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A Product of Childhood: Accounting for Age in the Miranda Analysis

Ariana Rodriguez

A PRODUCT OF CHILDHOOD: ACCOUNTING FOR AGE IN THE *MIRANDA* ANALYSIS

*Ariana Rodriguez**

One of the most polarizing areas of constitutional criminal procedure is that relating to police interrogations and confessions. While the Fifth Amendment guarantees a number of protections from self-incrimination and the inherently coercive nature of criminal investigation, these Constitutional promises are more likely to go unfulfilled when the accused is a child. This Article thoroughly examines the current law's use of the "totality of the circumstances" test in deciding whether a valid Miranda *waiver occurred or whether a juvenile has been taken into custody and, more importantly, explores why this current test remains an inadequate solution for protecting children's* Miranda *rights.*

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I. INTRODUCTION

"All right. So, you have the right to remain silent. You know what that means?" Detective Hopewell asked.[1] "Yes, it means that I have the right to stay calm," replied 10-year-old Joseph.[2]

The recent case *In re Joseph H.*[3] has prompted much debate in the legal community over the question of how child suspects should be treated during a criminal investigation, particularly with regards to the protection of a child's *Miranda* rights during a custodial interrogation. As the law stands today, the exchange above between young Joseph and Detective Hopewell is sufficient to constitute a waiver of Joseph's *Miranda* rights—a decision carrying significant legal consequence.[4] Meanwhile, however, modern developmental and neurological studies of juvenile development show, more clearly than ever, that juveniles actually lack the experience, maturity, and judgment necessary to make such legal decisions independently.[5] The resulting outcome is that the present law does not adequately protect children from having their legal rights violated.

While significant juvenile criminal law reforms have begun to take shape in California, the current solutions offered have yet to fully ensure that children's *Miranda* rights are protected. In response to *Joseph H.,* for example, the California legislature attempted to implement Senate Bill 1052 ("SB 1052")—legislation that would have required minors under 18 years of age to consult with legal counsel prior to a custodial interrogation or *Miranda* waiver.[6] While this measure would have provided significant protection for all children, the bill became caught in the political web.[7] Instead, a new version of the bill, Senate Bill 395 ("SB 395"), was passed and signed into law on October 14, 2017.[8] This 2.0 version protects only those children aged 15 and under.[9] Thus, despite a continuing need for improvement

1. *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015) (Liu, J., dissenting).
2. *Id.*
3. 367 P.3d 1 (Cal. 2015).
4. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 185 (Ct. App. 2015).
5. *See infra* pp. 125–127.
6. S.B. 1052, 2015–2016 Reg. Sess. (Cal. 2016).
7. *SB-1052 Custodial Interrogation: juveniles.*, CAL. LEGIS. INFO. (last visited Apr. 7, 2019), https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SB1052. Governor Brown vetoed the first version of the bill, Senate Bill 1052 ("SB 1052"), after citing concerns that the bill could obstruct police investigations. *Id.*
8. S.B. 395, 2017–2018 Reg. Sess. (Cal. 2017).
9. *Id.*

in this area of California law, an all-encompassing solution has not yet arrived.

Although those in search of a solution should continue fighting for all children through the California legislature, they should also consider doubling their efforts by urging the California courts to revisit their application of the law on this issue. Current law requires the courts to consider the "totality of the circumstances" in deciding whether a valid *Miranda* waiver occurred or whether a juvenile has been taken into custody.[10] However, as this Article argues, the courts' application of the totality of the circumstances test ("totality test") is incomplete at best (and plainly subjective at worst) because it does not adequately ensure that the characteristics of childhood are accounted for in analyzing whether a child's *Miranda* rights have been violated. In particular, this Article argues that the analysis is presently failing to account for children as a unique and vulnerable class of citizen and argues for modifying the test to ensure the appropriate weight is given to a child-suspect's age.

Part II of this Article details the current law regarding criminal procedure and the Fifth Amendment, and provides a timeline of this law's evolution as it pertains to children. Part III provides a critique of the Court's current application of the totality test in cases involving children's *Miranda* rights. Part III then closes with an explanation for why a child's age should be given substantial weight under the totality test by providing modern findings surrounding juvenile development. Part IV explores the strengths and weaknesses of other potential solutions in applying *Miranda* to children, and ultimately concludes that, regardless of additional legislative protections, the totality test should consider whether a waiver or confession was a "product of childhood." Part IV also argues that, by including a direct "product of childhood" inquiry under the umbrella of the totality test, courts can ensure that the *Miranda* analysis adequately accounts for the special characteristics of children. Part V reflects on the viability of the possible solutions discussed and concludes on the current status of children in the evolving field of criminal law.

10. Fare v. Michael C., 442 U.S. 707, 724–25 (1979); J.D.B. v. North Carolina, 564 U.S. 261, 271–72 (2011).

II. BACKGROUND: *MIRANDA* AND THE FIFTH AMENDMENT

One of the most polarizing areas of constitutional criminal procedure is that relating to police interrogations and confessions.[11] Longstanding arguments exist over how much merit and weight should be assigned to confessions taken during a police investigation.[12] This is, in part, because the admission of a confession in a criminal case can quickly become damning.[13] Thus, constitutional protections and specialized procedures govern when confessions may be properly admitted into evidence.

A. Fifth Amendment Rights and Procedures

The Fifth Amendment of the U.S. Constitution guarantees that "No person . . . shall be compelled in any criminal case to be a witness against [her]self. . . ."[14] It was this simple line that provided the Supreme Court with a foundation for the now-iconic Miranda warnings endlessly dramatized on television. *Miranda v. Arizona*,[15] decided in 1966, held explicitly for the first time that under the Fifth Amendment, a person can not be subject to a custodial interrogation until she is explicitly informed of her rights.[16] The Court held that the Constitution protects an accused from being compelled to give statements that are testimonial, incriminating, and compelled, and guarantees the right to remain silent and the right to counsel.[17] In short, a typical *Miranda* warning is usually summarized as:

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11. 2 WAYNE R. LAFAVE ET AL., WEST'S CRIMINAL PRACTICE SERIES: CRIMINAL PROCEDURE § 6.1(A) (4th ed. 2016) ("No area of constitutional criminal procedure has provoked more debate over the years than that dealing with police interrogation.").

12. *Id.* ("In large measure, the debate has centered upon two fundamental questions: (1) how important are confessions in the process of solving crimes and convicting the perpetrators? and (2) what is the extent and nature of police abuse in seeking to obtain confessions from those suspected of crimes?").

13. *See* Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . .") (internal quotation marks omitted).

14. U.S. CONST. amend. V.

15. 384 U.S. 436, 442 (1966).

16. *Id.* at 444. The origins of the *Miranda* rule first appeared in the seminal cases of (1) *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936), in which the U.S. Supreme court first struck down a conviction because of the manner in which the defendant's confession was obtained, and (2) *Escobedo v. Illinois*, 378 U.S. 478, 484 (1964), in which a confession was suppressed because it was obtained in violation of the defendant's right to counsel at the time of interrogation. It also affirmed the existence of an absolute right to remain silent. *See* LAURIE L. LEVENSON, CALIFORNIA CRIMINAL PROCEDURE § 7:3 (2016).

17. *Miranda*, 384 U.S. at 444.

