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Overawed and Overwhelmed: Juvenile Miranda Incomprehension

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Sara Cressey

- I. INTRODUCTION
- II. BACKGROUND
 - A. *The Advent of Miranda Warnings*
 - B. *Extending the Privilege Against Self-Incrimination to Juveniles*
 - C. *Police Interrogation Procedures Post-Miranda*
 - D. *Eighth Amendment Jurisprudence for Juveniles*
 - E. *The Science of Adolescence*
 - 1. *Background and General Principles*
 - 2. *Juvenile Miranda Comprehension*
- III. ASSESSMENT OF JUVENILE *MIRANDA* WAIVERS STATE BY STATE
 - A. *The Totality of the Circumstances Test*
 - 1. *Variations in Application*
 - 2. *Simplified Miranda Warnings*
 - B. *The “Interested Adult” Standard*
 - C. *Rebuttable Presumption*
 - D. *Mandatory Consultation with Counsel*
- IV. ARGUMENT
- V. CONCLUSION

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Sara Cressey*

ABSTRACT

Each year approximately one million juveniles in the United States are arrested and read the *Miranda* warnings. Though studies have shown that the majority of those children do not understand the warnings, most of them must decide alone whether to waive their constitutional rights—and nearly all ultimately make that choice without the help of an attorney. The Supreme Court has recognized that children differ from adults in critical ways, and those differences have important implications for juveniles' ability to meaningfully waive their *Miranda* rights. To ensure that juveniles' constitutional rights are protected, the Supreme Court should take up the issue and create a *per se* rule making a juvenile's *Miranda* waiver invalid unless that juvenile first consulted with counsel.

I. INTRODUCTION

During the early morning hours of May 1, 2011, Jeff Hall slept off a night of drinking on the couch in his California home, underneath a large flag bearing a Swastika that hung on the wall.¹ Around 4 a.m., Jeff's ten-year-old son, Joseph, retrieved a handgun from a low shelf in the house, approached his father's motionless body, and fired a shot into his skull at close range.² When the police arrived on the scene, the boy told an officer that he had shot his father and asked whether "people get more than one life."³ Later that same day, the small, disheveled boy sat in a police interrogation room where he waived his *Miranda* rights and gave a videotaped confession.⁴ In the course of that interrogation, Joseph made several other statements suggesting that he could neither predict the outcome of his actions nor fully understand the consequences of those actions. "I wasn't really thinking about if he was gonna die or get unconscious," he told the detective, referring to his father.⁵ "I just thought maybe . . . he might learn a lesson . . . I was trying to get him to know how I feel when I get hurt . . . Then maybe we could go back to being friends and start all over."⁶

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¹ Amy Wallace, *A Very Dangerous Boy*, GQ (Nov. 4, 2013, 2:00 AM), <http://www.gq.com/story/joseph-hall-murders-neo-nazi-father-story> [https://perma.cc/MB2F-MQZ8].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Joseph Hall's story is heart-wrenching. In some ways it is unique: his father led a chapter of the nation's largest neo-Nazi party, the National Socialist Movement, for which he held frequent meetings at his home that his son would attend.⁷ Yet parts of his story are all too familiar, and true for many kids caught up in the justice system: his childhood was marked by violence, malnourishment, and allegations of abuse by both of his parents.⁸ Joseph's story also raises a concern that is implicated whenever juveniles come into contact with the justice system: children's ability to understand and to meaningfully waive their constitutional rights during custodial interrogation.

Joseph was just one of over a million juveniles who were arrested in the United States in 2011.⁹ Of those children, 67,193 were between the ages of ten and twelve.¹⁰ That means that tens of thousands of other children like Joseph sat in police interrogation rooms or in the back of police cruisers while they were read their *Miranda* rights and had to decide whether to give up those rights and speak to the police. None of those children were automatically afforded the opportunity to consult with counsel before waiving their rights, though some were afforded the opportunity to consult with a parent or other "interested adult."¹¹ Studies indicate that the majority of those children did waive their constitutional rights,¹² and that few of them truly understood what they were giving up.¹³

Juveniles waive their *Miranda* rights at a remarkably high rate, around ninety percent.¹⁴ This high waiver rate has been attributed to a number of different factors, from parents' insistence that children always tell the truth, to the high pressure inherent in custodial interrogation, to a lack of understanding by the juvenile.¹⁵ Indeed, one study found that "only one-fifth (20.9%) of juveniles, as compared with almost half (42.3%) of adults, grasped the entire warning."¹⁶ In reference to Joseph's case, constitutional law scholar Erwin Chemerinsky wrote, "[a] 10-year-old child cannot waive his or her constitutional rights. By any measure of competence, a child that young cannot understand constitutional rights or the consequences of waiving them."¹⁷ Social science supports Professor Chemerinsky's assertion, and the Supreme Court has taken notice in recent years.¹⁸

⁷ Jesse McKinley, *Neo-Nazi Father Is Killed; Son, 10, Steeped in Beliefs, Is Accused*, N.Y. TIMES (May 10, 2011), http://www.nytimes.com/2011/05/11/us/11nazi.html?pagewanted=all&_r=0 [<https://perma.cc/LF29-JWVJ>].

⁸ *Id.*

⁹ Brief of Amicus Curiae Hum. Rts. Watch in Support of Petition for Writ of Cert. at 5, *Joseph H. v. California* (2016) (No. 15-1086).

¹⁰ *Id.*

¹¹ See *infra* Part III (detailing juvenile *Miranda* waiver protocols in different states).

¹² Barry C. Feld, *Behind Closed Doors: What Really Happens when Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 429 (2013).

¹³ See *infra* Part II.E.2 (discussing the results of studies assessing juveniles' ability to understand *Miranda* warnings).

¹⁴ Feld, *supra* note 12, at 429.

¹⁵ *Id.*

¹⁶ *Id.* at 409.

¹⁷ Erwin Chemerinsky, Opinion, *Court Gets it Wrong with Boy Who Killed Neo-Nazi Dad*, ORANGE COUNTY REGISTER (Oct. 22, 2015, 12:00 AM), <http://www.ocregister.com/articles/%20court-688579-boy-rights.html> [<https://perma.cc/Q5PL-PZG4>].

¹⁸ See *infra* Part II.D (discussing the impact of developments in psychology and brain research on the Supreme Court's recent Eighth Amendment jurisprudence).

The Supreme Court recognized more than half a century ago that children are more susceptible to police tactics than adults.¹⁹ This concept has been central in the Court's recent decisions affording juveniles greater protection under the Eighth Amendment – cases that have firmly established that children are different from adults for constitutional purposes.²⁰ That precedent, coupled with evidence that the warnings mandated by *Miranda v. Arizona* do not effectively protect juveniles' Fifth Amendment rights,²¹ weighs strongly in favor of a Supreme Court decision establishing a more stringent standard for juvenile *Miranda* waivers. In most states, juveniles' *Miranda* waivers are assessed by weighing the totality of the circumstances, an approach that has led to widely varied and arbitrary outcomes across the country.²² To ensure that juveniles' constitutional rights are truly protected, the Supreme Court should take up the issue and create a *per se* rule making a juvenile's *Miranda* waiver invalid unless that juvenile first consulted with counsel.

Part II provides an overview of the relevant legal and scientific background, including the advent of the *Miranda* warning and its application to juveniles, the Supreme Court's juvenile sentencing cases and the principles relied upon therein, relevant psychological and neurological research, and research examining the effect of police tactics on the waiver process. Part III surveys the various approaches to assessing juvenile *Miranda* waivers that are used in different states, as well as recent initiatives to put in place more meaningful protections. Finally, Part IV presents the argument that requiring consultation with counsel before a juvenile can waive his constitutional rights is the only way to truly protect those rights.

II. BACKGROUND

To appreciate the difficult issues concerning the validity of juveniles' waivers of their *Miranda* rights, one must understand them in both their social and legal context. Growing efforts across the country to afford children greater protection during custodial interrogation have been informed by social and cognitive science,²³ as have recent Supreme Court decisions grappling with the rights of juveniles in other contexts.²⁴ The following sections will first provide an overview of the development of *Miranda* warnings and the applicability of the *Miranda* safeguards to juveniles, the evolution of police interrogation procedures post-*Miranda*, the Court's recent Eighth Amendment cases and the significance of the Court's reliance on neurological and psychological research, and finally research specifically addressing juveniles' capacity to comprehend *Miranda* warnings.

¹⁹ See *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948).

²⁰ See generally *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

²¹ See *infra* Part II.E.2 (detailing research assessing juveniles' *Miranda* comprehension, which has found that juveniles cannot consistently and reliably understand their *Miranda* rights).

²² See *infra* Part III.A.1.

²³ See, e.g., An Act to Add Section 625.6 to the Welfare and Institutions Code Relating to Juveniles, SB-1052 § 1(a), 2016 Sess. (Cal. 2016), (CALIFORNIA LEGISLATIVE INFORMATION), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1052 [<https://perma.cc/8R5P-T6UK>] (citing studies showing that development continues into adulthood and that adolescents tend to disregard long-term implications of actions).

²⁴ See *infra* Part II.D.

