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ENSURING PROTECTION OF JUVENILES' RIGHTS: A BETTER WAY OF OBTAINING A VOLUNTARY *MIRANDA* WAIVER

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INTRODUCTION

In Illinois during the summer of 1998, two boys—ages seven and eight—were charged with murdering an eleven-year-old girl by striking her with a rock, sexually molesting her, and suffocating her with her own underwear.[1] The alleged facts of the case were horrific and the prosecution unprecedented, with "[j]uvenile justice experts sa[ying] they knew of no case in which younger children had been prosecuted for murder in the United States."[2] During the investigation, the police questioned both boys and the boys confessed without the presence of either their parents or an attorney.[3] Their parents were notified only after the boys had already confessed to the murder.[4] Yet, after police conducted interrogations and elicited confessions from both boys, the charges were dropped because medical experts determined that the boys could not have produced the semen found in the victim's underpants.[5] As a result of this terrible mistake, the City of Chicago agreed to pay 6.2 million dollars to settle a wrongful arrest lawsuit brought by one of the boys.[6]

Similarly, in New York, five juveniles were arrested for beating a woman who was jogging in Central Park. This case also led to wide press coverage and was dubbed by the media as the "Central Park Jogger case."[7] Antron McCray, Kevin Richardson, Yusef Salaam, Raymond Santana, and Korey Wise[8] were between the ages of fourteen and sixteen when they were arrested in connection with this crime. They were charged with rape, attempted murder, robbery, assault, and riot. Santana,

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[1] Pam Belluck, *Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11*, N.Y. TIMES (Aug. 11, 1998), http://www.nytimes.com/1998/08/11/us/chicago-boys-7-and-8-charged-in-the-brutal-killing-of-a-girl-11.html?pagewanted=all&src=pm.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Gretchen Ruethling, *National Briefing/Midwest: Illinois: Wrongful Arrest Case Settled*, N.Y. TIMES (Sept. 20, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C03EFDA1630F933A1575AC0A9639C8B63&ref=ryanharris.

[6] *Id.*

[7] Ronald Sullivan, *Judge Rejects Defense Claim in Central Park Jogger Case*, N.Y. TIMES (Aug. 10, 1990), http://www.nytimes.com/1990/08/10/nyregion/judge-rejects-defense-claim-in-central-park-jogger-case.html.

[8] While Mr. Wise's name was originally "Kharey," he had his named changed to "Korey" in 2002 to avoid the negative publicity associated with the Central Park Jogger case. Mea Ashley, *Central Park Five's Korey Wise Opens Up About Wrongful Conviction*, NEW AM. MEDIA (May 5, 2013), http://newamericamedia.org/2013/05/central-park-fives-korey-wise-opens-up-about-wrongful-conviction.php.

who was only fifteen years old at the time, was interrogated for hours without the presence of his parents.[9] Despite his attorney's challenges to the admission of the statements into evidence, the judge told the jury that the law did not require parents to be present for the questioning of the juveniles.[10] Years later, after the men served time in prison, Matias Reyes—a convicted serial rapist and murderer—confessed to the crime, and new DNA evidence was uncovered supporting his confession.[11] The five men convicted as juveniles each served nearly six years in prison before their release on parole; Wise had served nearly twelve years and was only freed after the DNA results came back.[12]

Another example of a false juvenile confession took place in Illinois in 1999.[13] Four juveniles—Michael Saunders, Harold Richardson, Terrill Swift, and Vincent Thames—confessed to the rape and murder of a thirty-year-old woman who was found in a dumpster, beaten and strangled to death.[14] Michael Saunders, who was only fifteen years old at the time of the arrest, appealed his conviction, stating that his waiver of rights was not voluntary.[15] Michael said that when he was arrested, "three police officers came into the room and slapped him on the neck. One officer snatched the earring out of his ear and threw it on the ground."[16] In addition to this deplorable treatment, the police officers refused Michael's request to call his mother or to have an attorney present.[17] Despite Michael's appeal, the Appellate Court of Illinois affirmed the lower court's decision, and Michael

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[9] Sullivan, *supra* note 7.

[10] *Id.*

[11] Barbara Ross, *Inside Story from Robert Morgenthau: Spills on Central Park Jogger Case and 35 Years of Law*, DAILY NEWS (Mar. 07, 2009), http://www.nydailynews.com/new-york/story-robert-morgenthau-spills-central-park-jogger-case-35-years-law-article-1.368961.

[12] *See id.*; *see also* Associated Press, *NYC Is Pressed To Settle Central Park Jogger Case*, USA TODAY (Apr. 6, 2013, 12:33 PM), http://www.usatoday.com/story/news/nation/2013/04/06/nyc-central-park-jogger/2058829/.

[13] Lauren Fitzpatrick, *Four Englewood Men Won't be Retried for 1994 Rape and Murder*, CHI. SUN-TIMES (Jan. 17, 2012), http://web.archive.org/web/20120213130514/http://www.suntimes.com/news/crime/10069019-418/four-englewood-men-wont-be-retried-for-1994-rape-and-murder.html.

[14] *Id.*

[15] People v. Saunders, 718 N.E. 2d 531, 535 (Ill. App. Ct. 1999).

[16] *Id.* at 533.

[17] *See id.*

was sentenced to thirty years in prison.[18] After serving approximately fifteen years of their prison sentences, the defendants' convictions were overturned when DNA was matched to Johnny Douglas—also known as "Maniac"—a murderer with a lengthy criminal history.[19]

The gravity of these cases can hardly be expressed in words. What happened was not a mere technicality or an innocent mistake made by authorities, but rather a tragedy that these children have to live with for the rest of their lives. While some of the innocent juveniles may have received monetary compensation for their wrongful convictions, such as the 6.2 million dollar settlement described above, the horrifying experiences these boys had undergone at such a young age is hardly anything that can be compensated with money. In the other two cases cited above, the accused juvenile defendants were only exonerated after they had already spent a substantial amount of time in prison, serving time for crimes they did not commit.[20]

Amid the publicity stemming from these trials, jurists, attorneys, and commentators have begun to reexamine the juvenile criminal law system and the constitutional rights afforded to juveniles in that system. In 1974, Congress amended the Federal Juvenile Justice and Delinquency Prevention Act ("Juvenile Delinquency Act" or "Act"), requiring arresting officers to notify the parents of accused juveniles of the arrest, and to advise the parents of their children's constitutional rights and the nature of the offense for which their children are accused.[21] Even though the Juvenile Delinquency Act was amended to ensure more protection for juveniles, it was unclear whether the failure to notify a parent or guardian gave rise to a suppression remedy.[22]

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[18] *Id.* at 536; Fitzpatrick, *supra* note 13.

[19] Fitzpatrick, *supra* note 13; Press Release, The Innocence Project, State's Attorney's Office Dismisses Indictment Following Ruling by Cook County Judge Overturning Their Convictions (Jan. 17, 2012) [hereinafter Innocence Project], *available at* http://www.innocenceproject.org/Content/Four_Chicago_Men_Exonerated_of_1994_Murder_and_Rape_by_New_DNA_Evidence_Linking_the_Crime_to_a_Convicted_Murderer.php.

[20] *See* Innocence Project, *supra* note 19; Ross, *supra* note 11.

[21] 18 U.S.C. § 5033 (1974) (current version at 18 U.S.C. § 5033 (2012)).

[22] *See* United States v. Guzman, 879 F. Supp. 2d 312, 315 (E.D.N.Y. 2012).

As a consequence, various federal courts apply different standards to determine whether a juvenile's waiver of rights is voluntary, and therefore admissible at trial, even despite the failure of parental notification. The majority of federal courts hold that admissibility of the juvenile's statements is still a function of whether the statements were knowingly and voluntarily made, which is determined by applying the totality of the circumstances approach.[23] If the statements are found to be voluntary, the defendant's motion to suppress is denied.[24] The Ninth Circuit applies a different standard, holding that when § 5033 of the Juvenile Delinquency Act is violated, the court must first evaluate "whether the government's conduct was so egregious as to deprive [the juvenile] of his right to due process of law."[25] If there was no due process violation, the court must determine whether the violation of the defendant's rights was harmless beyond a reasonable doubt.[26] If the violation prejudiced the juvenile, the court has the "discretion to reverse the conviction or order other more limited remedies so as to ensure that the prophylactic safeguard for juveniles not be eroded or neglected."[27]

Even though the Juvenile Delinquency Act was enacted to provide juveniles with more protection and ensure uniformity, the different approaches employed by federal courts fail to produce consistent and just outcomes. Unless a new standard is developed, the courts will remain divided on this issue and will risk falsely convicting juveniles by improperly obtaining their confessions.