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?[18]

Consequently, *Miranda*'s articulation of these constitutional limitations on custodial police interrogations created new and expansive protections for individual rights on which to build.[19]

In the years following *Miranda*, the landscape surrounding Fifth Amendment rights was shaped extensively by the Supreme Court. Modern *Miranda* analysis may be broken down into four distinct parts: custody, interrogation, delivery, and waiver. While each of these stages is integral to a full understanding of a *Miranda* analysis, the most important as far as children are concerned are custody and waiver because (1) both utilize some iteration of the totality of the circumstances test, and (2) the Supreme Court has considered the unique status of children at these stages.[20]

1. *Miranda* Analysis: Custody

The first question in determining whether a *Miranda* warning is necessary asks whether the individual who is the target of police attention is "in custody."[21] Determining whether an individual is in custody is a critical part of the analysis because the purpose of *Miranda*'s due process safeguards is to "protect the individual against the coercive nature of *custodial* interrogation."[22] *Miranda* warnings are only required where the police's target is in custody; they do not apply in noncustodial settings.[23]

18. *Id.* at 467–73; *see also What Are Your Miranda Rights?*, MIRANDA WARNING, http://www.mirandawarning.org/whatareyourmirandarights.html (last visited Apr. 7, 2019).

19. *Miranda*, 384 U.S. at 436.

20. Fare v. Michael C., 442 U.S. 707, 725 (1979) ("This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."); J.D.B. v. North Carolina, 564 U.S. 261, 280 (2011) ("To be sure, th[e totality of the circumstances] test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial.").

21. *J.D.B.*, 564 U.S. at 270.

22. *Id.* (emphasis added).

23. *Id.*; Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

Whether a suspect is "in custody" for *Miranda* purposes is an objective determination which consists of two inquiries.[24] First, courts must consider the "circumstances surrounding the interrogation."[25] Second, courts must consider whether "a *reasonable person* [would] have felt [that] she was at liberty to terminate the interrogation and leave" under those circumstances.[26] The custody analysis requires no subjective consideration of the suspect's "actual mindset,"[27] but looks instead to the totality of the circumstances—an objective inquiry.[28] Employing the totality test to determine whether a suspect was in custody is the first stage of the *Miranda* analysis.

There is a myriad of case law illustrating the application of the totality test to the *Miranda* custody analysis. In *Orozco v. Texas*,[29] the U.S. Supreme Court held that an individual was "in custody" where he was awoken by four officers in his bedroom and "under arrest" from the moment he gave his name.[30] The *Orozco* Court flatly rejected the state's argument that *Miranda* should not apply because the individual was interrogated on his own bed, in familiar surroundings.[31]

Alternatively, in *Oregon v. Mathiason*,[32] the Court found that a *Miranda* warning was not required where an individual confessed, went voluntarily to a police station, and was immediately told that he was not under arrest and could leave at any time.[33] The Court sternly emphasized that the custody analysis centers on whether the individual is actually in custody, not simply whether the questioning took place in a "coercive environment."[34]

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24. *J.D.B.*, 564 U.S. at 270*; see also* Yarborough v. Alvarado, 541 U.S. 652, 662–63 (2004); Stansbury v. California, 511 U.S. 318, 323 (1994); Berkemer v. McCarty, 468 U.S. 420, 442 (1984) (discussing stages of *Miranda* custody analysis).

25. *J.D.B.*, 564 U.S. at 270.

26. *Id.* (emphasis added).

27. *Yarborough*, 541 U.S. at 667.

28. *J.D.B.*, 564 U.S. at 270–71 (citing *Stansbury*, 511 U.S. at 322) ("Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to examine *all* of the circumstances . . . including any. . . that would have affected how a reasonable person in the suspects position would perceive her freedom to leave.") (internal quotation marks omitted) (emphasis added).

29. 394 U.S. 324 (1969).

30. *Id.* at 325.

31. *Id.* at 326.

32. 429 U.S. 492 (1977).

33. *Id.* at 495.

34. *Id.*

Finally, *Berkemer v. McCarty*[35] concerned an intoxicated motorist who was pulled over for swerving, given a sobriety test, and asked questions about whether he had used intoxicants; the motorist answered in the affirmative.[36] After the officer determined that the motorist was heavily intoxicated, he placed him under arrest and transported him to the county jail.[37] The Court distinguished the statements the motorist made on the roadside from those he made from the county jail.[38] It held that the roadside statements were admissible because the motorist was not yet in custody for the purposes of *Miranda*, but that the jail statements were inadmissible because the motorist was in custody when he made them.[39]

The totality test as applied to the custody analysis is a fact-specific but objective inquiry.[40] There is no distinct setting required to find that an individual is or is not in custody.[41] As the above cases illustrate, a suspect may be in custody when questioned in an informal setting, such as her own bedroom, and may *not* be in custody when questioned in a formal setting, such as a police station. It is easy to see the benefits of such flexibility. The Supreme Court itself praised the test's objective component in *J.D.B.*, stating, "The benefit of the objective custody analysis is that it is 'designed to give clear guidance to the police.'"[42] The Court elaborated:

> By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the [individual]'s position would understand [her circumstances], the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind.[43]

Thus, the Court strongly endorses the objective component of the totality test for custody analysis.

35. 468 U.S. 420 (1984).
36. *Id.* at 423.
37. *Id.*
38. *Id.* at 443.
39. *Id.* at 442.
40. J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011).
41. *Id.* at 270–71.
42. *Id.* at 271 (citing Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)).
43. *Id.*

2. *Miranda* Analysis: Interrogation

The second part of the *Miranda* analysis asks whether an interrogation has occurred.[44] While this stage of the *Miranda* analysis does not rely on the totality test discussed above, the interrogation analysis is nonetheless critical to the *Miranda* analysis. An individual's *Miranda* rights are triggered when she is in custody and interrogated, or subjected to the "functional equivalent" of interrogation.[45] In *Rhode Island v. Innis*,[46] the Court defined the "functional equivalent" of interrogation as words or actions that a reasonable police officer should know are reasonably likely to elicit an incriminating response from the suspect.[47] This is essentially an objective two-part test that considers both the "reasonable officer" and "reasonable suspect" viewpoints.[48]

3. *Miranda* Analysis: Delivery

For purposes of *Miranda*, when an individual is taken into custody and interrogated, she is subjected to a "custodial interrogation."[49] At this point, any statements taken by the police before giving the individual her *Miranda* warnings are taken in violation of *Miranda*.[50] The Court has emphasized that "the accused must be adequately and effectively apprised of [her] rights and the exercise of those rights must be fully honored."[51]

4. *Miranda* Analysis: Waiver

The final part of the *Miranda* analysis looks at whether a valid waiver occurred.[52] Both the right to remain silent and the right to consult with an attorney can be waived.[53]

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44. *See generally* Rhode Island v. Innis, 446 U.S. 291, 300 (1980) ("It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.").

45. *Id.* at 300–01.

46. 446 U.S. 291 (1980).

47. *Id.* at 301–02; *see also* Pennsylvania v. Muniz, 496 U.S. 582, 600–01 (1990) (explaining what constitutes a "functional equivalent" of interrogation).

48. *See Innis*, 446 U.S. at 301–02.

49. In Miranda v. Arizona, 384 U.S. 436, 444 (1966), the Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

50. *Id.* at 444–45.

51. North Carolina v. Butler, 441 U.S. 369, 374 (1979).

52. *Miranda*, 384 U.S. at 475.