A. The Advent of Miranda Warnings

In 1966 the Supreme Court decided *Miranda v. Arizona*, laying out the now-ubiquitous warnings that police must read before interrogating a person who is in custody.²⁵ Anyone who has ever watched an American procedural drama has no doubt witnessed a stern police officer or FBI agent handcuffing a suspect, telling him that he has the right to remain silent, and making a quip about justice being served while leading him to a nearby police cruiser.²⁶

Miranda marked the first time that the Supreme Court explicitly extended the Fifth Amendment privilege against compelled self-incrimination to suspects being interrogated while in police custody. The opinion made clear that the Fifth Amendment “protects persons in all settings in which their freedom of action is curtailed in any significant way,” including those interrogated by the police, “from being compelled to incriminate themselves.”²⁷ The Court’s decision was motivated by its concern that the coercive atmosphere inherent in custodial interrogation was leading individuals who may otherwise have asserted their constitutional rights to succumb to police pressure.²⁸ To ensure that statements made in the course of custodial interrogation are “truly the product of free choice,”²⁹ the Court put in place procedural safeguards: a series of warnings that police must administer to a suspect before questioning him.³⁰ The Court mandated that, “[p]rior to any questioning, the person . . . be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”³¹

In the course of its analysis, the Court engaged in a lengthy examination of police interrogation procedures, noting that officers are instructed to employ tactics designed to “deprive[] [the subject] of every psychological advantage,”³² including isolating the subject,³³ positing his guilt as a fact,³⁴ and questioning him for long periods of time, providing “no respite from the atmosphere of domination.”³⁵ Yet even without employing such tactics, the Court asserted, “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”³⁶ The Court readily concluded that this oppressive atmosphere is at odds with the Fifth Amendment privilege against self-incrimination.³⁷

After the warnings are administered, “[t]he defendant may waive effectuation of these rights, provided that the waiver is made voluntarily, knowingly and

²⁵ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

²⁶ See Ronald Steiner, Rebecca Bauer & Rohit Talwar, *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 226 (2011).

²⁷ *Miranda*, 384 U.S. at 467.

²⁸ *Id.* at 456.

²⁹ *Id.* at 457.

³⁰ *Id.* at 444.

³¹ *Id.*

³² *Id.* at 449.

³³ *Id.* at 456-58.

³⁴ *Id.* at 450.

³⁵ *Id.* at 451.

³⁶ *Id.* at 455.

³⁷ *Id.* at 457-58.

intelligently.”³⁸ If *Miranda* warnings are administered and an interrogation proceeds without an attorney present, the Court made it clear that “a heavy burden rests on the government” to show that the person in custody made a knowing and intelligent waiver of his rights.³⁹ However, a person’s waiver does not need to be explicit in order to be valid; as long as the prosecutor proves by a preponderance of the evidence that the suspect knowingly and voluntarily waived his rights, a subsequent statement may be admitted into evidence.⁴⁰

In prescribing the *Miranda* safeguards, the Court noted that the Constitution does not mandate any one solution to the problem of inherent police coercion during custodial interrogation.⁴¹ Congress and the States are free to seek out alternatives, but must observe the Court’s safeguards unless they are able to develop procedures that are *at least as effective* as the mandated warnings in apprising persons who have been accused of crimes of their rights.⁴² The Court recently reaffirmed that the protections announced in *Miranda* are “constitutionally required” and noted that subsequent cases have “reaffirm[ed] the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief.”⁴³

The procedural safeguards set out in *Miranda* were plainly intended to be a practical solution to what the Court perceived as a serious problem in the criminal justice system. The Court sought to protect against the “evils” of coercive police tactics and “protect precious Fifth Amendment rights” by ensuring that suspects are reminded of those rights.⁴⁴ Ideally, the person would then be emboldened to exercise them. This assumes, however, that the person not only understands his rights, but also that he understands the advantage to be gained from invoking them. Very often, and particularly with juveniles, neither is true.

B. Extending the Privilege Against Self-Incrimination to Juveniles

When *Miranda* was decided, the Court had not yet spoken to the issue of whether basic due process and other constitutional requirements apply equally in juvenile delinquency proceedings as they do in adult criminal proceedings.⁴⁵ One year after *Miranda*, however, the Supreme Court answered that question unequivocally in the affirmative. In its landmark decision in *In re Gault*, the Court asserted that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”⁴⁶ Not only does the privilege against self-incrimination apply to juveniles just as it does to adults,⁴⁷ it is even more compelling with respect to juveniles.⁴⁸

³⁸ *Id.* at 444.

³⁹ *Id.* at 475.

⁴⁰ See *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (holding that the State need only prove waiver of *Miranda* rights by a preponderance of the evidence); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that a person may make an implicit waiver of his *Miranda* rights).

⁴¹ *Miranda*, 384 U.S. at 475.

⁴² *Id.* at 490.

⁴³ *Dickerson v. United States*, 530 U.S. 428, 438, 443-44 (2000).

⁴⁴ *Miranda*, 384 U.S. at 456-57.

⁴⁵ *In re Gault*, 387 U.S. 1, 11 (1967).

⁴⁶ *Id.* at 13.

⁴⁷ *Id.* at 55.

⁴⁸ *Id.* at 48.

Though the Court presciently remarked that “special problems may arise with respect to waiver of the privilege by or on behalf of children,” it set no standard for assessing juveniles’ waivers in *Gault*.⁴⁹ The Court did, however, imply that attorneys should play an important role:

The participation of counsel will, of course, assist . . . in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary . . . that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.⁵⁰

It was not until more than a decade later that the Court established the standard for assessing juvenile *Miranda* waivers, in *Fare v. Michael C.*⁵¹ In order to ascertain whether a person in police custody “in fact knowingly and voluntarily decided to forego his rights to remain silent and to have the assistance of counsel,” the Court held that a totality of the circumstances analysis suffices for juveniles as well as adults.⁵² Such an analysis mandates the evaluation of a number of factors, including “the juvenile’s age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”⁵³ The Court asserted that lower courts have the expertise necessary “to take into account those special concerns,” including “limited experience and education” and “immature judgment,” that make juvenile waivers especially suspect.⁵⁴

Though *Gault* established that children must be accorded the same constitutional protections as adults, the notion that children are different is no novelty in American jurisprudence. In 1948, the Court recognized that children are more susceptible to police tactics, remarking in *Haley v. Ohio* that “[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens” and concluding that even a fifteen-year-old “cannot be judged by the more exacting standards of maturity.”⁵⁵ Theoretically, the totality of the circumstances test is appropriate in the juvenile context given its flexibility; it allows courts to take into account this heightened susceptibility. Though some courts have given meaningful weight to age when analyzing juveniles’ *Miranda* waivers, others have engaged in only a cursory analysis of the effect of age when evaluating the voluntariness of waivers.⁵⁶

C. Police Interrogation Procedures Post-Miranda

Though the *Miranda* Court sought to “dispel” the compulsion inherent in a custodial interrogation by requiring that suspects be warned of their rights, in practice *Miranda* has simply shifted the use of coercive police tactics to the administration of

⁴⁹ *Id.* at 55.

⁵⁰ *Id.*

⁵¹ 442 U.S. 707, 725 (1979).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 332 U.S. 596, 599 (1948).

⁵⁶ See *infra* Part III.A.1.

those warnings. Barry Feld, a law professor at the University of Minnesota, conducted an in-depth study of 307 files of juveniles charged with felonies in four counties in Minnesota and examined the circumstances under which juveniles either waived or invoked their rights.⁵⁷ Of the key players in the juvenile justice system whom Feld interviewed, police officers asserted that adolescents understood the warnings, while judges and public defenders largely agreed that juveniles did not even meet the initial threshold of understanding the language of the warning, let alone appreciating its importance.⁵⁸ “Unfortunately,” one judge remarked, “I don’t think a lot of them [understand the warning]. . . . [W]hen they don’t have an adult representative or a parent or an attorney, I don’t think they get it . . . I think most of them think it’s just a protocol.”⁵⁹ Feld’s investigation indicates that this perception of the *Miranda* warnings as simply a protocol is no accident; rather, it is the direct result of police training and tactics.⁶⁰

As Feld notes, “[o]ne of *Miranda*’s root contradictions is that ‘it assumes that these suspects can receive adequate advice and counseling about their constitutional rights from adversaries who would like nothing more than to see those rights surrendered.’”⁶¹ Police officers are responsible for administering *Miranda* warnings and have complete control over how they are presented. In order to obtain the result they seek, “[o]fficers must give a *Miranda* warning and elicit a waiver without alerting the suspect to its significance or consequences.”⁶² Police can comply with *Miranda*’s requirement that they inform suspects of their rights “and predispose suspects to perceive waiver as the normal and expected response.”⁶³ Feld reports that

[t]raining manuals instruct police to blend the warning into the conversation, to describe it as a formality that understates its importance, to tell suspects that this is their opportunity to tell their story, or to summarize the evidence and tell suspects that they can only explain it if they waive their rights.⁶⁴

Though these tactics may seem relatively benign, the implications are serious.

By intentionally employing tactics designed to coerce a waiver, police “compl[y] with the letter, but not the spirit, of the required fourfold warnings” mandated by *Miranda*.⁶⁵ To effectively dispel the compulsive pressures that are now inherent in the administration of *Miranda* warnings and elicitation of waivers,

⁵⁷ Feld “copied and coded tapes or transcripts, police reports, juvenile court records, and sentence reports for those interrogations” in addition to interviewing “more than three dozen police, prosecutors, defense lawyers, and judges” to corroborate his findings with their experience. BARRY C. FELD, *KIDS, COPS, AND CONFESSIONS* 11 (2013).

⁵⁸ However, police officers, public defenders, and judges did all distinguish between juveniles’ ability to understand the language in the waiver versus the ability to appreciate what they were giving up when they waived their *Miranda* rights. *Id.* at 82-85.

⁵⁹ *Id.* at 83.

⁶⁰ *Id.* at 79-82.

⁶¹ *Id.* at 76 (quoting Patrick Malone, *You Have the Right to Remain Silent: Miranda After Twenty Years*, 55 AM. SCHOLAR 367, 377 (1986)).

⁶² *Id.* at 76.

⁶³ *Id.* at 78.

⁶⁴ *Id.* at 79.