This Note introduces a new standard for determining whether juvenile confessions obtained without parental notification, as required by the Juvenile Delinquency Act, should be admissible into evidence. This Note examines all of the possible standards used to evaluate voluntariness of a juvenile's confession and proposes an amendment to the Juvenile Delinquency Act to achieve a greater balance of protecting juveniles' rights while ensuring that the police maintain proper

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[23] *See* United States v. Doe, 226 F.3d 672, 679 (6th Cir. 2000).

[24] *See id.* at 680.

[25] United States v. Juvenile Male, 595 F.3d 885, 902 (9th Cir. 2010) (per curiam) (alteration in original) (internal quotation marks omitted).

[26] *See id.*

[27] *Id.* at 903 (internal quotation marks omitted).

tools for conducting an investigation. Under this newly proposed standard, a per se exclusionary approach is used to keep out testimony of juveniles under the age of fifteen who are interrogated without the presence of both a parent and an attorney. Further, a totality of the circumstances approach is applied to juveniles ages fifteen and older to determine whether a confession was made voluntarily.

Part I provides background information about the evolution of judicial treatment of juveniles and the admissibility of confessions. Part II analyzes the different approaches applied by federal and state courts to determine whether a juvenile's waiver of rights was voluntary and examines the flaws in those approaches. Part III proposes a new approach to remedy the problems courts have faced with the existing approaches and to provide consistent outcomes at the federal level.

I. BACKGROUND LEGAL DEVELOPMENT CONCERNING JUVENILES

A. *Original Juvenile Court*

The first juvenile court was created in 1899, and it embraced the doctrine of parens patrie, meaning that the state acted in loco parentis.[28] Under this doctrine, personal handling of cases emphasized the individual needs of the juveniles instead of simply concentrating on their criminal behavior.[29] The treatment of juveniles was supposed to concentrate on rehabilitation instead of incarceration.[30] The basis for this doctrine is a belief that "children do not possess the necessary understanding or cognition to control their actions, and therefore the court must act as a parent to decide what is in the best interest of the child."[31] The juvenile courts placed an emphasis on the welfare of the child and rejected the punishment model and strict procedure applied to adults.[32] This doctrine fell short, however, in that

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[28] Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1281 (2004). In loco parentis literally means "in the place of a parent." *Id.* at 1281 n.15.

[29] Maria E. Touchet, Note, *Children's Law: Investigatory Detention of Juveniles in New Mexico: Providing Greater Protection than* Miranda *Rights for Children in the Area of Police Questioning*—State of New Mexico v. Javier M., 32 N.M. L. REV. 393, 397 (2002).

[30] *Id.*

[31] *Id.*

[32] *Id.*

addressing the child's best interests does not guarantee that a juvenile is afforded constitutionally mandated due process protections.[33]

The Fourteenth Amendment of the United States Constitution guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[34] Because the courts did not give children any rights, children had no due process protection.[35] Further, juvenile proceedings were considered civil, not criminal, which resulted in juveniles being denied due process otherwise afforded to adult defendants.[36] Noting this disparity, the United States Supreme Court, in *In re Gault*,[37] commented that "[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures."[38] Accordingly, the subsequent cases began to reflect a change in the way courts handled juvenile suspects.

B. Haley v. Ohio

Decided in 1947, *Haley v. Ohio*[39] was the first case in which the Supreme Court recognized that juveniles should be afforded extra protection during custodial interrogations as a matter of due process under the Fourteenth Amendment.[40] In *Haley*, Ohio police officers arrested a fifteen-year-old boy, and two others, for their alleged involvement in a robbery and murder.[41] The juvenile was questioned for approximately five hours between the hours of 12:00 A.M. and 5:00 A.M.[42] He was not allowed to see his mother or a lawyer during the questioning.[43] Further, the

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[33] *Id.* (stating that the juveniles were not deprived of any rights because they did not possess any rights to begin with).

[34] U.S. CONST. amend. XIV, § 1.

[35] *Id.*

[36] *See* Farber, *supra* note 28.

[37] 387 U.S. 1 (1967).

[38] *Id.* at 18.

[39] 332 U.S. 596 (1948).

[40] *Id.* at 599.

[41] *Id.* at 597.

[42] *Id.* at 597–98. There was evidence that the juvenile was beaten. *Id.* His mother testified that the clothes he wore during questioning were blood-stained and torn. *Id.*

[43] *Id.* at 598.

boy was not advised of his right to counsel.[44] Eventually, after being shown the alleged confessions of the co-defendants, the juvenile confessed to the crime.[45] "A confession was typed in question and answer form by the police."[46]

Following his confession, the boy was isolated for three days, where even a lawyer who his mother had retained was not allowed to see him.[47] As a result of his confession, the jury convicted the juvenile on the murder and robbery charges.[48] The Supreme Court, however, reversed his conviction on the grounds that the interrogation methods the officers employed were inappropriate for juveniles.[49] The Court specifically noted the child's age, stating that "when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used."[50] The Court further emphasized, "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[51] Further, the Court commented that the boy needed someone to be present during the questioning, emphasizing that "[h]e needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him."[52]

C. Gallegos v. Colorado

Another landmark case, *Gallegos v. Colorado*,[53] introduced the totality of the circumstances test to determine the voluntariness of a juvenile's confession.[54] In *Gallegos*, a fourteen-year-old boy was charged with battery and assault of an elderly

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* (explaining that the lawyer tried to see the boy twice, but was denied admission by the police).

[48] *See id.* at 597.

[49] *See id.* at 600–01. "We do not think the methods used in obtaining this confession can be sequared [sic] with that due process of law which the Fourteenth Amendment commands." *Id.* at 599.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 600 (noting specifically that the boy's mother was not allowed to see him for over five days after his arrest).

[53] 370 U.S. 49 (1962).

[54] *See id.* at 55.

man, a crime which he immediately admitted to committing.[55] As a result of the attack, the victim of the assault died, and the boy was then charged with first degree murder.[56] The boy was convicted upon his formal confession, which he signed after being held for five days without seeing a lawyer, a parent, or any other familiar adult.[57]

On certiorari, the United States Supreme Court reversed the conviction.[58] The Court affirmed its decision in *Haley* and reiterated the need for extra protection of juveniles during interrogations.[59] The Court further noted that a "14-year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."[60] The Court took into account the age of the boy and his limited capacity to understand by pointing out that the Court was "deal[ing] with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to" protect his constitutional rights.[61]

The Court emphasized the importance of the presence of an interested adult during questioning, stating that a "lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not."[62] Further, the Court created the totality of the circumstances test, explaining that the youth of the petitioner, length of questioning, use of fear to break a suspect, and accessibility to a lawyer are all factors that need to be evaluated in determining whether the confession is admissible.[63]

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[55] *See id.* at 49–50 (stating that the defendant in this case, along with another juvenile, followed an elderly man to a hotel, gained entry into his room, assaulted him, stole his money, and fled).

[56] *See id.* at 50.

[57] *See id.* (describing that the jury found the defendant guilty based mainly on a signed formal confession). The Supreme Court of Colorado affirmed the conviction. *Id.*

[58] *Id.* at 55.

[59] *See id.* at 53 (citing Haley v. Ohio, 332 U.S. 596, 599–600 (1948)).

[60] *Id.* at 54.

[61] *Id.*

[62] *Id.*

[63] *See id.* at 55 (pointing out that "[t]here is no guide to the decision of cases such as this, except the totality of circumstances" surrounding the facts of each case).

II. JUVENILE DELINQUENCY ACT AND DIFFERENT STANDARDS USED FOR EVALUATING VOLUNTARINESS OF A JUVENILE'S STATEMENTS

A. Miranda v. Arizona

Four years after the *Gallegos* decision, in the landmark case entitled *Miranda v. Arizona*,[64] the United States Supreme Court held that all suspects in custody must be advised of their constitutional rights before an interrogation can begin.[65] The Court prescribed words of warning that have become familiar to all police officers, lawyers, and most of the public—words that are known today as the *Miranda* warning.