53. *Id.*

To be valid, a waiver must be knowingly, intelligently, and voluntarily given.[54] However, this does not translate into an explicit waiver requirement:[55] "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver."[56] It is at this stage of the analysis that the totality test makes its return. Whether an individual in a given case waived her rights must be determined by the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[57] This is the same "totality" language applied in the *Miranda* custody analysis.[58]

North Carolina v. Butler[59] clearly demonstrates how the totality test applies to the *Miranda* waiver analysis. In *Butler*, an individual accused of kidnapping, armed robbery of a gas station, and other charges made incriminating statements to police after he was read his *Miranda* rights.[60] When asked if the individual understood his rights, he responded that he did.[61] He later refused to sign a waiver form, but continued to speak with the police, stating "I will talk to you but I am not signing any form."[62] The Court held that, in looking at the surrounding circumstances of the case, the waiver was valid.[63] The Court emphatically rejected the proposal that the *Miranda* waiver analysis required an explicit statement of waiver, finding that such a per se rule would be far too inflexible for the delicate demands of *Miranda*.[64]

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54. *Id.* at 444 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

55. *Butler*, 441 U.S. at 375–76.

56. *Id.* at 373.

57. *Id.* at 374–75.

58. *See* United States v. Washington, 431 U.S. 181, 188 (1977) (citing Rogers v. Richmond, 365 U.S. 534, 544 (1961)) ("The test is whether, considering the totality of the circumstances, the free will of the witness was overborne.").

59. 441 U.S. 369 (1979).

60. *Id.* at 370.

61. *Id.* at 370–71.

62. *Id.* at 371.

63. *Id.*

64. *Id.* at 376 ("By creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution.").

A violation of the *Miranda* rules renders a suspect's statement inadmissible.[65] "If [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his" *Miranda* privileges.[66] This rule has become such a keystone of the American justice system that it applies to all federal and state criminal cases, regardless of whether an individual is detained on suspicion of a felony or a misdemeanor.[67]

5. The Purpose of *Miranda*

The general policy purposes behind *Miranda* and its accompanying legal tests are well-explained in *Withrow v. Williams*.[68] In *Withrow*, the Court stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation."[69] *Miranda* requirements are not intended to hamper the traditional function of police officers in investigating crime; rather, they are intended to protect individuals from coercive interrogation methods.[70]

The *Miranda* Court elaborated on these concerns extensively.[71] It observed that "[i]nterrogation . . . takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge . . . ."[72] The Court cited training manuals used regularly by officers: "[T]he principal psychological factor contributing to a successful interrogation is privacy–being alone with the person under interrogation."[73] The Court also pointed to how these manuals instruct

65. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

66. *Id.* at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

67. Berkemer v. McCarty, 468 U.S. 420, 432 (1984). The Miranda rule was reaffirmed as recently as 2000 by the U.S. Supreme Court in an opinion which held that *Miranda* is a constitutional decision which cannot be overturned by congressional statute. Dickerson v. United States, 530 U.S. 428 (2000).

68. 507 U.S. 680 (1993).

69. *Id.* at 693 (citing Michigan v. Tucker, 417 U.S. 433, 448 n. 23 (1974)).

70. *Miranda*, 384 U.S. at 448, 477.

71. *Id.* at 445–56.

72. *Id.* at 448.

73. *Id.* at 449 (citing FRED E. INABU & JOHN REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)). The Court also expressed concern over the tactics advised by these manuals, which included "display[ing] an air of confidence in the suspect's guilt," "direct[ing]

interrogators to dismiss and discourage explanations contrary to guilt and sometimes even instruct to "induce a confession out of trickery."[74] The need for *Miranda*'s protections were thus obvious to the Court, and subsequent cases in the areas of both custody and waiver analysis deemed the "totality of the circumstances" test adequate to guarantee those protections.

B. Fifth Amendment Rights and Procedures for Children

In the years since *Miranda v. Arizona*, it has become apparent that the Supreme Court's *Miranda* jurisprudence has failed to adequately protect children. Current California law allows a police officer to take children under 18 years old into custody where the officer has reasonable cause to believe the minor has committed a crime or violated an order of the juvenile court.[75] Although federal law still requires police to read a child her *Miranda* rights prior to subjecting her to custodial interrogation,[76] the application of the protections discussed above still generally apply to children in the same manner as to adults. This remains the case, despite a clear struggle in the courts with this policy.[77] As a result, the U.S and California Supreme Courts have already tinkered with the application of the totality test as applied to children in three specific cases.

1. The Totality Test in the *Miranda* Waiver Analysis: *Fare v. Michael C.* (1979)

In *In re Michael C.*,[78] the California Supreme Court attempted to institute extra protection for children within the *Miranda* waiver analysis. There, sixteen-and-a-half year old Michael C. ("Michael") was taken into police custody on suspicion of murder.[79] After being

comments toward the reasons why the subject committed the act, rather than . . . whether he did it," "minimiz[ing] the moral seriousness of the offense," and "cast[ing] blame on the victim or on society." *Id.* at 450.

74. *Id.* at 450, 453.

75. S.B. 395, 2017–2018 Reg. Sess. (Cal. 2017).

76. *Id.*

77. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948). In *Haley*, the Court recognized that a 15-year-old child suspected of murder was more deserving of heightened protections from the overpowering presence of police during custodial interrogation. The court stated that "[w]hat transpired would make us pause . . . if a mature man were involved. And when, as here, a mere chil—an easy victim of the law—is before us, special care in scrutinizing the record must be used." *Id.*

78. 579 P.2d 7 (Cal. 1978).

79. Fare v. Michael C., 442 U.S. 707, 709–10 (1979).

read his *Miranda* rights, Michael asked to see his probation officer.[80] When police denied his request, Michael then agreed to speak with them without consulting an attorney.[81] Unsurprisingly, Michael then proceeded to make statements incriminating himself in the murder.[82] During criminal proceedings, Michael moved to suppress the statements, alleging that they were obtained in violation of *Miranda*.[83] He argued that his request to see his probation officer "constituted an invocation of his Fifth Amendment right to remain silent, just as if he had requested the assistance of an attorney."[84] Although the California Supreme Court accepted this argument, the U.S. Supreme Court ultimately rejected it.[85]

The California Supreme Court held that Michael's probation officer would act to protect the minor's Fifth Amendment rights in the same way an attorney would act, and thus found Michael's request for his probation officer to be a per se invocation of his *Miranda* rights.[86] The California Supreme Court did not apply the totality test, finding essentially that the circumstances surrounding the interrogation were inconsequential to the analysis if Michael had in fact invoked his Fifth Amendment privilege by asking for his probation officer.[87]

The U.S. Supreme Court, however, disapproved of California's per se rule, and focused instead on the distinctions between probation officers and attorneys.[88] Specifically, the Court took issue with what it saw as the California Supreme Court's assertion that to a child, a probation officer might play a similar role as an attorney might to an adult.[89] The Court held: "[I]t cannot be said that the probation officer is able to offer the type of independent advice that an accused would expect from a lawyer retained or assigned to assist him during

80. *Id.* at 710.
81. *Id.* at 710–11.
82. *Id.* at 711.
83. *Id.* at 711–12.
84. *Id.* In making this argument, *Fare* relied on a previous California Supreme Court decision, People v. Burton, 491 P.2d 793 (1971), which held that a minor's request made during custodial interrogation to see his parents constituted an invocation of the minor's Fifth Amendment rights. *Fare*, 442 U.S. at 712.
85. *Id.* at 707.
86. *Id.* at 714–15.
87. *Id.* ("Here, however, we face conduct which, regardless of considerations of capacity, coercion or voluntariness, per se invokes the privilege against self-incrimination.").
88. *Id.* at 707–08.
89. *Id.* at 722.

questioning."[90] Rather than consider the situation from the perspective of the child, the Court instead focused its analysis on what type of services Michael's probation officer would be able to provide him.[91]

The Supreme Court reiterated its stance on the totality test, insisting that "this totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."[92] *Fare* remains the controlling case for *Miranda* waiver analysis regarding children.