⁶⁵ *Id.* at 93 (quoting Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 L. & SOC’Y REV. 259, 260 (1996)).

counsel must be present. Even a parent or other “interested adult” may not understand that the *Miranda* warnings are not mere protocol, and that making a waiver and talking to the police can have serious consequences. The combination of juveniles’ documented inability to understand the meaning or appreciate the importance of the *Miranda* warnings, coupled with suggestion from the police officer that a waiver is the expected result, make it incredibly unlikely that a juvenile will invoke his constitutional rights during custodial interrogation.

D. Eighth Amendment Jurisprudence for Juveniles

Over the last decade, the Supreme Court has reaffirmed the conclusion that children are different from adults and has methodically carved out a separate place in its Eighth Amendment jurisprudence for juveniles.⁶⁶ Foreclosing first the imposition of the death penalty upon juvenile offenders as a class, then the imposition of life-without-parole sentences for juvenile nonhomicide offenders, and finally the imposition of mandatory life-without-parole sentences upon juvenile homicide offenders, the Court has firmly established that children are different from adults for the purposes of sentencing under the Eighth Amendment.⁶⁷ In identifying the characteristics of youth that significantly diminish juveniles’ culpability for purposes of sentencing, the Court relied on both psychology and neuroscience.⁶⁸ This section will provide a brief overview of the Court’s Eighth Amendment jurisprudence and highlight the impact of psychological and neurological studies in shaping the Court’s most recent decisions.

The Eighth Amendment prohibits the infliction of cruel and unusual punishments,⁶⁹ a standard that has proven imprecise in application.⁷⁰ The Court’s modern Eighth Amendment jurisprudence is marked by the principle that the Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷¹ The foregoing maxim was set forth by the Court in the late 1950’s, but the Court acknowledged over a hundred years ago that its interpretation of the Eighth Amendment must necessarily change over time.⁷² For a constitution to remain relevant, it must “be capable of wider application than the mischief which gave it birth.”⁷³ In other words, the Court must look not only to the past but also to “what may be” when interpreting its provisions.⁷⁴ Under this approach, the Eighth Amendment prohibits more than just punishments that are “inhuman and barbarous,”⁷⁵ and consequently its reach has broadened over time.⁷⁶

⁶⁶ See *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁷ *Miller*, 132 S. Ct. at 2475.

⁶⁸ *Graham*, 560 U.S. at 68.

⁶⁹ U.S. CONST. amend. VIII.

⁷⁰ *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

⁷¹ *Id.* at 101.

⁷² *Weems v. United States*, 217 U.S. 349, 373 (1910).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 368.

⁷⁶ See *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (holding that the Eighth Amendment prohibits torture); see also, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that imprisoning a person for being addicted to narcotics is cruel and unusual punishment); *Weems*, 217 U.S. at 362-63

Today the Court assesses Eighth Amendment challenges using a proportionality test, the roots of which go back to the early twentieth century.⁷⁷ In fact, the Court recently recognized the concept of proportionality as “central to the Eighth Amendment,” reaffirming in numerous decisions the requirement that punishment be proportioned to the offense.⁷⁸ Determining what is “cruel and unusual” using this framework of excessiveness adds significantly to the list of punishments prohibited under the Eighth Amendment; it opens the door for the Court to find a particular term of years sentence unconstitutional that may not appear “cruel and unusual” when considered in isolation, but becomes so when considered in light of the offense committed.

Within the Court’s line of cases requiring proportionality between crime and punishment is a subset of cases holding certain punishments disproportionate to the charged offense, and therefore unconstitutional, when applied to juveniles.⁷⁹ In its 2005 decision in *Roper v. Simmons*, the Court drew upon both its own precedent and psychological studies in identifying several characteristics of youth that make juveniles “categorically less culpable” than adults, among them immaturity, irresponsibility, and susceptibility to external pressures.⁸⁰ These fundamental differences between adults and juveniles make it nearly impossible to distinguish between a juvenile whose crime merely reflects immaturity and one whose crime reflects “irreparable corruption.”⁸¹ The Court thus concluded that juveniles cannot reliably be classified among the “worst [class of] offenders” for whom the death penalty is appropriate; as such, the execution of juvenile offenders is unconstitutionally disproportionate punishment under the Eighth Amendment.⁸²

Five years later the Court again distinguished between juveniles and adults for the purposes of sentencing in *Graham v. Florida*. Echoing *Roper*, the Court emphasized the inherent characteristics of youth in asserting that juveniles have “lessened culpability” and are “less deserving of the most severe punishments.”⁸³ The Court noted that the rationale supporting its decision in *Roper* had been bolstered in the intervening years as “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”⁸⁴ In light of the aforementioned considerations, the Court held that the Eighth Amendment prohibits a sentence of life without parole for juvenile offenders who did not commit homicide.⁸⁵

The Court’s Eighth Amendment jurisprudence for juvenile offenders was thus

(holding that fifteen years’ imprisonment for falsification of a public document is cruel and unusual punishment).

⁷⁷ See *Weems*, 217 U.S. at 366-67 (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense.”).

⁷⁸ *Graham v. Florida*, 560 U.S. 48, 59 (2010); see also, e.g., *Montgomery v. Louisiana*, 136 S. Ct. 718, 732-33 (2016); *Miller v. Alabama*, 567 U.S. 460, 469 (2012); *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

⁷⁹ See *Montgomery*, 136 S. Ct. at 732.

⁸⁰ *Roper*, 543 U.S. at 567, 569.

⁸¹ *Id.* at 573.

⁸² *Id.* at 568, 570, 575.

⁸³ *Graham*, 560 U.S. at 68.

⁸⁴ *Id.*

⁸⁵ *Id.* at 74.

developing quickly, with two decisions in the span of five years categorically barring certain penalties for juvenile offenders, when *Miller v. Alabama* was decided in 2012.⁸⁶ The thrust behind the Court's decision in *Miller* was, simply put, that children are different from adults.⁸⁷ The Court reiterated the principle asserted in *Roper* and *Graham* that juveniles are categorically less culpable than adults given their "transient rashness, proclivity for risk, and inability to assess consequences."⁸⁸ As such, a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders violates the Eighth Amendment because it precludes consideration of age and the characteristics that come with it.⁸⁹ Age, in other words, is an indispensable factor in a judge's evaluation of the circumstances during sentencing.

The foregoing decisions show that it is inappropriate to simply treat juveniles as "miniature adults."⁹⁰ Juveniles are fundamentally different, especially in the context of the criminal justice system. Though the Court's decisions in *Roper*, *Graham*, and *Miller* were based upon a determination about juveniles' culpability in the context of sentencing, the underlying reasoning in those cases has implications for juveniles in criminal law more broadly.⁹¹ The Court remarked in *Miller* that one of the "incompetencies associated with youth" is the "inability to deal with police officers or prosecutors."⁹² Also among the "hallmark features" of youth are "immaturity, impetuosity, and failure to appreciate risks and consequences."⁹³ In the context of custodial interrogation, juveniles' comparative inability to deal effectively with police, coupled with their inability to assess and appreciate consequences, is deeply troubling.

E. The Science of Adolescence

1. Background and General Principles

Scientific studies confirm the correlation between the characteristics of youth identified by the Supreme Court and juveniles' inability to comprehend *Miranda* warnings. Though the Supreme Court relied on general observations about the cognitive and behavioral differences between adults and children in its Eighth Amendment cases, significant research has also been conducted specifically to evaluate juveniles' ability to understand the *Miranda* warnings and make reasoned decisions under the pressures of custodial interrogation.⁹⁴

⁸⁶ See *id.* at 82 (holding life without parole for juvenile nonhomicide offenders unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding the death penalty for juvenile offenders unconstitutional).

⁸⁷ *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016); *Miller v. Alabama*, 567 U.S. 460, 480 (2012).

⁸⁸ *Miller*, 567 U.S. at 472.

⁸⁹ *Id.* at 477-79.

⁹⁰ *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

⁹¹ See Petition for Writ of Certiorari at 14, *Joseph H. v. California*, 137 S. Ct. 34 (Jan. 14, 2016) (No. 15-1086).

⁹² *Miller*, 132 S. Ct. at 2468.

⁹³ *Id.*

⁹⁴ See, e.g., Heather Zelle, Christina L. Riggs Romaine & Naomi E. S. Goldstein, *Juveniles' Miranda Comprehension: Understanding, Appreciation, and Totality of the Circumstances Factors*, 39 L. & HUM. BEHAV. 281 (2015) (examining justice-involved juveniles' understanding of *Miranda* rights); Joseph

The unique characteristics and “incompetencies”⁹⁵ of youth that the Supreme Court has identified stem from the fact that juveniles’ brains are simply different from those of fully developed adults. Kenneth King provides an overview of the key neurological differences between juveniles and adults in an article examining the totality of the circumstances test as applied to juveniles’ *Miranda* waivers.⁹⁶ The regions of the brain that facilitate abstract reasoning mature later than other regions of the brain—a fact that strongly supports several key conclusions.⁹⁷

Adolescents . . . have a lesser ability to reason and interpret information than adults have. Adolescents are not wired to process abstract information efficiently or to pick and choose between alternative actions while analyzing the consequences of each. Executive functions, which are essential to reasoning, reside in the frontal cortex This part of the brain, unarguably critical to making informed decisions with respect to legal rights, is the part of the brain that develops last.⁹⁸

Processing abstract information and analyzing the consequences of alternative choices are, as King notes, indispensable skills to the comprehension and exercise of legal rights.

