"[36] waived his or her rights before making statements to the police.[37]

Over ten years after *Miranda*, the Supreme Court decided in *Fare v. Michael C.* that the "totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."[38] The Court stressed that the totality approach would not only permit but *mandate* examination of *all* of the circumstances surrounding an interrogation of a juvenile.[39] According to the Court, this investigation into the circumstances surrounding the interrogation must include an "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[40]

34. Miranda v. Arizona, 384 U.S. 436 (1966).
35. *Id.* at 479.
36. *Id.* at 444.
37. *Id.*
38. Fare v. Michael C., 442 U.S. 707, 725 (1979).
39. *Id.*
40. *Id.*

It would seem that no one would be able to better determine if juveniles have "voluntarily, knowingly, and intelligently" waived their *Miranda* rights than juvenile courts who have the experience and expertise in dealing with juveniles. Yet the application of the totality of the circumstances approach appears to be flawed, considering that a staggering ninety percent of juveniles who are arrested for alleged felonies choose to waive their *Miranda* rights after they are informed of them.[41] Among juveniles under the age of fourteen, the number who waive their rights jumps to ninety-five percent.[42]

In light of these troubling statistics, this Comments identifies three main flaws with the totality of the circumstances approach to the waiver of *Miranda* rights by juveniles. First, the totality method treats juveniles as adults, which is contrary to the philosophy driving the juvenile system. Second, juveniles lack the mental capacity to understand what it means to waive their constitutionally protected rights.[43] And third, judges are unable to weigh the factors considered in the totality approach with consistency and regularity.

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41. A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (reporting that over 90% of the juveniles whom police interrogated waived their rights); J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 337–39 (1977) (noting that juveniles invoked their rights in about 10% of cases compared to the 40% of adults who invoked their rights); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & HUM. BEHAV. 253, 261 (2005) (reporting that in a retrospective study of delinquents held in detention, only approximately thirteen percent reported that they asserted their right to silence).

42. Grisso & Pomicter, *supra* note 41, at 337.

43. "[B]asic research on cognitive and psychosocial development suggests that some youths will manifest deficits in legally relevant abilities similar to deficits seen in adults with mental disabilities, but for reasons of immaturity rather than mental disorder." Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 334 (2003). In trying to ascertain a juvenile's competency to stand trial in comparison to adults, the

> [a]bilities associated with adjudicative competence were assessed among 927 adolescents in juvenile detention facilities and community settings. Adolescents' abilities were compared to those of 466 young adults in jails and in the community. Participants at 4 locations across the United States completed a standardized measure of abilities relevant for competence to stand trial (the MacArthur Competence Assessment Tool—Criminal Adjudication) as well as a new procedure for assessing psychosocial influences on legal decisions often required of defendants (MacArthur Judgment Evaluation).

Id. at 333.

III. IMPROPRIETY OF ADULT APPROACHES IN THE JUVENILE SYSTEM

The philosophy underlying the formation of the juvenile court system is that children are not adults and should not be held to an adult standard.[44] The idea is that children do not have the malice necessary to commit criminal acts, and any such acts committed by children are due to behavioral problems that are outside of their control.[45] Thus, rather than subjecting juveniles to criminal punishment, the State, through the juvenile court system, steps in when needed and acts as *parens patriae* to provide for the nurture, guidance, supervision, and needs of the child.[46]

Supreme Court jurisprudence has continually recognized that children should be treated as children rather than miniature adults. The Court has stated that juvenile courts "are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[47] The Court did not formally impose the adult totality of the circumstances approach on juveniles until *Fare*, even though the belief that juveniles who commit crimes should be treated differently from adult criminals was evident in pre-*Fare* cases involving the constitutionally protected right against self-incrimination. The pre-*Fare* cases of *Haley v. Ohio*[48] and *Gallegos v. Colorado*[49] prove instructive to this point, the Court having ruled in both instances that an offender's age is vital in deciding how the law administers justice.

In 1948, long before *Miranda*'s sweeping changes, the Supreme Court heard *Haley v. Ohio*.[50] The case involved the murder confession of a fifteen-year-old boy. After examining the facts surrounding the boy's arrest, questioning, and confession, the Court emphasized:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must

44. A.B.A., *supra* note 5, at 5.

45. Philip Rich, *The Juvenile Justice System and Its Treatment of the Juvenile: An Overview*, 17 ADOLESCENTS 141, 142 (1982).

46. *Id.*

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

48. 332 U.S. 596 (1948).

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

50. *Haley*, 332 U.S. at 596.

> be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity.[51]

The Court further stressed that it could not "indulge [in the] assumption" that one of such a young age could fully appreciate his constitutional rights without the advice of counsel.[52]

The Court's view that juveniles lack the understanding and maturity of adults and, therefore, that they cannot be held to adult standards was highlighted again almost fifteen years later in *Gallegos v. Colorado*.[53] *Gallegos* dealt with the admissibility of inculpatory statements made by a fourteen-year-old boy who, "immediately" upon being picked up by the police for questioning, confessed to robbing and beating an elderly man.[54] Citing *Haley*, the Court found the suspect's youth to be a "crucial factor"[55] to the admissibility the boy's statements. Consequently, the Court ultimately decided the boy's confession was inadmissible due to the immaturity characteristic to his age. As Justice Douglas explained, a youth of fourteen, "no matter how sophisticated . . . is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded."[56] Additionally, such a youth "is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[57] Douglas further emphasized that such a boy "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[58]