2. The Totality Test in the *Miranda* Custody Analysis: *J.D.B. v. North Carolina* (2011)

Three decades passed before the U.S. Supreme Court meaningfully revisited the question of whether it should institute any extra protection for children under *Miranda*—this time specifically under the *Miranda* custody analysis. Until mid-2011, courts applied the same *Miranda* custody analysis in cases where the defendant was a child as in cases where the defendant was an adult.[93] Then, in *J.D.B. v. North Carolina*, the Court articulated how this part of the *Miranda* analysis should differ when the defendant is under 18 years old.[94] At the center of this "new" interpretation was the totality test.

In *J.D.B.*, a 13-year-old boy ("J.D.B.") suspected of burglary challenged the Court to consider whether the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis.[95] In Justice Sotomayor's majority opinion, the answer was a muddy "sort of." The Court held that a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of questioning, or would have been objectively apparent to a reasonable officer.[96] The Court reasoned that:

> In some circumstances, a child's age would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel

90. *Id.* at 721.
91. *Id.* at 722–23.
92. *Id.* at 725.
93. *See* J.D.B. v. North Carolina, 564 U.S. 261 (2011).
94. *Id.*
95. *Id.* at 264–65.
96. *Id.* at 274.

> pressured to submit when a reasonable adult would feel free to go.[97]

The Court made clear, however, that this addition to the custody analysis was a subtle one: "We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis."[98]

J.D.B. thus took a major step toward protecting children's Fifth Amendment rights by explicitly requiring courts to consider a child's age where her age was reasonably apparent to the officer at the time she was questioned or would have been to a reasonable officer. It remains the leading case on applying custody analysis to children.

Although distinctions exist between the custody and waiver analysis, both rely on the totality test to fairly protect defendants of all ages. Yet, this is unreasonable because the purported objective nature of the totality test is inherently at odds with the need to consider the uniquely vulnerable nature of children. While *J.D.B.* valiantly attempted to harmonize the two, *In re Joseph H.*, decided four years later, clearly demonstrates why the issue cannot be resolved without a more radical solution.

C. Reaffirming the Totality Test Analysis in the Miranda *Waiver Context:* In re Joseph H.

In 2015, the California Supreme Court again had the opportunity to address the special characteristics of children in a waiver context. In *In re Joseph H.*, 10-year-old Joseph was questioned by police in the presence of his mother, but without the assistance of counsel.[99] During his interrogation, he admitted to shooting his heavily abusive, neo-Nazi father.[100] Despite his objection to this evidence, the Superior Court of Riverside County found the confession admissible; Joseph H. was sentenced to serve 10 years in a California juvenile facility for second-degree murder—a sentence equal to Joseph's entire life as of that time.[101]

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97. *Id.* at 271–72.

98. *Id.* at 272.

99. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 177–78 (Ct. App. 2015).

100. *Id.* at 178.

101. Kristine Phillips, *'I Shot Dad': The Tragic Case of a Child Who Killed His Abusive, Neo-Nazi Father*, WASH. POST (Aug. 26, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/26/i-shot-dad-the-tragic-case-of-a-child-who-killed-his-abusive-neo-nazi-father/?utm_term=.70d63e887cbd.

The California Court of Appeal upheld Joseph's conviction, applying the totality test outlined in *Fare*.[102] It held that Joseph's confession was admissible because "Joseph's responses indicated he understood his Miranda rights and that he validly waived his rights despite his young age, his ADHD [attention deficit hyperactivity disorder], and below average intelligence."[103] It added that Joseph's response to the question of whether he understood his right to remain silent did not sufficiently demonstrate that he did not knowingly and understandingly waive his rights.[104]

After the California Supreme Court denied review, (in the face of a 3-justice dissent written by California Supreme Court Justice Liu), the U.S. Supreme Court declined to hear the case.[105]

III. THE COURTS' CURRENT APPLICATION OF THE TOTALITY TEST FAILS TO ACCOUNT FOR CHILDREN'S UNIQUE VULNERABILITIES

The totality test analysis, as described above, is incomplete because it lacks critical fail safes to ensure the protection of minors. The Court's continued contention that, as applied, it always fully accounts for the distinctive characteristics of children as a subgroup is based on a theoretical analysis that borders on illusory. The actual results of the courts' analyses in cases involving children have sometimes yielded absurd outcomes, revealing that children are indeed falling through the cracks. There is no better evidence for this than the stories of sixteen-year-old Michael, thirteen-year-old J.D.B., and of course, 10-year-old Joseph.

A. Fare v. Michael C.*: A Lacking Analysis Under the Totality Test*

The Court's totality test analysis is most flawed in its application of the waiver analysis to children. In *Fare*, the Court began by explaining why it maintained such confidence in the totality test's ability to protect children:

> We discern no persuasive reasons why any other approach [than the totality test] is required where the question is whether a juvenile has waived [her] rights, as opposed to

102. *Joseph H.*, 188 Cal. Rptr. 3d at 185.

103. *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015) (Liu, J., dissenting) (internal quotation marks omitted).

104. *Id.*

105. *Id.*; *H v. California*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/h-v-california/ (last visited Apr. 7, 2019).

> whether an adult has done so. [This 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.*[106]

In addition to these considerations, the Court also cited the "special expertise" of juvenile courts as yet another reason why the totality test appropriately considers "those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved."[107]

Yet, there is a clear disconnect between the theory outlined above and the actual application of the test. In *Fare*, the Court ultimately held that Michael had in fact properly waived his rights.[108] In reaching this conclusion, the Court purported to consider the factors it had described earlier in its opinion: "age," "experience," "education," "background," "intelligence," and "comprehension."[109] In weighing these factors, the Court found that the interrogating officers had taken care to "ensure [the child] understood his rights."[110] The Court specifically stated that there was "no indication [the child] was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be."[111]

Additionally, the *Fare* Court held that "no special factors indicate[d] that [the child] was unable to understand the nature of his actions."[112] To support this, the Court first pointed to Michael's age (sixteen-and-a-half) and his "considerable experience with the police."[113] Next, in considering whether there was any "indication that [the child] was of sufficient intelligence to understand the rights he was waiving, or . . . the consequences of that waiver," the Court

106. Fare v. Michael C., 442 U.S. 707, 725 (1979) (emphasis added).
107. *Id.*
108. *Id.* at 726.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 726–27.
113. *Id.* at 726 ("[The child] had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities.").

offered a thin analysis that was conclusory at best.[114] It found no indication that Michael "was of insufficient intelligence to understand [his] rights."[115] Finally, in considering the behavior of the officers and the nature of the interrogation itself, the Court concluded that Michael "was not worn down by improper . . . tactics or lengthy questioning or by trickery or deceit."[116]

The analysis set out above is an excellent example of the issues that arise when the totality test is applied to children without some direct consideration of what it means to be a child. The Court gave only a cursory examination of certain critical factors benefitting Michael C., while inappropriately placing more weight on factors that benefit law enforcement. The Court also ignored other significant evidence altogether. For example, the Court gave great weight to the officers' explanation of *Miranda* rights and held that from this explanation, Michael undoubtedly understood what he had been told.[117] However, in reaching this conclusion, the Court was neither required nor encouraged to consider the remainder of the transcripts or the fact that sixteen-year-olds generally do not have exposure to the intricacies of the law. The Court seemed to refuse to consider the implications of being arrested at such a young age. In fact, the Court seemed to impose a higher expectation on Michael to understand his rights because of his previous history with law enforcement.[118] The Court also failed to address how a sixteen-year-old might respond to police interrogation tactics as compared to an adult. Had the Court given proper weight to these other "circumstances," this case would likely have resulted in a different outcome.