Researchers Abigail Baird and Jonathan Fugelsang have also observed that the legal system places a premium on this ability to “imagine alternative outcomes and understand the consequences of those outcomes,” a process that they refer to as “counterfactual thinking.”⁹⁹ This is especially true in the context of *Miranda* warnings, where a juvenile must weigh the consequences of waiving his rights and speaking to the police against the consequences of invoking his rights and remaining silent or requesting an attorney. Evidence from numerous studies suggests that “it may be physically impossible for adolescents to engage in counterfactual reasoning,” meaning that juveniles may be unable to “foresee the possible consequences of their actions.”¹⁰⁰ This inability is a result of adolescents’ “neural hardware,”¹⁰¹ including an underdeveloped prefrontal cortex, the area of the brain understood to be critical to “cognitive, social and emotional processes.”¹⁰²

As noted above, the Court relied heavily on similar psychological and neurological studies in its recent Eighth Amendment jurisprudence.¹⁰³ This science is likewise applicable in the context of the Fifth Amendment privilege against self-

Eastwood, Brent Snook, Kirk Luther & Stuart Freedman, *Engineering Comprehensible Youth Interrogation Rights*, 19 NEW CRIM. L. REV. 42 (2016) (assessing the extent to which juvenile comprehension can be improved by modifying warnings).

⁹⁵ *Miller*, 132 S. Ct. at 2468.

⁹⁶ 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, 434-45 (2006).

⁹⁷ *Id.* at 437-40.

⁹⁸ *Id.* at 440.

⁹⁹ Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, in LAW AND THE BRAIN 245, 245 (S. Zeki & O. Goodenough eds., 2006).

¹⁰⁰ *Id.* at 254.

¹⁰¹ *Id.*

¹⁰² *Id.* at 251.

¹⁰³ See, e.g., *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citing to Brief for American Medical Association et al. as *Amici Curiae* at 16-24; Brief for American Psychological Association et al. as *Amici Curiae* at 22-27) (noting that science shows fundamental differences between juveniles and adults).

incrimination, and researchers have conducted a number of studies assessing juveniles' capacity to understand and appreciate the *Miranda* warnings.

2. Juvenile *Miranda* Comprehension

The ability to make a truly meaningful decision about whether to relinquish one's constitutional rights requires several tiers of mental processes. One recent study evaluating juveniles' *Miranda* comprehension distinguished between the ability to understand the content of the warnings in a basic sense and the ability to appreciate the consequences of making a waiver.¹⁰⁴ Another examined juveniles' ability to recognize and recall the *Miranda* warnings, as well as the impact of common *Miranda* misconceptions upon the waiver process.¹⁰⁵

Juveniles' ability to simply understand the content of *Miranda* warnings is highly variable and influenced by numerous factors, from the language used in the warning itself¹⁰⁶ to the juvenile's age, IQ, and academic achievement.¹⁰⁷ One team of researchers collected and extensively analyzed 325 juvenile *Miranda* warnings, each of which was uniquely worded, and found that "[p]aradoxically, juvenile advisements sometimes include more difficult vocabulary words" than the general warnings administered to adults.¹⁰⁸ The same team tested juveniles on a list of sixteen "*Miranda*-relevant terms," and found that key words such as "consult" and "interrogation" were "completely missed by more than 50 percent of 181 juvenile detainees."¹⁰⁹ It is evident, therefore, that even understanding the vocabulary that makes up the *Miranda* warnings presents a challenge.

If a juvenile does surpass that initial threshold, he must then be able to apply those abstract concepts to the situation in which he finds himself. Though "vocabulary comprehension is a prerequisite for both understanding and appreciation,"¹¹⁰ it does not guarantee it; even when juveniles had a "general idea about the meanings of key words," they often "lack[ed] the specific ability to apply such vague notions to their own waiver decisions."¹¹¹ That gap between comprehension and appreciation is critical.

Even if a juvenile understands the meaning of the *Miranda* warnings, he may nevertheless be unable to understand the benefits conferred by those rights and the consequences of foregoing them. One contributing factor, researchers found, was that "[l]egally involved juveniles frequently possess serious *Miranda* misconceptions."¹¹² For example, two-thirds of juveniles with lower levels of "psychosocial maturity and cognitive development"¹¹³ not only "grossly misperceive[d] law enforcement as fulfilling a helping rather than adversarial role at

¹⁰⁴ Zelle et al., *supra* note 94, at 282.

¹⁰⁵ Richard Rogers & Eric Y. Drogin, *Miranda Warnings: Often Heard but Seldom Understood*, 40-MAY CHAMPION 38, 38-42 (2016).

¹⁰⁶ *Id.* at 39.

¹⁰⁷ Zelle et al., *supra* note 94, at 291.

¹⁰⁸ Rogers & Drogin, *supra* note 105, at 39.

¹⁰⁹ *Id.*

¹¹⁰ Zelle et al., *supra* note 94, at 285.

¹¹¹ Rogers & Drogin, *supra* note 105, at 39.

¹¹² *Id.* at 41.

¹¹³ *Id.* at 40.

the time of arrest,” they also “questioned the allegiance of court-appointed attorneys,” often believing that they were required to disclose any information that the juvenile shared with them to the judge.¹¹⁴ Another study confirmed that although juveniles “may *understand* the availability of an attorney, many . . . failed to grasp the attorney’s role as a personal advocate.”¹¹⁵ Such misperceptions and misunderstandings make it highly unlikely that a juvenile will choose on his own to exercise his right to counsel.

In addition to difficulties posed by complex warnings and misperceptions about the system, several personal traits also impact the ability of any given juvenile to understand and appreciate the *Miranda* warnings. Age and IQ have long been recognized as important, though “the relationship of each of these totality-of-circumstances factors with understanding appears more substantial than with appreciation.”¹¹⁶ Furthermore, results of a recent study indicate that academic achievement may be a stronger indicator of the likelihood that a juvenile was able to understand and appreciate *Miranda* rights than age and IQ alone.¹¹⁷ Finally, previous experience with the justice system is a factor commonly considered under the totality of the circumstances test.¹¹⁸ Interestingly, though various actors within the justice system report that juveniles are more likely to invoke their rights if they have been through the system before,¹¹⁹ researchers have found “no significant relationship” between that kind of prior experience and the ability to *understand* legal rights.¹²⁰

Numerous factors, including age, education, and perception, all of which are affected by the makeup of the adolescent brain, significantly impair juveniles’ ability to understand and exercise their rights during custodial interrogation. The inability to think abstractly and predict long-term consequences means that juveniles cannot consistently and reliably understand their *Miranda* rights or the implications of waiving them. Furthermore, without the assistance of counsel, juveniles are presented only one set of consequences to consider by the very person who seeks to obtain a waiver of their rights.

III. ASSESSMENT OF JUVENILE *MIRANDA* WAIVERS STATE BY STATE

In the wake of the Court’s decisions in *In re Gault* and *Fare v. Michael C.*, a number of states have enacted statutes that put in place measures designed to offer greater protection of juveniles’ rights in custodial interrogation situations.¹²¹ There are several kinds of protections currently in effect: some states require the presence of or opportunity to consult with an “interested adult” before a juvenile can make an

¹¹⁴ *Id.* at 41-42.

¹¹⁵ Zelle et al., *supra* note 94, at 290 (emphasis in original).

¹¹⁶ *Id.* at 291.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Feld, *supra* note 57, at 99-100.

¹²⁰ Zelle et al., *supra* note 94, at 290.

¹²¹ *See, e.g.*, N.M. STAT. ANN. § 32A-2-14(F) (LexisNexis 2017) (creating a rebuttable presumption that an admission or confession made by a juvenile aged thirteen or fourteen to “a person in a position of authority” is inadmissible); N.C. GEN. STAT. § 7B-2101(b) (2016) (providing that an admission or confession made by a juvenile under the age of sixteen in the course of custodial interrogation is inadmissible unless it was made in the presence of a parent, guardian, custodian, or attorney).

effective waiver of his or her rights¹²² while others create a rebuttable presumption that any admission or confession made by a juvenile under a certain age is inadmissible.¹²³ Many states, however, merely apply the totality of the circumstances test when determining the validity of a juvenile's waiver; some states have codified the test, mandating that courts consider particular factors in their analysis,¹²⁴ while other states have developed the test through common law.¹²⁵ Among those states that employ the totality of the circumstances test, some have pushed for mandating simpler language for juvenile *Miranda* warnings to aid in ensuring comprehension.¹²⁶ The following sections will examine each approach in turn, and explain why each approach fails to adequately protect the rights of juveniles in the justice system.

A. The Totality of the Circumstances Test

I. Variations in Application

As noted above, the Supreme Court concluded in *Fare v. Michael C.* that the “totality-of-the-circumstances approach is adequate” to determine whether a juvenile has knowingly and voluntarily waived the privilege against self-incrimination, reasoning that lower courts have the expertise to reliably weigh such attributes as age, experience, education, background, and intelligence.¹²⁷ In giving lower courts the flexibility to weigh various factors and consider the circumstances unique to each case, however, the totality approach also allows for disparate application and unjust outcomes. The risk that juveniles' constitutional rights may go unprotected in any given jurisdiction far outweighs the benefits of the test.

On February 14, 1981, two police officers in Lewiston, Maine, took a fourteen-year-old boy named Nicholas into custody in connection with the burglary of his neighbor's apartment.¹²⁸ The officers read the *Miranda* warnings from a card to both Nicholas and his mother, who was present at the interrogation—the Juvenile Court specifically found that the warnings were “explained to his mother, in the juvenile's presence.”¹²⁹ Nicholas's mother indicated that she understood the warnings, then told Nicholas to “tell the truth” and the officers began to ask leading questions about the burglary, which Nicholas answered without making an express waiver of his

¹²² See, e.g., COLO. REV. STAT. ANN. § 19-2-511(1) (West 2016) (providing that no statements or admissions made by a juvenile in the course of custodial interrogation are admissible unless a parent, guardian, or legal or physical custodian of the juvenile was present and informed of the juvenile's rights); IND. CODE ANN. § 31-32-5-1(2) (West 2016) (providing that a waiver may be made by a custodial parent, guardian, custodian, or guardian ad litem who has had a chance to consult with the child).