Two more recent cases involving the rights of juveniles, *Roper v. Simmons*[59] and *Miller v. Alabama*,[60] show the Supreme Court's continued insistence that children are not merely miniature adults and should not be held to the same standards as adults. In *Roper*, the Court determined that sentencing a juvenile offender below the age of eighteen to the death penalty constituted cruel and unusual

51. *Id.* at 599.
52. *Id.* at 601.
53. *Gallegos*, 370 U.S. at 49.
54. *Id.* at 49–50.
55. *Id.* at 53.
56. *Id.* at 54.
57. *Id.*
58. *Id.*
59. 543 U.S. 551 (2005).
60. 132 S. Ct. 2455 (2012).

punishment under the Eighth Amendment.[61] The Court held that juveniles are categorically less culpable than adult criminals for three reasons. First, "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young."[62] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[63] And third, "the character of a juvenile is not as well formed as that of an adult."[64] Each of these three reasons given by the Court relates to juveniles' lack of maturity and development because of their youth. This reasoning mirrors the philosophy behind the development of the juvenile court system—juveniles should not be held to the same standards as adults.

The Court again advanced the idea that juveniles should not be held to an adult standard when it decided in *Miller* that juveniles may not be given mandatory life imprisonment without parole.[65] Citing *Roper*, the Court reaffirmed that "children are constitutionally different from adults for purposes of sentencing," explaining that "juveniles have diminished culpability and greater prospects for reform."[66] Because juveniles do not have the same experience and maturity as adults, it makes sense that they should also not be viewed as having the same accountability as their adult counterparts.

Cases like *Haley*, *Gallegos*, *Roper*, and *Miller* all demonstrate the Supreme Court's embrace of the philosophy behind the development of the juvenile court system—children are not sufficiently developed or mature to be treated as adults. Given the Court's well-established and enduring stance on this issue, it seems illogical that juveniles should be held to adult standards when it comes to something as important as waiving the right against self-incrimination.

61. *Roper*, 543 U.S. at 560.
62. *Id*. at 569.
63. *Id*.
64. *Id*. at 570.
65. *Miller*, 132 S. Ct. at 2460.
66. *Id*. at 2464.

IV. CHILDREN LACK THE MENTAL ABILITY TO WAIVE THEIR RIGHTS

In order for a *Miranda* waiver to be admissible, the waiver must be made "voluntarily, knowingly, and intelligently."[67] Juvenile waivers, however, present at least two significant problems. First, juveniles' may lack the capacity to make a knowing and intelligent waiver because their brains are still developing.[68] Second, adolescents are more susceptible and vulnerable to coercion because they are still maturing in their psychosocial development.[69] The combination of juveniles' still-developing brains and immature psychosocial abilities calls into question whether juveniles are capable of making a voluntary, knowing and intelligent *Miranda* waiver.

An adolescent's inability to make a valid waiver of *Miranda* rights may have less to do with learning and education and more to do with the fact that the adolescent brain is still undergoing growth and change.[70] Due to a still maturing and developing brain, juveniles likely lack the ability to make a knowing and intelligent decision about their rights. With the advent of magnetic resonance imaging (MRI), scientists have been able to study and better understand the growth and development of the living brain.[71] Using MRI, scientists have shown that changes in the volume of grey and white matter of the brain take place throughout childhood, adolescence, and into early adulthood.[72]

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

68. *See* Grisso, *supra* note 43, at 356–57; *see generally* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003).

69. *See* Steinberg & Scott, *supra* note 68, at 1014–15.

70. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 440.

> While the growing body of research in brain development is still too young to make definitive correlations between brain development and reasoning ability or behavior, what is known strongly suggests that adolescents do not think like adults because they are physiologically incapable of doing so. Adolescents do not have the same access to their frontal lobes, nor the same ability to integrate the functions of different regions of their brains as adults. Hence, they have a lesser ability to reason and interpret information than adults have.

Id. (emphasis omitted).

71. Tomáš Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, 9 TRENDS IN COGNITIVE SCIS. 60, 60–67 (2005).

72. *Id.* at 61–62.

That the adolescent brain is continually evolving may explain why the teenage years are full of emotional upheaval, risk taking, experimentation, and overall change.[73] The MIT Young Adult Development Project was created in 2005 to scrutinize and examine the increasing research on changes that take place during adolescence. "Defining young adulthood as the years between 18 and 25, the project focused on identifying research conclusions about which there is widespread agreement across disciplines and researchers . . . ."[74] The Project concluded that adolescence is a time where the brain goes through "considerable growth and pruning,"[75] and teenagers "show a heightened desire for emotional intensity, and for the thrills, excitement, adventures, and risk-taking that are likely to generate high emotion."[76]

Accordingly, the adolescent years are a period of immense change for not only the physical characteristics attributed to puberty, but also the mental prowess of the brain, including the ability to make informed decisions.[77] Consider how myelination—the process that covers nerve fibers with white matter, insulating the nerve fibers and allowing signals to be transmitted more efficiently through the brain—is far from complete during adolescence and continues until early adulthood.[78] Because "[s]mooth flow of information throughout the brain depends to a great extent on the structural integrity and maturity of white-matter pathways[,]"[79] the development of which is still incomplete, adolescents tend to have a lower ability to problem solve, think ahead, assess risks, and regulate emotions relative to adults.[80] While a juvenile's brain can still perform such tasks, it takes much more effort for the brain to do so and, hence, the brain is less likely to complete the tasks.[81] Teenagers are not often known for their thorough reasoning, and it seems that science now has sufficient evidence to explain this phenomenon. Teenagers' possible reduced

73. A. RAE SIMPSON, MIT YOUNG ADULT DEVELOPMENT PROJECT 4–11 (2008), http://hrweb.mit.edu/worklife/youngadult/youngadult.pdf.

