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Inadmissibility: Solving Questionable Consent to Juvenile Interrogations

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Inadmissibility

SOLVING QUESTIONABLE CONSENT TO JUVENILE INTERROGATIONS

In New York State, children as young as twelve years old can be prosecuted for crimes.[1] When children are arrested, state law mandates that their parents or another appropriate adult be informed.[2] Once a child is in custody, the only requirement before commencing an interrogation of that child is to ensure that the child and parent have been informed of the child's Miranda rights.[3] That is the extent of the protection that a child receives in an interrogation: their parent being notified and nothing more. The situation can be hectic. With the police, parents (when they choose to be present during the interrogation), and the child in the room, it can be unclear who is in control. Adding a lawyer for the child may help, but it also adds another character into the already stressful and overwhelming interrogation. Regardless, no matter who is present, the ongoing brain development of a child will always call into question whether they have voluntarily consented to interrogation, the same voluntary consent that Miranda rights are designed to protect.[4] Each jurisdiction in the United States handles their juvenile justice systems differently and so New York's model is only one of many. However, there is no jurisdiction that provides optimal, complete protections for children in interrogations.[5]

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[1] N.Y. FAM. CT. ACT § 301.2(1)(i) (McKinney, Westlaw current through L.2022, chapters 1 to 562). This statute was recently amended to raise the minimum age of juvenile delinquency prosecution from seven to twelve. S.B. 4051-A, 2021 Leg. (N.Y. 2021). While it does limit standard juvenile prosecution to children ages twelve to seventeen, there are some exceptions. *Id.* Children between the ages of seven and twelve who commit homicide, for example, can still be prosecuted in juvenile proceedings. *Id.* Additionally, the bill provides for the creation of differential response programs to steer children between the ages of seven and twelve away from acts that would lead to juvenile delinquency prosecution if they were older. *Id.*

[2] *Id.* § 305.2(3).

[3] *Id.* § 305.2(7). *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (providing the information required to be covered in Miranda Warnings).

[4] *See infra* Part III.

[5] *Id.*

Several states follow a similar model to New York, mandating parental notification or presence during interrogations.[6] Though this policy may have good intentions, there are a variety of reasons why parents are not necessarily the optimal resources for children in the interrogation room.[7] Their presence does not guarantee that they will be involved in the interrogation process or will do anything to protect their child.[8] Many parents, while they may know more about the situation than their child, do not possess comprehensive knowledge of the process or the ramifications of an interrogation.[9] Further, if parent and child do not share the same goals in an interrogation, then the parent is not the best person to advocate for the child.[10] Even for parents who do want to protect their child in an interrogation, there remains potential for internal conflicts with their role as a parent or personal morals.[11] From a place of empathy, parents may encourage their children to tell the truth and the misconception abounds that the only people who need to remain silent or seek an attorney are those who did something wrong.[12]

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[6] *See infra* Section III.B.

[7] *See, e.g.*, Jennifer L. Woolard et al., *Examining Adolescents' and their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH & ADOLESCENCE 685, 687 (2008) ("Officers from the . . . survey report tha[t] even when parents are present during questioning, the parents never talk (20% of officers) or talk less than half of the time (50% of officers.") (citation omitted).

[8] *Id.*

[9] *Id.* at 694 ("It appears that parents . . . across the board expect police behavior to be governed by consideration for suspects and especially parents in concert with the search for the truth. If parents . . . enter the interrogation process with such 'rosy' expectations, even police questioning that is well within the confines of the law could foster the illusion of comparable interests between suspect and interviewer.").

[10] *Id.* at 695–96. When considering what misalignment of goals may look like between a parent and child, there are many situations that could potentially arise. As many juvenile delinquency matters arise in a domestic setting, it is quite possible that the parent is the complainant themselves. Alternatively, the complainant might be another child of the parent. In that case, there would be a clear conflict of interest in someone being the responsible parent for both the complainant and the accused child. Also, a parent might lead a busy life and so, not wanting to miss work, might advise their child to waive their rights to keep things simple. There may also be situations where parents are angry that their child did a horrible thing (or are accused of such) and so may make a snap decision to suggest the child waive their rights. Additionally, the parent may be worried about the whole situation as it may expose them to the potential for neglect or criminal negligence charges. Similarly, if this is an instance of a neglectful parent, then they may not care what happens with the child and so would not be the right choice to advise them. On the other hand, they may be so trusting of their child that they do not think their kid possibly did anything wrong and so tell them to waive their rights. This list is not exhaustive but does certainly expose the fact that relying on a parent to be the responsible adult that must be present before waiving of rights might not be the best choice.

[11] Hayley M.D. Cleary & Todd C. Warner, *Parents' Knowledge and Attitudes about Youths' Interrogation Rights*, 23 PSYCH. CRIME & L. 2 (2017).

[12] *Id.* at 2–3.

Most parents simply will not fully understand what their children go through after being arrested.[13] While parents may have a fair understanding of what a trial entails, many have less comprehension of probation, including their own role in their child's probation process.[14] Because of conflict of interest and lack of understanding, the typical parent is not the best resource to support children in the interrogation room.

Generally, children have developmental vulnerabilities that make an interrogation room a dangerous place to be alone.[15] For example, there are great concerns with regards to the suggestibility of children.[16] This can lead to false confessions when a child is alone in an interrogation.[17] In a 2020 survey of exonerated defendants, 36 percent of those who were under the age of eighteen at the time of the crime were found to have falsely confessed to those crimes while only 10 percent of those who were above the age of eighteen at the time of the crime falsely confessed to those crimes.[18] The percentage of individuals under the age of eighteen who were found to have falsely confessed was consistent across similar surveys in prior years.[19] While the impact of a false confession is life altering no matter the age of the defendant, the impact is felt across a broader swath of juveniles than adults.[20] With such a grave potential impact, children should not be left to fend for themselves in the interrogation room.

One alternative to parent presence in interrogations some states have implemented has been to read a modified set of Miranda rights that are tailored for comprehension by children.[21] These modified Miranda rights provide detailed explanations of the right to counsel and the right to remain

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[13] Caitlin Cavanagh & Elizabeth Cauffman, *What They Don't Know Can Hurt Them: Mothers' Legal Knowledge and Youth Re-Offending*, 23 PSYCH. PUB. POL'Y & L. 141, 141, 151 (2017).

[14] *Id.*

[15] *See* Hayley M. D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 PSYCH. PUB. POL'Y & L. 118, 119 (2017) (identifying the compounding realities of brain development continuing until one's midtwenties and people under twenty-five comprising a third of nation-wide arrests).

[16] *Id.*

[17] *Id.* at 118–19.

[18] NATIONAL REGISTRY OF EXONERATIONS, TABLE: AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED 1 (2020), https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf [https://perma.cc/2FS4-XTQD].

[19] *Id.* at 2–3 (covering results for 2017 and 2019).

[20] *See* Cleary, *supra* note 15, at 118.

[21] *See* Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCH. PUB. POL'Y & L. 63, 67–69 (2008).

silent that are the core of the Miranda rights along with checks for understanding.[22] But it is not just comprehension of Miranda rights that presents a bar to children consenting to a waiver of their rights, the behavior of police officers can also affect their decision-making ability.[23] The problem of reliance on the actions of an officer in making a decision is compounded when the child is at a lower level developmentally.[24] Even with instructions that have been modified to increase comprehension of the child, there remain factors that might lead to inappropriate waiver of rights.

As children are vulnerable, they need even greater protections than most adults receive.[25] Advice from counsel can provide that protection to children.[26] Some states have statutorily mandated the presence of an attorney before an interrogation of a child.[27] Defense attorneys do recognize the dangers present for juveniles in an interrogation room and will advocate to protect those juveniles.[28] However, when an attorney arrives in an interrogation room and says that their client will not be speaking with the police, even though that does provide protection for the child, it does not actually mean that the child has consented to the lawyer's decision. The attorney has simply substituted their own voice for that of the child. If the child has not actually consented, then they have not knowingly waived their Fifth Amendment right against self-incrimination: an autonomy right, the ability to make one's own decisions.[29] This then calls into questions whether attorney presence is the proper solution to the core problem. If that core problem is a child's inability to consent, then an ideal solution would remove any instance where a child's consent is needed.

This note argues the best protection for juveniles nationwide in terms of interrogations and Miranda waivers is for jurisdictions to pass legislation that makes all juvenile interrogations inadmissible as evidence. Currently, there is no jurisdiction that provides such thorough protection for

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[22] Larry E. Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 553–56 (1987).