¹²³ See N.M. STAT. ANN. § 32A-2-14(F) (LexisNexis 2017).

¹²⁴ See, e.g., ARK. CODE ANN. § 9-27-317(c) (West 2016).

¹²⁵ See, e.g., *State v. Nicholas S.*, 444 A.2d 373, 377-80 (Me. 1982) (applying the totality of the circumstances test, noting especially the education and experience of the juvenile).

¹²⁶ Bills were introduced in both the New York State Senate and Illinois General Assembly in early 2016 mandating the same simplified language for *Miranda* warnings when they are administered to juveniles. S. S6754, 2015-2016 Leg. (N.Y. 2016); S. SB2370, 99th Gen. Assemb. (Ill. 2016). The Illinois Bill has since been enacted. See 705 ILL. COMP. STAT. ANN. 405 / 5-401.5(a-5) (West 2017).

¹²⁷ *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

¹²⁸ *Nicholas S.*, 444 A.2d at 375.

¹²⁹ *Id.* at 376 (emphasis in original).

rights.¹³⁰ Following a suppression hearing, the Juvenile Court found that Nicholas knowingly and voluntarily waived his rights.¹³¹ On appeal, the Maine Supreme Judicial Court applied the totality of the circumstances test to assess the validity of the waiver.¹³²

Though neither party “question[ed] the vitality of the totality of the circumstances approach,” the court nonetheless began its analysis by noting its “superiority,” when “properly applied,” over *per se* exclusionary rules adopted in other states.¹³³ The court elaborated that “[l]iberal application of the rule in favor of juvenile rights . . . is absolutely essential” and “[o]bjective satisfaction by the State of several of the relevant factors . . . can not [sic] substitute for a critical examination of the circumstances surrounding the confession and a sensitive understanding of a juvenile’s vulnerability in a custodial atmosphere.”¹³⁴ In keeping with this construction of the test, the court went on to examine closely the officers’ supposed elaboration upon the *Miranda* warnings when administering them, the degree of protection afforded by the presence of an “interested adult,” and Nicholas’s “age, intelligence, level of education and experience with the criminal justice system.”¹³⁵ Ultimately, the court concluded that

[t]he factors noted above raise grave doubts as to whether there was a real understanding and intelligent exercise by the juvenile of his rights. The limited explanation of the rights to the mother of the juvenile, a young boy of limited experience, is insufficient for us to find that Nicholas S. was aware of his rights and the consequences of foregoing them.¹³⁶

The Maine Supreme Judicial Court’s opinion in *Nicholas S.* reflects a thoughtful application of the totality of the circumstances test that affords protection to juveniles’ constitutional rights. The discretionary nature of the totality test, however, leads to divergent applications from court to court and from state to state.

In stark contrast to *Nicholas S.*, the Georgia Court of Appeals held in *Swain v. State* that a fifteen year-old’s *Miranda* waiver was made voluntarily and knowingly despite the fact that “the detective used some profanities during the interview, called Swain a liar and coward, and told Swain some lies regarding other evidence that they had against him.”¹³⁷ The court noted with approval that “the detective did not threaten Swain, nor did the detective promise him anything in exchange for his confession.”¹³⁸ Though the court stated that “[c]onfessions of juveniles must be scanned with more care and received with greater caution than those of adults,” its brief analysis does not reflect that heightened care.¹³⁹ Though age, education, and knowledge of “the nature of his rights to consult with an attorney and remain silent” were among the nine factors that the court considered, the analysis was so cursory as

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 377-380.

¹³³ *Id.* at 377.

¹³⁴ *Id.*

¹³⁵ *Id.* at 378-80.

¹³⁶ *Id.* at 380.

¹³⁷ *Swain v. State*, 285 Ga. App. 550, 552 (2007).

¹³⁸ *Id.*

¹³⁹ *Id.* at 551.

to barely accord them any weight.¹⁴⁰ Unlike the Maine Supreme Judicial Court, the Georgia Court of Appeals made no apparent effort to apply the test liberally “in favor of juvenile rights.”¹⁴¹ Absent explicit extortion, the court concluded that the juvenile’s waiver and subsequent confession were made voluntarily and knowingly.

The greatest advantage of the totality test, as the Maine Supreme Judicial Court reasoned, is that it allows courts to account for the unique circumstances present in each case. Yet such discretionary case-by-case weighing also leaves room for arbitrary and unequal outcomes. The Maine Supreme Judicial Court found Nicholas’s *Miranda* waiver invalid, despite the fact that his mother was present and there was no evidence that the detectives had harassed or berated him. The court truly applied the totality test so as to protect the juvenile’s rights. In Georgia, on the other hand, the detective was verbally abusive—calling the juvenile names and peppering his questions with profanities—and lied to him about the evidence that the police had against him, yet the court found that the fifteen-year-old suspect was not coerced into waiving his constitutional rights. *Swain* and *Nicholas* represent only two of the numerous jurisdictions that employ the totality of the circumstances test,¹⁴² but the two cases also illustrate how wildly disparate the application of the test can be across jurisdictions. Such unequal adjudication of children’s constitutional claims is deeply problematic.

2. Simplified *Miranda* Warnings

New York and Illinois are among the states that assess juvenile *Miranda* waivers using the totality of the circumstances test, but seek to provide greater protection to juveniles through alternate means.¹⁴³ In early 2016, bills were introduced in both state legislatures that set out new, simplified language for *Miranda* warnings to be administered to juveniles.¹⁴⁴ At the time of this writing, the New York bill remains in committee,¹⁴⁵ the Illinois bill passed both houses, was approved by the Governor in August 2016, and went into effect on January 1, 2017.¹⁴⁶

The Illinois law and the New York bill mandate the same language; both require that an officer read the following statement to any person under eighteen years of

¹⁴⁰ *Id.* at 552.

¹⁴¹ *State v. Nicholas S.*, 444 A.2d 373, 380 (Me. 1982).

¹⁴² *See, e.g.*, *State v. S.V.*, 958 So. 2d 609, 611 (Fla. Dist. Ct. App. 2007) (stating that the relevant inquiry is whether the juvenile’s waiver was knowing and voluntary given the totality of the circumstances); *State v. Burrell*, 697 N.W.2d 579, 597 (Minn. 2005) (stating that the court subjectively analyzes the totality of the circumstances to determine validity of a juvenile’s *Miranda* waiver); *State v. Bybee*, 1 P.3d 1087, 1091 (Utah 2000) (stating that the court examines the totality of the circumstances surrounding the waiver).

¹⁴³ *See People v. Bernasco*, 562 N.E.2d 958, 965 (Ill. 1990) (explaining that Illinois courts have long applied the totality of the circumstances test to determine whether a waiver of rights was voluntary); *Matter of Julian B.*, 510 N.Y.S.2d 613, 617 (N.Y. App. Div. 1986) (“[T]he age, intellectual capacity, time of day and manner of questioning are all factors to be taken into account in determining if a statement is voluntary under the totality of the circumstances.”).

¹⁴⁴ S. S6754, 2015-2016 Leg. Sess. (N.Y. 2016); S. SB2370, 99th Gen. Assemb. (Ill. 2016).

¹⁴⁵ *Senate Bill S6754*, THE NEW YORK STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/s6754> [<https://perma.cc/5M9D-6CUA>].

¹⁴⁶ *Bill Status of SB2370*, ILLINOIS GENERAL ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=SB&DocNum=2370&GAID=13&SessionID=88&LegID=93740> [<https://perma.cc/P4QM-DU6Q>].

age, continuously and without stopping mid-warning for a response:

You have the right to remain silent. That means you do not have to say anything. Anything you do say can be used against you in court. You have the right to get help from a lawyer. If you cannot pay for a lawyer, the court will get you one for free. You can ask for a lawyer at any time. You have the right to stop this interview at any time.¹⁴⁷

The interrogator must then ask the juvenile, “Do you want to have a lawyer?” and “Do you want to talk to me?”¹⁴⁸ The short sentences and “wording comprehensible for an elementary school reading level” are designed to “ensur[e] that youth understand their constitutional rights.”¹⁴⁹ However, as detailed in Part II.E.2, research shows that understanding the language of the warnings is only the first step.

To make a truly intelligent waiver, a juvenile must not only be able to understand the vocabulary of the warnings and the concepts that they convey, but also the nature of the rights at stake and the consequences of giving them up. Without the assistance of counsel, a simplified warning has very little practical effect. Though a juvenile will likely understand better what it means that they can get a lawyer “for free” than that counsel will be appointed for them, if the juvenile does not understand the role of the lawyer as an advocate he cannot appreciate the consequences of foregoing that right. The conversational tone of the simplified warnings also raises concerns with respect to police tactics when administering the *Miranda* warnings.¹⁵⁰ Though the simplified language may be easier to understand, it also makes it easier to “blend the warning into the conversation” and downplay its importance.¹⁵¹ A simplified warning coupled with the advice of counsel would have a meaningful effect on a juvenile’s understanding of his constitutional rights, but research suggests that changing the language of the warning alone will have a negligible effect.

B. The “Interested Adult” Standard

In a number of states, a juvenile cannot make a valid waiver of his *Miranda* rights unless a parent, guardian, or legal custodian is present (and involved, in varying degrees depending on the jurisdiction, in the decision to do so).¹⁵² Like the totality of the circumstances test, however, different jurisdictions have put in place different “interested adult” requirements, some of which are more effective in protecting of juveniles’ rights than others.

Several states merely require that a parent or guardian be *present* before a

¹⁴⁷ 705 ILL. COMP. STAT. ANN. 405 / 5-401.5 (West 2017); N.Y. St. S., S6754, 2016 Leg. Sess. (N.Y. 2016).

¹⁴⁸ 705 ILL. COMP. STAT. ANN. 405 / 5-401.5 (West 2017); N.Y. St. S., S6754, 2016 Leg. Sess. (N.Y. 2016).