74. *Id.* at 2.

75. *Id.* at 10.

76. *Id.*

77. *Id.* at 6–7.

78. *Id.* at 10.

79. Paus, *supra* note 71, at 61.

80. *See* Simpson, *supra* note 73, at 10.

81. *See id.*

ability for thorough reasoning could also hinder them from making a valid waiver of their rights.

Juveniles who are asked to waive their *Miranda* rights must be able to not only understand the meaning of their rights, but also imagine the consequences of a decision to waive or invoke their rights.[82] This means that in order for a juvenile to make a "knowing and intelligent" waiver, he or she needs to be able to apply counterfactual thinking. Counterfactual thinking is the "ability to imagine alternative outcomes and understand the consequences of those outcomes."[83] Research on the adolescent brain and its reasoning ability by Abigail Baird and Jonathan Fugelsang, professors in the Department of Psychological and Brain Science at Dartmouth College, is instructive. Baird and Fugelsang found that an adolescent's ability to think counterfactually is hindered because of the still-developing white brain matter around the nerve fibers, which inhibits information from traveling as smoothly between areas of the adolescent brain as it does in a fully matured adult.[84] The study further clarifies:

> [I]t is the interaction of continued experience and refinements in the adolescent brain that enable the emergence of counterfactual reasoning, as well as the appreciation of consequences, in the absence of actual experience. What the evidence . . . suggests is that it may be physically impossible for adolescents to engage in counterfactual reasoning, and as a result of this [adolescents] are often unable to effectively foresee the possible consequences of their actions.[85]

In short, because juveniles' brains are, in many cases, unable to process counterfactual scenarios due to lack of neurological maturity, they may not be able to make the informed reasoning necessary to knowingly waive their *Miranda* rights.

Not only is there evidence that juveniles lack the brain development necessary to make a "knowing and intelligent" waiver of their rights, but juveniles may also lack the vocabulary to understand

82. *See generally* Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1797, 1799–1802 (2004).

83. *Id.* at 1797.

84. *Id.* at 1800–01.

85. *Id.* at 1802 (defining adolescents as the period of life between puberty and adulthood).

the words used and the rights provided in the *Miranda* warning. Professor Thomas Grisso assessed both juvenile and adult comprehension of the vocabulary and rights expressed in the *Miranda* warning, as well as juvenile and adult awareness of the purpose and importance of the rights expressed in the statement, in order to perform a comparative analysis between the two groups.[86] The study showed that juveniles' comprehension of the six key words used in the *Miranda* warning was significantly lower than that of the adults. When given an exam to test *Miranda*-related vocabulary comprehension, 60.1% of adult participants achieved the highest possible score compared to only 33.2% of juvenile participants.[87] Also, juveniles demonstrated a complete misunderstanding of *at least* one crucial word 63.3% of the time, in comparison to 37.3% of adults.[88]

The juvenile participants' understanding of the purpose and importance of the rights given during the *Miranda* warning were also significantly lower than those of the adults. Only 27.6% of juveniles received the highest score of comprehension of the rights compared to 62.7% of the adults.[89] Grisso explains that "The most significant conclusion to be drawn from these differences . . . is that as a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult) standards for adequate comprehension of

86. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980). Grisso explains that three samples of juveniles and two samples of adults were used to conduct the study:

> The juveniles ranged in age from 10 to 16, with about 20% aged 13 or younger; 60% were males, nearly three-quarters were white, and 48% were middle or upper-middle class (the remainder being lower-middle, lower class, or unclassifiable). About 20% of the juveniles had no prior court referrals, and 25% had five or more prior referrals. About one-third had been referred for one or more felony charges in the past. A wide range of IQ scores was obtained, 11% of the juveniles having scores of 70 or below and 22% having scores above 100.
>
> Among the adult ex-offenders, 40% were ages 17-22 (mean age = 25.5, range = 17-50), 79% were male, 58% were black, and 12% were from the middle class or a higher socioeconomic level. About one-third were on parole for their first arrest since having passed the statutory age of juvenile court jurisdiction (mean adult arrests = 4.0; mean felony arrests = 2.4). Approximately 14% attained IQ scores of 70 or below, and 18% had scores above 100.
>
> The adult non-offender sample had similar demographic proportions.

Id. at 1149 nn.68–69.

87. *Id.* at 1154.

88. *Id.*

89. *Id.*

their *Miranda* rights."[90] It can be easily deduced from such results that many juveniles simply do not completely understand the message of the *Miranda* warning. Given that the Supreme Court has established that *Miranda* waivers must be made "knowingly,"[91] this lack of knowledge casts serious doubt on juveniles' ability to make a valid *Miranda* waiver.