In formulating the *Miranda* warning, the Court held that police officers must advise a suspect of his "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."[66] Additionally, the Court stated that questioning must stop if the defendant wishes to consult with an attorney before speaking.[67] And, although the suspect may waive these rights, such waiver must be made "voluntarily, knowingly and intelligently."[68] Even though the Court stressed that "the accused must be adequately and effectively apprised of his rights," the decision rested on the assumption that by simply informing the accused of his rights, the accused will be able to comprehend them and, accordingly, assert or waive them voluntarily.[69] While the Supreme Court established adequate protection for adult suspects held in custody, it failed to address the effectiveness of the *Miranda* warning when a suspect is unable to comprehend the warning "due to a lack of maturity or sufficient cognitive development."[70]

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[64] 384 U.S. 436 (1966).

[65] *Id.* at 444.

[66] *Id.* ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

[67] *See id.* at 444–45.

[68] *Id.* at 444.

[69] *Id.* at 467, 473 (stating that sometimes a police officer might have to more fully explain the meaning of the warning).

[70] Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile* Miranda *Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1366 (2000).

B. Miranda *Application to Juveniles*

The first time the Supreme Court addressed the applicability of *Miranda* to juveniles was in *In re Gault*.[71] In *Gault*, the suspect was a fifteen-year-old boy who was arrested on the charge of making lewd telephone calls.[72] The boy's parents were not notified that he was taken into custody, and neither the boy nor his parents were advised that the juvenile had a right to refuse to speak with the police or that any incriminating statements may be used against him in a proceeding.[73] The trial court admitted the boy's statements into evidence and he was adjudicated a delinquent and committed to a juvenile institution.[74]

The Supreme Court reversed the judgment of the lower court and held that juveniles should be provided with the same constitutional safeguards of due process as adults, and thus, the *Miranda* warning should have been administered prior to questioning the juvenile.[75] The Court opined:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.[76]

The Court also took into consideration that juvenile confessions have to be handled with special caution because of the young age of accused juveniles.[77] Even though the Supreme Court addressed the juvenile's right to receive the *Miranda*

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[71] *See generally In re* Gault, 387 U.S. 1 (1967).

[72] *Id.* at 4 (stating that the phone calls included remarks of "offensive, adolescent, sex variety").

[73] *Id.* at 5, 9–10.

[74] *Id.* at 7–10. Since no appeal is permitted by Arizona law in juvenile cases, the defendant filed a petition for a writ of habeas corpus with the Supreme Court of Arizona. *Id.* at 8. The Supreme Court of Arizona dismissed the writ. *Id.* at 10.

[75] *Id.* at 28–30.

[76] *Id.* at 41.

[77] *See id.* at 45–46 (stating that there is a difference between procedural rights accorded to adults as opposed to juveniles).

warning, the Court did not address how to determine the voluntariness of a juvenile's confession when it is elicited without parental notification.[78]

C. *Juvenile Delinquency Act*

The Juvenile Justice and Delinquency Prevention Act of 1974 was passed in response to *Miranda* and *In re Gault*.[79] "The Act amended the Federal Juvenile Delinquency Act which had been virtually unchanged since its enactment in 1938."[80] According to a Senate Report, the purpose of the amendment was "to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions."[81] Congress recognized that there was a pressing need for national standards to improve the quality of juvenile contacts with the justice system.[82] Among other things, the Juvenile Delinquency Act was intended to provide basic procedural safeguards available to juveniles immediately after their arrest.[83] One such procedural safeguard was parental notification. As amended, § 5033 of the Juvenile Delinquency Act provides:

> Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.[84]

While the Act was meant to provide juveniles more protection by ensuring that their parents, guardians, or custodians ("parents") are notified of the juvenile's rights, the Act

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[78] *See* Thomas J. Von Wald, Student Article, *No Questions Asked!* State v. Horse*: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 144 (2003).

[79] *See* Juvenile and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, § 5033, 88 Stat. 1109, 1134 (1974).

[80] William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L.J. 509, 509 (1983) (footnote omitted).

[81] S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284.

[82] *See id.*

[83] *See* United States v. Juvenile Male, 595 F.3d 885, 899 (9th Cir. 2010) (per curiam).

[84] 18 U.S.C. § 5033 (2012).

failed to address whether the parents have to actually be given an opportunity to consult with their children or be given an opportunity to be present during the interrogation. Regrettably, the legislative history does not expound upon the underlying purpose of the notification provision.[85] And even though the Act clearly intended that parents be notified of juveniles' rights, it remains unclear whether failure of parental notification would require a suppression remedy. Lack of legislative history and the ambiguity within the statutory text left federal courts to formulate their own standards of admissibility of juveniles' statements obtained without parental notification. Consequently, federal courts have developed two different standards.

1. Standards Developed by Federal Courts

The issue of admissibility of juveniles' statements made without parental notification has not been a highly litigated matter. Those circuit courts that have addressed it, however, have developed two different standards: the totality of the circumstances approach and the Ninth Circuit approach.[86] The per se exclusionary approach, which automatically suppresses juveniles' statements obtained without parental notification, has been rejected by the federal courts.[87]

The Second,[88] Sixth,[89] Tenth,[90] and Eleventh[91] Circuits have held that the admissibility of juveniles' statements is a function

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[85] *See generally* S. REP. NO. 93-1011, *supra* note 81 (outlining the problems of juvenile delinquency and ways to solve it).

[86] *See, e.g.*, United States v. Doe, 226 F.3d 672, 679 (6th Cir. 2000) (applying the totality of the circumstances approach); *Juvenile Male*, 595 F.3d at 901–04 (developing a separate standard for determining admissibility of juveniles' statements made without parental notification).

[87] *See, e.g.*, *In re* E.T.C., 449 A.2d 937, 939 (Vt. 1982) (citing Fare v. Michael C., 442 U.S. 707 (1979), *reh'g denied*, 444 U.S. 857 (1979)) (applying the per se exclusionary approach).

[88] *See* United States v. Guzman, 879 F. Supp. 2d 312, 324 (E.D.N.Y. 2012).

[89] *See Doe*, 226 F.3d at 679 (citing McCall v. Dutton, 863 F.2d 454, 458 (6th Cir. 1988)). In *Doe*, the juvenile defendant was charged with conspiring to distribute crack cocaine, carrying a firearm in relation to a drug trafficking offense, and knowingly possessing a handgun. *Id.* at 676.

[90] *See* United States v. Watts, 513 F.2d 5, 8 (10th Cir. 1975). In *Watts*, the juvenile defendant was seventeen years old at the time of the alleged offense, and was charged with the manslaughter of his brother. *See id.* at 6.

[91] *See* United States v. Kerr, 120 F.3d 239, 241–42 (11th Cir. 1997) (per curiam) (explaining that there is no requirement that a parent be present in order for a

of whether the statements were knowingly and voluntarily made in compliance with due process.[92] To determine the voluntariness of such statements, courts have held that the failure to notify a parent or guardian after the juvenile's arrest, as required by § 5033 of the Juvenile Delinquency Act, is one of the factors the court should consider when evaluating the totality of the circumstances surrounding a juvenile's statements to law enforcement.[93]

These circuit courts generally found that in deciding whether a confession was voluntarily made, some of the following factors may be considered:

> (1) the time between the defendant's arrest and arraignment; (2) whether the defendant knew the nature of the charged or suspected offense; (3) whether the defendant was advised that he was not required to make any statements and that his statements could be used against him; (4) whether the defendant was advised of his right to the assistance of counsel before being questioned; and (5) whether the defendant was without the assistance of counsel when questioned."[94]

The courts also considered whether the defendant's parents were notified.[95] If, under the totality of the circumstances test, the court finds that the statements were knowingly and voluntarily made, the motion to suppress the statements will be denied.[96] If, however, after considering all of the circumstances, the court determines that the statements were not voluntary, the court will grant the motion to suppress.[97]

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juvenile's statement to be admissible, and that when evaluating the totality of the circumstances, the juvenile's statements were freely and voluntarily given).

[92] *See Doe*, 226 F.3d at 679 (citing *McCall*, 863 F.2d at 458).

[93] *See Guzman*, 879 F. Supp. 2d at 321. In *Guzman*, a seventeen-year-old juvenile was charged with participating in aid of the racketeering activities of the MS-13 street gang and in the murder of a woman and her son. *See id.* at 315.