Perhaps the most glaring issue with the Court's application of the totality test is its failure to address a certain exchange between Michael and the officers altogether, which clearly indicated that Michael did not understand his right to legal counsel.[119] That conversation between Michael and an officer appeared in the transcripts as follows:

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114. *See id.*

115. *Id.*

116. *Id.* at 726–27.

117. *Id.* at 726 ("The transcript of the interrogation reveals that the police officers conducting the interrogation took care to ensure that [the child] understood his rights. They fully explained to [the child] that he was being questioned . . . then informed him of all the rights delineated in *Miranda*, and ascertained that [he] understood.").

118. *Id.*

119. *Id.* at 710–11.

> Q: Do you understand these rights as I have explained them to you?
>
> A: Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A: What murder? I don't know about no murder.
>
> Q: I'll explain to you which one it is if you want to talk to us about it.
>
> A: Yeah, I might talk to you.
>
> Q: Do you want to give up your right to have an attorney present here while we talk about it?
>
> A: Can I have my probation officer here?
>
> Q: Well I can't get a hold of your probation officer right now. You have the right to an attorney.
>
> A: How I know you guys won't pull no police officer in and tell me he's an attorney?[120]

There are several indicators here that demonstrate Michael had no idea what *Miranda* rights were or what they guaranteed. Again, however, in its analysis under the totality test, the Court strangely stated that there was "no indication in the record that [Michael] failed to understand what the officers told him."[121] The transcript of his interrogation, however, tells a different story.

To begin, Michael failed to answer any of the questions regarding his rights decisively.[122] Although a proper waiver does not require explicit language, the totality of the circumstances must still indicate that it was "knowing and voluntary" for it to be valid.[123] Based on Michael's responses, it is difficult to see how the Court believed he knowingly and voluntarily waived his rights. In fact, the most concerning portion of this transcript, in which Michael asks, "How I know you guys won't pull no police officer in and tell me he's an attorney?", strongly indicates Michael's limited understanding of his rights.[124] He clearly believed that police investigators could

120. *Id.*
121. *Id.* at 726.
122. *Id.* at 710–11.
123. Miranda v. Arizona, 384 U.S. 436, 444 (1966); North Carolina v. Butler, 441 U.S. 369, 375–76 (1979).
124. *Fare*, 442 U.S. at 710–11.

impersonate an attorney, and did not comprehend that he held a Constitutional right to counsel.

Further, it is obvious from this exchange that Michael wished for some form of assistance when he requested his probation officer.[125] While the Court made clear that this did not adequately trigger Michael's Fifth Amendment rights, it was also not considered by the Court as one of the "circumstances" in this case.[126] Other than to deny the California Supreme Court's per se probation officer rule, the Court did not consider Michael's request for a familiar face relevant here.[127]

In addition to ignoring the above transcripts, the Court also generally seemed to dismiss the fact that Michael was only sixteen years old and had no basic understanding of criminal law. In *Fare*, Justice Powell argued in his dissent that the majority opinion should certainly have considered Michael's age in its application of the totality test.[128] He explained that, although Michael "had prior brushes with the law[,] . . . the taped interrogation—as well as his testimony at the suppression hearing—demonstrates that he was immature, emotional, and uneducated, and therefore was likely to be vulnerable to the skillful, two-on-one repetitive style of interrogation to which he was subjected."[129] Oddly, however, as mentioned above, the majority seemed to attach considerable weight to Michael's history with law enforcement in its evaluation of his understanding of *Miranda*.[130] Seeming to imply a correlation between interactions with the police and an up-to-date knowledge of Constitutional rights, the Court unfairly penalized Michael for his past.[131]

Finally, the Court rejected Michael's argument that the police pressured him into cooperating and providing incriminating statements.[132] In applying the totality test, the Court declared that "the officers did not intimidate or threaten [Michael] in any way. . . their questioning was restrained and free from abuses that so concerned the Court in *Miranda*."[133] The Court was unpersuaded by Michael's

125. *See id.*
126. *See generally Fare*, 442 U.S. 707 (1979).
127. *Id.*
128. *Id.* at 733 (Powell, J., dissenting).
129. *Id.*
130. *Id.* at 726 (majority opinion).
131. *Id.*
132. *Id.* at 727.
133. *Id.*

arguments that the police had threatened him, ignored his pleas to stop talking, and continued after he expressed fear by starting to cry.[134]

The *Fare* Court's application of the totality test not only demonstrates how the test can fail to sufficiently consider those characteristics most crucial in a juvenile case, but even worse, it shows how easily subjectivity can saturate the current analysis to eliminate a meaningful consideration of age altogether. The same story was repeated in *In Re Joseph H.*

B. In re Joseph H.*: A Continued Misapplication of the Totality Test*

The *Joseph H.* court held that, from "all the surrounding circumstances," Joseph knowingly and voluntarily waived his *Miranda* rights.[135] Yet, the California Court of Appeal's analysis also applied the totality test in the same flawed manner.[136] The courts again failed to give proper weight to the factor most significant to children as a class: age. As in *Fare*, the *Joseph H.* court ignored a troubling transcript of a conversation between the police and Joseph. It too stated that "the record does not support the minor's assertion that [Joseph's] hesitation, confusion and misunderstanding of the full scope of what it meant to 'waive' his rights, showed involuntariness."[137] This language is eerily reminiscent of the U.S. Supreme Court's conclusion in *Fare*.[138]

The transcript, which the California Court of Appeal omitted from its majority opinion, is telling of Joseph's lack of understanding of his rights in the same way it was in *Fare*:

> Q: Okay. Now I'm going to read you something and it's–it's called your Miranda Rights. And, I know you don't understand really what that is. But, that's why your mom's here. Okay? . . .
>
> A: Yeah.
>
> Q: All right. So, you have the right to remain silent. You know what that means?

134. *Id.*

135. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 186–87 (Cal. Ct. App. 2015).

136. *Id.* at 186 ("On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including all the surrounding circumstances.").

137. *Id.* at 187.

138. *See Fare*, 442 U.S. at 726 ("There is no indication in the record that [Michael] failed to understand what the officers told him [about his Miranda rights].").

A: Yes, that means that I have the right to stay calm.

Q: That means y-you do not have to talk to me.