Along with a still-developing brain that makes it unlikely that juveniles will meet the "knowing and intelligent" requirement for a valid *Miranda* waiver, juveniles are still maturing in their psychosocial development.[92] This is problematic because evidence suggests that a juvenile's still-maturing psychosocial abilities could hinder the juvenile's capacity to meet the "voluntary" requirement for a legal waiver.[93] For example, the *Roper* court cited a study on adolescent psychosocial development to justify its reasoning that it is a violation of the Eighth Amendment to give persons under the age of eighteen the death penalty, in part because "juveniles are more vulnerable or susceptible to negative influences and outside pressures."[94] This same study also explains that juveniles' immature psychosocial development affects the outcomes of their decision-making.[95] The analysis explains that even if adolescents have mental abilities that are relatively equal to that of an adult, the decisions they make will greatly differ because of psychosocial immaturity.[96] The study also states that "cognitive capacities shape the *process* of decision making, [and] psychosocial immaturity can affect decision-making *outcomes*."[97]

Psychosocial development affects decision-making outcomes because psychosocial factors influence the values and preferences adolescents place on decisions. The four psychosocial factors that shape adolescent decision outcomes are "(a) susceptibility to peer influence, (b) attitudes toward and perception of risk, (c) future

90. *Id*. at 1152.

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

92. Psychosocial is "[a] term referring to the mind's ability, consciously or unconsciously, to adjust and relate the body to its social environment." *Psychosocial*, GALE ENCYCLOPEDIA OF MED. (4th ed. 2011).

93. *See* Grisso, *supra* note 43; *see also* Steinberg & Scott, *supra* note 68; King, *supra* note 70.

94. Roper v. Simmons, 543 U.S. 551, 569 (2005).

95. *See* Steinberg & Scott, *supra* note 68, at 1011–12.

96. *Id*.

97. *Id*. (emphasis in the original).

orientation, and (d) the capacity for self-management."[98] According to the results of the study, an adolescent who lacks maturity in psychosocial development, even one with a mature intellectual process, does not understand the ramifications of his or her decisions as clearly as an adult.[99] If, as required by *Gault*, "special caution" should be given to confessions and admissions of juveniles,[100] then such a lack in "decisional making" is especially significant when it comes to juveniles deciding whether or not to waive *Miranda* rights[101] because juveniles in this situation are asked to make an adult decision while lacking the decision-making ability of an adult.

Juveniles' immaturity in psychosocial development also causes them to be more compliant[102] and suggestible[103] during police interrogations. Consequently, juveniles are more willing than adults to waive their *Miranda* rights. A study assessing juveniles' abilities and competence to participate in the legal process (in comparison to adults), found that "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to police rather than remaining silent."[104] In fact, about one-half of the juveniles (age eleven to fourteen) in the study thought confession to police was the best choice, while only one-fifth of the eighteen to twenty-four-year-olds would have made the same choice.[105]

In another study investigating how age and suggestibility affected the participants' willingness to take responsibility for an act they did

98. *Id*.

99. *Id*.

100. *In re* Gault, 387 U.S. 1, 45 (1967).

101. Grisso, *supra* note 43, at 361 (stating that a juvenile's "psychosocial immaturity may affect a young person's decisions, attitudes, and behavior . . . that may be quite important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context").

102. "Compliance is 'a subject's tendency to go along with instructions and directions without actual acceptance of the premises.'" Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 657 n.163 (2003) (quoting Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Assessment of* Miranda, 18 AM. J. FORENSIC PSYCHOL. 17, 24 (2000) (defining compliance as used in psychological literature)).

103. Suggestibility is "how a subject's memory and beliefs are influenced and manipulated during interrogation." *Id*. at 657 n.164 (quoting THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS 106 (1981) (defining suggestibility as used in psychological literature)).

104. Grisso, *supra* note 43, at 357 (alteration in original).

105. *Id*. at 336, 351.

not commit,[106] "69% of the participants 'falsely confessed[,]'" with minor children more likely to take responsibility than young adults.[107] Additionally, the youngest participants of the study, twelve and thirteen-year-olds, "asked the fewest questions or made the fewest comments" before signing a false confession.[108] Sixty-five percent of this age group signed the false confession without saying a word, which "suggests that the youngest participants were particularly prone to be compliant with authority without even questioning it."[109] Such a study illustrates why scientists for years have believed "[o]bedience to authority [figures] is a powerful phenomenon"[110] and why research consistently indicates that people are willing to obey authority figures because of their status as an authority.[111]

The fact that a juvenile's brain is still developing makes it doubtful that an adolescent is capable of a "knowing and intelligent" *Miranda* waiver. Along with a still growing brain, the juvenile's ongoing psychosocial development causes the juvenile to be more compliant and susceptible during interrogation. The juvenile's likelihood of being complacent and susceptible to authority makes it uncertain that a juvenile can make a "voluntary" waiver. These two elements combined render it improbable that juveniles have the capacity to meet the standards for a valid *Miranda* waiver.

V. Inconsistent Application of the Totality Approach

In *Fare v. Michael*, the Court explained that an inquiry into all the circumstances surrounding an interrogation should be made to determine if an accused person made a valid *Miranda* wavier.[112] Such an inquiry "includes evaluation of the juvenile's age, experience, education, background, and intelligence," as well as the juvenile's

106. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141 (2003) (citing a study where participants from three age groups were tested: twelve- and thirteen-year-olds, fifteen- and sixteen-year-olds, and young adults. They were led to believe they had crashed a computer, when they in fact had not, to see who would falsely confess.).

107. *Id*. at 151.

108. *Id*. at 150–51.

109. *Id*. at 151.

110. *Id*. at 152 (alteration in original) (referencing Robert B. Cialdini, Influence: Science and Practice (3d ed.1993); Stanley Milgram, Obedience to Authority: An Experimental View (1974)).

111. *Id*.