[94] *Doe*, 226 F.3d at 679 (citing United States v. Weekley, 130 F.3d 747, 751 (6th Cir. 1997)). "In effect, the Court considers the totality of the circumstances to evaluate whether a confession was voluntarily made." *Id.* (quoting *Weekley*, 130 F.3d at 751).

[95] *See id.*

[96] *See id.* at 680 (stating that after evaluating the totality of the circumstances, the record provided strong support for the admission of Doe's confession).

[97] *See* United States v. Nash, 620 F. Supp. 1439, 1444 (S.D.N.Y. 1985) (stating that under the totality of the circumstances of this case, the court found that these statements should be suppressed).

The Ninth Circuit employs a different standard for determining whether juvenile statements made without parental notification should be admissible.[98] First, the court addresses whether the government violated the requirements of the Juvenile Delinquency Act.[99] If it did, the court reaches the second question of whether the government's conduct was so egregious as to deprive the juvenile defendant of the right to due process of law.[100] In evaluating whether due process has been denied, the court reviews the juvenile's waiver of rights under the totality of the circumstances, including the background, experience, and conduct of the defendant, as well as whether there was parental notification.[101] If the juvenile was not deprived of due process of law, the third question is whether the violation was harmless beyond a reasonable doubt.[102] If the statutory violations prejudiced the juvenile defendant, the court has discretion to reverse or to order more limited remedies so as to ensure that the juvenile's "rights are safeguarded and the will of Congress is not thwarted."[103] In determining the harmlessness of a juvenile confession, the inquiry is whether the statutory violation was a cause of the juvenile's confession and whether the confession caused prejudice to the juvenile.[104]

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[98] *See* United States v. Doe, 219 F.3d 1009, 1014 (9th Cir. 2000) (discussing how a juvenile was arrested for smuggling drugs); *see also* United States v. Juvenile Male, 595 F.3d 885, 902–03 (9th Cir. 2010) (noting that a juvenile was arrested by federal border patrol agents on suspicion of smuggling aliens into the United States).

[99] *See Doe*, 219 F.3d at 1015 (stating that the Juvenile Delinquency Act requires the government to advise a juvenile's parents of his *Miranda* rights and that in this case the government failed to notify the juvenile's parents); *see also Juvenile Male*, 595 F.3d at 903 (finding that provisions of § 5033 had been violated).

[100] *See Doe*, 219 F.3d at 1016 (explaining that "[d]ue process is denied when the violation of § 5033 adversely effects [sic] the fundamental fairness of the proceedings"); *see also Juvenile Male*, 595 F.3d at 902.

[101] *See Doe*, 219 F.3d at 1016 (stating that under the totality of the circumstances, the notification in this case did not rise to the level of a constitutional violation).

[102] *See id.* at 1017 ("Suppression of the statements may be appropriate if the violation was not harmless to the juvenile beyond a reasonable doubt."); *see also Juvenile Male*, 595 F.3d at 902 (stating that if there is no due process violation, the court must consider whether the violation was harmless beyond a reasonable doubt).

[103] *Doe*, 219 F.3d at 1017; *see also Juvenile Male*, 595 F.3d at 902–03.

[104] *See Doe*, 219 F.3d at 1017 ("Only if the violation was a cause of the confession does a court look to the prejudice caused by the confession."); *Juvenile Male*, 595 F.3d at 903–04.

The two different standards formulated by the federal courts have created inconsistent outcomes. In addition to inconsistency of application, both of these standards are flawed and fail to properly account for juveniles' ages and their limited cognitive understanding of the *Miranda* warning.

a. Totality of the Circumstances Approach

A totality of the circumstances approach was first employed by the Court in *Fare v. Michael C.*[105] to determine whether a juvenile suspect's waiver of rights was voluntary.[106] The defendant was a sixteen-year-old boy who was questioned as a murder suspect.[107] Even though Michael was given his *Miranda* rights, he was denied a request to see his probation officer.[108] Subsequently, Michael confessed to the crime and drew incriminating sketches.[109] The defense moved to suppress the confessions and the incriminating sketches on the ground that they were obtained in violation of his *Miranda* rights, arguing that a request to see a probation officer is similar to an invocation of the Fifth Amendment right to remain silent once a request to see an attorney is made.[110] The motion was denied by the trial court and Michael's confession was used to convict him.[111]

The Supreme Court disagreed with the defendant's position that Michael's request to see his probation officer was a per se invocation of his Fifth Amendment rights.[112] Instead, the Court employed the totality of the circumstances approach to determine whether Michael's confession was voluntary.[113] It described the totality of the circumstances approach as an evaluation of "the juvenile's age, experience, education, background, and

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[105] 442 U.S. 707 (1979).

[106] *See id.* at 725.

[107] *See id.* at 710.

[108] *See id.*

[109] *See id.* at 711.

[110] *See id.* at 711–12.

[111] *See id.* at 712, 714–15 (stating that the trial court denied the motion because the juvenile waived his *Miranda* rights, despite his request to see his probation officer, because a request to see a probation officer was a per se invocation of Fifth Amendment rights, similar to a request for an attorney).

[112] *See id.* at 719, 727.

[113] *See id.* at 725 (stating that a totality of the circumstances approach is adequate even when interrogation of juveniles is involved).

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."[114]

Ultimately, after considering all of the pertinent factors, the Supreme Court concluded that Michael's confession was voluntary.[115] Yet, unlike the decisions in *Haley* and *Gallegos*, which treated juvenile confessions with "special care," the Court's decision in *Fare* established a new precedent for evaluating the voluntariness of a juvenile's confession by using the same standard that applies to adult confessions.[116] Based on this decision, the majority of states began applying the totality of the circumstances approach to determine whether a juvenile's waiver of rights was voluntary.[117] After the passage of the Juvenile Delinquency Act, requiring parental notification upon a juvenile's arrest, federal courts also began to apply the totality of the circumstances approach to determine the voluntariness of a juvenile's statements.[118] Under the totality of the circumstances approach, lack of parental notice was only one of the factors considered.[119]

Even though the totality of the circumstances approach became popular among federal and state courts, there are flaws that emerge from its application. And because this approach is similarly applied on the state, as well as the federal, level, it is instructive to analyze both types of judicial precedents to demonstrate the flaws associated with each level.

There are several problems that emerge from the application of the totality of the circumstances approach. First, courts have no guidance as to how heavily they should weigh each factor.[120] Second, police officers are uncertain about the proper procedure for interrogating juveniles.[121] Third, applying the totality of the circumstances approach permits the government to disregard

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[114] *Id.* ("The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation.").

[115] *See id.* at 726.

[116] *See* Nashiba F. Boyd, Comment, *"I Didn't Do It, I Was Forced To Say That I Did": The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 HOW. L.J. 395, 409–10 (2004).

[117] *See id.* at 412.

[118] *See, e.g.*, United States v. Doe, 226 F.3d 672, 679 (6th Cir. 2000).

[119] *See id.* at 679.

[120] *See* Boyd, *supra* note 116, at 411.

[121] *Id.* at 414–15.

procedural safeguards that Congress meant to provide to juveniles by enacting the Juvenile Delinquency Act. And finally, different jurisdictions vary in their treatment of parental absence, leading to inconsistent results.

When the Supreme Court articulated the totality of the circumstances test in *Fare v. Michael C.*, the test was left intentionally vague so that lower court judges would have enough flexibility to make proper decisions concerning the juveniles' waiver of rights.[122] The flexible standard described in *Fare*, however, has not been followed by all courts.[123] Precisely because the Supreme Court left the test intentionally vague, courts have no guidance as to how heavily each factor should be weighed,[124] resulting not only in inconsistent outcomes, but often in absurd outcomes.[125] Many courts have upheld waivers as voluntary despite the juvenile's youth, immaturity, or even low I.Q. level.[126]

For instance, in *State v. Jones*,[127] the juvenile suspect offered testimony that his I.Q. was in the range of mental retardation, and that he was depressed and extremely susceptible to domination by persons whom he perceived to be in positions of authority, yet the court still found that his waiver was voluntary.[128] Similarly, in *Commonwealth v. Darden*,[129] the court found the waiver of a fifteen-year-old, who was questioned without the presence of his parents or an attorney, to be voluntary despite the fact that the boy had "a verbal I.Q. of 71, a performance I.Q. of 75 and a full scale I.Q. of 76, 'classifying him

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[122] *See* Fare v. Michael C., 442 U.S. 707, 725 (1979).

> Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.

