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## Coming Clean: The Erosion of Juvenile Miranda Rights in New York State

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JUSTIN ASHENFELTER

Coming Clean: The Erosion of Juvenile  
*Miranda* Rights in New York State

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## COMING CLEAN: THE EROSION OF JUVENILE *MIRANDA* RIGHTS IN NEW YORK STATE

*The object of the juvenile process is to make men out of errant boys. In that process we must build upon the truth. A juvenile should be led to believe the decent thing is to come clean, to face the music.*

Chief Justice Joseph Weintraub, Supreme Court of New Jersey, 1966<sup>1</sup>

*“Our history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults.*

Justice Sonia Sotomayor, Supreme Court of the United States, 2011<sup>2</sup>

### I. INTRODUCTION

The stark reality of our criminal justice system is that it is flooded with juvenile offenders.<sup>3</sup> In 2009, the National Center for Juvenile Justice estimated that there were approximately 261,600 juveniles arrested for committing violent crimes and 1,271,900 arrested for perpetrating property crimes during that year alone.<sup>4</sup> These figures have persistently hovered in this range since 2000.<sup>5</sup> More often than not, each criminal arrest leads to a custodial interrogation.<sup>6</sup> And, like adult criminal defendants during custodial interrogations, juvenile defendants in New York State are accorded the Fifth Amendment right to remain silent.<sup>7</sup> When police arrest and subsequently interrogate a juvenile, *Miranda* warnings are read aloud and produced in writing.<sup>8</sup> At this point, the juvenile can either invoke his Fifth Amendment right, which will protect him from self-incrimination, or waive that right and speak “voluntarily” to his questioners.<sup>9</sup> The moment in time in which a juvenile is

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1. *In re Carlo*, 225 A.2d 110, 121 (N.J. 1966) (Weintraub, J., concurring).
  2. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).
  3. NAT’L CTR. FOR JUVENILE JUSTICE, *JUVENILE ARREST RATES BY OFFENSE, SEX, AND RACE (1980–2009)* (2011) (on file with author).
  4. *Id.* “Violent” crimes include murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.* “Property” crimes include burglary, larceny-theft, motor vehicle theft, and arson. *Id.*
  5. *Id.*
  6. See Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in *INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT* 107 (G. Daniel Lassiter ed., 2004).
  7. See U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”).
  8. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring police to prophylactically apprise criminal suspects in custody of their Fifth Amendment right to silence and Sixth Amendment right to counsel).
  9. *Miranda* warnings typically read:  
You have the right to remain silent.  
If you choose to answer questions, anything you say can and will be used against you in a court of law.  
You have the right to consult with an attorney before you answer any questions and to have an attorney present with you while you answer questions.

confronted with a *Miranda* waiver decision is a pivotal one, especially because “many children lack the psychosocial and cognitive maturity to consider the consequences of a waiver of rights or to reason how to make this decision.”<sup>10</sup>

Over the past four decades, state courts have extended Fifth Amendment protections to juveniles because the U.S. Supreme Court has “underscored the need for special protections for youths, due to their presumed greater vulnerability and lesser capacity to understand or assert their rights during police contact.”<sup>11</sup> In essence, the Court has recognized that police should treat children like children. New York, however, has disregarded the Supreme Court’s guidance, even though it has acknowledged the developmental fragility of children.<sup>12</sup> Although New York recognizes “that special care must be taken to protect the rights of minors in the criminal justice system,”<sup>13</sup> the safeguards in New York are insufficient to ensure special care is actually used by law enforcement.

Obtaining a waiver of *Miranda* is a critical tool for law enforcement because it encourages confessions.<sup>14</sup> But, waiving this constitutional protection without guidance from an attorney can jeopardize a juvenile’s best interests. The importance of a juvenile’s decision to either invoke or waive *Miranda* protections is one that section 305.2 of the New York Family Court Act (FCA) acknowledges.<sup>15</sup> It requires police officers to “immediately notify the parent or other person legally responsible for the child’s care”

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If you cannot afford an attorney, one will be appointed to represent you at no cost to you.

If you choose to answer any questions you have the right to stop answering at any time.

Having these rights in mind, will you waive your rights and answer my questions?

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, 431–32 (2006) (citing *Miranda*, 384 U.S. at 478–79).

10. *Id.* at 475.

11. Thomas Grisso, *Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2006) (citing *In re Gault*, 387 U.S. 1 (1967)).

12. See *In re Jimmy D.*, 15 N.Y.3d 417, 422 (2010) (stating that “[t]he emotional and intellectual immaturity of a juvenile creates an obvious need for the advice of a guardian . . . at an interrogation from which charges of juvenile delinquency may ensue,” while upholding the admissibility of a thirteen-year-old’s confession even though he was separated from his mother at the time (alteration in original) (quoting *In re Michelet P.*, 419 N.Y.S.2d 704, 707 (2d Dep’t 1979))).

13. *Id.* at 421.

14. See Redlich et al., *supra* note 6, at 109 (noting that the main objective of law enforcement during an interrogation is to get the suspect to confess).

15. The FCA provides, in part:

A child shall not be questioned pursuant to this section unless he and a person required to be notified pursuant to subdivision three if present, have been advised: (a) of the child’s right to remain silent; (b) that the statements made by the child may be used in a court of law; (c) of the child’s right to have an attorney present at such questioning; and (d) of the child’s right to have an attorney provided for him without charge if he is indigent.

N.Y. FAM. CT. ACT § 305.2(7) (McKinney 2011).

after an arrest and prior to any questioning.<sup>16</sup> However, the FCA does not require the parent to attend the interrogation, nor does it obligate even an interested party, like an attorney or social worker, to be present.<sup>17</sup> The FCA simply requires that a parental figure be “notified” and “advised” of both the arrest and the juvenile’s *Miranda* rights.<sup>18</sup> For instance, if a parent or guardian is unavailable or unwilling to accompany the juvenile during the interrogation, the FCA provides that a “minor has the capacity to make a voluntary confession.”<sup>19</sup> An adjudicating family court in New York will determine the admissibility of the confession and subsequent inculpatory statements based on a “totality of the circumstances” test, which considers the juvenile’s age, intelligence, education, experience, and ability to comprehend the meaning and effect of his or her statement.<sup>20</sup> But, compared to other jurisdictions, New York’s totality of the circumstances test for determining whether a juvenile has made a valid waiver is less protective of the rights that *Miranda* sought to ensure. For example, New Jersey, Vermont, and Texas provide additional safeguards in the form of mandatory factors for consideration in their waiver admissibility tests that include consideration of young age,<sup>21</sup> consultation with adults not associated with the police, and approval of waiver from a neutral party, respectively.<sup>22</sup>

In an effort to create a law that is more protective of juveniles, and to find a palatable approach for the New York State legislature, both fiscally and practically, I first propose that the presence of a parent should not be a mandatory consideration under the court’s totality of the circumstances analysis. Second, the presence or absence of an attorney during an interrogation should be a required factor holding the greatest weight, alongside a juvenile’s age, in the FCA analysis. Third, while family courts may consider additional factors to determine the admissibility of a juvenile’s statements after *Miranda* waiver, New York State should impose a per se bar within the FCA that specifically prevents *Miranda* waivers obtained without the presence of an attorney or,

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16. FAM. CT. § 305.2(3).

17. FAM. CT. § 305.2(3), (7). “A minor has the capacity to make a voluntary confession, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his or her age alone . . . .” PAUL M. COLTOFF ET AL., 31 N.Y. JUR., CRIM. LAW: PROC. § 663 (2d ed. 2011) (citing *People v. Stephen J.B.*, 23 N.Y.2d 611 (1969)).

18. FAM. CT. § 305.2(7).

19. COLTOFF ET AL., *supra* note 17, § 663 (citing *Stephen J.B.*, 23 N.Y.2d 611).

20. *Id.* It is important to note that the FCA mandates that certain totality factors be considered like the “child’s age, the presence or absence of his parents or other persons legally responsible for his care and [parental] notification [requirement].” FAM. CT. § 305.2(8). However, New York jurisprudence has recognized additional, non-exclusive factors such as the juvenile’s age, intelligence, education, experience, and ability to comprehend the meaning and effect of his or her statement. *In re Abraham R.*, No. D-19746/08, 2009 WL 750179, at \*10 (N.Y. Fam. Ct. Mar. 20, 2009) (“These factors are not exclusive and a court may consider any other relevant evidence bearing upon the question of voluntariness.” (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979))).

21. Taken here to mean any youth under fourteen years old.

22. See discussion *infra* Part II.C.

alternatively, an interested adult,<sup>23</sup> during the interrogation of a juvenile under the age of fourteen—because those under the age of fourteen have a limited cognitive capacity.

This note first contends that the FCA wrongfully allows the parents of uninformed juveniles to waive their Fifth Amendment rights for them, which can potentially expose juveniles, especially younger juveniles (those under fourteen), to unknowing self-incrimination that could have been avoided had defense counsel been automatically appointed prior to interrogation.<sup>24</sup> Second, this note argues that the FCA and New York courts fail to consider a juvenile's age as the most dominant factor among those currently used, which allows a young juvenile to waive his rights absent any consultation with an attorney or neutral third party. Lastly, this note points out that the FCA's totality of the circumstances approach to determining whether a juvenile has waived his right to counsel during an interrogation is improperly balanced because it fails to consider the most relevant factor as prescribed in *Miranda*—the presence or absence of defense counsel. Furthermore, without the requirement that a young juvenile defendant consult with an attorney prior to interrogation, the FCA is insufficient in preserving Fifth Amendment protections that all defendants, including juveniles, are guaranteed. Although the totality of the circumstances analysis might be appropriate in circumstances involving older juveniles, the reviewing court should mandatorily include the presence or absence of defense counsel in its analysis of juveniles under fourteen.<sup>25</sup> But this additional prong should not be given the same weight in its application to juveniles over the age of fourteen because of their more matured cognitive capacity and accompanying experience. Family courts analyzing waivers from older juveniles should weigh the "presence" factor as it would any other factor. Ultimately, New York should adopt New Jersey's standard that rebalances how much weight courts apply to the totality of factors before the age of fourteen.

Part II will survey the history of *Miranda* warnings and the admission or suppression of post-*Miranda* statements by juveniles across the United States and, specifically, in New York. This section will also provide an overview of three other states that have adopted more protective safeguards to ensure that juveniles avoid

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23. For purposes of this argument, Vermont's definition of an "independent interested adult" is "one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution." *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982).