¹⁴⁹ *Senate Bill S6754*, THE NEW YORK STATE SENATE, <https://www.nysenate.gov/legislation/bills/2015/s6754> [<https://perma.cc/XZQ4-VLHH>].

¹⁵⁰ See *infra* Part II.C.

¹⁵¹ Feld, *supra* note 57, at 79.

¹⁵² See ALA. CODE § 12-15-202(a)(2) (1975); COLO. REV. STAT. ANN. § 19-2-511(1) (West 2016); CONN. GEN. STAT. ANN. § 46b-137(a) (West 2016); IND. CODE ANN. § 31-32-5-1 (West 2016); IOWA CODE ANN. § 232.11(2) (West 2016); MONT. CODE ANN. § 41-5-331(2)(a)-(c) (West 2009); N.C. GEN. STAT. ANN. § 7B-2101(b) (West 2015); OKLA. STAT. ANN. TIT. 10A, § 2-2-301(A) (West 2016).

juvenile can make a valid waiver of his or her rights. Connecticut, Iowa, Montana, North Carolina, and Oklahoma all have similar statutes in place.¹⁵³ All five states draw a line at age sixteen; for juveniles who are sixteen or seventeen, Connecticut and Iowa require that the police make “reasonable” and “good faith” efforts, respectively, to notify the juvenile’s parent or guardian that the juvenile is in custody.¹⁵⁴ Montana, North Carolina, and Oklahoma permit juveniles who are sixteen or seventeen to waive their rights as long as those waivers conform with the requirements for adults.¹⁵⁵ If a juvenile is under the age of sixteen, Iowa requires that the parent give written consent for the juvenile to waive his or her rights;¹⁵⁶ Connecticut, on the other hand, requires that the parent or guardian be advised of the juvenile’s rights.¹⁵⁷ Montana, North Carolina, and Oklahoma all merely require that the parent or guardian of a juvenile under sixteen be present before the juvenile can waive his or her rights.¹⁵⁸

Indiana’s juvenile *Miranda* waiver statute, in contrast, is far more protective of juveniles’ rights. Under Indiana law, a “child” can only waive his *Miranda* rights in the absence of a “custodial parent, guardian, or guardian ad litem” if the child has been emancipated or is married.¹⁵⁹ If a custodial parent, guardian, or guardian ad litem is present, that adult may waive the juvenile’s rights only if four conditions are met: “(A) that person knowingly and voluntarily waives the right; (B) that person has no interest adverse to the child; (C) meaningful consultation has occurred between that person and the child; and (D) the child knowingly and voluntarily joins with the waiver.”¹⁶⁰ Finally, “counsel retained or appointed to represent the child” may make a waiver “if the child knowingly and voluntarily joins with the waiver.”¹⁶¹ The State “bears the burden of proving beyond a reasonable doubt that the juvenile received all of the protections” set out in the statute and that “both the juvenile and his or her parent knowingly, intelligently, and voluntarily waived the juvenile’s rights.”¹⁶² The State may not introduce evidence of a statement or confession obtained in violation of this provision.¹⁶³

The statute “represents the legislature’s agreement” with the Indiana Supreme Court’s 1972 decision in *Lewis v. State*, where the court concluded “that extra protections are necessary when juveniles are faced with the prospect of waiving their constitutional rights.”¹⁶⁴ In that case, the Court aptly asserted that

¹⁵³ See CONN. GEN. STAT. ANN. § 46b-137(a) (West 2016); IOWA CODE ANN. § 232.11(2) (West 2016); MONT. CODE ANN. § 41-5-331(2)(a)-(c) (West 2009); N.C. GEN. STAT. ANN. § 7B-2101(b) (West 2015); OKLA. STAT. ANN. TIT. 10A, § 2-2-301(A) (West 2016).

¹⁵⁴ CONN. GEN. STAT. ANN. § 46b-137(b) (West 2016); IOWA CODE ANN. § 232.11(2) (West 2016).

¹⁵⁵ MONT. CODE ANN. § 41-5-331(2)(a) (West 2009); N.C. GEN. STAT. ANN. § 7B-2101(d) (West 2015); OKLA. STAT. ANN. TIT. 10A, § 2-2-301(B) (West 2016).

¹⁵⁶ IOWA CODE ANN. § 232.11(2) (West 2016).

¹⁵⁷ CONN. GEN. STAT. ANN. § 46b-137(a) (West 2016).

¹⁵⁸ MONT. CODE ANN. § 41-5-331(2)(b)-(c) (West 2009); N.C. GEN. STAT. ANN. § 7B-2101(b) (West 2015); OKLA. STAT. ANN. TIT. 10A, § 2-2-301(A) (West 2016).

¹⁵⁹ IND. CODE ANN. § 31-32-5-1(3) (West 2016).

¹⁶⁰ § 31-32-5-1(2).

¹⁶¹ § 31-32-5-1(1).

¹⁶² *D.M. v. State*, 949 N.E.2d 327, 334 (Ind. 2011).

¹⁶³ *Stewart v. State*, 754 N.E.2d 492, 495 (Ind. 2001).

¹⁶⁴ *Id.* at 494.

[i]t would indeed be inconsistent and unjust to hold that one whom the State deems incapable of being able to marry, purchase alcoholic beverages, or even donate their own blood, should be compelled to stand on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.¹⁶⁵

This principle is of central importance and makes instinctual sense: children whose rights and responsibilities are limited because of their age and immaturity should not be held to the same standard as adults when it comes to surrendering important constitutional rights. The Indiana statute reflects this principle by requiring “meaningful consultation” between the juvenile and an adult who has the juvenile’s interests in mind before the juvenile may make this important legal decision.¹⁶⁶

The mere presence of a friendly adult, without the requirement that the adult provide substantive assistance to the juvenile, provides little protection for the child’s rights. Indiana’s statute ensures more meaningful assistance to juveniles faced with the *Miranda* waiver decision than the statutes in Connecticut, Iowa, Montana, North Carolina, and Oklahoma, which simply require an adult’s presence. However, the benefit of the presence and advice of an attorney is unique in this context. The Supreme Court recognized the distinct role that lawyers play in the justice system in *Fare v. Michael C.*, asserting that “the 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.”¹⁶⁷ An attorney is best equipped both to dispel the inherent pressures of the custodial setting and to advise the juvenile about the consequences of waiving his rights and speaking to the police.

Though adults generally comprehend the *Miranda* warnings at a higher rate than juveniles,¹⁶⁸ an adult evaluating his own interests and making a waiver decision is far different than an adult who is trying to weigh the benefits and consequences of making a waiver on behalf of a juvenile. Adults oftentimes cannot discern and advocate for their own interests, let alone those of a third person. Even a parent who has a child’s best interest in mind may nevertheless hold misperceptions about the rights at issue or feel compelled by the police-dominated environment. An attorney, on the other hand, has training and experience in advocating for the rights of others, and in dealing with the pressures that come with police custody.

C. Rebuttable Presumption

New Mexico takes yet another approach to juvenile *Miranda* waivers, creating a presumption against the admissibility of statements made by children fourteen

¹⁶⁵ *Lewis v. State*, 288 N.E.2d 138, 141-42 (Ind. 1972) (citations omitted).

¹⁶⁶ To prove that meaningful consultation occurred, the State must show that “the police provided a relatively private atmosphere that was free from police pressure in which the juvenile and the parent could have had a meaningful discussion about the ‘allegations, the circumstances of the case, and the ramifications of their responses to police questioning and confessions.’” *D.M.*, 949 N.E.2d at 335 (quoting *Trowbridge v. State*, 717 N.E.2d 138, 148 (Ind. 1999)).

¹⁶⁷ 442 U.S. 707, 719 (1979).

¹⁶⁸ *Feld*, *supra* note 12, at 408-09.

years old and younger that the State may then rebut.¹⁶⁹ The relevant statute first provides that waivers made by juveniles must be knowing, intelligent, and voluntary, and sets out eight factors that courts must consider in conducting a totality of the circumstances analysis.¹⁷⁰ The statute then creates a “rebuttable presumption that any confessions, statements, or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible” against that child.¹⁷¹ The waivers of juveniles between the ages of fifteen and seventeen are evaluated using the totality of the circumstances test.

The Supreme Court of New Mexico recently held that, in order to overcome this presumption of inadmissibility, the State must prove by “clear and convincing evidence” that “the child had the maturity to understand his or her constitutional and statutory rights and the force of will to assert those rights” at the time the interrogation took place.¹⁷² The Court went on to explain that,

[i]n order to obtain the clear and convincing evidence needed . . . the interrogator who is in a position of authority must first adequately advise the thirteen- or fourteen-year-old child of his or her *Miranda* and statutory rights and then invite the child to explain, on the record, his or her actual comprehension and appreciation of each *Miranda* warning. This could be done by having the child explain in his or her own words—without suggestions by the interrogator—what each of the rights means to the child.¹⁷³

A few of the officers in the Minnesota juvenile cases that Barry Feld reviewed employed this method when administering *Miranda* warnings to juveniles, and “[i]nvestigators acknowledged that repeating back could better reveal whether a youth understands the warning.”¹⁷⁴ However, this approach ultimately falls short of providing adequate protection for the constitutional rights of juveniles.