Id.

[123] See W.M. v. State, 585 So. 2d 979, 985 (Fla. Dist. Ct. App. 1991) (Farmer, J., dissenting) (discussing how the Florida court engaged in a rigid application of the totality of the circumstances test).

[124] *See* Boyd, *supra* note 116, at 411 (demonstrating that the Supreme Court did not address, for instance, whether age is a more important factor than prior experience in the court system).

[125] *See supra* notes 1–19 and accompanying text.

[126] *See* State v. Jones, 566 N.W.2d 317, 325 (Minn. 1997); Commonwealth v. Darden, 271 A.2d 257, 260 (Pa. 1970).

[127] 566 N.W.2d 317.

[128] *Id.* at 325, 327.

[129] 271 A.2d 257.

at a border line of a mildly retarded level.' "[130] *Miranda* waivers by juveniles as young as eleven years old, given without the presence of a parent, have been found to be voluntary by state courts in South Carolina,[131] Ohio,[132] and Oregon.[133]

In *W.M. v. Florida*,[134] a court found that a ten-year-old voluntarily waived his rights, yet the dissenting judge wrote that "not a single objective factor suggests voluntariness."[135] The dissenting judge stated that the test applied by the court seemed to be the "very antithesis" of the totality of the circumstances test, when the court found a confession to be voluntary despite being elicited from a ten-year-old who had an "I.Q. of 69 or 70, who had been placed by school authorities in a learning disability program and was described . . . as having difficulty in understanding directions, who had no prior record with the police, . . . and who was then held by the police for nearly 6 hours."[136]

Another problem with the totality of the circumstances approach is that there are no definite standards as to how to apply the totality test. Therefore, law enforcement officers have no guidance as to how to properly interrogate juveniles.[137] For instance, in *United States v. Guzman*,[138] even though law enforcement agents were aware of the identity of the juvenile's mother and failed to contact her, the court denied the juvenile's motion to suppress his statements when applying the totality of

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[130] *Id.* at 260 (noting that a clinical psychologist testified that in terms of chronological test age, the juvenile would range "from a youngster chronologically aged 8 to 11 ½ (years)").

[131] *See, e.g.*, *In re* Christopher W., 329 S.E.2d 769, 769 (S.C. Ct. App. 1985) (discussing that the suspect was an eleven-year-old boy whose waiver was upheld as voluntary on appeal without an evaluation of the boy's understanding of the warnings, his intelligence, or his prior court experience).

[132] *In re* Goins, 738 N.E.2d 385, 390 (Ohio Ct. App. 1999) (discussing that the suspect was an eleven-year-old boy whose confession was elicited without the presence of a parent and upholding the waiver of the boy's rights on appeal, finding the waiver to be voluntary).

[133] State *ex rel* Juvenile Dep't of Wash. Cnty. v. Deford, 34 P.3d 673, 676–78 (Or. Ct. App. 2001) (upholding an eleven-year-old suspect's waiver of rights, despite the fact that the juvenile was questioned without the presence of a parent or a lawyer and had the "cognitive capacity of a seven-year-old child").

[134] 585 So. 2d 979 (Fla. Dist. Ct. App. 1991) (Farmer, J., dissenting) (per curiam).

[135] *Id.* at 985.

[136] *Id.* at 983, 985.

[137] Boyd, *supra* note 116, at 414.

[138] 879 F. Supp. 2d 312 (E.D.N.Y. 2012).

the circumstances approach.[139] On the other hand, in *United States v. Nash*,[140] in which two juveniles were arrested and their respective family members were advised of the arrest and charges filed against them, the court found that such efforts to notify were not sufficient and that the statements should be suppressed.[141] Therefore, it is often unclear whether the statements elicited from the juvenile will be admitted in court, thereby leading to inconsistent and unpredictable judgments.[142] In *Haley v. Ohio*, Justice Frankfurter noted that because there is a lack of guidance, the totality of the circumstances test "invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society."[143]

Additionally, admitting juveniles' statements given without parental notification presents the danger of law enforcement ignoring the statutory notification requirement without any consequences. By permitting the government to ignore the requirements of the Juvenile Delinquency Act, the courts seem to plainly disregard the procedural safeguards Congress meant to provide juveniles to protect their due process rights, thus thwarting the will of Congress. This sets a dangerous precedent for disregarding an important statutory requirement that would entail no consequences for improper actions by law enforcement.

Section 5033 of the Juvenile Delinquency Act requires only that the arresting officer notify the parent of the juvenile's rights and of the nature of the alleged offense.[144] It does not expressly provide that the parent has a right to be present during the interrogation or to consult with the juvenile regarding the juvenile's rights. Such ambiguity provides for inconsistency in the application of the totality of the circumstances approach, permitting different jurisdictions to vary in the weight given to the lack of parental notice and leaving room for various interpretations of the statute.

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[139] *Id.* at 316.

[140] 620 F. Supp. 1439 (S.D.N.Y. 1985).

[141] *See id.* at 1440, 1443 (stating that even though the government's efforts at notification were made with good intentions, the government did not satisfy the statute).

[142] *See* Boyd, *supra* note 116, at 414–15.

[143] Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring).

[144] 18 U.S.C. § 5033 (2012).

For instance, some courts fail to require that the parents and children be informed that they could consult in private or that they could discuss the consequences of waiving the child's rights, stating that § 5033 of the Act does not mandate parental consultation in order for a juvenile's statements to be admissible.[145] Other courts have held that a juvenile does not have a constitutional or statutory right to have an adult present during the interrogation.[146] On the other hand, some judges give more weight to parental involvement. As Judge Holloway pointed out, notice to the parents is not merely for protection of their right to custody, "but is notice required for the juvenile's benefit to insure that the parents may have a reasonable opportunity to participate in preparing and presenting the juvenile's case."[147] Such inconsistency of application demonstrates the glaring flaws of the totality of the circumstances approach.

b. The Ninth Circuit Approach

The standard formulated by the Ninth Circuit is more stringent and is intended to afford juveniles more protection. Under this standard, after determining whether there was a violation of the Juvenile Delinquency Act, the court applies the totality of the circumstances approach to determine whether the juvenile was deprived of due process of law.[148] Even if due process has not been denied, the court further makes a determination as to whether the violation of the Juvenile Delinquency Act was harmless to the juvenile beyond a reasonable doubt.[149] If the statutory violation was a cause of the juvenile's confession, and the prejudice was caused by the confession, the court has discretion to suppress the statement "or to order more limited remedies so as to ensure that [the defendant's] rights are safeguarded."[150]

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[145] *See, e.g.*, United States v. White Bear, 668 F.2d 409, 412 (8th Cir. 1982).

[146] *See, e.g.*, United States v. Nash, 620 F. Supp. 1439, 1443 (S.D.N.Y. 1985).

[147] United States v. Watts, 513 F.2d 5, 10 (10th Cir. 1975) (Holloway, J., concurring).

[148] *See* United States v. Doe, 219 F.3d 1009, 1016 (9th Cir. 2000).

[149] *Id.* at 1017.

[150] *See id.* (alteration in original).

Aside from the flawed totality of the circumstances approach used under this standard to determine whether there was a violation of due process, this standard presents additional problems. Even though the Ninth Circuit standard affords juveniles more protection, its application is problematic when determining whether the juvenile was prejudiced by the statutory violation. Because there is no clear standard for determining whether the statutory violation was, in fact, a cause of the confession and prejudicial to the juvenile, it leaves judges to fill in the gaps, often resulting in inconsistent opinions.

While some judges remand this question for further findings of fact, others make their own determinations. For instance, in *United States v. Doe*,[151] a fifteen-year-old juvenile was arrested and convicted for smuggling aliens from Mexico into the United States.[152] Upon arrest, border patrol agents failed to notify either his parents or the Mexican Consulate, as required by § 5033 of the Juvenile Delinquency Act.[153] The court remanded the case to determine whether the statutory violations prejudiced the juvenile.[154] However, in a concurring opinion, Judge Tang stated that the violations were so egregious that "we could easily conclude that [the juvenile] was prejudiced without a remand for further fact finding."[155] On the other hand, Judge Wallace opined that the record demonstrated that the juvenile suffered no prejudice.[156]

Similarly, in *United States v. Juvenile (RRA-A)*,[157] while the court held that the statutory violation was prejudicial,[158] Judge Trott dissented, stating that the failure to notify was harmless beyond all reasonable doubt.[159] This demonstrates the difficulty of determining whether there has been harmless error and invites various judicial opinions, as opposed to consistent application of law.