24. Ideally, the FCA should mandate that juveniles under the age of fourteen be provided consultation with an attorney prior to questioning, instead of only a parent or guardian, who then may or may not be present during the interrogation. This argument does not suggest that those juveniles over fourteen years of age are per se capable of voluntarily waiving their rights—quite the contrary. In fact, no state has adopted the ideal protection for juveniles—automatic appointment of an attorney upon arrest—most likely because of the budgetary concerns and the constraints that such a practice would have on law enforcement; especially because a large portion of crime in the United States is attributed to juvenile offenders. *See supra* notes 3–5 and accompanying text.

25. Additionally, the presence or absence of an attorney during an interrogation should be a required consideration under the FCA, and it should be given the greatest weight in the court's analysis for juveniles over the age of fourteen. In all cases involving children under fourteen, the juvenile's age should be the weightiest consideration, while the presence or absence of an attorney should be a close second.

both potential police coercion and involuntary *Miranda* waiver. Part III will dissect the FCA, and contemporary case law interpreting it, to reveal the law's constitutional shortcomings, especially in its application to impressionable juvenile suspects whose parents may lack the knowledge and foresight to consult with an attorney before waiving their child's *Miranda* rights. Part III will also discuss how most juveniles misinterpret the gravity of the *Miranda* waiver decision, and how the state cannot conscientiously expect valid waivers from younger children without adequate consultation with an attorney.

Part IV will discuss my proposals for legislative reform and the potential impact those modifications will have on courts' application and interpretation of the totality factors. Specifically, this note proposes that each mandatory factor be given a separate weight in the court's analysis, and that one of the mandatory factors, not currently listed, should be the consideration of whether an attorney or independent adult was present prior to or during the interrogation. This section will also discuss the public policy implications of juveniles' ability to avoid involuntary waivers, even if such avoidance is to the detriment of law enforcement. Finally, Part V will conclude with a discussion of the future for New York courts presiding over juvenile *Miranda* waiver cases.

## II. THE HISTORY AND DEGENERATION OF *MIRANDA* FOR JUVENILES

The Supreme Court has imposed upon law enforcement the duty to perform a mandatory prophylactic recitation of Fifth Amendment rights, commonly known as *Miranda* warnings, which must be read to a suspect once he is in custody.<sup>26</sup> Such rights have been duly extended to juveniles.<sup>27</sup> Based on the well-established principle that juveniles require additional safeguards to account for their uneven footing against law enforcement, many state legislatures have established legal requirements that protect juvenile suspects and determine whether they have voluntarily waived their *Miranda* rights before a custodial interrogation commences.<sup>28</sup> Prior to analyzing the ways in which several jurisdictions, outside of New York, apply *Miranda* to juveniles, the brief discussion below provides the doctrine's history, which is necessary to conceptualize how the breadth of *Miranda* protections have been narrowed by the courts and legislatures. In essence, lawmakers have tried tailoring their *Miranda* laws to account for the divergent considerations of juveniles' age, cognitive capacity, maturity, IQ, and foresight. I will then survey a few of these jurisdictions—namely, New Jersey, New York's neighboring state; Vermont, one of the nation's more liberal

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26. See *Miranda v. Arizona*, 384 U.S. 436, 463 (1966).

27. See *In re Gault*, 387 U.S. 1, 55 (1967) (“[T]he constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.”).

28. There are several examples of state laws that require police and courts to recognize that juveniles should be treated differently than adults during interrogations. For various examples of statutes requiring the presence of a parent, guardian, custodian, or attorney during a juvenile interrogation, see COLO. REV. STAT. § 19-2-511(1) (2010); CONN. GEN. STAT. § 46b-137(a) (2011); N.C. GEN. STAT. § 7B-2101(b) (2010); W. VA. CODE § 49-5-2(1) (2011). For various examples of statutes requiring that a parent, guardian, custodian, or attorney concur in a juvenile's waiver decision, see IND. CODE § 31-32-5-1(1)-(2) (2011); KAN. STAT. ANN. § 38-2333(a) (2011); MONT. CODE ANN. § 41-5-331(2)(b)-(c) (2011).

states;<sup>29</sup> and Texas, a conservative state<sup>30</sup>—and reveal how adopting both their laws and court precedents could better uphold juvenile Fifth Amendment rights in New York State.

*A. The Supreme Court: Miranda and its Application in Juvenile Interrogations*

In 1966, the U.S. Supreme Court decided *Miranda v. Arizona*, the seminal case that forms the foundation of the constitutional protection from self-incrimination during police interrogations.<sup>31</sup> The Court held that prior to custodial interrogations, police are required to warn suspects about their right to counsel and their privilege against self-incrimination.<sup>32</sup> The following year, the Supreme Court decided *In re Gault*<sup>33</sup> and extended the right to counsel and the privilege against self-incrimination to juveniles in delinquency proceedings.<sup>34</sup> The *Gault* Court said that it “appreciate[ed] that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not principle—depending upon the age of the child and the presence and competence of parents.”<sup>35</sup> Although *Gault* did not explicitly apply the *Miranda* holding to custodial interrogations involving juveniles, it did hold that “[i]f 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 . . . [and] that it was not the product of ignorance of rights or the adolescent fantasy, fright or despair.”<sup>36</sup>

The Court ultimately suppressed the juvenile’s statements when it found that “[t]he ‘confession’ of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald’s parents, without counsel and without advising him of his right to silence,” which demonstrated the Court’s recognition of both the importance of parental notification *and* the appointment of counsel to juveniles during interrogations.<sup>37</sup> In first construing *Gault*, courts generally applied *Miranda* protections to juveniles; notably, one court stated that “[w]hen [the] juvenile has not been given [an] opportunity for consultation, [with an adult, guardian, or counsel, the court] need not look to the

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29. Jeffrey M. Jones, *Mississippi Rates as the Most Conservative U.S. State; Vermont, Rhode Island, District of Columbia Have Highest Percentages of Liberals*, GALLUP, Feb. 25, 2011, available at <http://www.gallup.com/poll/146348/mississippi-rates-conservative-state.aspx>.

30. See BAY AREA CTR. FOR VOTING RESEARCH, THE MOST CONSERVATIVE AND LIBERAL CITIES IN THE UNITED STATES 6–8, <http://alt.coxnewsweb.com/statesman/metro/081205libs.pdf>.

31. 384 U.S. 436.

32. JOHN B. TAYLOR, RIGHT TO COUNSEL AND PRIVILEGE AGAINST SELF-INCRIMINATION: RIGHTS AND LIBERTIES UNDER THE LAW 355 (2004).

33. 387 U.S. 1 (1967).

34. *Id.* at 55; TAYLOR, *supra* note 32; FRANCIS BARRY MCCARTHY ET AL., JUVENILE LAW AND ITS PROCESSES: CASES AND MATERIALS 452 (3d ed. 2003).

35. *In re Gault*, 387 U.S. at 55 (discussing a juvenile’s waiver of Fifth Amendment protections).

36. *Id.*

37. *Id.* at 56.



totality of the circumstances to determine the voluntariness of the confession. The confession must be suppressed.”<sup>38</sup> This model appeared to offer relatively strong protections for juvenile defendants; however, the Supreme Court’s *Fare v. Michael C.* decision subsequently reshaped how courts adjudicate juvenile waiver cases.<sup>39</sup>

The *Michael C.* Court “abandoned reliance on adult guidance as the measure of the admissibility of a juvenile’s statement,”<sup>40</sup> and instead broadly applied a totality of the circumstances test.<sup>41</sup> Before *Miranda*, courts analyzed juvenile custodial interrogations under a Fourteenth Amendment analysis, recognizing “a juvenile’s need for adult counsel and guidance when subject to custodial interrogation as a requirement of the Due Process Clause.”<sup>42</sup> But *Michael C.* applied an adult *Miranda* analysis and, in so doing, slightly modified how courts determine whether a juvenile’s waiver is valid under the totality of the circumstances approach.<sup>43</sup>

Michael was a sixteen-year-old suspect in a 1976 murder-robbery in California.<sup>44</sup> At the time of his arrest, he was on probation and had recently served a one-year sentence in a youth corrections camp.<sup>45</sup> Michael also had prior juvenile adjudications for burglary and purse snatching.<sup>46</sup> When police read him the *Miranda* warnings, Michael asked if he could have his probation officer present during the interrogation.<sup>47</sup> The police refused to call his probation officer and told him: “If you want to talk to us without an attorney present, you can. If you don’t want to, you don’t have to. . . . That’s your right. You understand that right?”<sup>48</sup> Michael said he understood, waived his right to consult with an attorney, and then made several inculpatory statements that authorities used to petition the juvenile court, alleging he committed the murder and therefore should be adjudged a ward of its jurisdiction.<sup>49</sup> Michael appealed to have his statements suppressed on the ground that “his request to see his probation officer at the outset of the questioning constituted an invocation of his *Fifth*

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38. Commonwealth v. Markle, 475 Pa. 266, 270 (1977); McCARNEY ET AL., *supra* note 34, at 452 (citing *In re J.M.A.*, 542 P.2d 170, 173 n.2 (Ak. 1975) (“There appears to be general agreement, however, that a juvenile is entitled to the *Miranda* warnings concerning the right to remain silent, the use of any statements against him or her and the right to presence of counsel, to be appointed in case of indigency.”)).

39. 442 U.S. 707 (1979).

40. King, *supra* note 9, at 447 (citing *Fare v. Michael C.*, 442 U.S. 707, 724–25 (1979)).

41. *Id.*; see Grisso, *supra* note 11, at 5 (“This means that each individual case requires weighing the nature of the situation . . . and the characteristics of the suspect.”); *Michael C.*, 442 U.S. at 725.

42. King, *supra* note 9, at 449.

43. *See id.*

44. *Michael C.*, 442 U.S. at 707.

45. *Id.* at 710.

46. *Id.*

47. *Id.*

48. *Id.* at 711.

49. *Id.*

*Amendment* right to remain silent, just as if he had requested the assistance of an attorney.”<sup>50</sup>

The Supreme Court held that Michael’s request to see his probation officer during the interrogation was not dispositive of whether he invoked his constitutional right to counsel because a probation officer may not adequately protect the rights of an accused juvenile the same way that an attorney might.<sup>51</sup> The Court also reversed the California Supreme Court’s holding, which was in favor of suppressing the confession, and instead held that the “totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.”<sup>52</sup> The Court explained:

The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into 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.

...

At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his *Fifth Amendment* rights and voluntarily consents to interrogation.<sup>53</sup>

In applying these factors, the Court held that because Michael was sixteen years old, had been arrested several times, and had spent time in a youth camp, there was “no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be.”<sup>54</sup> And so the totality of the circumstances test was thereafter adopted by state courts and codified in New York.<sup>55</sup>

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50. *Id.* at 711–12.