112. Fare v. Michael C., 442 U.S. 707, 725 (1979).

capacity to understand the warning, his or her constitutional rights, and the consequences of the waiver.[113] Thirty-four states and the District of Columbia apply the totality of the circumstances approach set forth in *Fare* with little to no alteration.[114] *Seventeen* states apply a presumption that, until a specified age, juveniles cannot waive their *Miranda* rights without consulting with either a parent, an "interested adult," or an attorney, or outside the presence of a parent.[115] An "interested adult" is usually defined as the parent, guardian, close family member, or attorney of the juvenile. If a child is over the specified age and decides to waive his or her rights, the totality approach is then applied to decide if the waiver was properly made.

Apart from the developmental problems discussed above in Part IV, an additional problem with the factors used to determine if juveniles have "voluntarily, knowingly, and intelligently" waived their *Miranda* rights is that courts often fail to distinguish which factors should carry the most weight. Should a child's age be the determining factor, or should the circumstances surrounding the interrogation ultimately shape the court's decision? Juvenile court judges make these decisions according to their own interpretation of *Fare* and individual feelings regarding which factor should be given priority.[116] Because each judge brings his or her own experience and opinions to a case, decisions about juvenile *Miranda* waivers are highly variable.[117]

113. *Id.*

114. King, *supra* note 70, at 452–53 (listing thirty-five states and the District of Columbia applying the totality of the circumstances test resulting from *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)). I have not included West Virginia because the state enacted W. VA. CODE ANN. § 49-4-701 (West 2016) declaring statements made by juveniles under fourteen while "in custody" are not admissible unless counsel is present, and statements made by juveniles age fourteen to sixteen who are "in custody" are not admissible without the presence of counsel or an informed parent or custodian.

115. King, *supra* note 70 at 451–52 (listing fourteen states where age of the juvenile is a factor when determining the validity of a *Miranda* waiver). I have added three additional states, Pennsylvania, West Virginia, and Wisconsin, for a total of seventeen. Pennsylvania, PA. R.J.C.P. 152 (stating that juveniles must be fourteen or older to waive their right to counsel); West Virginia, W. VA. CODE ANN. § 49-4-701 (West 2016) (stating that statements made by juveniles under fourteen while "in custody" are not admissible unless counsel is present, and statements made by juveniles age fourteen to sixteen who are "in custody" are not admissible without the presence of counsel or an informed parent or custodian); and Wisconsin, WIS. STAT. ANN. § 938.23 (West 2015) (stating that a juvenile age fifteen and older can waive the right to counsel).

116. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 118–19 (1999).

117. *Id.*

One of the many factors articulated in *Fare* is the age of the juvenile defendant.[118] Court decisions vary in the amount of deference given to the age of a juvenile who has waived *Miranda* rights. Courts in some states conclude that the juvenile's young age is not enough to invalidate a waiver—children as young as eleven have been held to have the capacity to give a valid waiver, even if no parent was present.[119] Other state courts attach great significance to the juvenile's age when deciding the validity of a waiver, but, even then, age alone is usually not enough to invalidate a waiver.[120]

The following discussion compares how two different state courts addressed the importance of age, thereby illustrating how the relative significance assigned to the age factor influenced the courts' respective decisions. The examination of two cases, *In re Jerrell C.J.*[121] and *In re Joseph H.*,[122] provides a small window into the immense discretion juvenile courts have in deciding how much weight to give to an adolescent's age when deciding if a waiver is valid.

In re Jerrell provides an example in which the juvenile's age was a strong factor weighing against the voluntariness of the juvenile's *Miranda* waiver.[123] In *Jerrell*, a fourteen year-old's confession to taking part in an armed robbery was ruled to be involuntary under the totality of the circumstances approach.[124] The Supreme Court of Wisconsin recognized the importance of age when determining voluntariness but stated that age was "not necessarily dispositive."[125] The court further showed its unwillingness to make age the definitive

118. *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968) restates the relevant factors related to the totality of the circumstances approach set up by the Supreme Court in *Gault*:

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

119. King, *supra* note 70 at 456–57.

120. *Id*. at 458.

121. 699 N.W.2d 110 (Wis. 2005).

122. 188 Cal. Rptr. 3d. 171 (Ct. App. 2015).

123. *In re* Jerrell C.J., 699 N.W.2d at 116–17.

124. *Id*. at 113.

125. *Id*. at 116–17.

reason for invalidating a waiver by declining "to adopt a per se rule, excluding in-custody admissions from any child under the age of 16 who has not been given the opportunity to consult with a parent or interested adult."[126] Besides age, the court took into account the juvenile's education and intelligence, prior experience with law enforcement, and the "pressures and tactics" used by the police during the interrogation before concluding that the confession was invalid.[127]

In her concurring opinion, however, Chief Justice Abrahamson argued that the court should adopt a per se rule excluding confessions by children under the age of sixteen who were not given the opportunity to consult with a parent or interested adult.[128] Justice Abrahamson cites eight different reasons for adopting such a per se rule,[129] several of which align with the issues discussed in Part IV. These reasons include both the idea that a juvenile's still developing brain permits only a minimal understanding of *Miranda* rights, and also concerns about juveniles' inherent "propensity to confess to police."[130]

Both the majority opinion and Justice Abrahamson's concurring opinion in *Jerrell* agree that age is an important factor in determining whether a juvenile's waiver is voluntary.[131] However, the two opinions differ on how much weight to assign age when deciding the validity of a juvenile's waiver. The majority opinion states the age of the juvenile is not "dispositive" but rather a "critical factor" in determining a voluntary waiver.[132] In contrast, Justice Abrahamson believes age is so crucial that she wants to "adopt a per se rule excluding in-custody admissions from any child under the age of 16 who has not been given the opportunity to consult with a parent or interested adult."[133] These differing opinions within the same court decision regarding the significance of age when scrutinizing *Miranda* waivers illustrates the nearly impossible task that courts face when they are asked to make consistent and reliable judgements using the totality approach.