[23] Caitlin N. August & Kelsey S. Henderson, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor*, 27 PSYCH. PUB. POL'Y & L. 268, 269–70 (2021).

[24] *Id.*

[25] Jennifer Alberts, *Interrogation of Juveniles: Are Parents the Best Defenders of Juveniles' Right to Remain Silent?*, 19 NEW CRIM. L. REV. 109, 123 (2016).

[26] *Id.* at 124.

[27] CAL. WELF. & INST. CODE § 625.6(a) (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Reg. Sess.); 705 ILL. COMP. STAT. ANN. 405/5-170 § 5-170 (Westlaw current through P.A. 102-1102 of the 2022 Reg. Sess.).

[28] August & Henderson, *supra* note 23, at 277.

[29] Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1153 (2010).

juveniles.[30] A change should be made to each jurisdiction's respective statutory code to establish that inadmissibility. This will best protect the rights, interests, and liberties of juveniles as a particularly vulnerable class. New Mexico has already added statutory protections establishing inadmissibility of juvenile interrogations; however, those protections only apply for the youngest defendants.[31] This should be the starting point for a legislative change to implement comprehensive juvenile protection against interrogations.

Proceeding in four parts, this note will ultimately suggest language for such a legislative change. Part I discusses the history of juvenile delinquency as its own subset of the criminal law, the development of Miranda rights, and the intersection of Miranda rights and juvenile delinquency. Part II assesses the needs of children in interrogations. It first covers how the development of children impacts their behavior in an interrogation. It then analyzes research surrounding how best to support children in the interrogation room. It looks at the shortcomings of current solutions such as Miranda rights tailored for juveniles, parent presence during juvenile interrogations, and attorney presence during the interrogation of a child. Part III provides a brief survey of the current state of the law regarding juveniles in interrogations and Miranda waivers across the jurisdictions of the United States. It assesses the strengths and weaknesses of existing frameworks for protecting children in interrogations while taking particular time to analyze the jurisdictions that provide the strongest protections for juveniles. It also presents case law that emphasizes a need for juvenile interrogation protections. Part IV suggests statutory language that should be used to establish the inadmissibility of juvenile interrogations while also addressing counterarguments to such legislation. Although this note looks to current statutory frameworks and legislative history from specific jurisdictions that have made advancements with regards to statutory protections for children, the rationales for the proposed changes and the suggested statutory language are applicable to all jurisdictions.

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[30] *See infra* Part III.

[31] N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

I. HISTORY OF JUVENILE DELINQUENCY AND MIRANDA RIGHTS

Before identifying the best solution to a problem, it is necessary to understand the origin of the problem itself. In the case of juvenile interrogations, the origins of juvenile justice systems and the rights at risk in interrogations lay the groundwork for comprehending both the specific rights of children during those interrogations and why those rights require protection.

A. Juvenile Delinquency

As early as the seventh century in England, an individual could not use their young age as a defense for a crime.[32] However, even though a determination of culpability for a child was possible, children convicted of crimes were generally pardoned.[33] By the fourteenth century, this was justified by the perceived inability of children under seven to understand the difference between good and evil.[34] The choice of seven likely traces from the age of infancy being set (albeit arbitrarily) at seven years old in the Roman Civil Law in the fifth century.[35]

Eventually, by the nineteenth century, the common law had settled to recognize three distinct categories of culpability for children based on age.[36] A child under seven years of age was in no way culpable through the complete defense of infancy.[37] A child between the ages of seven and fourteen had a rebuttable presumption of incapacity for the purposes of culpability.[38] And any child over fourteen had the same capacity for culpability as an adult.[39]

This structure of differing capacities of child culpability led to the creation of the Illinois Juvenile Court in 1899.[40] This first juvenile court in America recognized that children have individual needs and must be handled accordingly when doling

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[32] A.W.G. Kean, *The History of Criminal Liability of Children*, 53 LAW Q. REV. 364, 364 (1937) (referring specifically to those under the age of seven).

[33] *Id.*

[34] *Id.*

[35] Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 435 (1939).

[36] WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 9.6(a) (3d ed. 2020).

[37] *Id.* See RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. L. INST. 1981) for further application of the infancy defense, providing that any contract signed by an individual under the age of eighteen is rescindable.

[38] LAFAVE, *supra* note 36.

[39] *Id.*

[40] Illinois Juvenile Court Act of 1899, 1899 Ill. Laws § 131.

out retribution.[41] In the interest of guiding children and maximizing their future, this first juvenile court (and others since) utilized alternatives to traditional punishment that best suited the needs of the individual child.[42] As time has gone on, some jurisdictions have recognized that this should be extended to older children. For example, in 2018, New York raised the age of criminal responsibility from sixteen to eighteen, meaning that sixteen- and seventeen-year-olds can now be tried in juvenile courts.[43] Massachusetts is looking to extend this even further as state lawmakers have considered raising juvenile jurisdiction to include individuals as old as twenty years old.[44] The consideration of this change in Massachusetts has included a recognition of the ongoing brain development in individuals of that age.[45] Although the precise age of capacity has changed, acknowledgement of a child's inability to comprehend their actions fully has existed throughout the evolution of juvenile justice systems.[46] An individual's comprehension is also essential to the meaningful issuance of Miranda rights.

B. Miranda Rights

At their core, Miranda warnings protect fundamental rights granted by the US Constitution. The right to remain silent is a protection against self-incrimination.[47] The right to have an attorney appointed if you cannot afford one is a protection of the right to counsel.[48] The litany of the Miranda warnings is a relatively new development in our legal system, even though the nation's familiarity with them may lead one to think otherwise.[49]

Regarding self-incrimination, the Supreme Court first considered voluntariness of confessions in 1884 in *Hopt v.*

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[41] Gustav L. Schramm, *Philosophy of the Juvenile Court*, 261 ANNALS AM. ACAD. POL. & SOC. SCI. 101, 101 (1949).

[42] *Id.* at 101–03.

[43] *See* N.Y. FAM. CT. ACT § 301.2(1) (McKinney, Westlaw current through L.2022, chapters 1 to 562).

[44] Colin A. Young, *Bills Would Pull Defendants up to Age 20 into Mass. Juvenile Justice System*, BERKSHIRE EAGLE (Oct. 12, 2021), https://www.berkshireeagle.com/statehouse/bills-raise-age-juvenile-court-mass/article_13b9bf2a-2b99-11ec-b0f9-efb21c73f91e.html [https://perma.cc/URV4-ZLU7].

[45] *Id.* Both versions of the bill, one in each house of the Massachusetts state legislature, have gained cosponsors since being introduced but no vote has yet been made on either. H.B. 1826, 192d Gen. Ct. (Mass. 2021); S. 920, 192d Gen. Ct. (Mass. 2021).

[46] Barbara Kaban & James Orlando, *Revitalizing the Infancy Defense in the Contemporary Juvenile Court*, 60 RUTGERS L. REV. 33, 35–37 (2007).

[47] U.S. CONST. amend. V.

[48] U.S. CONST. amend. VI.

[49] *See* Dickerson v. United States, 530 U.S. 428, 443 (2000).

Utah.[50] The Court therein held that for a confession to be admissible, it must have been given voluntarily.[51] The Court focused on the fact that when a person is coerced to confess, that confession is not voluntary and is thereby inadmissible.[52] Several years later, in *Bram v. United States*, the Court tied this requirement of voluntariness to the self-incrimination clause of the Fifth Amendment.[53] In *Brown v. Mississippi*, the Court incorporated this right against the states through the Due Process clause of the Fourteenth Amendment.[54]

The constitutional right to appointed counsel has been extended to more groups of individuals over the years. In 1932, in *Powell v. Alabama*, the Supreme Court held that when any individual who is unable to afford counsel is being tried in a federal capital case, the court must assign that individual counsel.[55] The Court then expanded the right to counsel to indigent defendants in any federal criminal trial six years later in *Johnson v. Zerbst*.[56] Twenty-three years later, the Court incorporated this right to apply to the states through the Due Process clause of the Fourteenth Amendment, first just in state capital cases in *Hamilton v. Alabama*, but shortly thereafter in all state felony cases in *Gideon v. Wainwright*.[57] Finally, *In re*

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[50] Hopt v. People of the Territory of Utah, 110 U.S. 574, 585 (1884).