51. *Id.* at 723–24.

52. *Id.* at 725.

53. *Id.* at 725–26 (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)).

54. *Id.* at 726.

55. Thirty-five states and the District of Columbia apply *Michael C.*’s totality of the circumstances test. King, *supra* note 9, at 452; see N.Y. FAM. CT. ACT § 305.2 (McKinney 2011); see also *Michael C.*, 442 U.S. at 725.

This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.

*Id.*

*B. New York's Approach to the Totality of the Circumstances Test*

Under New York law, a child over nine years old is “presumed competent to give sworn testimony in a criminal action or a juvenile delinquency proceeding.”<sup>56</sup> New York courts allow seven-year-olds to be the subject of juvenile delinquency proceedings.<sup>57</sup> Unfortunately, there is no age at which it is presumed that a juvenile suspect may validly waive his rights.<sup>58</sup> In every case, “the determination of voluntariness [of waiver] turns upon a judicial assessment of the particular facts and the individual characteristics of the juvenile.”<sup>59</sup> The FCA mandates, in relevant part, that:

7. A child shall not be questioned pursuant to this section unless he and a person required to be notified pursuant to subdivision three if present, have been advised:
  - (a) of the child's right to remain silent;
  - (b) that the statements made by the child may be used in a court of law;
  - (c) of the child's right to have an attorney present at such questioning; and
  - (d) of the child's right to have an attorney provided for him without charge if he is indigent.
8. In determining the suitability of questioning and determining the reasonable period of time for questioning such a child, the child's age, the presence or absence of his parents or other persons legally responsible for his care and notification pursuant to subdivision three shall be included among relevant considerations.<sup>60</sup>

In the absence of parents or an attorney, a juvenile can waive his *Miranda* rights pursuant to the FCA and the “mere failure of the police to seek the additional consent of an adult will not outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made.”<sup>61</sup> In other words, a juvenile's statement can be admissible notwithstanding the failure to notify the juvenile's parents so long as the juvenile has been “Mirandized.”<sup>62</sup> Furthermore, the statute allows for parents to unilaterally waive their child's *Miranda* rights regardless of whether the child

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56. *In re Abraham R.*, No. D-19746/08, 2009 WL 750179, at \*10 n.7 (N.Y. Fam. Ct. Mar. 20, 2009) (citing N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2011); FAM. CT. § 343.1(2); *In re Noel O.*, 855 N.Y.S.2d 318 (2008)).

57. *Id.* at \*10 (citing FAM. CT. § 301.2(1)).

58. *Id.* at \*9.

59. *Id.*

60. FAM. CT. § 305.2(7)–(8).

61. COLTOFF, *supra* note 17, § 663 (citing *People v. Stephen J.B.*, 23 N.Y.2d 611, 616–17 (1969)).

62. *See In re Raphael A.*, 385 N.Y.S.2d 288 (1st Dep't 1976). “Mirandized” means “[t]o read or recite (to an arrestee) rights under the *Miranda* rule.” BLACK'S LAW DICTIONARY 458 (3d pocket ed. 2006).

gives consent.<sup>63</sup> In addition to biological parents, courts recognize that the FCA allows other adults to waive a child's *Miranda* rights; such adults include "close blood relatives, whose protective relationship with children our society has also traditionally respected, as well as non-related adults whose functional relationship with the child is equally as close."<sup>64</sup>

In applying the FCA, New York courts analyze a number of factors when considering the circumstances surrounding a custodial interrogation of a juvenile. The relevant and mandatory factors include: "[1] the age of the juvenile, [2] whether or not the juvenile has had prior experiences with the criminal justice system, and [3] the presence or absence of a parent, guardian or other supportive adult."<sup>65</sup> However, "[t]hese factors are not exclusive and a court may consider any other relevant evidence bearing upon the question of voluntariness."<sup>66</sup> The other, less relevant factors not required for this discussion are: "the location of the interrogation, the time of day at which the questioning occurred, and whether the police took care to fully and clearly explain the import of the *Miranda* warnings to the child."<sup>67</sup> The critical question is whether prosecutors can prove, during a suppression hearing, "that the statement [made during interrogation] was voluntary beyond a reasonable doubt through a consideration of the totality of the circumstances."<sup>68</sup>

In a 2008 case, *In re Richard UU.*, the New York Appellate Division, Third Department, held that a fourteen-year-old boy voluntarily waived his *Miranda* rights when he was removed from his home and interviewed a day after the crime at a reasonable time of day, his caseworker was advised of his *Miranda* rights at the outset of the interrogation, and the boy "unequivocally indicated that he understood his rights and was willing to speak with the investigator."<sup>69</sup> Also, the court noted that the juvenile had "prior experience with law enforcement and was aware of the significance of his *Miranda* rights."<sup>70</sup> According to the court, this sequence of events, along with the juvenile's criminal history, satisfied the FCA's guidelines for a voluntary waiver.

In *In re Abraham R.*, a Queens County Family Court held that a ten-year-old burglary suspect voluntarily waived his *Miranda* rights while he, accompanied by his father, was interrogated by a detective in a police station.<sup>71</sup> After the juvenile's father

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63. See generally FAM. CT. § 305.2(7)–(8).

64. *In re Abraham R.*, 2009 WL 750179, at \*12 (quoting *Reno v. Flores*, 507 U.S. 292, 310 (1993)) (internal quotation marks omitted).

65. *Id.* at \*10.

66. *Id.* (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

67. *Id.* at \*19.

68. *In re Richard UU.*, 870 N.Y.S.2d 472, 475 (3d Dep't 2008) (citing *In re Paul QQ.*, 681 N.Y.S.2d 644, 645 (3d Dep't 1998)).

69. *Id.* at 476.

70. *Id.*

71. 2009 WL 750179, at \*10.

was notified that his son was a suspect, he voluntarily subjected his son to the interrogation. The father's consent satisfied the FCA's requirement that a juvenile suspect's parents be notified even though at the time of questioning the parents were divorced and legal custody of the juvenile was awarded to the mother.<sup>72</sup> Because neither the juvenile nor his father sought to terminate the interrogation, and the detective administered the standard *Miranda* warnings, the court found that both the father and the juvenile "knowingly, intelligently and voluntarily waived those rights and agreed that [the juvenile] would speak with [the] [d]etective."<sup>73</sup>

The court also noted that

it has been recognized that "the parent or other legal guardian of a juvenile delinquent, or juvenile offender, may invoke the right of counsel on his or her child's behalf." However, "[i]n order for the right to attach, the invocation of counsel by an uncharged defendant or by a parent standing in the defendant's shoes must be unequivocal."<sup>74</sup>

In this case, Abraham's mother argued that she was the only parent with legal custody of Abraham, and that she was the only one who could waive her son's *Miranda* rights.<sup>75</sup> Abraham's mother alleged that she invoked her son's right to an attorney during the detective's initial visit to her apartment several days before the interrogation.<sup>76</sup> However, the court rejected both arguments on the grounds that (1) Abraham's biological father was his legal father, meaning he had a recognized parental relationship with Abraham, and therefore the detective had no reason to question his status as a parent under the FCA; and (2) Abraham's mother's indication that she wished to speak to a lawyer at some time prior to the interrogation was equivocal and did not amount to a formal invocation of counsel for Abraham.<sup>77</sup> In the end, the juvenile's incriminating statements were admitted pursuant to a finding that the *Miranda* waiver was properly upheld as voluntary because the interrogation procedures squared with the FCA provisions requiring (1) parental notification, (2) the release of an arrested child to his parents, and (3) parental advisement of the child's *Miranda* rights prior to questioning.<sup>78</sup>

Most recently, the Appellate Division, Second Department, in *In re Jimmy D.*,<sup>79</sup> held that police detectives did not attempt to prevent a thirteen-year-old defendant from exercising his right to counsel because his mother gave police permission to question her son outside of her presence (effectively waiving her son's *Miranda*

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72. *Id.* at \*12.

73. *Id.* at \*9.

74. *Id.* at \*10 (alteration in original) (quoting *People v. Mitchell*, 2 N.Y.3d 272, 276 (2004)); see also *Richard UU.*, 870 N.Y.S.2d at 476.

75. *Id.* at \*11.

76. *Id.*

77. See *id.*

78. *Id.* at \*10.

79. 880 N.Y.S.2d 334 (2d Dep't 2009).

rights).<sup>80</sup> When Jimmy failed to ask for his mother's presence during questioning, the detectives seized the opportunity to tactfully imply that the juvenile might be eligible for counseling if he told them the truth about the sex offenses of which he was suspected.<sup>81</sup> Jimmy inculpated himself in the crimes and his statements were upheld as being voluntary.<sup>82</sup> In October 2010, the New York Court of Appeals affirmed the Second Department's decision because "Jimmy and his mother agreed to his being questioned outside his mother's presence, and there [was] no evidence that Jimmy asked for her during the questioning."<sup>83</sup>

In a vigorous dissenting opinion, however, Chief Judge Lippman expressed his uneasiness with the 4-3 majority holding in *Jimmy D.*<sup>84</sup> Judge Lippman argued that although Jimmy's initial waiver in the presence of his mother was valid under the FCA, once his mother left the room, Jimmy's waiver was invalidated.<sup>85</sup> Furthermore, Judge Lippman contested that not only was Jimmy entitled to an attorney, but that it was also "obvious, except perhaps to a child, that a confession to criminal wrongdoing is not a condition of access to psychological counseling."<sup>86</sup> In the end, thirteen-year-old Jimmy was denied both the guidance of his mother and the assistance of an attorney, "at a time when it would have been crucial to the protection of his interests."<sup>87</sup>

Other jurisdictions outside New York have adopted different procedures and considerations when applying the totality of the circumstances test; these safeguards provide stronger Fifth Amendment protections for juveniles confronted with a decision to waive their *Miranda* rights.

### C. Comparisons: Other Jurisdictions' Legal Treatment of Juvenile *Miranda* Waiver

Three states in particular, New Jersey, Vermont, and Texas, provide alternative and more robust protections for a juvenile confronted with a *Miranda* waiver decision. These protections are practical and unlikely to frustrate law enforcement initiatives. For those reasons, the safeguards implemented by these three states should be influential in reforming the FCA. These state policies range from placing greater

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80. *Id.* at 335.

81. *Id.* at 335–36.

82. *Id.* at 336.

83. *In re Jimmy D.*, 15 N.Y.3d 417, 423 (2010).

84. *Id.* at 425 (Lippman, J., dissenting).