126. *Id.* at 112–13.
127. *Id.* at 117–19.
128. *Id.* at 124.
129. *Id.* at 133–38.
130. *Id.* at 135–36.
131. *Id.* at 116, 133.
132. *Id.* at 116–17.
133. *Id.* at 133.

While the Wisconsin court found the juvenile's age to be of great importance, other states do not consider age to be a substantial factor when deciding if a waiver is admissible. One such state is California, where a ten-year-old's *Miranda* waiver and subsequent confession was upheld by the California Court of Appeals in *In re Joseph H.*[134] Joseph was removed from his biological mother and placed with his father at the age of three or four because he had been physically abused, severely neglected, and "sexually abused by his mother's boyfriend."[135] Joseph's situation remained dire at his father's house—his father was addicted to drugs and would lose control if he was drunk or high and start to beat Joseph.[136] On one such occasion, after beating Joseph and other members of the family, Joseph's father "threatened to remove all the smoke detectors in the house and burn the house down, while the family slept."[137] That night, after his father fell asleep on the couch, Joseph took a loaded gun that was in the house, went downstairs, and shot his father in the head.[138] Joseph was subsequently tried, committed to the Division of Juvenile Justice, and confined to a secure facility for a maximum of forty years to life.[139]

On appeal, Joseph argued that his *Miranda* waiver and subsequent confession were involuntary because of his lack of understanding of his rights partly due to his young age.[140] In deciding that Joseph's waiver was voluntary, the court recognized that while age "*may* be a factor in determining the voluntariness of a confession. . . . [I]t cannot be said that a juvenile cannot waive constitutional rights as a matter of law. It is a factual matter to be decided by the trial judge in each case."[141] While the court admitted that special caution should be taken when determining if a juvenile's confession is voluntary, it went on to acknowledge that "absent coercive conduct by police, and despite his young age, his ADHD, and low-average intelligence," Joseph was able to voluntarily waive his rights.[142]

134. 188 Cal. Rptr. 3d. 171, 176, 185–87 (Ct. App. 2015).
135. *Id.* at 176.
136. *Id.* at 177.
137. *Id.* at 178.
138. *Id.*
139. *Id.* at 181.
140. *Id.* at 185–86.
141. *Id.* at 185 (emphasis added).
142. *Id.* at 187.

In explaining its decision that Joseph's *Miranda* waiver was valid, the California court placed more weight on police conduct during an interrogation than the age of the juvenile. Despite the fact that the court recognized, in a footnote, research recommending that juveniles are incompetent to waive their *Miranda* rights because of age and lack of development, it decided to ignore such research because none was presented at trial or on appeal.[143]

These two cases, one from Wisconsin and one from California, demonstrate the varied and inconsistent application of age consideration—one of at least nine factors[144] typically considered in the *Fare* totality of the circumstance approach. Such unpredictability when it comes to deciding if a juvenile has made a valid waiver does not meet the *Gault* standard that "special caution"[145] and the "greatest care"[146] should be given when deciding whether juveniles have made a "knowing, intelligent, and voluntary" waiver of their rights.

Nevertheless, some might argue that the totality of the circumstances is the best approach for evaluating juvenile *Miranda* waivers because it gives the courts flexibility and discretion. The *Gault* court faced such a question of discretion when deciding whether to decree stricter due process procedures in the juvenile process.[147] Until *Gault*, states were given wide discretion on what procedural rights were given to juveniles.[148] Such discretion allowed the state to insert itself, when needed, into the juvenile's life to protect the child's interest.[149] The problem, the *Gault* court found, with giving the state such discretion was that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[150]

The *Gault* court reasoned that the juvenile court's deviation "from established principles of due process" caused "arbitrariness" rather than "enlightened procedure."[151] I would assert that the same can be said about the inconsistent way the totality of the circumstances

143. *Id*. at 185 n.11.

144. West v. United States, 399 F.2d 467, 469 (5th Cir. 1968); *see* factors cited *supra* note 118.

145. *In re* Gault, 387 U.S. 1, 45 (1967).

146. *Id*. at 55.

147. *Id*. at 13–14.

148. *Id*.

149. *Id*. at 16.

150. *Id*. at 18.

151. *Id*. at 18–19.

approach is applied to juvenile *Miranda* waivers. The discretion given to courts in applying the totality approach does not provide as high a standard and protection as a set and clear rule stating juveniles cannot waive their constitutional rights without first consulting an attorney would provide. Yet, this higher standard would be more in keeping with the "greatest care" criteria set by *Gault* because such a set procedure gives juveniles the utmost protection against invalid waivers.