[51] *Id.*

[52] *Id.* ("But the presumption upon which weight is given to such evidence . . . ceases when the confession appears to have been made . . . in consequence of inducements . . . held out by one in authority . . . or because of a threat or promise by or in the presence of such person, which . . . deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.").

[53] Bram v. United States, 168 U.S. 532, 557 (1897) ("From this review it clearly appears that the rule as to confessions, by an accused, . . . is in England to-day what it was prior to and at the adoption of the Fifth Amendment, and that . . . the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.").

[54] Brown v. Mississippi, 297 U.S. 278, 286 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.").

[55] Powell v. Alabama, 287 U.S. 45, 71 (1932) ("All that it is necessary now to decide . . . is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.").

[56] Johnson v. Zerbst, 304 U.S. 458, 467 (1938) ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

[57] Hamilton v. Alabama, 368 U.S. 52, 55 (1961) ("In this case, . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is

Gault saw the Court extending this right to children accused of crimes in juvenile court proceedings in 1967.[58]

In 1966, the Supreme Court increased both the self-incrimination and right to counsel protections in *Miranda v. Arizona*.[59] The Court considered the threat of coercion in the interrogation room and how an attorney could provide additional protections to an arrested individual.[60] The Court also recognized that many individuals are not warned of their right against self-incrimination and their right to an attorney.[61] Accordingly, recognizing the need to protect arrested individuals, the Court held that, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[62] The Court explained that informing the person of their right to remain silent will relieve the pressure of the otherwise tense and likely coercive interrogation setting.[63] The Court continued by saying the right to an attorney will further protect against self-incrimination as the lawyer will provide proper guidance to the arrested individual.[64] Finally, the Court established that these rights are not effectively waivable unless the individual was fully apprised of said rights in advance.[65] In this ruling, the Court recognized its role in protecting constitutional rights and in ensuring that nothing abridges those rights.[66] The next step is then understanding what it looks like for a juvenile to consent to waiving their Miranda rights.

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in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

[58] *In re* Gault, 387 U.S. 1, 41 (1967) ("We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.").

[59] Miranda v. Arizona, 384 U.S. 436, 467, 470 (1966).

[60] *Id.* at 470.

[61] *Id.* at 440.

[62] *Id.* at 444.

[63] *Id.* at 468.

[64] *Id.* at 471.

[65] *Id.* at 470.

[66] *Id.* at 490–91.

C. Miranda and Juveniles

In re Gault, decided just a year after *Miranda*, saw the Supreme Court consider the idea of a waiver of Miranda rights by a juvenile.[67] The Court mentioned that there may be unique problems in terms of a juvenile waiver, especially with regard to the age of the child, whether parents are present, and the competence of the parents.[68] However, the only remark that the Court made regarding how to assist a child in an interrogation was that the presence of an attorney would be beneficial.[69] It is worth noting that the only explicit reference to *Miranda* in *Gault* is with regards to admissions made during an adjudicatory proceeding before a judge, not during an interrogation.[70] Even with that in mind, however, there are indications that the Supreme Court intended for the *Miranda* protections to extend to all phases of a juvenile's interactions with the justice system, starting with interrogations.[71]

In 1979, the Supreme Court considered juvenile Miranda waivers more closely in *Fare v. Michael C.*[72] The Court discussed the "totality-of-the-circumstances approach" that is used when evaluating Miranda waivers by adults and held that such an adaptable test was also appropriate for juvenile Miranda waivers.[73] The Court stated that the "totality-of-the-circumstances" test mandated evaluating "the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[74] Such a test allows a court to determine whether an individual, in this case a juvenile in particular, has waived their Miranda rights "knowingly and voluntarily."[75]

The Supreme Court again considered the matter of juveniles and Miranda rights more recently in 2010 in *J.D.B. v. North Carolina*.[76] In deciding which factors must be weighed when assessing whether a person is in custody and therefore must be Mirandized, the Court held that the age of the

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[67] *In re* Gault, 387 U.S. 1, 55 (1967).

[68] *Id.*

[69] *Id.*

[70] Holtz, *supra* note 22, at 539.

[71] *Id.* at 540.

[72] Fare v. Michael C., 442 U.S. 707, 717 (1979).

[73] *Id.* at 725.

[74] *Id.* (citation omitted). Though these factors were presented by the court, no mention was made of the root behind these factors: the ongoing brain development of children.

[75] *Id.* (citation omitted).

[76] J.D.B. v. North Carolina, 564 U.S. 261, 261 (2011).

individual must be considered.[77] The Court further held that consideration of age is a key factor in affording children the same Miranda protections that adults receive.[78] In making that statement, the Court acknowledged there are "very real differences between children and adults."[79]

It is widely recognized that there are differences between children and adults when it comes to interrogations and culpability. Still, acknowledging this difference is not enough. If the differences are known, then the additional protections should be commensurate with those differences. The reality is that, due to their ongoing brain development, children are not reliably able to consent to a waiver of their Miranda rights. As their brain development generally bars their ability to consent, a "totality-of-the-circumstances" test would fall short because it is based on the inaccurate presumption that children are able to consent to a Miranda waiver in the first place. Ongoing brain development simply bars that possibility.

II. BRAIN DEVELOPMENT AND POTENTIAL INTERROGATION PROTECTIONS

To comprehend the proper level of protection that children need, one must first understand the brain development of children that forms the basis for requiring specialized protections. While no two people are identical, scientists have a deep understanding of the general developmental phases that children undergo.

A. Child Development

Broadly speaking, brain development continues into an individual's midtwenties.[80] Adolescence in particular forms a distinct phase in development that exhibits a handful of characteristics that impact the interrogation process.[81] One example of this is adolescent interest in receiving rewards.[82] Through adolescence and young adulthood, the brain's ability to

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[77] *Id.* at 277.

[78] *Id.* at 281. Interestingly, the Court does not provide exact guidance of how lower courts should consider age when assessing Miranda waivers; the Court simply says that age must be considered. Presumably, however, children of a younger age would merit increased protections and courts should be more wary of ruling a Miranda waiver valid with younger children.

[79] *Id.*

[80] Cleary, *supra* note 15, at 119.

[81] *Id.*

[82] *Id.* at 120.

evaluate risk and reward continues to mature.[83] In an interrogation, the hormones in a developing brain might push an individual to act in a way that will give them a reward, in this case, the reward being the ability to leave and go home.[84] Further, juveniles want to please the adults around them,[85] and in an interrogation that may lead them to comply and agree with authority figures without actively intending to do so. Children consider immediate rewards more heavily than other long-term impacts.[86] Consequently, a child may be more likely to admit to certain acts in the interest of being able to end the interrogation, please the adults around them, and leave.[87]

Though it is commonly known that teenagers exhibit less self-regulation than adults, neurological studies have proven that those up to age twenty-one exhibit decreased cognitive control when placed in threatening situations.[88] Accordingly, as a result of a long interrogation, a child is likely to succumb to stress and provide a confession or share information that ordinarily they were not willing or intending to share in the hopes that it will lead the interrogation to end.[89] This is only intensified by a juvenile's inability to perceive time and future consequences in the way that the average adult does.[90] An interrogation, to a developing teenager, seems even longer than it does to adults, making that interaction feel even more stressful.[91] Beyond that, developing children do not have a complete ability to connect their present actions with future implications.[92] This inability to perceive time and future consequences exacerbates a child's interests in receiving rewards in that they may say whatever they believe needs to be said in order to receive what they want, i.e. ending the interrogation.[93]

All of these characteristics cast doubt upon the ability of a child to understand their Miranda rights fully or comprehend what it means to invoke or waive them.[94] This in turn calls into question the ability of a child to waive those rights. In practice,

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[83] Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

[84] Cleary, *supra* note 15, at 120.

[85] Scott & Steinberg, *supra* note 83, at 819.

[86] *Id.* at 817.

[87] Cleary, *supra* note 15, at 120.

[88] *Id.* at 120–21.

[89] Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCH. 286, 295 (2006).

[90] Scott & Steinberg, *supra* note 83, at 817.

[91] Cleary, *supra* note 15, at 121.

[92] *Id.*

[93] Owen-Kostelnik et al., *supra* note 89, at 296.