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[151] 862 F.2d 776 (9th Cir. 1988).

[152] *Id.* at 777–78.

[153] *See id.* at 780 (stating that even if the government made reasonable efforts to contact Doe's parents, it violated the statute by failing to show that it notified the Mexican Consulate of Doe's arrest and of the charges against him).

[154] *Id.* at 781 ("The connection between the government's misconduct and [the] confessions is a factual question to be explored on remand.").

[155] *Id.* at 782 (Tang, J., concurring).

[156] *Id.* (Wallace, J., concurring and dissenting).

[157] 229 F.3d 737 (9th Cir. 2000).

[158] *Id.* at 747 (holding that there is no doubt that the errors were prejudicial).

[159] *Id.* at 749 (Trott, J., dissenting).

Additionally, this approach is flawed because it lacks predictability and uniformity. The Ninth Circuit standard first requires a determination of whether there was a violation of the Juvenile Delinquency Act and, if so, whether it deprived the defendant of the right to due process, which requires an application of the totality of the circumstances approach.[160] In addition to the already imperfect totality of the circumstances approach, it requires a determination of harmlessness.[161] Determination of harmlessness, in turn, requires an evaluation of "whether the statutory violation was a cause of the juvenile's confession" and whether the confession caused the prejudice.[162] Overall, this leaves judges with several different legal determinations and a great amount of discretion in their decisions, resulting in lack of predictability and uniformity. Predictability and uniformity are an essential part of our justice system and are especially important when dealing with juvenile offenders. Lack thereof hardly serves the purpose of improving the quality of juvenile contacts with the justice system intended by the Juvenile Delinquency Act.[163]

In determining which standard should be employed to determine admissibility of juveniles' statements obtained without parental notification, it is important to examine all possible alternatives. One such alternative—employed by several states but explicitly rejected by the federal courts—is the per se exclusionary approach.[164]

2. Per Se Exclusionary Approach

The per se exclusionary approach provides important "procedural safeguards" to afford juveniles more protection.[165] The requirements under this approach have a wide range, "from mandating the presence of counsel during the interrogation of a juvenile under thirteen years of age, to mandating the presence

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[160] *See* United States v. Doe, 219 F.3d 1009, 1016 (9th Cir. 2000).

[161] *Id.* at 1017.

[162] *Id.*

[163] *See supra* text accompanying note 82 (citing S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5284).

[164] *See* United States v. Guzman, 879 F. Supp. 2d 312, 324 (E.D.N.Y. 2012).

[165] Farber, *supra* note 28, at 1287 (internal quotation marks omitted).

of a parent or guardian who has been apprised of the juvenile's *Miranda* rights and is capable of knowingly and intelligently waiving these rights on the juvenile's behalf."[166]

The per se rule is based on a "public policy determination that juveniles do not have the capacity to understand or waive their right against incrimination and so they need an adult's help to make this decision."[167] In *In re E.T.C.*,[168] the Supreme Court of Vermont articulated the reasons for implementing the per se rule:

> It 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 . . . rights at a time most critical to him and in an atmosphere most foreign and unfamiliar.[169]

The Supreme Judicial Court of Massachusetts concluded that a juvenile's statements will not be admissible unless the state can show that "an interested adult was present, understood the warnings, and had the opportunity to explain [the warning and the] rights to the juvenile."[170] In *Lewis v. State*,[171] the Indiana Supreme Court applied the per se exclusionary rule because of the insufficiency of the totality of the circumstances test in setting proper guidelines.[172]

Delaware, Wyoming, and Florida, among other states, have implemented statutory per se exclusionary approaches in respect to juveniles' waiver of *Miranda* rights.[173] For instance, a statute in Colorado states in pertinent part:

> No statements or admissions of a juvenile made as a result of the custodial interrogation of such juvenile by a law

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[166] *Id.*

[167] Von Wald, *supra* note 78, at 161.

[168] 449 A.2d 937 (Vt. 1982).

[169] *Id.* at 939 (quoting Lewis v. State, 288 N.E.2d 138, 141–42 (Ind. 1972)).

[170] Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 657 (Mass. 1983).

[171] 288 N.E.2d 138.

[172] *Id.* at 142 (reversing a conviction of a juvenile who confessed to murder when notice was not given to either a parent or an attorney of the juvenile's rights).

[173] *See, e.g.*, Barrow v. State, 749 A.2d 1230, 1250 (Del. 2000) (suppressing juvenile's statements due to violation of a statute); M.M. v. State, 827 P.2d 1117, 1117 (Wyo. 1992) (advising that police must fulfill the notification statute before juvenile statements are admissible); Sublette v. State, 365 So. 2d 775, 777 (Fla. Dist. Ct. App. 1978) (holding that the failure to notify parents after a child is taken into custody causes juvenile statements to be inadmissible).

> enforcement official concerning delinquent acts alleged to have been committed by the juvenile shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation and the juvenile and his or her parent, guardian, or legal or physical custodian were advised of the juvenile's right[s] . . . .[174]

North Carolina is another state that has implemented a per se approach through legislation, as it has a statute which mandates that "[w]hen the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney."[175] Oklahoma also renders statements inadmissible unless a parent, a guardian, or a legal or physical custodian of the juvenile was present during the interrogation and was advised of the juvenile's rights.[176]

Even though the per se exclusionary approach affords more protection to juveniles than the totality of the circumstances approach, it is similarly not without flaws. One of the problems with the per se exclusionary method is that it assumes that the parents or persons standing in the interest of the juvenile would actually be able to assist the child in understanding and deciding to waive the child's rights.[177] The approach fails to account for the fact that some parents may not be able to understand the *Miranda* warning themselves.[178] Associate Professor of Psychology at Saint Louis University, Thomas Grisso, notes, "Commentators have observed that many parents do not care, and that often the parents are, at best, only equal in capacity to

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[174] COLO. REV. STAT. ANN. § 19-2-511 (West 1999).

[175] N.C. GEN. STAT. ANN. § 7B-2101 (West 1999).

[176] *See, e.g.*, C.G.H. v. State, 580 P.2d 523, 525 (Okla. Crim. App. 1978) (citing an Oklahoma statute that provides "[n]o information gained by questioning a child shall be admissible into evidence against the child unless the questioning about any alleged offense by law enforcement officer or investigative agency, or employee of the court, or the Department is done in the presence of said child's parents, guardian, attorney, or the legal custodian of the child, and not until the child and his parents, or guardian, or other legal custodian shall be fully advised of their constitutional and legal rights, including the right to be represented by counsel at every stage of the proceedings") (citing OKLA. STAT. ANN. tit. 10, § 1109 (West 1995).

[177] Boyd, *supra* note 116, at 419.

[178] *Id.*

the child and therefore poorly equipped to comprehend the complexities confronting them."[179] Therefore, applying this test may cause more harm than good because parents may be giving the juvenile wrong advice.[180]

A second problem with the per se exclusionary approach is that many times, parents coerce their child into confessing, even if it is not in the child's best legal interests.[181] For instance, in *Anglin v. State*,[182] a fifteen-year-old boy's mother told him that if he did not tell police the truth, she would "clobber him"; subsequently the boy confessed to participation in robbery and murder.[183] Additionally, in *In re Carter*,[184] two juvenile girls, arrested for engaging in sexual acts and consuming controlled substances, were threatened by their parents and pastor until they made a confession.[185] As Grisso concluded in his study, "[I]n the almost 400 juvenile interrogations examined, 70 to 80 percent of parents offered no advice to their children, and when parental advice was given, parents were far more likely to advise their children to waive their rights than to assert them."[186]

Further, although the per se exclusionary approach was intended to remedy the flaws of the totality of the circumstances test, it lacks consistency. In Colorado, for instance, the juvenile confession statute mandates that a juvenile must have the opportunity to have a parent present at the interrogation and gives the juvenile an opportunity to consult with the parent.[187] On the other hand, in North Dakota, in some circumstances the juvenile confession statute requires that counsel be present with the juvenile during the interrogation.[188] In Massachusetts, actual consultation with a parent during an interrogation is not required; a juvenile under the age of fourteen merely needs to be

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[179] Thomas Grisso, *Juveniles' Capacities To Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1163 (1980) (footnote omitted) (internal quotation marks omitted).