85. *See id.* Judge Lippman argued:

It follows that any representation in the course of the interrogation tending to impair the interogee's understanding of the consequences of his or her continuing waiver must be deemed to invalidate the waiver and render the product of consequent interrogation inadmissible, unless the representations are conclusively shown not to have clouded the interogee's comprehension of the basic risks entailed by continued participation in the interrogation.

*Id.* at 428 (Lippman, J., dissenting) (citing *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

86. *Id.* at 430.

87. *Id.*

emphasis on the child's age, under the totality of the circumstances analysis, to mandating that a juvenile consult with an independent adult prior to an interrogation regardless of a parent's availability.<sup>88</sup> While New Jersey is arguably the most protective of juveniles under the age of fourteen, Vermont requires some consultation with an interested adult regardless of the juvenile's age, and Texas provides for a neutral third party—a magistrate judge—to determine whether waiver is valid before an interrogation commences. Even though none of these states applies the greatest protection—appointing counsel prior to every juvenile interrogation<sup>89</sup>—they all appear to use procedures that are more protective than those employed in New York.

### 1. *New Jersey*

Two cases decided over the past decade or so, *State v. Presha*<sup>90</sup> and *In re A.S.*,<sup>91</sup> have recognized the importance of parental involvement with regard to juvenile interrogations and *Miranda* waiver. In New Jersey, “[t]he requirement of voluntariness applies equally to adult and juvenile confessions.”<sup>92</sup> Generally, New Jersey Supreme Court decisions reflect a greater cognizance of a child's vulnerability when determining whether waiver is voluntary outside the presence of a parent.<sup>93</sup> In contrast to New York, New Jersey's jurisprudence on juvenile *Miranda* waivers places the greatest weight in the totality of the circumstances analysis on age and the parent's presence or absence.<sup>94</sup> Moreover, New Jersey courts have consistently held that the totality of the circumstances analysis cannot be applied to juveniles fourteen years of age and younger.<sup>95</sup> As such, the New Jersey Supreme Court has held that “when a parent or legal guardian is absent from an interrogation involving a juvenile that young, any

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88. See, e.g., VT. CONST. ch. I, art. X, § 1; *State v. Presha*, 748 A.2d 1108 (N.J. 2000); *In re E.T.C.*, 449 A.2d 937 (Vt. 1982).

89. See *supra* text accompanying note 24.

90. 748 A.2d 1108.

91. 999 A.2d 1136 (N.J. 2010).

92. See e.g., *Presha*, 748 A.2d at 1113 (citing N.J. STAT. ANN. § 2A:4A-40 (2012) (“All rights guaranteed to criminal defendants by the Constitution of the United States and the Constitution of this State . . . shall be applicable to cases arising under the [New Jersey Code of Juvenile Justice]” (alteration in original))).

93. *Presha*, 748 A.2d at 1114. For instance, when taking into account confessions by juveniles of any age, courts should consider the adult's absence as a highly significant factor among all other facts and circumstances. By “highly significant factor” we mean that courts should give that factor added weight when balancing it against all other factors. By elevating the significance of the adult's role in the overall balance, we are satisfied that the rights of juveniles will be protected in a manner consistent with constitutional guarantees and modern realities.

*Id.*

94. *Id.*

95. *Id.* at 1115 (“New Jersey statutes and court rules contain numerous provisions creating age-differential standards set at fourteen.”).

confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable.”<sup>96</sup>

The New Jersey Supreme Court held in *Presha* that having parents accompany juveniles during interrogation protects both the juvenile’s interests as well as the truthfulness of any statements made to the police.<sup>97</sup> In *Presha*, the court affirmed the Appellate Division’s holding that a seventeen-year-old’s confession was voluntary after consideration of the totality of circumstances, “including the juvenile’s age at the time of his statement, his clear desire to speak outside the presence of his mother, his mother’s initial agreement to be absent, and his fair treatment by police.”<sup>98</sup>

More importantly, the court also held that the absence of a parent or guardian from the interrogation was one of the most significant facts in assessing whether the juvenile’s waiver of *Miranda* was knowing, intelligent, and voluntary.<sup>99</sup> The court noted a caveat, however, that it should treat juveniles under the age of fourteen as a “special circumstance” when considering their ability to voluntarily waive *Miranda* without an adult present.<sup>100</sup> In that scenario, the parent’s absence will bar the admissibility of the juvenile’s inculpatory statement “as a matter of law, unless the parent or legal guardian is truly unavailable.”<sup>101</sup> For suspects under the age of fourteen, the court held:

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96. *Id.* at 1114.

97. *Id.* at 1113–14 (citing *In re Carlo*, 225 A.2d 110, 121 (N.J. 1966)).

98. *Id.* at 1110. The court made a specific finding as to the totality of the circumstances in that case: [T]he fact that defendant was just two weeks shy of his seventeenth birthday; defendant had extensive prior encounters with law enforcement; had been giving [sic] his *Miranda* rights on several of those encounters; defendant had waived those rights . . . in the presence of his mother; defendant had agreed with his mother that she would not be present during his interrogation; and defendant had not attempted to either invoke his right to counsel or expressed a desire to speak to his mother at any time during the interrogation. Further, the interrogation, which occurred in spurts of forty to fifty minute periods, was neither grueling nor strenuous for defendant. Moreover, defendant never challenged the truth of his confession nor claimed that his investigators used tactics that overbore his will.

*Id.* at 1112.

99. *Id.* at 1114.

100. *Id.* at 1110. “New Jersey statutes and court rules contain numerous provisions creating age-differential standards set at fourteen.” *Id.* at 1115. (citing N.J. STAT. ANN. § 2A:4A-26 (2012)); see also *In re Registrant J.G.*, 777 A.2d 891, 904–05 (N.J. 2001) (“Other statutory and rule provisions reflect the important distinction between juveniles over and under the age of fourteen.”); see, e.g., N.J. STAT. ANN. § 2A:4A-35 (authorizing under specified circumstances the release of juveniles over age fourteen on their own recognizance); N.J. STAT. ANN. § 2A:4A-61 (authorizing for juveniles over fourteen retention of photographs and fingerprint records for criminal identification purposes).

101. *Presha*, 748 A.2d at 1110. In any event, the court also held that “[r]egardless of the juvenile’s age, law enforcement officers must use their best efforts to locate the adult before beginning the interrogation and should account for those efforts to the trial court’s satisfaction.” *Id.* The court implied this approach is consistent with other jurisdictions, like Massachusetts, that adopted similar applications of *Miranda* for younger juveniles. See *id.* at 1114 (citing *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983)).



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[A]n evaluation of the totality of circumstances would be insufficient to assure the knowing, intelligent, and voluntary waiver of rights. Accordingly, when a parent or legal guardian is absent from an interrogation involving a juvenile that young, any confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable. That approach is consistent with other jurisdictions that have recently adopted the same or similar rule. *We cannot ignore the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation. In such a case, we conclude that the totality of the circumstances is not sufficient to ensure that the child makes an intelligent and knowing waiver of his rights.*<sup>102</sup>

In other words, *Presba* held that, in New Jersey, statements made during custodial interrogations by juveniles under the age of fourteen, and outside the presence of a parent, will not be analyzed by a totality of the circumstances test unless every effort to produce the parent has proven fruitless. While the availability of the parent is a consideration that resembles one of the mandatory factors examined under New York's FCA, New Jersey courts require a rebuttable presumption of involuntary waiver. New York, however, simply treats the parent's presence as one of three factors that shares equal weight with both the age factor and the "prior experiences with the criminal justice system" factor.<sup>103</sup>

Ten years later, in *In re A.S.*,<sup>104</sup> the same court held that in cases involving a conflict of interest between the victim and the juvenile suspect's parent, another adult is required to be present to counsel the juvenile.<sup>105</sup> In that case, the defendant was a fourteen-year-old girl with an IQ of eighty-three.<sup>106</sup> The court found that although the juvenile's adoptive mother was present during the interrogation, her presence did not adequately protect the juvenile because of her conflicting concern for the victim, her four-year-old grandson.<sup>107</sup> During the interrogation, the mother read A.S. her *Miranda* rights, and the police "failed to correct the mother's later misstatements about those rights, and failed to stop the inquiry when A.S. ma[de] . . . efforts to assert her right to

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For the purpose of obtaining the waiver, in the case of juveniles who are under the age of fourteen, we conclude that no waiver can be effective without this added protection . . . that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights.

*Id.*

102. *Id.* at 1114 (emphasis added) (citing *In re B.M.B.*, 955 P.2d 1302, 1312 (Kan. 1998)).

103. *In re Abraham R.*, No. D-19746/08, 2009 WL 750179, \*10 (N.Y. Fam. Ct. Mar. 20, 2009).

104. 999 A.2d 1136 (N.J. 2010).

105. *Id.* at 1150.

106. *Id.* at 1138. An IQ score of eighty-three is considered to be in the "dull normal intelligence [range,] which is also considered borderline mental retardation." KIDS IQ TEST CENTER: DISCOVER YOUR CHILD'S IQ, <http://www.kids-iq-tests.com/iqscores/83.html> (last visited Feb. 17, 2012).

107. *In re A.S.*, 999 A.2d at 1138.

silence that were overcome by her mother's badgering of her in the police presence."<sup>108</sup> Applying the totality of the circumstances test, the court found that the juvenile's confession must be suppressed. Ultimately, the court declined to adopt a categorical rule requiring an attorney to be present when there is a parental conflict of interest: "based on a familial relationship with the victim or another involved in the investigation. . . . [and that] another adult—not necessarily an attorney—may be able to fulfill the parental assistance role envisioned by *Presha*."<sup>109</sup>

New Jersey does not require an attorney to be present during a juvenile's custodial interrogation, even when a parent proves ineffective in preserving the juvenile's Fifth Amendment rights. However, the state does place a heavy emphasis on whether the parent is or is not present when balancing the totality of the circumstances to determine the admissibility of a post-*Miranda* statement. The state also ignores the totality of the circumstances test, in place of a bright-line rule, for juveniles under the age of fourteen unless the parent is truly unavailable. The *Presha* court noted the utility of establishing such a "bright line rule" . . . [because it would] be easy for the police to implement."<sup>110</sup> The history of this recognition stems from New Jersey's "statutory and decisional law of a substantial distinction in the criminal responsibility of juveniles over and under the age of fourteen [that] traces its roots to the infancy defense at common law."<sup>111</sup> Specifically, the "infancy defense was grounded in an unwillingness to punish individuals incapable of forming criminal intent and thus incapable of assuming responsibility for their acts."<sup>112</sup> This defense is applied to children under the age of fourteen.<sup>113</sup> In sum, New Jersey jurisprudence on the admissibility of inculpatory statements after *Miranda* has been waived notably reflects greater protections for younger juveniles.