[94] Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 77 (2006).

a child may give a brief remark of understanding, a gesture of agreement, or decline to ask questions after being read their Miranda rights.[95] However, it is likely that those actions or words "may reflect compliance with authority rather than an actual subjective appreciation of the meaning of the warning."[96] There are naturally harmful ramifications when a child waives their rights, as when anyone waives their Miranda rights.[97]

In fact, children as a group are especially at risk. Studies have shown that about 90 percent of arrested children have waived their Miranda rights and, what is more, that rate is significantly higher than the rate of Miranda waivers made by adults.[98] The low number of children invoking their Miranda rights is a strong indicator of a potential lack of comprehension on the part of those children who are being interrogated.[99] Police officers are aware of the "diminished developmental capacities and diminished psychosocial maturity" of children.[100] There have been efforts, therefore, to provide additional safeguards to children in interrogations. The next Section analyzes those efforts and shows that, in practice, the protections are not always as robust as intended.

B. Potential Juvenile Interrogation Protections

The extra protections afforded to children include amended scripts for the reading of Miranda rights and mandates for the notification or presence of additional parties who can support children.[101] While such efforts may increase a child's level of protection or even improve their understanding during an interrogation, the core problem remains—that the child still has not provided their own consent to waive their Miranda

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[95] *Id.* at 78.

[96] *Id.*

[97] Naomi E.S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 3 (2018) (noting that as Miranda warnings protect individuals from the natural pressures of policing interrogation, waiving one's Miranda rights means that you lose those protections).

[98] *Id.* at 29.

[99] *Id.*

[100] Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCIS. & L. 757, 775 (2007) (internal citation omitted).

[101] *See, e.g.*, Holtz, *supra* note 22 (describing Miranda rights with language tailored to juveniles); N.Y. FAM. CT. ACT § 305.2(7) (McKinney, Westlaw current through L.2022, chapters 1 to 562) (mandating parent notification before a juvenile's potential waiver of Miranda rights); CAL. WELF. & INST. CODE § 625.6 (West, current with urgency legis. through Ch. 997 of 2022 Reg. Sess.) (mandating attorney presence before a juvenile's potential waiver of Miranda rights).

rights. Instead, these methods substitute another's understanding in place of the accused child's.

1. Parent Presence in Juvenile Interrogations

Several states mandate the presence, notification, or advisement of a parent or guardian when a child has been arrested.[102] This may be done in an effort to provide someone who knows more about the interrogation than the child, but this objective often goes unrecognized as parents generally do not have much more of an understanding of the juvenile justice system than their children do.[103] Beyond the lack of comprehension, parents also can be placed in a conflicting position where they are expected to protect their child's interests while partnering with the police to support an investigation.[104]

On the one hand, it is true that parent involvement in the legal process can benefit children.[105] When a parent is knowledgeable of the juvenile justice system, they can provide guidance through the system, leading to more rehabilitative outcomes and thereby lower rates of the child reoffending.[106] When a parent is involved, children are more likely to complete the terms of their punishment and not commit further offenses.[107] By providing accountability and additional points of contact, parents can also be helpful with regards to assisting in the rehabilitative process.[108] Further, the hope has been that a parent or other interested adult can help to increase the trustworthiness of a juvenile's statement.[109] On the other hand, the reality is that parents rarely become actively involved during the child's interrogation, generally tending to remain silent.[110]

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[102] These states include New York (N.Y. FAM. CT. ACT § 305.2(7) (McKinney, Westlaw current through L.2022 chapters 1 to 562)), Colorado (COLO. REV. STAT. ANN. § 19-2.5-203 (West, Westlaw current through the 2d Reg. Sess., 73rd Gen. Assemb. (2022)), and Washington (WASH. REV. CODE. ANN. § 13.40.140 (West, Westlaw current with all legis. from the 2022 Reg. Sess. of the Wash. Leg.)).

[103] *See* Cavanagh & Cauffman, *supra* note 13, at 149.

[104] *See id.* at 142.

[105] *Id.* at 151.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] Woolard et al., *supra* note 7, at 687.

[110] *Id.* (detailing one report that showed "when parents are present during questioning, the parents never talk (20% of officers) or talk less than half of the time (50% of officers)" as well as a second report from a state that mandated presence of parents during juvenile interrogations where "66% involved no communication between parent and child [and] [l]ess than 10% of the juveniles asked their parents for advice on how to handle the questioning") (citation omitted).

So, the assistance that parents are intended to give rarely comes to fruition.

Even with that potential for benefit, the fact remains that parents, along with adolescents, can have serious misconceptions about how interrogations work.[111] This lack of understanding can be made worse by the fact that parents may be overly trusting of police in thinking that they will do right by their child, causing the parents not to speak up.[112] Most fundamentally, however, the concern comes from the all too likely scenario that the parent and child's goals are not aligned.[113] In that case, any advice from the parents cannot be said to be beneficial to the child as it is not providing them with the support that they are seeking.[114]

In sum, parents can be uninformed about the interrogation, overly trusting of police, and misaligned with the wishes of their children.[115] All of this means that they are not the optimal agent of protection for a child during an interrogation. If their goals are not aligned with their child's, then any waiver invoked by the parent is not valid as it reflects the wishes of the parent and not the child. Even when the parent's goals are aligned with their child's, many parents lack knowledge about the juvenile justice system, leading to less substantive involvement and assistance on the part of the parents.[116] All in all, despite the aspirations that a parent will benefit a child, the reality is that those benefits are unlikely to come to fruition. Accordingly, parent presence in juvenile interrogations does not provide optimal protections and other avenues must be explored.

2. Miranda Rights Tailored to Juveniles

Another effort to increase the ability of children to understand their Miranda rights has been to read them in language specifically tailored for them. The hope has been that if the Miranda rights are given in terms comprehensible to a child, then any waiver would be valid, the result of knowing consent, and any confession would be admissible.[117] In practice, this can often be a standard Miranda litany with each warning followed by a simplified version that fully explains what each

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111 *Id.* at 694.
112 *See id.* at 695.
113 *See supra* note 10 and accompanying text.
114 *See* Woolard et al., *supra* note 7, at 696.
115 *See supra* note 10 and accompanying text.
116 *See* Cavanagh & Cauffman, *supra* note 13, at 149.
117 Holtz, *supra* note 22, at 549.

warning means and asks if the child understood the each warning to ensure that the child comprehends.[118] In creating amended Miranda litanies, jurisdictions sought input from children in custody, judges, law enforcement, among others, with the hope that the resulting juvenile Miranda warnings would provide the protections needed for children.[119]

Setting aside the fact that anyone, child or adult, would benefit from being read such amended warnings with detailed explanations, many of the amended warnings are unviable for children.[120] The inclusion of detailed explanations leads to warnings that can become quite long.[121] As the warnings grow longer, it becomes more difficult for children to comprehend and retain all of the information with which they have been presented.[122] This is true whether the warnings are given orally or in writing.[123]

Further, even with the deeper explanations, the Miranda litany still ends with the police seeking a simple affirmation that does not easily allow for opportunities "to express confusion or a lack of understanding."[124] The task of creating an optimal Miranda litany for children that fully incorporates the necessary information is challenging and the hope of balancing concision with uncomplicated language only serves to exacerbate that challenge.[125] Therefore, it is not a valid method for facilitating knowing consent on the part of the child when waiving their Miranda rights. Accordingly, other alternatives must be used to bolster protections for juveniles in interrogations.

3. Attorney Presence in Juvenile Interrogations

Perhaps, then, mandating the presence of an advocate for the child who is knowledgeable about legal matters would be beneficial for a child. "Juveniles are less likely to waive their rights or further incriminate themselves if they consult with counsel first and counsel properly advises them of their rights."[126] Even though attorney presence during juvenile

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[118] *See id.* at 551.

[119] *Id.* at 551–52.

[120] *See* Richard Rogers et al., *Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?*, 39 CRIM. JUST. & BEHAV. 229, 243 (2012).

[121] *Id.* at 242.

[122] *Id.* at 243.

[123] *Id.*

[124] *Id.* at 243–44.

[125] *Id.* at 246.

[126] August & Henderson, *supra* note 23, at 271 (internal quotation marks and citation omitted).

interrogations is not mandated in all jurisdictions, the benefit they provide when present is clear.[127] Any contact that a child has with an attorney increases their ability to understand the interrogation and the process going on around them.[128]

An attorney provides additional benefits when compared with the presence of a parent.[129] Where a parent and child might have conflicting goals, an attorney is present to act as the direct advocate for the child.[130] As such, their goals are naturally aligned and potential conflicts are not present.[131] Further, where parents often know little more than their children about interrogations and the juvenile justice system, attorneys are experts.[132] A lawyer can provide superior protections to a child because they know how the system works and can explain it to the child.[133] An attorney is also superior to a specialized juvenile Miranda litany in that an attorney can provide a more individually tailored explanation of the Miranda rights, rather than a one-size-fits-all simplification of the adult warning.