VI. An Alternative to the Totality of the Circumstances

A credible substitute to the totality approach is a fixed procedural requirement that juveniles must first consult with an attorney before making a valid waiver. In deciding to evaluate whether a juvenile had waived his or her *Miranda* rights with the same totality of the circumstances approach used for adults, the *Fare* Court considered the adult approach to be "adequate."[152] The Court went on to explain that one reason it implemented the adult approach was because it could "discern no persuasive reasons why any other approach is required."[153] Such lack of persuasive reasoning might have been the case in 1979 when *Fare* was decided, but, as demonstrated above, modern scientific research provides many persuasive reasons why the totality approach should be abandoned when it comes to determining the validity of juvenile *Miranda* waivers.[154]

In *Fare*, the Court rejected the juvenile's request to see his probation officer as an invocation of his Fifth Amendment right because asking to see a probation officer was not the equivalent of asking for an attorney.[155] The court reasoned that a probation officer is not in the same position as a lawyer to give the legal assistance needed to protect such constitutional rights.[156] In other words, there is no comparable substitute for the legal advice an attorney can give in such a circumstance. The Court went on to emphasize:

> [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. Because of this special ability of

152. Fare v. Michael C., 442 U.S. 707, 725 (1979).

153. *Id.*

154. For studies, reasoning, and analysis of why the totality approach should be abandoned, see Parts III–IV and accompanying footnotes.

155. *Fare*, 442 U.S. at 718–19.

156. *Id.* at 722.

> the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence.[157]

Thus, according to the Supreme Court, no one is better able to protect the constitutional rights of an accused person than a lawyer who has been trained to do so. Therefore, a juvenile should not be able to waive his or her rights without first consulting with an attorney.

While some states have already legislatively or judicially required the presence of an interested adult for a juvenile to be able to make a valid waiver,[158] that approach is insufficient to protect the juvenile's rights. The idea behind having an interested adult present is that the adult will help protect juveniles by decreasing the coercive environment of an interrogation and give the juvenile an advocate who better understands the juvenile's rights and the consequences of waiving those rights.[159]

While having an interested adult with the juvenile is a laudable idea, it is unlikely to bring about the desired effect. Psychologists have understood for some time that the presence of such an adult may not help at all and, in fact, could actually hurt the juvenile's likelihood of comprehending and asserting his or her rights.[160] Furthermore, one study demonstrated that nearly three-fourths of parents thought that children should not be allowed to withhold information from the police if the child was suspected of a crime.[161] A parent's belief that a child should not withhold information from the police could put even

157. *Id*. at 719 (quoting Miranda v. Arizona, 384 U.S. 436, 469–70 (1966)).

158. For a listing of the states that require an interested adult to be present for a valid waiver see *supra* note 115 and accompanying text.

159. Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 117 (Thomas Grisso & Robert G. Schwartz eds., 2000) (describing states' reason for the interested adult rule).

160. Larson, *supra* note 102, at 654 (quoting Thomas Grisso & C. Pomiciter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 340 (1977)) (finding parental presence did not increase frequency of children's assertion of rights to the same level as found with adults).

161. Grisso, *supra* note 86, at 1163.

more coercive pressure on the child to waive his or her rights. Also, a parent who is called to the police station might be embarrassed, angry with the child, or want the child to learn a lesson by forcing the child to talk to the police.[162] In another study, more than two-thirds of parents who were actually present when their children were asked to waive their rights before an interrogation offered no comments or advice to their children.[163]

In *Fare*, the Court stated that one reason it did not consider the request by the juvenile to speak to his probation officer to be an invocation of his *Miranda* rights was because the probation officer was likely to offer advice that "would contrast sharply with the interests of the juvenile."[164] The Court went on to rationalize that a probation officer would likely advise the juvenile to cooperate with the police while an attorney "might well advise his client to remain silent."[165] The basic philosophy behind having an interested adult or parent with the juvenile when making a waiver of rights is that such an adult would look out for the child and make sure decisions made are in the best interest of the child. As the aforementioned studies suggest, however, an interested adult is unlikely to advise a child to remain silent and refuse to waive his or her rights. Instead, it is likely that, like the probation officer in *Fare*, an interested adult's advice "would contrast sharply"[166] with the interests of the accused juvenile. Thus, having an interested adult or parent present does not provide the juvenile with adequate constitutional protection.

The best way to protect children and to assure that they understand their constitutionally protected rights is to require that they consult with an attorney before waiving their rights. As stated above, the *Fare* Court stressed that "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [a] person in his dealings with the police and courts."[167] Likewise, in discussing statements and confessions made by juveniles to the police, the *Gault* Court stated:

162. *See* Grisso & Pomiciter, *supra* note 41, at 340 (listing the reasons that parents may force their children to talk to police, which include anger, teaching obedience to authority, emphasizing responsibility, and the hope that leniency will be given for a confession).

163. Grisso, *supra* note 86, at 1163.

164. Fare v. Michael C., 442 U.S. 707, 721 (1979).

165. *Id.*

166. *Id.*

167. *Id.* at 719.

> If counsel was not present for some permissible reason when an admission was obtained, *the greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights.[168]

Both of these Supreme Court decisions point to the fact that having an attorney present ensures that the juveniles' rights will be protected and that the "greatest care" has been taken.

States and advocates of juveniles' rights will likely face opposition to such a standard. For example, when the state of Illinois tried to pass legislation that would prohibit juvenile *Miranda* waivers until after the accused had spoken with an attorney,[169] police groups in Illinois adamantly opposed the bill since it required an attorney to be present during police interrogations of juveniles.[170] The police likely opposed such added protection because it could hamper their investigations and reduce the amount of information acquired through juvenile interrogations, especially given that attorneys are likely to advise their clients to remain silent.[171] However, as Kenneth J. King, a practitioner of juvenile justice, asserts: "If this is the cost of protecting children, so be it; there is always a cost to protecting the rights of the accused."[172]

Furthermore, as was discussed in Part IV of this Comment, the information that juveniles provide the police is unlikely to be trustworthy because juveniles are more likely to falsely confess to a crime.[173] Also, the *Gault* case points out that admissions and confessions of juveniles should be made outside the presence of counsel only for a "permissible reason."[174] The police objections to the presence of counsel on *assumed* or *possible* hindrances they might face in interrogating juveniles do not meet the Supreme Court mandate of a "permissible reason." The *Gault* decision could be interpreted to

168. *In re* Gault, 387 U.S. 1, 55 (1967) (emphasis added).