## 2. Vermont

The State of Vermont allows for the presence of a parent or guardian, but also requires an interested independent adult (not necessarily an attorney) to assist a juvenile during a custodial interrogation.<sup>114</sup> In accordance with the Vermont Constitution, a juvenile's *Miranda* waiver is considered voluntary and intelligent when the following criteria are met:

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108. *Id.*

109. *Id.* at 1150.

110. *Presha*, 748 A.2d at 1114–15 (citing *State v. Hartley*, 511 A.2d 80, 98 (N.J. 1986)).

111. *In re Registrant J.G.*, 777 A.2d 891, 905 (N.J. 2001).

112. *Id.* at 906 (quoting Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 512 (1984) (footnote omitted)).

113. *See id.* at 905–06 (citing *State v. Monahan*, 104 A.2d 21, 28–29 (N.J. 1954)).

114. *See State v. Mears*, 749 A.2d 600, 604 (Vt. 2000).

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- (1) he must be given the *opportunity to consult with an adult*;
- (2) that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and
- (3) the *independent interested adult* must be informed and be aware of the rights guaranteed to the juvenile.<sup>115</sup>

As long as the police ensure that these criteria are met prior to interrogation, a juvenile's *Miranda* waiver in Vermont will be considered voluntary regardless of the juvenile's age.<sup>116</sup>

In *In re E.T.C.*,<sup>117</sup> the Vermont Supreme Court adopted the reasoning of the Indiana Supreme Court and stated:

This State, like all the others, has recognized the fact that juveniles many times lack the capacity and responsibility to realize the full consequences of their actions. As a result of this recognition minors are unable to execute a binding contract, unable to convey real property, and unable to marry of their own free will. 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.<sup>118</sup>

In this case, Vermont police questioned E.T.C., a fourteen-year-old burglary suspect.<sup>119</sup> At the time of the crime and subsequent questioning, E.T.C. was in the residential custody of the State Department of Social and Rehabilitation Services for his role in a prior crime.<sup>120</sup> Once the police administered the *Miranda* warnings, the director of the department instructed E.T.C. to be "straight" with the police.<sup>121</sup> Thereafter, E.T.C. made incriminating statements about his involvement in the crime.<sup>122</sup> The

115. *In re E.T.C.*, 449 A.2d 937, 930 (Vt. 1982) (citing *Commonwealth v. Barnes*, 394 A.2d 461, 464 (Pa. 1978); *Commonwealth v. Roane*, 329 A.2d 286, 288 (Pa. 1974); *Lewis v. State*, 288 N.E.2d 138, 142 (Ind. 1972)); VT. CONST. ch. I, art. 10) (emphasis added).

116. In *State v. Mears*, a juvenile defendant, suspected of a murder, argued that his inculpatory statements to police should have been inadmissible because they were made over his father's objection that an attorney be hired to represent the juvenile before questioning recommenced. *See* 749 A.2d 600, 603 (Vt. 2000). The juvenile claimed that he did not have a "meaningful consultation" with his father. *Id.* at 604. The court found that all three of the Vermont constitutional protections with regard to juvenile *Miranda* waiver were satisfied, therefore the juvenile's statements were admissible notwithstanding his father's efforts to hire an attorney before the juvenile confessed. *Id.* at 603-04.

117. 449 A.2d 937 (Vt. 1982).

118. *Id.* at 939 (alteration in original) (citing *Lewis v. State*, 288 N.E.2d 138, 141-42 (Ind. 1972)).

119. *Id.* at 938.

120. *Id.*

121. *Id.* at 939.

122. *Id.*

court concluded that because the director of the department did not engage in a private consultation with E.T.C., but in fact coerced E.T.C. to testify, the director's involvement was inadequate to protect E.T.C.'s Fifth Amendment rights.<sup>123</sup> Ultimately, the Vermont Supreme Court held that a "[w]aiver will not be presumed from a silent record absent a showing at least of the assistance of an *independent, impartial, responsible, interested adult consulting with the juvenile*."<sup>124</sup> The court's recognition of the importance of independent and private consultation for juvenile suspects arguably harkens back to what *Miranda* warnings ultimately promote, which is the right to remain silent during interrogation and the right to consult with an attorney.

The Vermont courts' history in recognizing the importance of this type of independent consultation, and even representation, for juvenile defendants traces back to the state's *guardian ad litem*<sup>125</sup> provision, which reads:

Whenever a minor is charged with a crime in any court and is not represented by counsel the court shall forthwith appoint a guardian ad litem to defend the interests of the minor. Whenever the minor is charged with a felony in any court, he shall be represented by counsel.<sup>126</sup>

In applying this provision, the Supreme Court of Vermont held in *In re Dobson* that "[t]he legislature has now made clear [through the guardian ad litem statute] its express opposition to uncounselled waiver of rights by a minor in criminal actions" and therefore "in all cases where a minor is charged with a crime in any court, a guardian ad litem shall be appointed."<sup>127</sup> The court further reasoned that "[t]he minor is presumed incapable and under disability, hence the need of a guardian ad litem to weigh alternatives for him."<sup>128</sup> Ever since *Dobson* was decided in 1965, before the U.S. Supreme Court decided *Miranda*, Vermont has recognized that juvenile defendants should always be able to consult an independent third party prior to the State's commencement of criminal prosecution. The *E.T.C.* court extended this notion to custodial interrogations involving juveniles.<sup>129</sup>

In essence, Vermont's jurisprudence reflects the importance of providing juveniles with a private, independent consultation with an adult—not necessarily an attorney—prior to custodial interrogation. The state's hiring of an attorney during every interrogation could prove very costly. But, this approach may prove less burdensome on a state's budget, and still provides greater protection than New York's FCA because it presents the juvenile with an opportunity to receive advice and guidance.

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123. *Id.* at 940.

124. *Id.* (emphasis added).

125. A "guardian ad litem" is "[a] guardian, usu[ally] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." BLACK'S LAW DICTIONARY 321 (3d pocket ed. 2006).

126. VT. STAT. ANN. tit. 33, § 678 (repealed 1967).

127. 212 A.2d 620, 622 (Vt. 1965).

128. *Id.*

129. *See supra* notes 125–27.

### 3. *Texas*

In Texas, a juvenile must sign his *Miranda* waiver in front of a magistrate judge before it will be considered voluntary, and before police may begin questioning.<sup>130</sup> In a 1974 case, *In re S.E.B.*, the Court of Civil Appeals of Texas held that a juvenile's confession was inadmissible because he was not represented by an attorney when he waived his right to remain silent, even though he and his parents were advised of his *Miranda* rights prior to the interrogation.<sup>131</sup> While this case arguably provided some of the most protective safeguards for juveniles facing custodial interrogations, it was decided prior to *Michael C.* in 1979. This case illustrates how, at a point in time, courts accorded juveniles the full panoply of Fifth Amendment rights. These rights, however, have since been slightly abrogated. Nevertheless, Texas Family Code section 51.09 provides, in relevant part, that:

[A]ny right granted to a child by this title or by the constitution or laws of this state or the United States may be waived in proceedings under this title if:

- (1) the waiver is made by the child and the attorney for the child;
- (2) the child and the attorney waiving the right are informed of and understand the right and the possible consequences of waiving it;
- (3) the waiver is voluntary; and
- (4) *the waiver is made in writing or in court proceedings that are recorded.*<sup>132</sup>

Even though section 51.09 provides procedural safeguards for children confronted with a decision to waive their rights, Texas courts also use a totality of the circumstances test to determine whether waiver was actually voluntary.<sup>133</sup> For instance, courts will look to the juvenile's intelligence, the length of questioning by the police, and whether any aspect of obtaining the waiver was coercive.<sup>134</sup> By simply imposing an additional procedure on the police—one that requires a neutral judicial officer to witness a waiver signing—Texas appears to hold a greater appreciation of the procedural protections that should be afforded to juveniles. A synopsis of the legislative history behind section 51.09, which was provided in a concurring opinion written by Judge Clinton in *Carter v. Texas*,<sup>135</sup> further sheds light on Texas's procedural safeguards:

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130. TEX. FAM. CODE ANN. § 51.09 (West 2009).

131. 514 S.W.2d 948, 950–51 (Tex. Civ. App. 1974).

132. FAM. CODE § 51.09 (emphasis added).

133. See *Cammon v. State*, 672 S.W.2d 845, 848–49 (Tex. App. 1984) (citing *Darden v. State*, 629 S.W.2d 46 (Tex. Cr. App. 1982)).

134. *Id.* at 849.

135. 650 S.W.2d 793 (Tex. Crim. App. 1983).

In sum, the statutory scheme for taking a confession from a child outside the presence of and without concurrence from his lawyer is that he first be warned of rights by a magistrate and then, once a confession is obtained, that he sign it in front of a magistrate upon a determination that those rights were properly waived.<sup>136</sup>

This additional safeguard ensures that a neutral party, other than the juvenile suspect and the police, determines whether the juvenile's waiver actually was knowing, intelligent, and voluntary. New York State, on the other hand, does not incorporate any procedural component to the FCA that would provide an added layer of protection for juveniles making such decisions.

*D. A Different Approach: Adopting Other States' Miranda Protections*

A survey of New Jersey, Vermont, and Texas legislative histories, statutes, and jurisprudence proves that more protective methods of determining juvenile waiver admissibility are available to New York. While none of these procedures are as ideal as a per se rule that an attorney always accompany a juvenile during a custodial interrogation, any one, or all of them could potentially revamp the FCA so that fewer juveniles face interrogations unaccompanied by an attorney, parent, or interested adult. Currently, the FCA fails to adequately weigh the most critical factors in the totality of the circumstances test for determining a voluntary *Miranda* waiver.

### III. THE FCA ALLOWS FOR INVOLUNTARY *MIRANDA* WAIVERS

Since New York State codified the *Michael C.* totality of the circumstances test in the FCA, its application by New York courts has allowed for a violation of the Fifth Amendment in three separate ways: (1) the test requires that a parent only be notified that the juvenile is in custody, but does not absolutely require the parent's presence during interrogation; however, if a parent is present, the parent can waive the juvenile's rights for him; (2) it fails to consider a juvenile's age as the most relevant factor among the others and in turn allows a young juvenile to waive his rights absent any consultation with an attorney or third party; and (3) it fails to include as mandatory for consideration the presence or absence of an attorney during questioning.<sup>137</sup>

The root of these problems trace to the legislature's enactment of the FCA and family courts' application of the same. First, the FCA mandates consideration of only three factors, one of which may actually prove to be a harmful consideration: the notification/presence of a parent during the interrogation. Second, each factor holds no greater weight than the others in a court's analysis. Finally, these systemic problems

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136. *Id.* at 799 (Clinton, J., concurring).