[180] Boyd, *supra* note 116, at 419.

[181] *Id.*

[182] Anglin v. State, 259 So. 2d 752 (Fla. Dist. Ct. App. 1972).

[183] *Id.* at 752.

[184] 318 A.2d 269 (Md. Ct. Spec. App. 1974).

[185] *Id.* at 275–76 (reasoning that because it was not the police who threatened the girls, their confessions were voluntary).

[186] Boyd, *supra* note 116, at 420.

[187] COLO. REV. STAT. ANN. § 19-2-511 (West 1999).

[188] N.D. CENT. CODE ANN. § 27-20-26 (West 2012).

given an opportunity to consult with a parent.[189] Although there is no potential for speculation as there is under the totality of the circumstances approach, the inconsistency between jurisdictions remains with the per se exclusionary approach as well.[190]

D. *Understanding the Differences Between Adults' and Juveniles' Cognitive Development*

To understand a juvenile's capacity to waive rights, it is important to have a basic knowledge of adolescent psychological and brain development.[191] Neuroscience helps explain adolescent development and points to the conclusion that children cannot think and reason like adults.[192] Research shows that children and adults use different areas of the brain to analyze a similar situation.[193] Further, a juvenile's "sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure will often drive him or her to make very different decisions than an adult would in similar circumstances."[194] These differences between adolescent and adult psychology are exacerbated when a juvenile is "under stress and without adult support or guidance."[195]

Courts have long recognized the importance of the relationship between parents and children.[196] In *Meyer v. Nebraska*,[197] the Supreme Court held that parents possess the fundamental right to "bring up children."[198] Further, in *People v.*

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[189] See MASS. GEN. LAWS ANN. ch. 119, § 67 (West 2013); *see also* Farber, *supra* note 28, at 1290.

[190] Boyd, *supra* note 116, at 420.

[191] 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 (2006).

[192] *Id.* at 434–35 (stating that adults and adolescents have a different perception of the same experience because each uses a different area of the brain to analyze a situation, and that adults and adolescents have a different capacity to process information).

[193] *Id.* at 435.

[194] *Id.* at 436.

[195] *Id.*

[196] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the Fourteenth Amendment provides the freedom to establish a home and raise children).

[197] *Id.* at 390.

[198] *Id.* at 399.

Castro,[199] the court reasoned that "history and society . . . looked upon parents as the true and faithful guardians and protectors of their child's moral and legal rights."[200]

Because of the significance of the relationship between parents and children, it is important to evaluate the need for the presence of a parent when a juvenile is being questioned. Thomas Grisso conducted an empirical study of juveniles and their ability to understand the words and phrases of the *Miranda* warning when questioned alone.[201] In his study, Grisso employed both lawyers and psychologists and administered three different tests to three samples of juveniles and two samples of adults.[202] Grisso's study concluded that juveniles under the age of fifteen could not give a meaningful *Miranda* waiver.[203] Additionally, Grisso noted that the juveniles who participated in the study were questioned under optimal circumstances, which would not be provided when juveniles are interrogated by police officers.[204] Therefore, the study demonstrates further that administration of the *Miranda* warning to a juvenile under "real world" conditions is even more unlikely to produce a "voluntary" confession.[205] Grisso concluded that "juveniles younger than fifteen years old require some form of assistance if they are to waive their rights knowingly."[206] Additionally, statistical evidence demonstrates that a large percentage of adjudicated juveniles are learning-disabled, which exacerbates the problem of obtaining knowing and voluntary waivers of *Miranda* rights among juveniles.[207]

Besides not being able to appreciate and knowingly waive their *Miranda* rights, most children are more susceptible to giving false confessions.[208] Research demonstrates that children

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[199] 118 Misc. 2d 868, 462 N.Y.S.2d 369 (Sup. Ct. Queens Cnty. 1983).

[200] *Id.* at 377.

[201] *See* Grisso, *supra* note 179, at 1135–36 (evaluating whether juveniles understand the words and phrases used in the *Miranda* warning and whether they accurately perceive the function and significance of the rights that the warning provides).

[202] *Id.* at 1148–49 (discussing that within each sample used, the subjects' age, sex, race, offense history, IQ classification, and socioeconomic level were considered).

[203] *Id.* at 1161.

[204] *Id.*

[205] *See id.*

[206] *Id.*

[207] Raymond Chao, *Mirandizing Kids: Not as Simple as A-B-C*, 21 WHITTIER L. REV. 521, 526 (2000).

[208] Boyd, *supra* note 116, at 402 (stating that juveniles are very susceptible to psychological techniques used by the police).

wish to please authority figures and will often tell the investigator what the child believes the investigator wants to hear.[209] Further, psychological research on children's understanding of the *Miranda* warning suggests that children are more likely to give false confessions when police use interrogation techniques designed for adults.[210] "Inappropriate questioning, such as suggestive or coercive questions, can lead juveniles to make statements that may misrepresent the facts and potentially incriminate innocent defendants."[211]

E. Miranda *Application to Adults with Mental Incapacity*

Because the Supreme Court has not yet formulated a test for determining the voluntariness of a *Miranda* waiver of rights by juveniles questioned without parental notification, it may be instructive to analyze an approach the courts use when it comes to adults with a mental defect or subordinate intelligence. Adults with a mental defect or subordinate intelligence can be compared to juveniles from a legal standpoint because of their limited cognitive ability.[212] Several courts have held that when a person's cognitive ability is low, the constitutional protections from police coercion should be high.[213] For instance, in *Smith v. Zant*,[214] the Eleventh Circuit held that the suspect's mental defect prevented him from making a knowing and intelligent *Miranda* waiver.[215] The treatment of mentally retarded people can be compared to juveniles because even though juveniles "do not have cognitive limitations due to mental defect, [they] have cognitive limitations due to lack of maturity and their young age."[216]

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[209] *Id.* at 403.

[210] *Id.*

[211] *Id.* ("Young children more easily succumb to suggestion, trickery, and coercion, resulting in false, self-incriminating statements.").

[212] McGuire, *supra* note 70, at 1367.

[213] *See, e.g.*, Smith v. Zant, 855 F.2d 712, 718–19 (11th Cir. 1988), *rev'd on other grounds*, 873 F.2d 253, 253 (11th Cir. 1989) (en banc) (holding that the defendant deserved more protection from police coercion where there was evidence of a definite mental defect, and concluding that defendant did not intelligently waive his *Miranda* rights); United States v. Hull, 441 F.2d 308, 312 (7th Cir. 1971) (holding that the *Miranda* waiver of a man with a low I.Q. level and a mental age of an eight-year-old was invalid).

[214] 855 F.2d 712 (1988).

[215] *See id.* at 718–19.

[216] McGuire, *supra* note 70, at 1369.

Additionally, the Ninth Circuit found that low mental capacity coupled with limited English skills can constitute grounds to invalidate a *Miranda* waiver.[217] The court held that the suspect's low intelligence and inability to understand English made him unable to intelligently and voluntarily waive his rights.[218] This case is pertinent to juvenile constitutional rights because the court analyzed the limited ability of an individual to understand the *Miranda* rights being read to him due to cognitive limitations, just as a juvenile may be unable to understand the *Miranda* warning due to limited development because of young age.[219]

III. PROPOSED SOLUTION

The American justice system provides for a fair trial, not a perfect one. But there is no justice served when a seven or an eight-year-old child confesses to a crime the child did not commit because of being questioned without the presence of an interested adult.[220] In light of the startling number of wrongful juvenile convictions,[221] society must not rush to convict children. Society must take steps to remedy the existing problem, and the most feasible way to do so is through legislative reform.

In 1974, Congress passed the Juvenile Delinquency Act, which provides that "the arresting officer shall immediately advise [the] juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify . . . the [juvenile's] parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense."[222] One of the problems with the Act is that it does not specify whether the juvenile's statements are admissible into evidence if the parents are not notified. Another problem is that the Act does not afford juveniles sufficient protection because there is no clearly

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[217] *See* United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998).

[218] *Id.*

[219] McGuire, *supra* note 70, at 1369.

[220] *See supra* notes 1–6 and accompanying text.

[221] Benjamin E. Friedman, Note, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In re Gault, 58 UCLA L. REV. DISCOURSE 165, 179 (2011) (stating "that in juvenile wrongful-conviction cases, 42 percent were attributable to false confessions, and for children between the ages of twelve and fifteen, the percentage leaps to 69 percent").