Even though the presence of an attorney can be quite beneficial, few children request representation during interrogations.[134] While some jurisdictions have sought to alleviate that issue by mandating attorney presence,[135] it does not tackle the core problem completely. The fundamental issue confronting children in interrogations is not lack of support but instead an insufficient "level of comprehension and understanding to make a knowing and intelligent waiver of their rights."[136] While an attorney may help by explaining things and advocating for the child, an essential question remains. Can an attorney do anything to change the fundamental comprehension and understanding their child client has in order to allow them to make a choice to remain silent that is fully knowing, voluntary, and competent? If an attorney cannot change this core understanding, then they cannot do anything to effectuate true consent to a waiver of Miranda rights. Accordingly, even this protection does not fully guard children against unknowingly or involuntarily waiving their Miranda rights.

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[127] *Id.*

[128] *Id.*

[129] Alberts, *supra* note 25, at 122–23.

[130] *Id.* at 122.

[131] *Id.*

[132] *Id.* at 123.

[133] *Id.*

[134] August & Henderson, *supra* note 23, at 271.

[135] CAL. WELF. & INST. CODE § 625.6 (West, Westlaw current with urgency legislation through Ch. 997 of 2022 Reg. Sess.); 705 ILL. COMP. STAT. ANN. 405/5-170 § 5-170 (West, Westlaw current through P.A. 102-1102 of the 2022 Reg. Sess.).

[136] August & Henderson, *supra* note 23, at 270.

III. THE STATE OF THE STATES

Currently, across the United States, there are a variety of approaches in terms of how to provide for children in interrogations. Some states provide little to no protections for children.[137] Other states provide safeguards that are well-intentioned but fall short of true, meaningful protections.[138] But only one state has crafted a statute that provides near maximal protections for children in interrogations.[139] These three levels of protection are summarized below.

A. Little to No Protections

Most states rely on the "totality-of-the-circumstances" framework as provided by the Supreme Court in *Fare v. Michael C.*[140] Most of these states apply this framework by assessing the factors using further court decisions rather than creating a statutory framework that would provide strong protections or, at the very least, encourage consistency. Without any additional statutory protections for children in interrogations, the "totality-of-the-circumstances" framework does not provide ample protections for children as it gives much leeway to the courts to assess whether the waiver was knowing and voluntary.

The Idaho Supreme Court provides a recent example of how to apply the "totality-of-the-circumstances" framework.[141] The Idaho Supreme Court instructs lower courts to consider a child's "age, experience, education, background, and

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[137] *See infra* Section III.A. Many jurisdictions apply a "totality-of-the-circumstances" test when assessing whether or not a juvenile waiver of Miranda rights was valid. The jurisdictions that follow this model include, among many others, Idaho (State v. Samuel, 452 P.3d 768, 786 (Idaho 2019)), Nevada (Ayala v. State, No. 69877, 2017 WL 1944321, at *1 (Nev. May 9, 2017)), The District of Columbia (*In re* S.W., 124 A.3d 89, 101-02 (D.C. 2015)), Minnesota (State v. Thompson, 788 N.W.2d 485, 492-93 (Minn. 2010)), and Alabama (*Ex parte* Landrum, 57 So.3d 77, 89 (Ala. 2010)).

[138] *See infra* Section III.B. These are the jurisdictions that statutorily mandate third-party presence before a juvenile waiver of Miranda rights. The jurisdictions that mandate parent presence include, among others, New York (N.Y. FAM. CT. ACT § 305.2(7) (McKinney, Westlaw current through L.2022, chapters 1 to 562)), Colorado (COLO. REV. STAT. ANN. § 19-2.5-203 (West, Westlaw current through the 2d Reg. Sess., 73rd Gen. Assemb. (2022)), and Washington (WASH. REV. CODE. ANN. § 13.40.140 (West, Westlaw current with all legis. of the 2022 Reg. Sess. of the Wash. Leg.). The jurisdictions that mandate attorney presence are California (CAL. WELF. & INST. CODE § 625.6 (West, Westlaw current with urgency legis. through Ch. 997 of 2022 Reg. Sess.)) and Illinois (705 ILL. COMP. STAT. ANN. 405/5-170 § 5-170 (West, Westlaw current through P.A. 102-1102 of the 2022 Reg. Sess.)).

[139] *See infra* Section III.C. New Mexico has established that certain juvenile interrogations are inadmissible in court (N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

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

[141] State v. Samuel, 452 P.3d 768, 781–90 (Idaho 2019).

intelligence, and . . . whether [a child] has the capacity to understand the warnings given" when weighing whether a waiver was made knowingly and voluntarily.[142] While Idaho, and other states, have case law that can help to narrow down how to assess those factors, without statutory protections there is inherently wiggle room. In creating a system that offers only a retrospective assessment of a variety of factors, the possibility remains high that a child will give away their rights without any guarantee that the injustice will be later rectified. Further, a "totality-of-the-circumstances" test naturally presumes that a child is capable of voluntarily consenting to a waiver of their Miranda rights. As children developmentally do not possess the ability to knowingly understand and waive that right, a "totality-of-the-circumstances" test inherently does not provide a resolution to the problem of consent.[143]

B. Efforts at Protections

Some jurisdictions have gone further and provided statutory protections for children in interrogations by mandating third party presence. These guidelines, however, fall short of providing meaningful protections in that none of them address the reality that children are unable to provide true consent to a waiver. These statutes look to involve an adult in the interrogation process in the hopes that they will protect the child and ensure that the interrogation is done properly and fairly.[144]

New York mandates that a parent or guardian must be present and advised of a child's right to remain silent and their right to an attorney before the child is questioned.[145] The corresponding federal statute also mandates parent notification prior to questioning of a child.[146] However, as discussed above, this framework does not provide children with the protections that it purports to give.[147] While at first glance parents may seem like a strong choice to protect their children, there are a variety

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[142] *Id.* at 786 (citation omitted).

[143] *See supra* Section II.A.

[144] August & Henderson, *supra* note 23, at 270, 278.

[145] N.Y. FAM. CT. ACT § 305.2(7) (McKinney, Westlaw current through L.2022, chapters 1 to 562).

[146] 18 U.S.C. § 5033. The statute also requires that a child be read their "rights[ ] "in language comprehensive to [the] juvenile." *Id.* It is of note that the statute uses the word "comprehensive" rather than the preferable (and perhaps intended) "comprehensible." *Id.* Comprehensive means that the rights only need to be "complete and including everything that is necessary." It therefore does not necessitate that it be given in language that the child understands, just that the complete information is given. *Comprehensive*, CAMBRIDGE DICTIONARY (Online ed. 2021)).

[147] *See supra* Section II.B.1.

of instances where that is not the case. From conflicting interests to lack of information, the examples are ample as to why parents do not provide optimal protections to children in interrogations.

California and Illinois have gone a step further and looked to a different third party to provide support for children in interrogations, attorneys.[148] This third party, however, while perhaps more beneficial to the child than a parent still falls short of the full protections that children deserve and does not solve the problem of a child's consent.

1. California

In 2020, California passed a law mandating the presence of attorneys in interrogations of children.[149] In weighing the statutory change, the California legislature considered the remarks made by the United States Supreme Court on the ability of children to comprehend interrogations.[150] The California legislature recognized children lack the experience and perspective to avoid harmful choices, "lack the capacity to exercise mature judgment," and are vulnerable to outside influences.[151] Specifically, the legislature acknowledged "that the human brain undergoes significant changes throughout adolescence and well into young adulthood."[152] Additionally, the legislature found "[y]outh under 18 years of age have a lesser ability than adults to comprehend the meaning of their rights and the consequences of waiving those rights" and considered that "[a] large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions."[153] As a result, it passed a law mandating consultation with counsel for all individuals under the age of eighteen.[154] This consultation cannot be waived unless there is a reasonable belief there is an imminent threat that can be abated by information gained through

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148 CAL. WELF. & INST. CODE § 625.6 (West, Westlaw current with urgency legis. through Ch. 997 of 2022 Reg. Sess.); 705 ILL. COMP. STAT. ANN. 405/5-170 § 5-170 (West, Westlaw current through P.A. 102-1102 of the 2022 Reg. Sess.).