A: Right.[139]

This response should have been an obvious signal that a knowing and voluntary waiver did not occur. As admitted by the officer herself, Joseph had no understanding of his *Miranda* rights.[140]

The *Joseph H.* court also placed a significantly higher weight on factors benefitting law enforcement than on those favoring children. The *Joseph H.* court stated that it was not persuaded by Joseph's "age," "the fact that he suffers from ADHD," and "other mental disabilities," because "the detective repeatedly asked Joseph if he understood what she was explaining about his rights, and when he demonstrated misunderstanding, she provided additional explanation."[141] It stated that "Joseph's responses indicated he understood," and that "nothing in the record supports the premise that he was confused or suggestible."[142]

The *Joseph H.* court further explained why, under the totality test, Joseph's actions constituted a legal waiver. It first pointed to the fact that Joseph had his stepmother "for support" in deciding whether to waive his rights by speaking with police.[143] It then cited Joseph's show of "guilt for what he had done" as a second reason why Joseph "decided" to waive his rights.[144]

Given the unique facts of *Joseph H.*, it is bizarre that the outcome and opinion in this case are nearly identical to those in *Fare*.[145] These similarities raise serious doubts about the courts' analysis under the totality test because it continually fails to give proper weight to a child's age. Michael C. and Joseph H. demonstrate how an incomplete application of the totality test in the *Miranda* waiver analysis can seriously endanger the rights of children. While the totality test would be a useful strategy in situations where the childhood factor is

139. *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015) (Liu, J., dissenting). The transcript was cited by California Supreme Court Justice Liu in his dissenting opinion to the decision denying review of *Joseph H.*

140. *Id.*

141. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 186 (Cal. Ct. App. 2015).

142. *Id.*

143. Surprisingly, the court did not consider this a conflict of interest, despite the fact that Joseph's stepmother was newly widowed because Joseph had just shot and killed her husband. *Id.*

144. *Id.* at 187.

145. *See* Phillips, *supra* note 101. This same case produced headlines such as, "'I Shot Dad': The Tragic Case of a Child Who Killed His Abusive, Neo-Nazi Father." *Id.*

appropriately accounted for, as it stands now, its inherent openness to subjective application makes it a poor tool for use in safeguarding children's *Miranda* rights. The totality test requires that the courts consider *all* of the circumstances, but, as explained above, that is clearly not what is occurring when it is actually applied to minors. Thus, this test's analysis requires more guidance and specificity when considering the actions of children.

C. J.D.B.*: Improving the Totality Test Analysis by Directly Accounting for Age*

While *J.D.B.* is admittedly far more realistic about the differences between adults and children, it still does not fully accomplish the protections such a class deserves.[146]

In the majority opinion written by Justice Sotomayor, the Court held that a child's age properly informs the *Miranda* custody analysis.[147] This is significant because prior to *J.D.B.*, age was not explicitly considered under the totality test custody analysis.[148] The majority opinion openly reflected on the Court's duty to protect children because of their unique status.[149] Further, it acknowledged the difficulties of applying the test to children without considering how they differ from adults. The Court candidly stated: "[T]he dissent insists that the clarity of the custody analysis will be destroyed unless a 'one-size-fits-all reasonable-person test' applies. In reality, however, ignoring a juvenile defendant's age will often make the inquiry more artificial, and thus only add confusion."[150] The Court went on to explain the absurd and paradoxical implications of applying the totality test without taking age into consideration:

> [J.D.B.] is a prime example. Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being

146. *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) (holding that age should be directly considered in the *Miranda* custody analysis, but only where the child's age is known or reasonably apparent).

147. *Id.* at 265.

148. *See id.* at 278.

149. *See generally id.* at 272–80 (discussing the inherent vulnerabilities of children as compared to adults).

150. *Id.* at 279.

> removed from a seventh-grade social studies class by a uniformed school resources officer . . . ?[151]

Although the Court recognized the futility of applying the totality test to children without accounting for age, it did not go far enough. The Court reiterated that it now requires that age be considered under the totality test in a *Miranda* custody analysis; however, it did not entirely elaborate on how this solves the aforementioned tension.[152] It simply stated that this new requirement did not create a further conflict.[153] Thus, even *J.D.B.*, with all its reflection on the fundamental differences between adults and children,[154] did not wholly repair the subjective nature of the analysis. The Court qualified its holding by stating: "this is not to say that a child's age will be a determinative, or even a significant, factor in every case."[155]

D. Modern Studies of Juvenile Development Support Giving a Child's Age More Weight Under the Totality Test

As illustrated in the case law above, the totality test, as applied now, is failing to assign appropriate weight to a child-suspect's age. Contemporary science supports the assertion that age should be a far more significant factor under the totality test.

Today, the scientific community has supplied the legal community with a substantial amount of research showing that children's brains are in a fundamentally different developmental stage than those of adults. This research demonstrates that the prefrontal cortex, a region of the brain just behind the forehead, controls judgment, problem-solving, decision-making, and the regulation of impulsive behavior.[156] Research further shows that the prefrontal cortex does not fully develop in humans until the early twenties.[157]

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151. *Id.* at 275–76.

152. *Id.* at 271–72.

153. *Id.* at 277 ("We hold that so long as the child's age was known . . . or would have been objectively apparent . . . its inclusion in the custody analysis is consistent with the objective nature of that [totality] test.").

154. *See, e.g.*, *id.* at 281 ("To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.").

155. *Id.* at 277.

156. Megan Crane et al., *The Truth About Juvenile False Confessions*, AM. B. ASS'N: INSIGHTS ON L. AND SOC'Y (Winter 2016), http://www.americanbar.org/publications/insights_on_law_andsociety/16/winter2016/JuvenileConfessions.html.

157. *Id.*

Critically, this timeline makes a juvenile's capacities and behaviors inherently less developed than those of full-grown adults.[158] Scientists have demonstrated that this difference disadvantages juveniles because it results in a propensity toward impulsivity, underdeveloped cognitive capacities critical for information processing, difficulty weighing options and making complex decisions, and a tendency to over-emphasize potential short-term gains over possible long-term consequences.[159] Thus, science tells us, it is extremely unfair to ask children to make such paramount legal decisions because they are often unable to fully realize the consequences of their actions.[160]

The scientific principles outlined above also shed light on why, ethically, children should not be penalized for making irrational decisions concerning *Miranda* waivers on their own. The developmental differences between children and adults underscore the common-sense concern that children are more susceptible to outside influences and peer pressure. This makes them far more likely to fold under the stresses of custodial interrogation, waive their rights, and provide potentially false confessions.[161] It has also been shown that younger children under the age of thirteen are particularly at risk of not understanding their rights.[162]

This high rate of waiver also suggests a high rate of false confessions among those under 18. While extremely difficult to quantify, studies have concluded that the rate of false confessions for children lies somewhere between fourteen and twenty-five percent.[163] The U.S. Supreme Court itself has cited a study of false confessions, which found that out of 125 proven false confessions, sixty-three

158. *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice,* 5 ANNUAL REV. CLINICAL PSYCHOL. 47, 53–59 (2009) (expanded discussion of the cognitive and psychosocial development of the adolescent brain).

159. Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice,* 7 VICTIMS & OFFENDERS 428 (2012).

160. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948) (referring to a child in the context of confessions as an "easy victim of the law").

161. Crane et al., *supra* note 156.

162. Brief for Juvenile Law Center & The Center on Wrongful Convictions of Youth as Amici Curiae Supporting Petitioner, *In re* Joseph H., 137 S. Ct. 34 (No. 15-1086) [hereinafter *Brief for Juvenile Law Center*] (citing Jodi L. Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards,* 25 BEHAV. SCI. & L. 1, 2, 9 (2007)).

163. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 907 (2004).

percent were from individuals under the age of twenty-five and thirty-five percent were from individuals under the age of 18.[164]

Finally, children simply lack the basic education necessary to understand a *Miranda* warning. An examination of the traditional *Miranda* language makes clear that it is unreasonable to expect minors to comprehend the warning at a level necessary for an adequate waiver. A careful look at the standard language of the warning reveals a long, complex sentence structure that requires more advanced reading levels to comprehend fully:

> *"I have the right to an attorney."* (4th grade; comprised of seven words.)
>
> *"I have the right to the presence of a lawyer and to talk with a lawyer before and during any questioning."* (10th grade; comprised of 21 words.)
>
> *"I have the right to hire an attorney and have her present prior to and during any interview and questioning by peace officers or attorneys representing the state. I may have reasonable time and opportunity to consult with my attorney if I desire."* (12th grade; comprised of 45 words.)[165]

As most children do not turn 18 until they reach the twelfth grade and graduate high school, it follows that most children who encounter *Miranda* warnings have not yet even had the opportunity to learn the language skills necessary to comprehend the warning in its entirety. Presumably, educators do not expect students to read above their grade levels, so it is impractical to demand such performance in this context.

Thus, the takeaway here is that critical legal decisions like waiving *Miranda* rights are simply not compatible with a child or adolescent's capacity for decision-making, and forcing a child to do so is unfair at best and cruelly irresponsible at worst.

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164. *See* Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner at 21, J.D.B. v. North Carolina, 564 U.S. 261 (2011) (No. 09-11121); *see also* Corley v. United States, 556 U.S. 303, 320–21 (2009) ("[C]ustodial police interrogation by its very nature, isolates and pressures the individual . . . and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.") (alteration in original) (citations omitted).

165. Eric Y. Drogin & Richard Rogers, *Juveniles and Miranda: Current Research and the Need to Reform How Children Are Advised of Their Rights*, CRIM. JUST., Winter 2015, at 14.

IV. PROPOSAL: THE TOTALITY TEST SHOULD INCLUDE A DIRECT "PRODUCT OF CHILDHOOD" INQUIRY FOR CASES CONCERNING CHILDREN

Taking into consideration the above critique, children require further protection when it comes to preserving their *Miranda* rights. This could be accomplished in several ways.

A. A Legislative Solution: SB 1052 and SB 395

An obvious source of action could be the California legislature. Where California and federal courts have failed to implement enduring and effective change, the California legislature should fill the void. However, the legislative process is imperfect, and is often susceptible to public pressure,[166] bureaucratic pitfalls, tit-for-tat negotiation, and of course, the gubernatorial veto.[167]

The state legislature has in fact already attempted to fully address the issue of *Miranda* rights for children. In response to *Joseph H.*, California State Senators Ricardo Lara and Holly Mitchell proposed Senate Bill 1052 ("SB 1052"), a law intended to consider the newly discovered developmental and neurological science surrounding the capacity of those under 18.[168] The Bill's authors hoped to add three distinct provisions to section 625.6 of the Welfare and Institutions Code, with the primary effect of requiring that children under 18 consult with an attorney before either waiving *Miranda* rights or being subjected to a custodial interrogation.[169] However, the Bill was vetoed by Governor Brown in 2016.[170]

The following year, a new version of the bill, Senate Bill 395 ("SB 395"), was introduced in the California legislature.[171] This 2.0 version was ultimately passed and signed into law on October 14,

166. *See, e.g.*, Simpson v. Mun. Court, 92 Cal. Rptr 417, 421 (Ct. App. 1971) ("[T]he judicial process repels the intervention of external opinion while the legislative process stands in need of it.").

167. *See generally Lifecycle of a Bill*, FRIENDS COMMITTEE ON LEGIS. OF CAL., http://www.fclca.org/news-a-resources/lifecycle-of-a-bill.html (last visited Apr. 8, 2019).

168. S.B. 1052, 2015–2016 Reg. Sess. (Cal. 2016).

169. *Id.*

170. The uncertainty of the full consequences of SB 1052 were cited as reasons by Governor Brown for his veto: "I am not prepared to put into law SB 1052's categorical requirement that juveniles consult an attorney before waiving their *Miranda* rights. Frankly, we need a much fuller understanding of the ramifications of this measure." *See Bill Status*: *S.B. 1052 Custodial Interrogation,* CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1052.

171. S.B. 395, 2017–2018 Reg. Sess. (Cal. 2017).

2017.[172] Although it consists of almost precisely the same language as SB 1052, SB 395 contains one crucial distinction—it only protects those minors aged 15 or younger.[173] While this lowered age is surely devastating for advocates of juvenile rights, a deconstruction of SB 395's individual provisions demonstrates that the bill will still provide major protections for younger children and possibly also provide the legislature with valuable insight for future policy.

> For example, subsection (a) of SB 395 reads:
>
> Prior to a custodial interrogation, and before the waiver of any Miranda rights, a youth 15 years of age or younger *shall* consult with legal counsel in person, by telephone, or by video conference. The consultation may *not* be waived.[174]

Subsection (a) states that minors "shall consult with legal counsel" prior to interrogation or waiver.[175] This use of "shall" clearly indicates that a legal consultation would be *mandatory* under this addition. The proposed language further supports this by including that "consultation may *not* be waived."[176] The effect of this provision is to protect children from any of the demonstrably coercive environments and tactics used by law enforcement. By not allowing anyone—guardian, officer, or other—to influence the accused child into waiving her *Miranda* rights, SB 395 offers significantly more protection, and, for that matter, clarity, than the totality test currently laid out by the Court.

Although subsection (a) ensures some form of general legal consultation for young children, its design is still a cause for some concern. First, the flexibility provided by allowing a consultation to take place by phone or video conference may come at a cost. Face-to-face counsel has the best chance of ensuring that the attorney's directives are adequately followed. It is foreseeable that technical difficulties or bad connections, rushed communications, or most simply, forgetful children, can counterbalance any productive work contributed by the attorney from afar. For example, one can conceive of a situation where, after speaking with an attorney, the child would

172. *Id.*
173. *Id.*
174. *Id.* (emphasis added).
175. *Id.*
176. *Id.*

walk back into the interrogation room and immediately forget his attorney's advice in the presence of another more intimidating adult.

Additionally, this provision raises a separate concern that the law could be used as an excuse to hold children more accountable because they will have already had an opportunity to consult with an attorney. While such a provision will likely lower rates of self-incriminating statements given by children in general due to adequate counsel, it is also foreseeable that courts might become more hesitant to exclude confessions made after this statutorily-mandated counsel visit occurs.

Subsection (b) instructs courts on the consequences of failing to provide counsel prior to waiver or interrogation:

> (b) The court *shall*, in adjudicating the admissibility of statements of a youth 15 years of age or younger made during or after a custodial interrogation, *consider* the effect of failure to comply with subdivision (a).[177]

The bill proposed that courts "*shall*. . . *consider*" the effect of a failure to comply with the legal consultation requirement ("representation rule").[178] It is unclear how such a vague enforcement clause will operate, and whether or not it will serve as a positive or a negative addition to the rules surrounding children and *Miranda*. Despite requiring that courts "consider" the effects of a failure to comply with the representation rule, such language is highly suggestive of a discretionary enforcement measure rather than a bright line rule excluding inappropriately conducted interviews and waivers. This language raises important questions about consistency and enforcement. In a sense, the "shall. . . consider" language essentially transforms the requirements of SB 395 into yet another iteration of the totality test analysis, as a court considering non-compliance with the statute is apparently free to disregard it if it so chooses (or, more precisely, if other circumstances are more persuasive).