169. Larson, *supra* note 102, at 661–62 (referencing Jennifer Walters, Note, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogation of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 513–14 (2001) (relating to opposition encountered by Illinois legislature)).

170. *Id*. at 662; *see* Walters, *supra* note 169, at 514 (discussing political pressure by police groups in order to prevent the proposed legislature).

171. Grisso, *supra* note 86, at 1163.

172. King, *supra* note 70, at 475–76.

173. *See supra* pp. 115–17 (providing support of juveniles' compliancy, suggestibility, and willingness to falsely confess during discussions with the police).

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

suggest that possible "permissible reason[s]" for a juvenile's confession to be made outside the presence of counsel should be limited to confessions made by older juveniles and confessions made by juvenile's accompanied by parents or guardians, since these are the only two circumstances mentioned by the Court.[175]

In summary, the best way to ensure that juveniles' rights are protected is to mandate that they consult with an attorney before waiving their rights. The totality of the circumstances approach set forth in *Fare* is no longer "adequate," and allowing a juvenile to consult with an attorney before making a waiver is a reasonable alternative to the totality approach.

CONCLUSION

The great author and civil rights activist Maya Angelou is often attributed with having said, "I did then what I knew how to do. Now that I know better, I do better."[176] This phrase could easily sum up the evolution and progression of the juvenile justice system**.** For centuries, children were viewed simply as small adults. The writings of William Blackstone began to change this perception of children and helped lessen their legal culpability.[177] The advancement of child protection and the creation of the juvenile court system in the early 1900s further improved how children were treated in the American legal system. Even more changes were seen in the juvenile court following the Supreme Court's decision in *Gault*.[178] With the help of the *Gault* decision, juvenile courts began to better understand and protect the rights of accused juveniles by mandating a stricter adherence to due process of law.

Supreme Court decisions dealing with the legal rights of juveniles have followed this progressive trend. The Supreme Court has interpreted the Constitution in accordance with "the evolving standards of decency that mark the progress of a maturing society."[179]

175. *Id*.

176. *Oprah's Lifeclass: The Powerful Lesson Maya Angelou Taught Oprah* (OWN television broadcast Oct. 19, 2011), http://www.oprah.com/oprahs-lifeclass/the-powerful-lesson-maya-angelou-taught-oprah-video.

177. A.B.A., *supra note 2*, at 4–5.

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

179. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

In other words, when the Supreme Court sees evidence that society knows better, its decisions will reflect the evolution among the people.

An example of this jurisprudence is evidenced in the *Roper* Court's abolition of the juvenile death penalty.[180] Before 1987, there was no ban stopping a juvenile from receiving a death sentence and being executed.[181] On November 9, 1987, the Supreme Court decided that juveniles under the age of sixteen could not be given the death penalty.[182] The age at which someone can be given the death penalty was later raised to eighteen by the Supreme Court in 2005.[183] The *Roper* Court explained that there was evidence of "a national consensus against juvenile executions" and that "today our society views juveniles as 'categorically less culpable that the average criminal.'"[184]

Just as society knew better with respect to juveniles and the death penalty, society is now more informed about the development of the brain and adolescents' still-maturing psychosocial characteristics. As shown above, the still-changing brain and psychosocial features hinder an adolescent's ability to make a knowing and intelligent *Miranda* waiver. Added to this is the fact that juveniles are more compliant and susceptible to authority figures, which makes a voluntary waiver unlikely. These advancements, combined with the indeterminacy of the totality of the circumstances approach, suggest that the totality approach is no longer an acceptable method of protecting the constitutional rights of juvenile defendants. A better and more thorough way of protecting juveniles accused of crimes is to mandate that they consult with an attorney before waiving their rights. Allowing juveniles to consult with an attorney before waiving their constitutionally protected rights would provide juveniles the

180. Roper v. Simmons, 543 U.S. 551 (2005).

181. Death Penalty Information Center, *The Execution of Juveniles in the U.S.* (Feb. 23, 2011), http://www.deathpenaltyinfo.org/execution-juveniles-us-and-other-countries#execsus.

> The first execution of a juvenile offender was in 1642 with Thomas Graunger in Plymouth Colony, Massachusetts. In the 360 years since that time, a total of approximately 365 persons have been executed for juvenile crimes. Twenty-two of these executions for juvenile crimes have been imposed since the reinstatement of the death penalty in 1976. These 22 recent executions of juvenile offenders make up about 2% of the total executions since 1976.

Id.

182. Thompson v. Oklahoma, 487 U.S. 815, 857 (1987).

183. Roper, 543 U.S. at 578.

184. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

heightened protection they deserve and ensure the validity of their waivers. The legal system now knows better how to protect juveniles—therefore, it should do better.

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[*] J.D. candidate, April, 2017, J. Reuben Clark Law School, Brigham Young University. I would like to thank my husband, Wes, and my children who endured without complaint the hours I spent buried in research and at the computer. You inspire and motivate me to reach for my dreams.