149 CAL. WELF. & INST. CODE § 625.6 (West, Westlaw current with urgency legis. through Ch. 997 of 2022 Reg. Sess.).

150 S.B. No. 203, 2020 Leg. (Cal. 2020).

151 *Id.*

152 *Id.*

153 *Id.*

154 CAL. WELF. & INST. CODE § 625.6(a) (West, Westlaw current with urgency legis. through Ch. 997 of 2022 Reg. Sess.). As this law was passed rather recently, there has not yet been any research undertaken to determine the practical impact that this has had for juveniles in interrogations.

interrogation.[155] Absent such circumstances, however, any information gained through an interrogation performed prior to consultation with counsel is inadmissible.[156]

Some California prosecutors have challenged the California law, saying they believe it will make police investigations too difficult.[157] Geraldine Wong-Williams, speaking on behalf of the California District Attorneys Association, argued the bill would "mak[e] it harder to question youth who might be both perpetrators and victims."[158] While this is true, there remains alternative, reliable methods for gathering evidence, especially in today's day and age.[159] The former District Attorney of San Francisco, Chesa Boudin, disputed the contention that the bill would hinder the ability to prosecute crimes.[160] It is worth noting that San Francisco had already, prior to the passing of the California statute, mandated a lawyer explain to juveniles their Miranda rights before an interrogation.[161] Boudin said that considering the increased availability of video, computer data, and forensic evidence, "prosecutors rely on confessions 'less and less.'"[162] With that in mind, the detrimental effects to investigations and prosecutions are not as dire as they may seem. Further, Miranda warnings themselves were assumed to make investigation and prosecution harder, but they are necessary because they protect fundamental Constitutional rights.[163]

While the California protections are strong, they do have the escape hatch for situations of imminent harm.[164] Accordingly, it is necessary to consider stauncher protections of juvenile's Miranda rights.

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[155] *Id.* § 625.6(c).

[156] *Id.* § 625.6(b).

[157] Jeremy Loudenback, *California Bill Seeks Strengthened Miranda Rights for Minors*, IMPRINT (Aug. 5, 2020, 10:45 PM), https://imprintnews.org/justice/juvenile-justice-2/california-bill-seeks-strengthened-miranda-rights-for-minors/46324 [https://perma.cc/6XDH-LJEV].

[158] *Id.*

[159] Edwin Chavez, *CA SB 203 Extends Miranda Rights Protection*, SAN QUENTIN NEWS (Feb. 25, 2021), https://sanquentinnews.com/ca-sb-203-extends-miranda-rights-protection/ [https://perma.cc/B82K-96JT].

[160] Loudenback, *supra* note 157.

[161] *Id.*

[162] *Id.*

[163] Miranda v. Arizona, 384 U.S. 436, 467 (1966). Additionally, despite the overwhelming fear from police and prosecutors that Miranda warning mandates would make investigations more difficult, suspects have still often waived their rights after being read the Miranda litany and the ruling has hardly hindered investigations. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 632 (1996).

[164] CAL. WELF. & INST. CODE § 625.6(c) (West, Westlaw current with urgency legis. through Ch. 997 of 2022 Reg. Sess.).

2. Illinois

In 2017, Illinois passed a statute to mandate counsel presence during interrogations of children.[165] That statute has both benefits and drawbacks relative to California's statute. The benefit is that there is no workaround provision for imminent threats.[166] While a child could conceivably pose an imminent threat, it is quite unlikely that a juvenile would have information that could truly mitigate such a massive, imminent threat. As such, that provision would only serve to give police an excuse to interrogate a child who has not consented to interrogation.

On the other hand, the drawback of Illinois's statute is this mandate for counsel only extends to individuals who were under the age of fifteen at the time they were alleged to have committed the crime.[167] Illinois's juvenile justice system, however, has exclusive jurisdiction over all individuals who have been charged with crimes committed prior to their eighteenth birthday.[168] So, while this statute does provide additional protections for certain children, those protections disappear after age fourteen, despite the fact that they are still within the purview of the juvenile courts for another three years. As brain development continues through one's midtwenties, there seems to be no good reason to differentiate among juveniles based on the arbitrary aged-fifteen cutoff.[169] Therefore, the protections provided by the Illinois statute are not optimal and more can be done to protect children in interrogations.

Even setting aside the drawbacks of the California and Illinois statutes in their respective imminent threat and limited age provisions, mandating attorney presence does not provide ideal protection for children.[170] When an attorney comes in to protect a child, it is likely that they will substitute their own judgment for that of the child. Even when that judgment benefits the child, it still usurps the child's ability to make their own decision. When a child has not made their own decision, there is a decreased ability to ensure that the child has truly consented to that decision. As Miranda rights revolve around

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[165] 705 ILL. COMP. STAT. ANN. 405/5-170 § 5-170 (West, Westlaw current through P.A. 102-1102 of the 2022 Reg. Sess.). Again, similar to California, no research has been undertaken as of yet to explore the impact that this statute has had on juveniles in interrogations.

[166] *Id.*

[167] *Id.*

[168] *Id.* 405/5-120 § 5-120.

[169] *See* Cleary, *supra* note 15, at 120.

[170] *See supra* Section II.B.3.

autonomy, the core interest—that which needs heightened protection—should be consent.[171]

C. Stable Statutory Protection

New Mexico has taken the strongest step towards providing protections for children in interrogations by deeming juvenile interrogations inadmissible, with some variations based on the age of the child.[172] Some prosecutors believe that protections such as these are not necessary, and that Miranda rights are self-explanatory and easy to understand.[173] However, there are inherent challenges in the ability of a child to comprehend their Miranda rights and what it means to waive them.[174] Most juveniles waive their Miranda rights and do not understand what that actually means.[175] Therefore, providing increased protections is not only merited, but also necessary.

Although New Mexico provides the strongest protection for children in interrogations, those protections only apply to children up to a certain age. In 2009, New Mexico passed the stringent standard that "no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition."[176] There are then weaker protections for children aged thirteen and fourteen because there is a rebuttable presumption of inadmissibility for any confessions, statements, or admissions made by children of those ages.[177] In order to rebut the presumption, the New Mexico Supreme Court has held that clear and convincing evidence must be presented to prove that the defendant knowingly waived their Miranda rights.[178] The court further held that the child's maturity

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171 Hashimoto, *supra* note 29, at 1153.

172 *See* N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

173 Elizabeth Weill-Greenberg, *Children Can Be on Their Own When Grilled by Police. The Push for Protection Is Growing*, APPEAL (Mar. 25, 2021), https://theappeal.org/juvenile-right-to-attorney-police-interrogation-maryland-state-legislation/ [https://perma.cc/Y26D-46TY] (quoting one prosecutor who said "Miranda can apply to juveniles and it's very easily understood" and "I don't know what's hard about the statement, 'You have the right to remain silent.'").

174 August & Henderson, *supra* note 23, at 270.

175 Weill-Greenberg, *supra* note 173; Lorelei Lard, *Police Routinely Read Juveniles Their Miranda Rights, but Do Kids Really Understand Them?*, A.B.A., (Aug. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practice online/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights—but-do-kid/ [https://perma.cc/2E2Z-CYGA] (indicating that studies have shown that juveniles waive their Miranda rights around 90 percent of the time).

176 N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

177 *Id.*

178 State v. DeAngelo M., 360 P.3d 1151, 1153 (N.M. 2015).

must be proven conclusively in order to meet this rebuttable presumption.[179] This sounds strikingly similar to a "totality-of-the-circumstances" test that is functionally inadequate to address the problem of juvenile Miranda waivers.[180]

However, just like most jurisdictions, the juvenile justice system in New Mexico has exclusive original jurisdiction over children who were under the age of eighteen at the time they allegedly committed the crime with which they have been charged.[181] As such, though this provision is paramount in the protections it provides, it is also severely limited with regards to the range of children to whom it grants those protections. Children aged fifteen to seventeen receive none of those additional protections that their younger counterparts receive.[182] And while those aged thirteen and fourteen fare better than their older peers, there is still the very real possibility that the rebuttable presumption works against them, and the protection therefore evaporates.