First, the approach outlined by the Supreme Court of New Mexico does not do anything to shift the balance of power from the police officer who is administering the warnings (and who wishes the juvenile to make a waiver) in favor of the child. Even if the juvenile develops a better understanding of what those warnings mean by repeating the warnings back to the officer in his own words, he is still unlikely to assert his rights if the officer is suggesting that a waiver is the expected outcome, or if he misunderstands the role of the police officer as serving a helping role. Second, as mentioned previously, the distinction between understanding the language of the *Miranda* warnings and appreciating the importance of the rights described is significant. Consultation with an attorney not only provides the most meaningful

¹⁶⁹ N.M. STAT. ANN. § 32A-2-14(F) (West 2016). The Pennsylvania Supreme Court once created a rebuttable presumption “that a juvenile is incompetent to waive his constitutional rights without first having an opportunity to consult with an interested and informed adult,” but quickly abandoned that approach after only a year in favor of the totality of the circumstances test. *Commonwealth v. Williams*, 475 A.2d 1283, 1287 (Pa. 1984).

¹⁷⁰ The statute includes those factors commonly considered by courts, including the age and experience of the juvenile, but also includes “whether the respondent had the counsel of an attorney, friends, or relatives at the time of being questioned.” The statute thus makes the presence of an interested adult relevant, but does not mandate it. N.M. STAT. ANN. § 32A-2-14(D)-(E) (West 2016).

¹⁷¹ N.M. STAT. ANN. § 32A-2-14(F) (West 2016).

¹⁷² *State v. DeAngelo M.*, 360 P.3d 1151, 1157 (N.M. 2015).

¹⁷³ *Id.*

¹⁷⁴ Feld, *supra* note 57, at 91.

opportunity for a juvenile to develop an appreciation for the consequences of foregoing his rights, it increases the chances that the juvenile will be emboldened to exercise those rights by shifting some of the power away from the officer.

D. Mandatory Consultation with Counsel

Though a handful of state courts have found individual juveniles' *Miranda* waivers invalid in cases where the juvenile was not afforded an opportunity to consult with an attorney, at present no states mandate that juveniles consult with counsel as a prerequisite to making a valid *Miranda* waiver.¹⁷⁵ In 2015, after Joseph Hall's case had made its way through the California courts on direct appeal, the California legislature passed a bill that would have adopted such a requirement. The bill was, however, ultimately vetoed by the governor.¹⁷⁶

The juvenile court that heard Joseph Hall's case found that the child understood the wrongfulness of his acts and that he had committed what would constitute second degree murder if committed by an adult.¹⁷⁷ The California Court of Appeal subsequently upheld the juvenile court's decision and Joseph's commitment to the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF).¹⁷⁸ Joseph's petition for review was denied by the Supreme Court of California.¹⁷⁹ However, three justices felt that the petition should have been granted, and Justice Liu wrote a powerful dissent explaining why he believed the case merited review.¹⁸⁰

Justice Liu argued that "whether and, if so, how the concept of a voluntary, knowing, and intelligent *Miranda* waiver can be meaningfully applied to a child as young as 10 years old," is an important issue that affects hundreds of children in California each year.¹⁸¹ He noted the paucity of cases from other states addressing *Miranda* waivers by such young children and cited Supreme Court precedent and social science research recognizing the diminished mental capabilities of children as compared to adults.¹⁸² Finally, in the last sentence of his dissent, Justice Liu made a suggestion: "[o]ur legislature may wish to take up this issue in light of this court's decision not to do so here."¹⁸³

Four months to the day after the denial of Joseph's petition was published, SB

¹⁷⁵ See, e.g., *Ezell v. State*, 489 P.2d 781, 783 (Okla. Crim. App. 1971) (holding that a juvenile's *Miranda* waiver was invalid despite the presence of his legal custodian and mother because neither was shown to have any knowledge of the law). Texas's Family Code originally required "the concurrence of an attorney" before a juvenile could make a valid *Miranda* waiver, but that provision was removed after only one legislative session. *Comer v. State*, 776 S.W.2d 191, 195 (Tex. Crim. App. 1989); see *In re R.E.J.*, 511 S.W.2d 347 (Tex. Civ. App. 1974) (holding waiver invalid because juvenile was not joined by his attorney).

¹⁷⁶ *Status, SB-1052 Custodial Interrogation: Juveniles*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1052 [<https://perma.cc/AB8R-MB7K>].

¹⁷⁷ *In re Joseph H.*, 188 Cal. Rptr. 3d 171, 176 (Cal. Ct. App. 2015).

¹⁷⁸ *Id.* at 194.

¹⁷⁹ *In re Joseph H.*, 367 P.3d 1, 1 (Cal. 2015).

¹⁸⁰ *Id.* (Liu, J., dissenting).

¹⁸¹ *Id.*

¹⁸² *Id.* at 1-2, 4.

¹⁸³ *Id.* at 6.

1052 was introduced on the floor of the California State Senate.¹⁸⁴ If enacted, the bill would have required a juvenile under the age of eighteen to consult with legal counsel before a custodial interrogation and before waiving his *Miranda* rights.¹⁸⁵ The proposed law provided that, “[p]rior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth under 18 years of age shall consult with legal counsel in person.”¹⁸⁶ Such consultation could not be waived. The legislature’s findings, set out in section one of the bill, included conclusions from developmental and neurological science as well as legal precedent regarding adolescent brain development and the characteristics of youth.¹⁸⁷ The bill quotes the Supreme Court’s 2011 decision in *J.D.B. v. North Carolina*, as well as *Roper v. Simmons* and *Graham v. Florida*, among several other cases, in asserting juveniles’ vulnerability to outside pressures, limited understanding of “the criminal justice system and the rules of the institutional actors in it,” and characteristic lack of mature judgment.¹⁸⁸

On September 30, 2016, Governor Jerry Brown of California vetoed SB 1052.¹⁸⁹ In his veto message, Governor Brown stated that he was “not prepared to put into law SB 1052’s categorical requirement that juveniles consult an attorney before waiving their *Miranda* rights,” stating, “[f]rankly, we need a much fuller understanding of the ramifications of this measure.”¹⁹⁰ Though the Governor noted recent studies suggesting that “juveniles are more vulnerable than adults and easily succumb to police pressure to talk instead of remaining silent” and showing “a much higher percentage of false confessions” from juveniles, he also asserted that, “[o]n the other hand, in countless cases, police investigators solve very serious crimes through questioning.”¹⁹¹ In other words, the impediment to police investigations would simply be too significant. Opponents of the bill, including Cory Salzillo, the legislative director of the California State Sheriffs’ Association, voiced similar concerns.¹⁹² The bill, Salzillo posited, “could have a ‘chilling’ effect on the justice system by blocking or weakening voluntary confessions made by juveniles.”¹⁹³ Juries would not get to hear “otherwise truthful” statements made in the absence of counsel.¹⁹⁴ This argument, however, is one that has been made before in the *Miranda*

¹⁸⁴ *History, SB-1052 Custodial Interrogation: Juveniles*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SB1052 [https://perma.cc/53CN-PWDY].

¹⁸⁵ *Text, SB-1052 Custodial Interrogation: Juveniles*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1052 [https://perma.cc/8XRJ-6PDW].

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Status, SB-1052 Custodial Interrogation: Juveniles*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1052 [https://perma.cc/NN4Y-6QFE].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Jeremy Loudonback, *California Bill Says a 10-Year-Old Cannot Waive Miranda Rights*, THE CHRON. OF SOC. CHANGE (Aug. 1, 2016), <https://chronicleofsocialchange.org/juvenile-justice-2/california-bill-says-10-year-old-murderer-cannot-waive-miranda-rights/19939> [https://perma.cc/B3FL-U4LX].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

context, and is one that the Supreme Court has found unconvincing.

In the half-century since *Miranda* was decided, the Court has interpreted and applied the rule on numerous occasions, and has diminished its protections in some respects.¹⁹⁵ However, the original spirit of *Miranda* has not been weakened—the Court recently observed that its decisions have “reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision’s core ruling.”¹⁹⁶ In the *Miranda* opinion itself, the Court remarked that “[a] recurrent argument made in these cases is that society’s need for interrogation outweighs the privilege” against self-incrimination.¹⁹⁷ However, the thrust of the Court’s decision was that “the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself.”¹⁹⁸ Whether or not warning a suspect of his constitutional rights might have a “chilling” effect on the justice system is, therefore, somewhat beside the point. The rights guaranteed under the Constitution are empty promises unless the people whom they are intended to protect can understand and assert them.

If most juveniles cannot understand their rights without the assistance of an attorney, as studies suggest, the risk that juveniles’ constitutional rights are being violated is far more grave than the risk of hampering the interrogation process. In fact, high rates of *Miranda* waivers and confessions made during interrogations have arguably tilted the scales too far in favor of police and prosecutors,¹⁹⁹ strengthening protections for juveniles would simply help to restore the balance. Furthermore, taking steps to ensure that confessions made by juveniles are accurate, and not the product of fear or pressure, is in the interest of law enforcement officers just as much as those they interrogate.

IV. ARGUMENT

“So,” Detective Hopewell said to the boy in the “Video Games vs. Homework” t-shirt, “you have the right to remain silent. You know what that means?”²⁰⁰ Joseph responded, “Yes, that means that I have the right to stay calm.”²⁰¹ The two continued their exchange, Detective Hopewell explaining each of the four warnings required under *Miranda*. She told Joseph that he had the right to have a lawyer and “if you can’t afford one,” she told him, “the court will appoint one, an attorney for you.”²⁰²

¹⁹⁵ See, e.g., *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (holding that invocation of the right to remain silent must be unambiguous and unequivocal); *New York v. Quarles*, 467 U.S. 649, 657 (1984) (creating a “public safety” exception to the *Miranda* rule); *North Carolina v. Butler*, 441 U.S. 369, 376 (1979) (recognizing the validity of implicit *Miranda* waivers).

¹⁹⁶ *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

¹⁹⁷ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

¹⁹⁸ *Id.*

¹⁹⁹ As Barry Feld argues, “[c]onfessions greatly tilt the balance of advantage to the state. Prosecutors charge defendants who confess with more crimes and more serious crimes, set higher bails, and offer fewer plea concessions than they do with defendants who remain silent. Defense attorneys pressure clients who confessed to accept guilty pleas because of reduced negotiating leverage.” Feld, *supra* note 12, at 450 (internal citations omitted).