The interpretation of such broad language would directly influence the behavior of officers. If interpreted narrowly, subsection (b) could strictly enforce the representation rule while still allowing judges some flexibility in their decisions. Interpreting subsection (b) narrowly would be a best-case scenario, where courts would generally suppress statements made without legal consultation. This

177. *Id.* (emphasis added).
178. *Id.*

interpretation would incentivize investigators to abide by the representation rule. The opposite is true as well. If courts interpret the language broadly, and exercised their discretion often to admit inappropriately-collected statements, investigators would be less cautious and would treat the representation rule more like a technicality. In other words, depending on how the rule is enforced, investigators would be incentivized to follow it either loosely or diligently.

Subsection (c) of SB 395 includes an exception arguably more troubling than the malleability of subsection (b):

> (c) This section does *not* apply . . . if *both* of the following criteria are met:
>
> (1) The officer who questioned the youth reasonably believed the information he or she sought was necessary to protect life or property from an imminent threat.
>
> (2) The officer's questions were limited to those questions that were reasonably necessary to obtain that information.[179]

Subsection (c) exempts police from following the representation rule in certain emergency situations, subject only to a limited restriction on the types of questions permitted.[180] Much like subsection (b), the potential for abuse with a provision like this is high and dependent almost entirely on the courts' interpretation and analysis. A rough analogy can be drawn to the court-created exceptions to the Fourth Amendment's guarantees against unreasonable searches and seizures, which some have argued have swallowed the rule.[181]

As promising as the original SB 1052 might have been, the reintroduction and lower age compromise of SB 395 is a testament to the potential pitfalls of a legislative solution. Part of this reality is that some are more concerned about impeding the investigations of law

179. *Id.* (emphasis added). Part (d) of the proposed addition to § 625.6 of the Welfare and Institutions Code omitted above stated, "This section does not require a probation officer to comply with subdivision (a) in the normal performance of his or her duties under Section 625, 627.5, or 628."

180. *Id.*

181. *See* Florida v. White, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting) ("The Court does not expressly disavow the warrant presumption . . . but its decision suggests that the exceptions have all but swallowed the general rule."); *see also* Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule:* Florida v. White, 90 J. CRIM. L. & CRIMINOLOGY 917, 950 (2000) (discussing the effects of Supreme Court precedent on the warrant requirement).

enforcement than abusing the constitutional rights of children.[182] A true working legislative solution would thus have to be able to address these competing interests.

B. A Bold Judicial Solution: A Bright Line Age Rule

The next obvious source for a solution is the California court system. One option for California courts is to implement a bright line rule for children in the *Miranda* context. As discussed above, this would not be the first time California attempted something of this nature. *Fare* revolved around the U.S. Supreme Court reversing the California Supreme Court's creation of a per se rule regarding a child's invocation of his right to an attorney.[183]

Such a bright line rule might, for example, articulate an age limit on the ability to waive a *Miranda* warning in a "knowing, intelligent, and voluntary" manner.[184] Imposing a per se rule of this kind would ensure that inappropriately induced confessions, and particularly false confessions, by children under a specific age would never appear before a jury.

While this appears to be an attractive option, as with the legislative approach, the bright-line rule strategy is also accompanied by one major criticism. Namely, if the court were to delineate an age limit as described above, it would necessarily exclude a considerable fraction of children above that age from the additional layer of protection. This is not to say that the overall effect would not be positive, however. It would simply be that children over the age limit would remain subject to the same totality test as before, while bolstering existing protections for the youngest of an already vulnerable category. (As is also be the case under SB 395). A rule like

182. Governor Brown's veto message regarding SB 1052 is informative: "Recent studies . . . argue that juveniles are more vulnerable than adults and easily succumb to police pressure to talk instead of remaining silent. Other studies show a much higher percentage of false confessions in the case of juveniles . . . On the other hand, in countless cases, police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow. These competing realities raise difficult and troubling issues . . . ." *Bill Status*: *S.B. 1052 Custodial Interrogation,* CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201520160SB1052.

183. *See generally* Fare v. Michael C., 442 U.S. 707 (1979).

184. California Supreme Court Justice Liu indicated as much in his opinion dissenting in the court's decision to decline to hear *Joseph H.*, outlining the value of considering "whether there is an age below which the concept of a voluntary, knowing, and intelligent waiver has no meaningful application . . . ." *In re* Joseph H., 367 P.3d 1, 4 (Cal. 2015) (Liu, J., dissenting).

this could, however, act as a strong first step toward establishing that children in general cannot truly comprehend *Miranda* rights.

Despite the potential of a bright line age rule, the fate of the California Supreme Court's per se rule in *Fare* is discouraging, and it is possible such an approach would have a difficult time surviving the U.S. Supreme Court.

The most effective strategy at their disposal would thus be for the California courts to draw from other areas of law that have already more readily embraced the science and psychology of child brain development to perfect the existing rule regarding children and their *Miranda* rights.

C. Another Judicial Solution: A "Product of Childhood" Inquiry Under the Totality Test

First, borrowing from the special education context, federal law requires that children not be held responsible when a disruption arises out of or results from a child's disability.[185] Under Title 20 of the U.S. Code, if a child with a disability violates a code of student conduct and a school attempts to discipline the child or change her education placement, a specialized procedure known as a "manifestation determination" is triggered.[186] An inquiry is made into the source of the violation of school code, and if it is determined that the conduct resulting in the violation was "caused by, or had a direct and substantial relationship to, the child's disability," the school's disciplinary measures are rescinded and a more specialized plan to address the behavior is implemented.[187]

Similarly, the law has a history of providing comparable protections for adults with severe mental impairments, specifically in the context of criminal law. Consider the *Durham* rule, for example, which provides that "an accused [person] is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[188]

185. 20 U.S.C. § 1415(k)(1)(E)–(F) (2012).

186. *Id.*

187. *Id.*

188. Durham v. United States, 214 F.2d 862, 874–75 (D.C. Cir. 1954) *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). While this rule is no longer widely used in the insanity context, its "product of" language would be useful in the *Miranda* context as applied to children. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

These examples demonstrate that the law already uses workable solutions that could satisfactorily account for the unique characteristics of children. While this is not to say that childhood should be considered akin to a disability, these other examples do demonstrate that legal models capable of considering the special nature of childhood already exist.

This Article proposes that the courts adapt the totality test by assigning a stronger weight to a child's age in the *Miranda* analysis. In considering the totality of the circumstances, a child's age is an extremely significant circumstance. To hold otherwise yields the results explored earlier in this Article. Thus, under the umbrella of the totality test, the courts should craft a "product of childhood" inquiry which directly asks, "Does a child's waiver or confession arise out of, or is it the product of, her childhood?" Such an addition would necessarily require a court to consider the realities of science and childhood psychology, and would provide children with the most comprehensive protection of their *Miranda* rights to date.

V. CONCLUSION

As far as *Miranda* jurisprudence is concerned, it is time to finally address the significant vulnerabilities that accompany childhood. By paralleling the logic used to accommodate such vulnerabilities in other legal contexts, such recognition has the potential to provide children with the protections that both science and common sense recommend. Indeed, science supports this idea, as the physical differences between child and adult brains demonstrate the measurable developmental differences that have critical effects on a child's ability to understand concepts like waiver of constitutional rights.

While each of the avenues mentioned above has its respective strengths and weaknesses, the proposed "product of childhood" inquiry provides considerable benefits while minimizing possibilities for abuse and misapplication. It improves upon the already-existing totality test by centering the inquiry on a child's capacities rather than the fictional reasonable person, while simultaneously moving the analysis away from considerations that disproportionately benefit law enforcement. Regardless of the solution, such problems will persist in California unless and until a more comprehensive solution protecting all children under the law is adopted.