New Mexico has provided an incredible model that truly gets at the heart of the problem that arises in juvenile interrogations. There will always be the question of whether a child can knowingly and voluntarily consent to a waiver.[183] While a lawyer, or any third party, may provide protection for children, they do not have the ability to fundamentally alter a child's level of understanding and comprehension. Even though any lawyer worth their salt will advise their client not to speak with the police, that is not actually consent. While silence is the correct, protective choice for a child, the lawyer is still substituting their own judgment for that of the child. Therefore, the presence of a lawyer does not actually resolve the consent problem and even the seemingly ideal statutes in states like California and Illinois fall short. Conversely, New Mexico's statute does solve the consent problem because it removes the need for a child to consent in the first place. When no decision needs to be made by the child because the interrogation will not happen, then there is no need to worry about whether the child has consented.

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[179] *Id.*

[180] *See supra* Section III.A.

[181] N.M. STAT. ANN. § 32A-1-8 (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

[182] This is the case despite there being no significant indication that fifteen is a significant year with regards to a juvenile's ability to understand culpability or a Miranda waiver. In fact, ages fourteen and fifteen comprise the peak of juvenile impulsivity and desire to seek rewards. Those traits remain present as they decrease until around age seventeen. Kean Poon, *Hot and Cool Executive Functions in Adolescence: Development and Contributions to Important Developmental Outcomes*, 8 FRONTIERS PSYCH. 1, 15 (2018).

[183] August & Henderson, *supra* note 23, at 270.

Even with that model, however, the shortcoming concerning age is problematic. New Mexico does not have a minimum age at which a child can be prosecuted in juvenile court.[184] Therefore, there are many children under the age of thirteen who could theoretically be protected by this provision. That being said, the statute still draws an arbitrary line between which juveniles receive those protections and which do not.[185] Protections for all juveniles are important, and the judiciaries of many states have recognized that fact.

D. Court Recognition of a Need for Juvenile Protection

Even if jurisdictions have varied in their solutions to the problem, courts across the United States have recognized the need for increased protections of juveniles in the legal system. In 2010, the New York Court of Appeals considered the admissibility of a juvenile interrogation conducted without the child's parent.[186] An interrogating detective initially spoke to the defendant and his mother together, reading them his Miranda rights.[187] Once they had chosen to sign Miranda waivers, the detective then asked the defendant's mother if he could speak to the defendant alone because "children sometimes do not feel comfortable talking to a detective in front of a parent. . . . [T]he mother agreed," left the room, and the defendant confessed to the detective in the ensuing interrogation.[188] The court placed importance on the role of the parent in interrogations as they can monitor the questioning and protect against the potentially deleterious impact of the immaturity of the child.[189] Further, the court recognized that "juveniles charged with delinquency may not fully 'understand the scope of their rights and how to protect their own interests. They may not appreciate the ramifications of their decisions or

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[184] *Age Boundaries in Juvenile Justice Systems*, NAT'L GOVERNORS ASS'N (Aug. 12, 2021), https://www.nga.org/center/publications/age-boundaries-in-juvenile-justice-systems/ [https://perma.cc/FRH9-2786].

[185] The psychosocial maturity that is of vital importance for juveniles in situations like interrogations, is not reached until the age of twenty and onward. This period of development "requires an effective coordination between emotions and cognition" and is marked by changes in "impulsivity, risk perception, sensation seeking, future orientation, and resistance to peer pressure." Ezequiel Mercurio et al., *Adolescent Brain Development and Progressive Legal Responsibility in the Latin American Context*, 11 FRONTIERS PSYCH. 7 (2020). Accordingly, the age distinctions drawn in the New Mexico statute do not have a basis in science.

[186] *In re* Jimmy D., 938 N.E.2d 970, 972 (N.Y. 2010).

[187] *Id.* at 971.

[188] *Id.*

[189] *Id.* at 973 ("[T]he parent who is present at questioning is able to monitor the interrogation lest the police engage in coercive tactics.").

realize all the implications of the importance of counsel.'"[190] While parent presence is not the optimal protection for children, the New York Court of Appeals recognized the importance of protections for children in interrogations.

In *State v. Horse*, the Supreme Court of South Dakota considered a matter where a juvenile waived his rights against self-incrimination without prior notification of his parents, a statutory requirement in South Dakota.[191] During the interrogation, officers told the defendant that while they could not promise anything if he confessed, they would do anything that they could to help him and the defendant subsequently confessed.[192] The court noted the young defendant would not have been able to understand the emptiness of those promises.[193] In weighing whether or not such a confession should be suppressed, the court recognized that "[c]hildren can be 'easy victim[s] of the law.'"[194] The court held that additional protections were merited and that due to the lack of understanding of the defendant and the breach of the statutory parental notification requirement, the resultant admission needed to be suppressed as it greatly harmed the defendant.[195]

Even if the South Dakota Supreme Court based its decision on the need for parent presence to protect the defendant, something that does not actually provide optimal protection for children in interrogations, the court still highlighted the great need for additional protections for children. This understanding is frequently shared by courts across the United States.[196] Legislators and courts alike

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[190] *Id.* (citation and internal quotation marks omitted).

[191] State v. Horse, 644 N.W.2d 211, 213 (S.D. 2002).

[192] *Id.* at 215.

[193] *Id.*

[194] *Id.* at 218 (alteration in original) (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948)).

[195] *Id.* at 224–25.

[196] *See, e.g.*, *In re* A.A., 222 A.3d 681, 689 (N.J. 2020) ("Juveniles receive heightened protections when it comes to custodial interrogations for obvious reasons . . . . [J]uveniles—teenagers and children alike—are typically less mature, often lack judgment, and are generally more vulnerable to pressure than adults."); State v. Filemon V., 412 P.3d 1089, 1094 (N.M. 2018) ("Questioning officials must exercise greater vigilance with child suspects due to their [l]ack of experience, perspective, and judgment, and their diminished ability to recognize and avoid various choices detrimental to them.") (alteration in original) (citations and internal quotation marks omitted); State v. Griffin, 513 S.W.3d 828, 830–31 (Ark. 2017) (noting greater statutory protections for children in the legal system); *In re* A.L.-C., 382 P.3d 842, 845 (Colo. 2016) ("[W]e have observed that the requirement that a parent, guardian, custodian, or attorney be present for the interrogation provides an additional and necessary assurance that the juvenile's Fifth Amendment right against self-incrimination . . . will be fully afforded to [them].") (citation and internal quotation marks omitted) (omission in original); Sen v. State, 301 P.3d 106, 120 (Wyo. 2013) (describing Wyoming's "system in which defendants tried in juvenile court are afforded greater protections than those granted to adults in the criminal justice system"); State v. Farrell, 766 A.2d 1057, 1061

recognize the ongoing development of children and the need to provide them with additional protections. But, as of yet, no jurisdiction has provided a solution that is truly commensurate with that problem. No jurisdiction has provided a solution that addresses the true problem, the inability of a child to give a true and knowing consent to a Miranda waiver.

IV. A NEW STATUTORY FRAMEWORK

While some jurisdictions provide more protections for children in interrogations than others, none provide comprehensively protective safeguards.[197] However, when jurisdictions have passed legislation, or sought to pass legislation, they have been motivated by accurate rationales. New York State Assemblywoman Latoya Joyner and New York State Senator Jamaal T. Bailey recognized that children are not able to protect their Fifth Amendment right against self-incrimination on their own because of "their inherent developmental limitations."[198] Accordingly, they have introduced legislation that mandates the presence of attorneys in juvenile interrogations.[199] Further, in passing a statute mandating attorney presence in interrogations, California legislators noted the ongoing brain development in children and their inability to comprehend Miranda rights.[200] But still, the legislature passed or proposed statutes that do not truly recognize the best solution for the problems identified.

When a child does not have the capacity or understanding to consent, bringing in another individual to substitute their own decision creates a potentially unfair scenario, as discussed above.[201] Even when that decision made by another individual is beneficial for the child, there is still the matter that the child is not the one consenting to or making the choice. Therefore, even though attorneys provide strong protections for children, the strongest, and perhaps fairest, solution to a situation where a child is not fully able to

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(N.H. 2001) ("In *Benoit*, we addressed the capacity of juveniles to understand and waive their rights, concluding that special procedures are needed to protect them.") (citation omitted); Trowbridge v. State, 717 N.E.2d 138, 147 (Ind. 1999) ("Only juveniles have the added statutory protection of a 'meaningful consultation.'") (quoting Hickman v. State, 654 N.E.2d 278, 281 (Ind. Ct. App. 1995)).