²⁰⁰ *In re Joseph H.*, 367 P.3d 1, 3 (Cal. 2015); Wallace, *supra* note 1.

²⁰¹ *In re Joseph H.*, 367 P.3d at 3.

²⁰² *Id.*

Joseph said that he understood, and agreed to talk with Detective Hopewell about what had happened without an attorney present.²⁰³

On appeal, Joseph argued that he “fundamentally misunderstood the nature of *Miranda* and his right to be free of coercive confessions” and that he “did not understand what was being explained” by Detective Hopewell.²⁰⁴ The California Court of Appeal, Fourth District, evaluated Joseph’s waiver under the totality of the circumstances test, noting as relevant factors age and “the mental subnormality of the accused.”²⁰⁵ The court, however, did not weigh how those specific factors likely impacted Joseph’s ability to understand the *Miranda* warnings, and in fact somewhat conflated its analysis of Joseph’s *Miranda* waiver with its analysis of the voluntariness of his subsequent confession.²⁰⁶ Ultimately, the court concluded that “absent coercive conduct by police, and despite his young age, his ADHD, and low-average intelligence, the finding that Joseph voluntarily waived his rights, guaranteed by the Fifth Amendment, is supported by the record.”²⁰⁷ Ten-year-old Joseph, who also had an individualized education program (IEP) for a learning disability and had been subjected to neglect and abuse since his birth, nevertheless understood his constitutional rights and knowingly gave them up.²⁰⁸

As noted above, the Supreme Court of California denied Joseph’s petition for review. Joseph then filed a petition for a writ of certiorari to the Supreme Court of the United States, urging the Court to take up the issue of whether the totality of the circumstances analysis for *Miranda* waivers is sufficient to protect juveniles’ rights.²⁰⁹ Noting the Court’s recognition of the stark difference between the cognitive abilities of adults and children, the petition urged the Court to provide guidance regarding “the legal significance of these issues to the evaluation of whether a child has given a valid waiver of important constitutional rights in custodial interrogations.”²¹⁰ The “bottom-up” approach has failed, Joseph argued, as decisions in lower courts remain “ad hoc” and fail to give proper weight to the relevant scientific findings.²¹¹ The Supreme Court denied Joseph’s petition for certiorari on October 3, 2016.²¹²

As Joseph’s petition correctly observed, police, judges, and legislators across the country have grappled with how to appropriately resolve the challenges that arise when children come into contact with the criminal justice system. Studies documenting the crucial differences between the capabilities of juveniles and adults continue to grow in number and, as the Supreme Court has recognized in the context of the Eighth Amendment, elucidate the critical need to provide greater protection to juveniles.²¹³ As the law stands now, the disparate approaches to evaluating juvenile *Miranda* waivers across jurisdictions mean that a *Miranda* waiver made by a sixteen-

²⁰³ *Id.* at 3-4.

²⁰⁴ *In re Joseph H.*, 237 Cal. Rptr. 3d 171, 185 (Ct. App. 2015).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 186.

²⁰⁷ *Id.* at 187.

²⁰⁸ *Id.* at 176-77.

²⁰⁹ Petition for Writ of Certiorari at 12, *Joseph H. v. California*, 137 S. Ct. 34 (2016) (No. 15-1086).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Joseph H. v. California*, 137 S. Ct. 34, 34 (2016).

²¹³ *See supra* Part II.D.

year-old in Florida will be evaluated differently than that of his peers in California or New Mexico or Maine. Given this disparity, the Supreme Court should take up the issue and establish meaningful prophylactic protections for juveniles by mandating consultation with counsel before a valid waiver can be made.

The insights from social and cognitive science that have become critical foundation for the Supreme Court's modern Eighth Amendment jurisprudence are likewise compelling in the Fifth Amendment realm. The Supreme Court recognized the importance of age in the context of police interrogation in *J.D.B. v. North Carolina*, holding that a child's age must be accounted for in the *Miranda* custody analysis if it was known to the officer at the time of police questioning or would have been objectively apparent to a reasonable officer.²¹⁴ The Court relied on *Graham* and *Roper*, among other precedent, in concluding that age "generates commonsense conclusions about behavior and perception," including that juveniles are more susceptible to police pressure than adults.²¹⁵ Consequently, the Court extended the prophylactic *Miranda* protections for children and thus acknowledged that the warnings may have to be administered to juveniles in situations where an adult would not be considered "in custody" for *Miranda* purposes.

From *Haley* to *Gault* to *J.D.B.*, and in many decisions in between, the Court has drawn a line between juveniles and adults. The *J.D.B.* Court cited "the legal disqualifications placed on children as a class" more broadly, including "limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent," as evidence of "the settled understanding that the differentiating characteristics of youth are universal."²¹⁶ Yet despite this authoritative assertion, the impact of those "differentiating characteristics" is not universally recognized in the legal system, including in the Fifth Amendment context. A child who cannot enter a binding contract or marry without parental consent can nonetheless waive important constitutional rights in a situation where his individual liberty is at stake.

Recent studies indicate that the *Miranda* warnings alone do not offer meaningful protection to juveniles subjected to custodial interrogation. Even if a juvenile can understand the language of the warning, which is often not the case, he must then be able to imagine two alternative outcomes and weigh the consequences of each course of action. Most juveniles do not have the cognitive capacity to do so; they lack the "neural hardware" required to engage in that kind of reasoning.²¹⁷ A juvenile's ability to foresee the consequences of waiving his *Miranda* rights is further hampered if he possesses one or more of many common misperceptions about the system. For example, if a child believes that a court-appointed attorney is required to disclose to the judge any information that he shares, he will be unlikely to invoke his right to counsel; if a child is among the two-thirds of juveniles who perceive law enforcement as fulfilling a helping rather than an adversarial role, he may believe that if he just tells the officer his side of the story the officer will help him and he will be able to go home.²¹⁸ In order to fully comprehend and appreciate the rights set out in the

²¹⁴ *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

²¹⁵ *Id.* at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

²¹⁶ *Id.* at 273.

²¹⁷ Baird & Fugelsang, *supra* note 99, at 254.

²¹⁸ See *supra* Part II.E.2 (discussing juveniles' *Miranda* misconceptions).

Miranda warnings, a person must engage in fairly complex legal reasoning. A juvenile is far too apt to miss the mark when proceeding without assistance.

In the “adversarial balance between the individual and the state,”²¹⁹ the individual is often at a disadvantage. This is true for adults as well as children, and the problem of *Miranda* comprehension is certainly not limited to children alone.²²⁰ However, the vast majority of juveniles—four-fifths, according to one study—cannot comprehend the entirety of the *Miranda* warnings.²²¹ The odds are that a juvenile will not understand the *Miranda* warnings when they are administered to him, and the potential harm to his constitutional rights in such a situation is great. As such, courts should, and do, draw the line differently for children. Simply allowing lower courts to assign weight and significance to age in the waiver analysis, however, is not sufficient. Because the odds of incomprehension among juveniles are so high, a categorical rule is warranted. The only way to ensure that juveniles’ constitutional rights are protected is to require that every juvenile consult with counsel before making a *Miranda* waiver.

The procedures that are currently in place to assess juveniles’ *Miranda* waivers vary wildly between jurisdictions, and lead to unequal and unjust outcomes for similarly situated juveniles across the United States. Most jurisdictions assess juveniles’ waivers by weighing the totality of the circumstances, including age, education, and experience, among others. Though the flexibility that this test affords has been hailed as an advantage, it has led to ad hoc decisions that often fail to give weight to the unique characteristics of youth that make juveniles particularly vulnerable to police tactics. Despite the Supreme Court’s assertion that understanding of these “universal” differences between adults and children is “settled,” many lower court decisions suggest otherwise.²²²

Some states have put in place additional protections for juveniles, the most common being the requirement that a juvenile meaningfully consult with an “interested adult” before making a *Miranda* waiver. Though the presence of a friendly adult may help to dispel the pressures of the interrogation, even an adult who has the child’s best interests in mind may be unable to understand and explain the importance of the rights set out in the *Miranda* warnings. Attorneys are, as the Supreme Court recognized, uniquely equipped “to protect the Fifth Amendment rights of a client undergoing custodial interrogation.”²²³ An attorney understands the power of the right to remain silent, and the serious implications of making statements that can later be introduced in a court proceeding. In addition to protecting his client’s rights, the attorney can ensure that the *Miranda* warnings are not downplayed and treated as mere protocol and, if the juvenile does decide to speak to the police, help to guard against the use of coercive tactics in the course of interrogation. Consultation with an attorney provides a meaningful opportunity for a juvenile to understand and exercise his constitutional rights.

²¹⁹ Feld, *supra* note 12, at 401.

²²⁰ As noted in the Introduction, one study found that less than half of all adults (42.3%) understood the entirety of the *Miranda* warnings. *Id.* at 409.

²²¹ *Id.*

²²² J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011).

²²³ Fare v. Michael C., 442 U.S. 707, 719 (1979).

V. CONCLUSION

More than a million children are arrested each year in the United States, and those children face important decisions that they should not have to make alone. The Supreme Court has highlighted, both in its Eighth Amendment precedent and in the context of the Fifth Amendment in *J.D.B. v. North Carolina*, the innate characteristics of youth that have serious implications for juveniles caught up in the justice system. Studies assessing *Miranda* comprehension show that these characteristics prevent juveniles from understanding *Miranda* warnings and appreciating their importance. To protect juveniles' Fifth Amendment rights and to ensure that the constitutional rule set out in *Miranda* is applied equally, the Supreme Court should create a *per se* rule making any waiver by a juvenile invalid unless he first consulted with counsel.