137. N.Y. FAM. CT. ACT § 305.2(8) (McKinney 2011) ("In determining the suitability of questioning and determining the reasonable period of time for questioning such a child, [1] the child's age, [2] the presence or absence of his parents or other persons legally responsible for his care and [3] notification pursuant to subdivision three shall be included among relevant considerations."). *See generally In re Abraham R.*, No. D-19746/08, 2009 WL 750179 (N.Y. Fam. Ct. Mar. 20, 2009).

are bolstered by the FCA's text because courts are mandatorily constricted to consider only three factors that, when considered together, are not sufficient to determine whether waiver was voluntary. Each of these issues will be addressed below.

*A. The Presence of Parents During Custodial Interrogations Does Not Provide Ample Constitutional Protection*

Parents should not be able to waive their children's rights without first consulting an attorney. More often than not, parents fail to consider the consequences of *Miranda* waiver; there has been a long-standing "doubt that many parents have sufficient understanding or appreciation of the juvenile's rights or of the consequences of waiver to be able to provide meaningful advice."<sup>138</sup> Empirical evidence suggests that most parents do not weigh the "major potential consequences of rights waiver [a]s a necessary part of adequate protection for juveniles."<sup>139</sup> For example, in *Abraham R.*, the defendant was ten years old, confessed to the crime, and was convicted of burglary, in part, because his father waived his *Miranda* rights on his behalf.<sup>140</sup>

A study conducted by psychologist Dr. Thomas Grisso addressed the question of whether "parents generally perceive juveniles as having a legitimate claim to silence and counsel when suspected of legal wrongdoing?"<sup>141</sup> The results of that study, among other sources analyzed by Grisso, suggest the answer is no.<sup>142</sup> Additional evidence shows that, because many parents play a disciplinarian role much like the police, their presence can pressure juveniles into confessing instead of remaining silent.<sup>143</sup> Simply put, the role of parents in the interrogation process can sometime cause greater harm to a juvenile's legal interests.<sup>144</sup>

*B. Younger Juveniles Cannot Voluntarily Waive Miranda, and the FCA Does Not Adequately Account for Juveniles' Limited Cognitive Capacity*

While the FCA requires courts to consider factors in addition to the juvenile's age, it fails to recognize that the juvenile's age should be, more often than not, the controlling factor when determining whether waiver of *Miranda* rights was voluntary. Empirical research suggests that "preteen suspects are rarely able to appreciate the typical *Miranda* warnings presented to them, thus making any waiver of questionable

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138. THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 168 (1981).

139. *Id.* at 189.

140. *See In re Abraham R.*, 2009 WL 750179, at \*10.

141. *See* GRISSO, *supra* note 138, at 168 (emphasis removed).

142. *See id.* at 168.

143. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 *PSYCHOL. PUB. POL'Y & L.* 63, 80 (2008).

144. *Id.* ("Parental pressure to confess or provide inculpatory information seems at odds with protecting the child's welfare.") (citation omitted).

validity.”<sup>145</sup> Because the FCA allows police to seek a *Miranda* waiver only after attempting to notify parents that the juvenile is in custody, the FCA exposes some younger juveniles, unaccompanied by their parents or an attorney, to questioning about crimes when they do not have the cognitive capacity to fully comprehend the consequences of waiver. Even though New York courts also consider the juvenile’s prior experiences with law enforcement, “study after study has shown that there is no relationship between [the] amount of juvenile court experience and the ability to understand the *Miranda* warnings.”<sup>146</sup> Moreover, scientific studies continue to show that “younger children lack the capacity to waive *Miranda* rights.”<sup>147</sup> If the FCA allows younger juveniles to waive<sup>148</sup> their *Miranda* protections without first conferring with an attorney, a parent, an interested adult, or other third party, most juveniles will undoubtedly inculcate themselves during an interrogation. The FCA does not provide pre-interrogation procedures that sufficiently mitigate the risks of misunderstood waiver.<sup>149</sup>

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145. *Id.* at 82.

146. Grisso, *supra* note 11, at 11.

This sounds odd until one realizes that (a) some youths with lots of experience do learn a lot, and (b) some youths with lots of experience do not learn anything at all by their experiences, and (c) the two types nullify each other, so that knowing simply that a youth “has lots of experience” is of no predictive value at all when trying to decide about degree of understanding.

*Id.*

147. King, *supra* note 9, at 460.

The developing body of neuroscience highlights the error in these [*Miranda* waiver] decisions. Compared to adults, adolescents have limited access to their frontal lobes and limited ability to coordinate the different brain regions needed for reasoning and problem solving. They are unlikely to have working memories adequate to hold all the *Miranda* warnings in mind while considering the ramifications of talking or not talking. Formulations of the totality test . . . [do] not protect children from their immaturity.

*Id.* at 461–62.

148. The term “waive” is especially difficult for some younger juveniles to comprehend. Rogers et al., *supra* note 143, at 78 (“Of even greater concern, many juvenile warnings expect youthful suspects to understand and accurately apply the word *wave* as a key component of their decision making. However, *wave* requires more than a high school education for adequate comprehension.”).

149. Additionally, the FCA invites false confessions from younger and easily impressionable juvenile defendants. Popular interrogation tactics require police to interrogate under an “assumption of guilt,” which has proven, in some cases, to increase the possibility of obtaining false confessions from impressionable juveniles. Redlich et al., *supra* note 6, at 110. The *Miranda* decision acknowledged that police interrogations are “inherently coercive” because the suspect is coerced into confessing guilt via “an array of psychologically oriented techniques.” *Id.* at 109.

Police typically use three types of techniques to interrogate suspects: (1) Minimization techniques that “mitigate the offense or lessen the strength of the evidence, such as feigning sympathy, friendship, or understanding, and flattering suspects”; (2) maximization techniques that “exaggerate the strength of the evidence and use a strong-arm approach, such as intimidation and veiled threats”; and (3) “trickery and deception” (e.g., telling suspects they have an eyewitness or fingerprints on the weapon when they do not) to obtain statements of guilt.” *Id.* Some interrogation manuals “suggest using the same psychologically oriented themes with juvenile suspects as used with adult suspects.” *Id.* at 110.



Furthermore, the age of fourteen is not an arbitrary line. In addition to New Jersey, several other states like Kansas, North Carolina, and West Virginia, also denote fourteen as the pivotal age at which a court should weigh factors differently than with older youths to determine whether a juvenile's waiver is, in fact, voluntary.<sup>150</sup> Also, a 2008 study examined the correlation between reading levels and juvenile comprehension of *Miranda* warnings.<sup>151</sup> The findings revealed that even though the "right to remain silent" component of the standard *Miranda* warning is easily understandable, "all other *Miranda* components require an average of at least a sixth-grade education for 75% comprehension and close to a ninth-grade education . . . for full comprehension."<sup>152</sup> This study further concludes that "juvenile *Miranda* warnings are far beyond the abilities of the more than 115,000 preteen offenders charged annually with criminal offenses."<sup>153</sup>

*C. An Attorney's Presence or Absence Is Not Among the Required Factors*

The FCA requires only three factors be included in the court's analysis when considering the totality of the circumstances: (1) the juvenile's age, (2) the presence or absence of his parents, and whether the parent or legal guardian was contacted, or whether there was an attempt to reach them, prior to obtaining a *Miranda* waiver; and (3) the number of previous encounters between the juvenile and law enforcement. In practice, New York courts apply several other subordinate factors, as the Supreme Court in *Michael C.* held that totality of the circumstances factors are not exclusive and that state courts may consider other relevant factors that can prove voluntariness

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By subjecting juveniles without an attorney to these types of interrogations, the state runs the risk of obtaining a false confession from juveniles, undermining our criminal justice system. If a false confession is extracted, and the totality of the circumstances is applied to determine whether a child under the age of fourteen has waived his *Miranda* rights without (1) a parent even being present, which is arguably no more helpful, and (2) without an attorney being present, then the juvenile runs the high risk of being adjudicated for a crime he did not commit, which could have been prevented if he had been provided with adequate representation.

On June 16, 2011, the U.S. Supreme Court held that police must consider a juvenile's age before questioning in order to decide whether to warn the juvenile about their Fifth Amendment rights. *See* *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011) ("Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances."). It has been predicted that the Court "did not answer all the questions that its ruling may raise in the minds of police officers dealing with a youthful suspect" and that "[a]nswers may have to come as lower courts apply the new ruling." Lyle Denniston, *Opinion Analysis: Children's Age and Miranda*, SCOTUSBLOG (June 16, 2011, 11:18 AM), <http://www.scotusblog.com/2011/06/opinion-analysis-childrens-age-and-miranda/>.

150. *See* KAN. STAT. § 38-2333(a) (2011); *In re B.M.B.*, 955 P.2d 1302, 1312 (Kan. 1998) ("We cannot ignore the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation. In such a case, we conclude that the totality of the circumstances is not sufficient to ensure that the child makes an intelligent and knowing waiver of his rights."); N.C. GEN. STAT. § 7B-2101(b) (2011); W. VA. CODE § 49-5-2(l) (2011).

151. Rogers et al., *supra* note 143, at 72.

152. *Id.*

153. *Id.* at 75.

of waiver.<sup>154</sup> Other considerations include the time of day the interrogation occurred, the location of the interrogation, and whether the police engaged in a thorough explanation of the *Miranda* warnings.<sup>155</sup>

Only requiring courts to consider whether a parent was present during the interrogation is not always sufficient for determining the voluntariness of waiver. Parents who waive their child's *Miranda* rights and submit him to interrogation sometimes "lack consideration for the potential effects of the juvenile's statement on adjudicatory and dispositional consequences."<sup>156</sup> Many advocates argue that the only adequate protection for juveniles during interrogations is to automatically appoint legal counsel prior to a juvenile consenting to a *Miranda* waiver.<sup>157</sup> This is "because neither juveniles nor parents can be expected to understand the consequences of confession . . . [and] [a]ny parental advice providing less protection than this would be seen as placing the juvenile at the mercy of a court system."<sup>158</sup>

These problems create loopholes through which police can obtain involuntary waivers from juveniles while staying within the textual parameters of the FCA. In essence, the law allows and encourages this type of waiver, which is why it must be amended to comport with the Fifth Amendment. The following discussion will analyze exactly what changes can and should be made.