197 *See supra* Part III.

198 S.B. 2800-B, 2021 Leg. (N.Y. 2021).

199 *Id.*

200 S.B. No. 203, 2020 Leg. (Cal. 2020).

201 *See supra* Section II.B.

understand or consent to what is going on is to remove the need for consent in the first place.

As such, New Mexico provides the optimal starting point from which jurisdictions should develop appropriate statutes to protect children in interrogations. New Mexico's statute says in relevant part:

> F. Notwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition. There is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible.[202]

But this is not where jurisdictions should end their efforts to project children in terms of interrogations. The entire purpose of juvenile justice systems has been to accommodate the well-known fact that children are still developing and their capacity for true culpability is not comparable to that of adults.[203] Even if the original choices of age delineating the difference in treatment of juveniles was arbitrary, the fact remains that the decision to create special courts for juvenile criminal matters was based on the very real and accurate understanding that children's minds function differently.[204] If an entire system has been created to account for the fact that children operate differently in terms of culpability, then why further break down that category to give only select children certain protections?

Brains continue to develop until an individual is in their midtwenties.[205] The rationales based on juvenile brain development that justify having a juvenile justice system are the same rationales that determine a child's ability to comprehend and consent to a waiver of their Miranda rights. It is accepted that children should not be held comparably culpable to adults for the actions that they take because they are unable to understand fully the ramifications of those actions. By the same reasoning, children should not be expected to understand fully the ramifications of waiving their Miranda rights. Accordingly, there is no basis for distinguishing between the juveniles who receive increased protections in interrogations and who do not.

Therefore, a simplified version of New Mexico's statute should be used as a model. Jurisdictions should enact statutes

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[202] N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)).

[203] *Supra* Section I.A.

[204] *Supra* Sections I.A, II.A.

[205] Cleary, *supra* note 15, at 119.

that state: No confessions, statements, or admissions may be introduced against a juvenile on the allegations of the petition.[206]

When an interrogation cannot be admitted as evidence, then there is nothing to be gained from interrogating a child. When there is nothing to be gained by undergoing an interrogation of a child, then the interrogation will not occur. When an interrogation does not occur, then there is no need to worry about whether or not a child has consented to the interrogation or, for that matter, has voluntarily chosen to waive their Miranda rights. By removing the purpose of an interrogation, the rights of the child are protected. Courts have recognized the importance of these rights, and this is the best way to recognize this importance and protect it.[207]

There is no doubt that rendering juvenile interrogations inadmissible will certainly make investigations harder, but that is no reason not to pursue this path.[208] Many facets of criminal procedure add hurdles to investigatory processes, but they are done so with the purpose of protecting core constitutional rights. That was intent of the *Miranda* decision and the later impacts it has had on criminal procedure.[209] It remains that these rights must be protected even at the cost of increased procedural hurdles.

Even with these hurdles, however, there are alternative means of investigation. There are resources such as video and computer evidence that will not infringe upon the constitutional rights of children.[210] Despite the importance placed on interrogations, there are other methods of collecting evidence. Convictions do not hinge on confessions. Throughout history, many individuals have been convicted who did not confess to crimes. There exist judicial systems throughout the country that are built specifically for assessing guilt.

Further, false confessions present their own challenges to investigations. False confessions lead to increased crime rates because the true perpetrator is still at large, able to commit further crimes, while law enforcement stops looking under the assumption they have arrested the proper person.[211] If the goal

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[206] Adapted from N.M. STAT. ANN. § 32A-2-14(F) (West, Westlaw current through the 2022 2d Reg. Sess. & 3d Special Sess. of the 55th Leg. (2022)). Depending on the jurisdiction, the exact language may change to align with the local terminology used to refer to individuals subject to the juvenile court's jurisdiction, the charging instrument, and anything else that is relevant.

[207] *See supra* Section III.D.

[208] *See, e.g.*, Weill-Greenberg, *supra* note 173; Loudenback, *supra* note 157.

[209] *See supra* note 163 and accompanying text.

[210] Loudenback, *supra* note 157.

[211] Karen Savage, *New York Youth Need Attorney Before Interrogation, Coalition Tells State Lawmakers*, JUV. JUST. IDEA EXCH. (Mar. 5, 2021),

of law enforcement is truly to protect the community and stop people who threaten the community, there should be a vested interest in taking the necessary steps to reduce false confessions.

This new framework will protect children's rights in the interrogation room better than the existing methods. This will protect children's rights better than having their Miranda rights read in simplified language that just ends up causing more comprehension challenges. Some law enforcement officials believe the current level of protections in places where parent presence is mandated is enough.[212] However, this new statutory framework will protect children's rights better than by mandating the presence of a parent who may have different goals and lack knowledge of the interrogation procedure.

The proposal to hold any juvenile interrogation inadmissible in court may seem extreme, but functionally it is no different from mandating attorney presence. Any competent attorney will say that their client is not going to speak with the police. Therefore, if it is necessary to await the arrival of counsel, then the result will be that no interrogation happens. This proposal therefore skips that step by just holding the interrogations inadmissible in the first place. Perhaps someone who believes mandating attorney presence is the optimal protection for children in interrogations might ask why juvenile interrogations should be made inadmissible or why take the extreme step instead of just mandating attorney presence. The answer to that question gets at the constitutional right that is at the heart of Miranda rights.

Miranda rights protect the Fifth Amendment right against self-incrimination. This is a right protecting someone from saying something that they do not want to say. Any waiver of this right must be done voluntarily. This is all to say that this right is an autonomy right.[213] This right protects and respects the ability of an individual to make their own decisions and give consent voluntarily. While attorney presence functionally protects those rights, it also controverts them by mandating the presence of an individual regardless of the child's wish to be represented at an interrogation. That cuts against autonomy. This new statutory framework will protect children's right to autonomy better than by mandating the presence of an attorney, even when that attorney has the best interests of the child in mind.

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https://jjie.org/2021/03/05/new-york-youth-need-attorney-before-interrogation-coalition-tells-state-lawmakers/ [https://perma.cc/4TT3-XAFC].

[212] *Id.*

[213] Hashimoto, *supra* note 29, at 1153.

State legislators, in proposing bills to mandate attorney presence, have recognized, due to the limitations of their development, that children are unable to protect themselves against self-incrimination.[214] That is to say that children are unable to consent voluntarily to waiving this constitutional protection. If state legislators recognize that problem, then the solution should be tailored to that problem. Current statutory frameworks across jurisdictions do not protect that autonomy right but removing the possibility of interrogation altogether does. Accordingly, eliminating the admissibility of juvenile interrogations is the most fitting solution to the widely recognized problem of juvenile consent in terms of Miranda waivers.

Passing legislation to render juvenile interrogation inadmissible is the optimal protection because none of the other models actually effectuate consent on the part of the child, regardless of the safeguards that they provide. This model both removes any instance of uncertainty regarding consent of the child and protects them from the abuses in the interrogation room.

CONCLUSION

Some jurisdictions have taken important steps in recognizing that their procedural protections for children in interrogations are lacking. However, more must be done. It is a common solution to think adding a third party to the interrogation will solve the problem, but that is not always the case. Even a lawyer—realistically the individual best positioned to protect the child and who can advise and act in protection of an individual—cannot consent for another. If the problem at the root is one of consent, then the best solution is simply to remove the need for consent in the first place.

By removing the admissibility of juvenile interrogations, one need not worry whether a child has consented to the interrogation or not. This problem of consent and brain development is well recognized. In fact, it is the entire basis of the juvenile justice systems found in the United States. If those problems are well known, then half measure solutions are not enough. The juvenile justice systems in this country exist to support children and allowing children to be coerced in interrogations is not supporting children. Further, it is not enough to protect only the nation's youngest children. The ongoing brain development of children continues until an individual's midtwenties. Accordingly, any protections should

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[214] *See, e.g.*, S.B. 2800-B, 2021 Leg. (N.Y. 2021); S.B. No. 203, 2020 Leg. (Cal. 2020).

extend at the very least to all who fall within the purview of the juvenile justice system.

Establishing inadmissibility of juvenile interrogations will greatly protect children's autonomy rights in the face of criminal investigations. Efforts have been made to protect those rights, but none suit the problem as well as inadmissibility of interrogations. To solve the problem of juvenile consent to waivers of Miranda rights, the best solution is to eliminate the interrogations altogether.

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