[222] 18 U.S.C. § 5033 (2012).

established requirement that the police advise juveniles of their right to have a parent present during questioning or of their right to consult with their parents.[223]

This Note has evaluated the different approaches federal and state courts apply to determine whether a juvenile's waiver of rights—made without parental notification or presence—is voluntary, and has evaluated the shortcomings of the approaches. This Note proposes an amendment to the Juvenile Delinquency Act to reflect the continuing concerns of legal society over false confessions produced by juveniles. It proposes excluding confessions of juveniles under the age of fifteen if their parents were not notified and they were questioned without the presence of both a parent and an attorney. Confessions of juveniles ages fifteen and older should be evaluated using the totality of the circumstances approach, where the absence of a parent and an attorney during questioning is among the factors to be considered.

Because Grisso's study indicates that juveniles under the age of fifteen cannot give a meaningful waiver of their *Miranda* rights, the best approach is to apply per se exclusion to confessions of juveniles under the age of fifteen when statutory requirements are not met.[224] To ensure maximum protection for juveniles and consistency of application, this Note suggests going one step further than merely notifying the parents of the rights of the juvenile. It suggests implementing a rule that requires the parents' presence during the interrogation. The presence of a juvenile's parent will provide for a more neutral environment where the juvenile feels comfortable enough to answer freely and not be pressured into producing a certain response.

To further promote an environment that affords constitutional due process to juveniles, this Note proposes adding a requirement to have counsel present during the interrogation.[225] This would ensure that even if the parents do

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[223] Hall v. Thomas, 611 F.3d 1259, 1289 (11th Cir. 2010); *see* Hardaway v. Young, 302 F.3d 757, 763 (7th Cir. 2002) ("[T]he mere absence of a friendly adult is by itself insufficient to require suppression of a juvenile confession."); *see also* Blankenship v. Estep, No. 05-CV-02066-WDM-KLM, 2008 WL 4964712, at *4 (D. Colo. Nov. 18, 2008) ("[I]t is not a fundamental right to have a parent or guardian present during *Miranda* advisements and waivers by juveniles.").

[224] Grisso, *supra* note 179, at 1135.

[225] *See* Miranda v. Arizona, 384 U.S. 436, 466 (1966) (stating that the presence of an attorney "enhances the integrity of the fact-finding processes in court"); *see also*

have a limited understanding of the waiver of the juvenile's rights, they may be advised by a professional with a full comprehension of the law.[226] Further, the presence of counsel will act to prevent the pressure parents may put on their children to confess and will ensure that any decision made is in the best legal interests of the child.[227] Because juveniles often give false information during police interrogations, the exclusionary rule could only serve to promote accuracy. This test will also prevent the inconsistent results produced by the Ninth Circuit approach—which requires several different balancing tests and evaluations to determine admissibility of statements—while ensuring that the procedural safeguards intended by Congress are afforded to juveniles.

Further, "[a] court would make judgments . . . on issues of police misconduct or constitutional improprieties—rather than being forced to make judgments more appropriate for a child psychologist."[228] Therefore, any confession made by a juvenile under the age of fifteen without the presence of both a parent and an attorney would be inadmissible. This standard would make the results not only more just, but also more uniform and consistent, at least at the federal level.

Because the exclusionary remedy is not one the courts apply lightly,[229] the totality of the circumstances approach should be applied to determine voluntariness of confessions of juveniles aged fifteen and older. As Grisso's study suggested, fifteen and sixteen-year-olds have a better comprehension of the *Miranda* warning.[230] In fact, his study showed that their understanding of

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In re Gault, 387 U.S. 1, 38 (1967) (stating that the President's Crime Commission recommended that in order to assure "procedural justice for the child," counsel has to be appointed when coercive action is a possibility).

[226] *See Miranda*, 384 U.S. at 466 ("Without the protections flowing from adequate warning and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.' ") (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961)); *see also* Kansas v. Ventris, 556 U.S. 586, 591 (2009) (stating that having an attorney ensures that police manipulation does not deprive the defendant of effective representation at the only stage when legal advice would help him).

[227] *See Gault*, 387 U.S. at 40 (stating that counsel is "helpful in making reasoned determinations of fact and proper orders of disposition").

[228] McGuire, *supra* note 70, at 1386.

[229] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 347 (2006).

[230] Grisso, *supra* note 179, at 1164–65.

the *Miranda* warning was comparable to that of adults.[231] Because of the increasing number of crimes committed by juveniles, there is also an obligation to provide law enforcement with the proper tools of interrogation to solve crimes. Because a confession is powerful evidence of guilt, there is a strong public policy in favor of law enforcement being able to properly utilize this tool.[232] And with juveniles who are old enough to have a better understanding of what it means to waive their rights, the courts should apply the totality of the circumstances approach to determine whether the waiver was made knowingly, voluntarily, and intelligently.

Even given all of its flaws, the totality of the circumstances approach mandates an "inquiry into all the circumstances surrounding the interrogation."[233] If applied properly, as theCourt intended its application in *Fare v. Michael C.*, this approach would be sufficient to determine whether the waiver had been voluntary.[234] It also provides for an effective way of dealing with juveniles who clearly understand the effect of their waivers and does not unnecessarily burden law enforcement. Additionally, courts are equipped under this approach to consider the lack of a parent and an attorney being present as a factor within the totality of the circumstances test, and as many circuit courts have held, "an arrestee's juvenile status and the absence of a parent are certainly important factors that must be considered in assessing the voluntariness of a juvenile's statement."[235] Additionally, by requiring only one balancing test, this approach provides more consistency and predictability than the Ninth Circuit approach, which requires the courts to make several legal determinations when determining admissibility.[236]

Thus, the balanced application of both the per se exclusionary approach and the totality of the circumstances approach would ensure that juveniles are voluntarily waiving their rights while still serving the state's interest in effective

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[231] *Id.*

[232] *See* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 4–5 (2008).

[233] United States v. Guzman, 879 F. Supp. 2d 312, 320 (E.D.N.Y. 2012) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)).

[234] *See Fare*, 442 U.S. at 727–28.

[235] *Guzman*, 879 F. Supp. 2d at 321; Gilbert v. Merchant, 488 F.3d 780, 791 (7th Cir. 2007); Hardaway v. Young, 302 F.3d 757, 765 (7th Cir. 2002).

[236] *See, e.g.*, United States v. Doe, 219 F.3d 1009, 1016–18 (9th Cir. 2000).

police investigations. Although this approach may not be immune from criticism, it represents a balanced solution that accounts for psychological development of the adolescent mind. The proposed change affords more protection to both the younger and the older juveniles. The younger juveniles—those under the age of fifteen—will be afforded more protection by requiring the presence of a parent and an attorney to make sure the juveniles have a proper understanding of a waiver of their rights. The older juveniles' confessions will be evaluated under the totality of the circumstances approach to make sure that the confessions are made voluntarily, knowingly, and intelligently.

CONCLUSION

The question of how juvenile confessions should be treated has been addressed by courts for a long time; however, the approaches currently used fail to provide sufficient statutory and constitutional due process protections to juveniles. In determining the admissibility of juvenile confessions made without parental notification, some courts apply the totality of the circumstances approach, which leads not only to inconsistent outcomes, but also to admissibility of statements by juveniles with an I.Q. level low enough to fall within the range of mental retardation. The second approach—that of the Ninth Circuit—involves a number of steps requiring several different inquiries that often invite inconsistent opinions by judges. The third approach, used by several state courts, is a per se exclusionary approach that fails to account for circumstances in which parents might not have the child's best legal interests in mind.

To remedy this problem, this Note proposes a change to the Juvenile Delinquency Act to ensure more protection for juveniles and consistency of application at the federal level. Under this proposed amendment, the statement of a juvenile under fifteen years of age would be excluded unless the juvenile was interrogated in the presence of both a parent and an attorney. As for juveniles between the ages of fifteen and eighteen, the Juvenile Delinquency Act should require the application of the totality of the circumstances approach, which will consider the absence of a parent and an attorney as a factor in the determination of whether the juvenile's confession was voluntary. This new approach will not only provide better statutory and due process protection to juveniles, but will also

ensure that law enforcement possesses the tools necessary to conduct a proper interrogation and convict those who are guilty. Additionally, an improved federal statute could serve as a model for uniform adoption at the state level.

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