#### IV. THE FCA SHOULD BE AMENDED TO ADEQUATELY PRESERVE FIFTH AMENDMENT PROTECTIONS FOR JUVENILES

Although the FCA has many defects that can expose juvenile defendants to coercive police tactics, several minor adjustments can provide greater protections for juveniles without seriously encumbering New York's police procedures. Ultimately, the FCA's application of the totality of the circumstances approach in juvenile *Miranda* waiver cases takes into consideration a number of factors, which, when considered together, create an illusory safeguard against involuntary waiver. These factors appear to be easily satisfied so long as there is no blatant coercion by the police in obtaining the waiver, and if reasonable efforts have been made to notify the juvenile's parent that he is in custody and subject to interrogation. This rendition of the totality of the circumstances is not enough to ensure Fifth Amendment protections for juveniles. Courts should consider factors outside of those mandated by the FCA, as originally stated in *Michael C.*, and again reiterated in *Abraham R.*: "[t]hese factors are not exclusive and a court may consider any other relevant evidence

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154. See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) ("The totality approach permits—indeed, it mandates— inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him." (citing *North Carolina v. Butler*, 441 U.S. 369, 373 (1979))).

155. *In re Abraham R.*, No. D-19746/08, 2009 WL 750179, at \*10 (N.Y. Fam. Ct. Mar. 20, 2009).

156. GRISSE, *supra* note 138, at 189.

157. *Id.* at 187.

158. *Id.*

bearing upon the question of voluntariness.”<sup>159</sup> First, courts do not recognize that a parent can have a detrimental impact on a juvenile’s waiver decision during interrogation, causing him to prematurely forego the right to silence and inculcate himself. At the very least, the New York legislature should mandate that if a parent is unavailable then the juvenile must be required to meet with an independent third party prior to interrogation.<sup>160</sup> Second, for younger juveniles (under fourteen years of age), the FCA should deem involuntary all confessions given by those unaccompanied by an attorney. And third, the law should require the court to consider whether an attorney was present during the interrogation. Presently, the FCA sets an unacceptable standard for protecting juvenile *Miranda* protections, which is precisely why the legislature should consider implementing the similar approaches taken by several sister states.

*A. A Parent’s Presence During Custodial Interrogations Should Be Considered an Ancillary Factor in the Court’s Analysis, Not a Mandatory One*

There is a marked difference between a parent’s insistence on a child’s best interest and the Fifth Amendment’s more protective guarantee of every person’s—including children’s—legal interests. While many parents might believe that their child should cooperate with police, sometimes the child’s criminal misbehavior can result in parents being angry, which may influence the parent’s degree of interaction during the interrogation.<sup>161</sup> In these circumstances, it is possible that parents can “unwittingly encourage the child to answer questions, not anticipating how the child may incriminate him or herself[,]”<sup>162</sup> as was the case in *Abraham R.* Unfortunately, the juvenile is the one who suffers the consequences of his parent’s miscalculated advice.<sup>163</sup> Even though the parent’s motives for waiver could be well-intentioned and rooted in a “concern that their child receive treatment, [like *A.S.*] or [an] expectation that the child will learn certain responsibilities by confessing to alleged wrongdoings[,]” their motives can be misguided, as demonstrated by the *Abraham R.* case.<sup>164</sup> Parental advice and waiver can sometimes overlook the reasons why the Supreme Court, in *Gault*, extended the full panoply of Fifth Amendment protections to children.<sup>165</sup> But, it appears as though the FCA functions under the assumption that “parent[s] will have a sufficient understanding and appreciation of a juvenile’s rights and the consequences of their waiver, and therefore can supply the explanation

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159. *In re Abraham R.*, 2009 WL 750179, at \*10 (citing *Michael C.*, 442 U.S. at 725).

160. See discussion, *infra* Part IV.A.

161. GRISSE, *supra* note 138, at 167.

162. King, *supra* note 9, at 468.

163. See *id.* (“[T]he good parent may be a lousy source of guidance for the protection of the child’s constitutional rights.”).

164. GRISSE, *supra* note 138, at 167.

165. *Id.*

and reasoning which the juvenile alone might lack.”<sup>166</sup> This assumption, as proven in *Abraham R.*, is poorly grounded and potentially disingenuous.

If parents are unaware or do not fully comprehend the importance of their children’s right to invoke *Miranda* protections, then the FCA’s requirement is ineffective and provides nothing more than a meaningless safeguard for children. Arguably, “[w]ithout attitudes supportive of such a choice for juveniles, it is not likely that parents could provide the advice and protection which the Supreme Court in *Gault* believed were due to juveniles.”<sup>167</sup> Operating under the notion that parents are not always capable of understanding the negative consequences of their child’s *Miranda* waiver, the FCA’s notification requirement might actually hurt, instead of assist, juvenile defendants. For this reason, the FCA should require parents to consult with an attorney or other interested adult prior to waiving their child’s *Miranda* rights. Considering that children are “unlikely to have working memories adequate to hold all the *Miranda* warnings in mind while considering the ramifications of talking or not talking[,]”<sup>168</sup> they are at a de facto disadvantage and require, at the very least, consultation with an interested adult—ideally an attorney, who can offer advice about waiver.

As adults, parents with the requisite mental state undoubtedly have the capacity to waive their own *Miranda* rights, whereas children fourteen and under lack such a capacity.<sup>169</sup> Even though some states allow parents to invoke and waive other rights on their child’s behalf,<sup>170</sup> *Miranda* rights should be exempted from the list of parental privileges. Even an “independent interested adult,” not necessarily a parent, could be better suited to help a juvenile in making a waiver decision. Courts have long recognized that

special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique—but not in principle—depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in eliminating the privilege.<sup>171</sup>

Notwithstanding these special problems, New York still allows parents to, on a whim, waive *Miranda* for their children absent any input from counsel.<sup>172</sup>

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166. *Id.* at 166.

167. *Id.* at 168.

168. King, *supra* note 9, at 461.

169. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966).

170. See FLA. STAT. § 549.09(1)(3) (2011) (upholding parental authority to release liability in advance of the tort claims relating to injury or death arising from the child’s participation in a commercial activity).

171. *In re Robert O.*, 439 N.Y.S.2d 994, 999–1000 (N.Y. Fam. Ct. 1981).

172. Dr. Thomas Grisso explains why states, like New York, still allow parents to waive their children’s legal rights:

*B. Juveniles Under the Age of Fourteen Should Not Be Able to Waive Miranda Without First Consulting an Attorney or an “Independent Interested Adult”*

Currently, New York’s greatest protections for children are reserved for those under seven years of age because the state will not allow them to be the subject of a delinquency proceeding.<sup>173</sup> While children that age should undoubtedly be provided the highest protection, the FCA should extend this heightened standard for *Miranda* waiver to children who are old enough to commit serious crimes but still too young to appreciate the consequences of waiving their constitutional rights.<sup>174</sup> When applied to juveniles, *Gault* and its progeny recognize children’s inability to effectively waive *Miranda*; yet in application, “[t]he decisions that uphold *Miranda* waivers by particularly young children not only apply the totality test in a manner that fails to consider the child’s immaturity and incomplete development, but essentially say that such considerations are irrelevant.”<sup>175</sup> New Jersey’s cut-off age of fourteen provides the most protective standard for younger children, protecting those who lack the cognitive capacity of adults. The FCA and New York case law, on the other hand, merely pay lip service to *Gault*’s concerns and fail to adequately protect younger children who have “limited access to their frontal lobes and limited ability to coordinate different brain regions needed for reasoning and problem solving.”<sup>176</sup>

Additionally, Professor Kenneth J. King persuasively argues that the totality test does not “protect children from their immaturity.”<sup>177</sup> When adolescents are confronted with a decision about the waiver of *Miranda* rights, their capacity to comprehend the consequences of speaking to police might be hampered simply by their inability to remember all of the warnings.<sup>178</sup> If scientific research tells us that children might not understand *Miranda* warnings, let alone remember what they are being told, the juvenile suspect is already at a disadvantage before he waives these protections. The FCA should conservatively account for this type of confusion on the part of the juvenile. Currently, it does not. At the very least, by raising the age of when a juvenile can *actually* waive his *Miranda* rights—regardless of whether a parent or attorney is present—the law would ensure that waiver is only obtained from juveniles who are more likely to be capable of comprehending the consequences of waiver.

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Whether or not parents have an absolute authority to govern their children’s behaviors in these matters—that is, to advise or decide for their child regarding their rights—is in large part a philosophical and moral question requiring a weighing of doctrine concerning the family and the state’s interest in protecting the rights of children.

GRISSE, *supra* note 138, at 164.

173. See N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2011).

174. See *In re Abraham R.*, No. D-19746/08, 2009 WL 750179, at \*10 (N.Y. Fam. Ct. Mar. 20, 2009) (“[T]here is no age at which it is presumed that an accused juvenile delinquent or a youthful criminal suspect may validly waive his or her rights.”).

175. King, *supra* note 9, at 461.

176. *Id.*

177. *Id.* at 462.

178. *Id.* at 461.

New York's neighboring state, New Jersey, has long since incorporated the age of fourteen into its legal analysis when considering the voluntariness of waiver. Empirical studies also suggest that fourteen is an age at which children's "hypothetical decision-making capabilities in interrogation scenarios"<sup>179</sup> begin to increase. Recently, researchers examined a study conducted by Dr. Thomas Grisso that asked 1400 detained juveniles about the "best choice" for a vignette character facing a custodial interrogation.<sup>180</sup> The results showed that fifty percent of juveniles ages eleven to thirteen would confess to a crime instead of choosing to deny any involvement in the crime or refuse to speak.<sup>181</sup> Similarly, forty-five percent of juveniles age fourteen and fifteen decided that confessing was the best choice.<sup>182</sup> Only thirty percent of juveniles age sixteen and seventeen, chose to confess.<sup>183</sup> The results of this study suggest that "confession rates among youthful offenders support the potential for these findings to generalize to actual interrogations."<sup>184</sup> By drawing a line at fourteen, as New Jersey does, the FCA would ensure that younger juveniles are provided greater protections because of their lesser capacity to comprehend the negative consequences of waiving *Miranda* rights. "[T]he contemporary understanding of adolescent brain and psychosocial development shows that juvenile courts' reliance on adult *Miranda* jurisprudence is misplaced and at odds with the due process roots of the protections for children."<sup>185</sup> Therefore, the New York legislature should require courts to consider the juvenile's age, if they are under fourteen, as the predominant factor in the FCA totality of the circumstances analysis, and mandate that any statements a juvenile makes following a waiver are per se inadmissible if made outside the presence of an attorney.<sup>186</sup>

*C. An Attorney's Absence or Presence Should Be Among the Required Factors*

Although New York State's limited resources may hamper such a lofty requirement, it would be ideal, and likely the most constitutionally sound approach, to require an attorney's presence at every juvenile custodial interrogation. Considering that sometimes parents have proven to be less protective of a child's welfare in the interrogation room,

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179. Redlich et al., *supra* note 6, at 112.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 113.

184. *Id.* (citation omitted).

185. King, *supra* note 9, at 461.

186. The totality of the circumstances analysis would then only be applied to juveniles over the age of fourteen. For younger juveniles:

[W]hen we allow judges to indulge in a case-by-case totality analysis and assign whatever weight they see fit to their chosen totality factors, we create an unacceptable risk that a child who does not understand his or her *Miranda* rights or the relevant circumstances will be found to have made a knowing, intelligent, and voluntary waiver nonetheless.

*Id.* at 477-78.

the FCA should include, as a mandatory factor in its totality of the circumstances analysis, the presence or absence of an attorney to more accurately determine whether a waiver was voluntary. An attorney's presence does not necessarily mean, as some have suggested, that juvenile interrogations would cease to exist. As in the adult system, an attorney can counsel the juvenile defendant on what types of information to divulge without risking inculcation. Arguably, parents—unless they are criminal defense attorneys—are unlikely to be able to offer appropriately specialized advice. The New York legislature and courts should be cognizant of the disparity between the outcomes of juvenile custodial interrogations with an attorney and those without. Furthermore, courts should also weigh the attorney's presence against whether a parent was also present. If one or the other was present, the court should account for that in its analysis. Similarly, the court should also weigh the presence of both an attorney and parents, if necessary. While courts may consider other factors, the presence or absence of an attorney should be mandated as a fourth prong in the FCA analysis. Even though parental attendance may be all that *Michael C.* suggests as adequate, in reality, a parent's usefulness pales in comparison to the significant effect an attorney's presence can have on a juvenile's *Miranda* waiver decision.<sup>187</sup>

The FCA currently leaves open four possible interrogation scenarios for juveniles, and only one satisfies the Fifth Amendment's minimum requirements. In the first scenario, the juvenile is interrogated outside the presence of his parents and attorney. The second scenario involves the juvenile being interrogated with only a parent at his side, which can be problematic for reasons already discussed. The third scenario involves the juvenile being interrogated with the counsel of an attorney, which is likely the most protected circumstance under the Fifth Amendment. And in the fourth, the juvenile is interrogated in the presence of both his parents and his attorney. The last scenario can possibly lead to a standoff between the parent, who might favor the juvenile "coming clean," and the attorney, who seeks to ensure that his client's legal interests are protected, which might mean invoking the right to remain silent. The courts are not required, at this time, to consider all of the variables that can affect a juvenile's waiver and subsequent confession. Simply adding or removing the parent and/or the attorney from the interview room can substantially vary the outcome of the interrogation. In the end, proper counseling could make all of the difference when considering whether *Miranda* waiver is in the juvenile's best interest. A parent sometimes does not have the foresight to consider what is in his child's best interest. As a result, the legislature should require the FCA to include defense counsel's presence or absence as mandatory in the totality of the circumstances analysis; this factor, alongside the juvenile's age, should be given the greatest weight. Practically, courts can consider additional factors because *Michael C.* explicitly held that the totality factors enumerated are not exclusive, and other factors can be considered. Assuming that the attorney is the best counselor available, and not the parent, the FCA statute should explicitly require courts to consider the attorney's

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187. See *In re S.E.B.*, 514 S.W.2d 948, 950–51 (Tex. Civ. App. 1974).

presence or absence in determining the admissibility of statements made after a juvenile's waiver of *Miranda*.

*D. What are the Consequences for New York State if the FCA is Amended?*

In *Gault*, the Supreme Court intended for juveniles to enjoy the full panoply of Fifth Amendment protections available to adults. Therefore, state courts and legislatures are required to ensure such protections, while also balancing legitimate and reasonable law enforcement initiatives. But notwithstanding New York's interest in fighting crime, the right to remain silent is a bedrock protection that the U.S. Constitution and the U.S. Supreme Court have recognized as paramount when the police and a citizen are in opposition.<sup>188</sup> Alternatively, if the FCA is amended pursuant to the three proposals listed above, it is likely that law enforcement's ability to gain confessions in juvenile interrogations will only be slightly hampered. The amendments, however, will not completely bar police from obtaining confessions. If adopted, these revisions to the FCA and my proposals for a change in the court's analysis will (1) require courts to still consider, although not as heavily, the presence or absence of a juvenile's parents during interrogation; (2) require police to interrogate juveniles under the age of fourteen in the presence of an attorney; and (3) require courts to consider, as the most weighty factor next to age, the presence or absence of an attorney during interrogation for all juveniles.

These amendments seem to be less burdensome on the state than a per se rule requiring the presence of an attorney during every interrogation of a juvenile. In the past, many researchers and legal commentators have suggested such a proposition.<sup>189</sup> However, such blanket requirements have not been adopted because of the "concern that insertion of lawyers into the interrogation room will be a net loss for public safety . . . [and that] lawyers will advise children to remain silent and police will thereby be deprived of an important crime-fighting tool."<sup>190</sup> Professor King advocates that such a requirement *is* necessary, however, and that commentators' concerns are unfounded, as they rely on assumptions that "children will follow the advice of their

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188. The Supreme Court noted in *Miranda v. Arizona* that:

Today, then, there can be no doubt that the *Fifth Amendment* privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

384 U.S. 436, 467 (1966).

189. King, *supra* note 9, at 475.

190. *Id.*



counsel” and that their “confessions [will] yield reliable evidence.”<sup>191</sup> Regardless of whether Professor King is correct, the fact that such a requirement has yet to be imposed in any jurisdiction suggests that the concerns are strong enough to dissuade any legislature from adopting it.

However, the modified approach suggested here is likely more palatable for the legislature and would adequately balance the rights of younger children (those under fourteen) against law enforcement coercion. If the legislature amends the FCA, the courts will be better equipped to determine whether a waiver is valid, and the police will need to refine their interrogation tactics accordingly. In a case like *Abraham R.*, a revised FCA could potentially require a parent to consult with an attorney, or require a juvenile’s *Miranda* waiver to be approved by a magistrate judge. Such a shift would better protect juveniles from entry into the criminal justice system, enhance the accuracy of the court’s analysis, and prompt police to implement procedures that yield more reliable and constitutional results.

New Jersey applies a similar restriction on interrogations involving juveniles under the age of fourteen, and its criminal justice system has not self-destructed as a result. In essence, New Jersey’s elevated protections for younger children illustrate an admirable balancing of juvenile rights and public safety. Both Texas and Vermont’s procedures require an objective third party (a magistrate or adult who is independent and disassociated from the prosecution) to determine whether waiver was voluntary and not the product of misguided parental advice, “ignorance of rights or of adolescent fantasy, fright or despair.”<sup>192</sup> If the FCA applied even one safeguard from any of these states, it would more adequately ensure Fifth Amendment protections for juveniles. Adopting a provision similar to the one from Vermont could prevent juveniles from waiving *Miranda* rights without first consulting an interested adult, even if the juvenile’s parent is present or truly unavailable or even unwilling to attend the interrogation. Creating a presumption against voluntary waiver for defendants under the age of fourteen, like in New Jersey, could potentially avoid *Jimmy D.* issues, and would require a juvenile’s willing parent to be present during custodial interrogations, contrary to police efforts to separate juveniles from their parents. While parents have sometimes proven to be detrimental to juveniles’ Fifth Amendment protections during interrogations, their presence, along with that of an attorney or other independent party, can provide juveniles with more protections. And finally, adopting a procedure similar to section 51.09 of the Texas Family Code could establish an additional safeguard without foregoing the well-established totality of the circumstances approach for determining validity of waiver.

This proposal does not suggest that the FCA should abandon the *Michael C.* totality of the circumstances test—it merely recommends that the totality test be amended and applied only to older juveniles, who are arguably more adept at comprehending *Miranda* based on their reading level and better evolved maturity. While there will always be outlier cases where older juveniles with learning

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191. *Id.* at 475–76.

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

disabilities or deficient education will suffer under the totality approach, this proposal is practicable and would not overburden the juvenile justice system.<sup>193</sup>

## V. CONCLUSION

Unfortunately, there are no indications that the legislature or New York courts are seeking to revamp the FCA's totality of the circumstances analysis. Indeed, based on the Court of Appeals's decision in *Jimmy D.*, New York courts will likely continue applying the FCA's current framework notwithstanding its inadequate constitutional protections for juveniles. The evidence is overwhelming with regard to younger juveniles' lack of capacity to comprehend *Miranda* warnings and the ramifications of waiver decisions. Similarly, for decades, parents have proven to be ill-equipped, or even detrimental, in assisting their children in the interrogation room. Simply put, attorneys can provide the greatest protection for juveniles, while leveling the playing field on which waiver is determined to be voluntary or involuntary. By reorganizing the FCA's procedures according to how other states (specifically New Jersey, Texas, and Vermont) approach the application of *Miranda* to juveniles, New York will finally be capable of protecting juveniles from involuntary waivers. The Court of Appeals will likely revisit the *Jimmy D.* issue, and perhaps it will hold similarly. Change is likely to be slow-moving in the legislature and in the courtroom until a set of facts that demonstrates gross police misconduct or a miscarriage of justice rises to the surface. For the time being, however, New York seems content on continuing to treat juveniles as adults during interrogations, even though they lack adult cognitive capabilities.

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193. The proposals for revamping the FCA would likely and most noticeably benefit the younger and more impressionable juveniles because they provide for the assistance of counsel in every interrogation. Of course, tweaking the totality test's factors would also benefit older juveniles, but the "age" factor is what will require police to refrain from interrogating younger juveniles without an attorney. However, for the older juveniles (ages fourteen to eighteen), would revamping actually matter considering the rise of the "stop snitching" counterculture in urban environments? See Jack McDevitt & Jorge Martinez, *Treating Juveniles as Juveniles*, PROJECT R.I.G.H.T. INC., [http://www.projectright.org/index.php?option=com\\_content&task=view&id=71&Itemid=85](http://www.projectright.org/index.php?option=com_content&task=view&id=71&Itemid=85) (last visited Feb. 12, 2012). Today, it appears that more and more juveniles are reluctant to talk to police, let alone confess to them about their crimes. Mostly, there seems to be a great fear among younger people who do not want to give off the appearance of being a "snitch" or informer for the police. See Gregory Kane, *'Stop snitches' campaign could be fatal for enablers*, WASH. EXAM'R (Oct. 19, 2009), available at <http://www.washingtonexaminer.com/node/156671>. Attacking this problem is an issue that this note does not broach. Indeed, not enough evidence has been accumulated to determine whether the "stop snitching" campaign will negatively influence the outcome of police interrogations involving juveniles.