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The Evolution of Juvenile Justice From the Book of Leviticus to Parens Patriae: The Next Step After In re Gault

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THE EVOLUTION OF JUVENILE JUSTICE

FROM THE BOOK OF LEVITICUS TO PARENS PATRIAE: THE NEXT STEP AFTER *IN RE GAULT*

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Since the arrival of the Pilgrims, American jurisprudence has known that its law-breaking children must be treated differently than adults. How children are treated by the law raises ethical and constitutional issues. This Article questions the current approach, which applies adult due process protections to children who are unable to fully understand their constitutional rights and the consequences of waiving those rights. The authors propose new Miranda warnings and a Bill of Rights for Children to protect children and their constitutional right to due process under the law.

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I. INTRODUCTION

The United States Supreme Court, through its decision in *Miranda v. Arizona*,[1] requires criminal suspects to be warned of their Fifth Amendment rights before being interrogated.[2] In doing so, it created certain safeguards to ensure the police do not coerce incriminating statements from suspects.[3] First among those safeguards are the right to legal counsel and the right against self-incrimination.[4] But how those rights are advised and waived by suspects has produced a long history of judicial decisions. This is particularly true when it comes to juvenile suspects.

The Supreme Court has decided more cases regarding the interrogation of juveniles than any other aspect of the juvenile justice system.[5] Over the years, the Court has questioned whether juvenile suspects have the legal and psychological capacities to understand their constitutional rights, and whether they have the ability to knowingly, intelligently, and voluntarily waive those rights when questioned by adults.[6] Although the Court has cautioned trial judges in regard to the immaturity of minors and minors' inability to invoke or waive their *Miranda* rights, the Court has not mandated any special procedural protections for juveniles.[7] Instead, it has applied the adult standard of review by looking, after the fact, at the totality of the circumstances surrounding the waiver of the minors' *Miranda* rights.[8]

Today, the overwhelming weight of scientific evidence shows that the mind of a juvenile is insufficiently developed to fully understand the ramifications of *Miranda* warnings.[9] Accordingly, the

1. 384 U.S. 436 (1966).
2. *Id.* at 444–45.
3. *Id.* at 437.
4. *Id.* at 442.
5. Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 27 (2006).
6. *See* Yarborough v. Alvarado, 541 U.S. 652, 661–68 (2004); Fare v. Michael C., 442 U.S. 707, 727–28 (1979); *In re* Gault, 387 U.S. 1, 55 (1967); Gallegos v. Colorado, 370 U.S. 49, 52–55 (1962); Haley v. Ohio, 332 U.S. 596, 598–601 (1948).
7. J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011); *In re Gault*, 387 U.S. at 55; *see also* Claire Chiamulera, *Juvenile's Age is a Factor in Miranda Custody Analysis*, AM. B. ASS'N (July 1, 2011), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/july_2011/juvenile_s_age_isafactorinmirandacustodyanalysis/ (discussing *J.D.B. v. North Carolina*).
8. *Fare*, 442 U.S. at 725.
9. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1152 (1980); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70, 70 (2014).

time has come to consider stronger protections for minors when they come in contact with the authorities. This is particularly true when minors are subjected to a custodial interrogation. The toll on youths and their families, as well as on the judicial system, can no better be demonstrated than by the cold hard fact that thousands of minors have been exonerated following convictions based on false confessions—an exoneration rate three times that for adults.[10]

The predominant cause of this woeful rate of false confessions is the lack of safeguards to protect minors' inability to understand the meaning of a *Miranda* admonishment and the consequences of forgoing their constitutional rights. Only with a heightened level of security provided to juveniles, beginning with their first contact with police and through questioning and arrest, can society avoid repeating the mistakes of the past.

This Article provides a review of the development of juvenile rights from the time of the earliest colonists to the requirement of due process for minors defined by *In re Gault*,[11] and the current post-*In re Gault* era. Proposed are new, simplified *Miranda* warnings for children and a Children's Bill of Rights. It is hoped that, through these reforms, the rights promised to juveniles by *In re Gault* will be fulfilled.

II. FIRST JUVENILE EXECUTION

The first documented juvenile execution in North America was that of Thomas Granger, age sixteen.[12] Thomas was "cast by . . . jury and condemned, and after executed" in Plymouth Colony, on September 7, 1642,[13] for a crime of the biblical ages: "if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast."[14] The matter of Thomas Granger first arose when a witness reported to

10. *New Study Finds False Confessions More Likely Among Juveniles*, INNOCENCE PROJECT (Oct. 22, 2013), https://www.innocenceproject.org/new-study-finds-false-confessions-more-likely-among-juveniles/.

11. 387 U.S. 1 (1967).

12. *History of the Juvenile Death Penalty*, WASH. POST, https://www.washingtonpost.com/archive/lifestyle/wellness/1988/07/19/history-of-the-juvenile-death-penalty/d2ebf62e-3c6f-4f9b-b673-d6d607e0154a/ (last visited Feb. 23, 2020).

13. *Id.*; *see* WILLIAM BRADFORD, BRADFORD'S HISTORY "OF PLIMOTH PLANTATION": FROM THE ORIGINAL MANUSCRIPT 475 (Boston, Wright & Potter Printing Co. 1898); *Crime and Punishment in Plymouth Colony*, MayflowerHistory.com, http://mayflowerhistory.com/crime (last visited Feb. 23, 2020).

14. *Leviticus* 20:15 (King James); *see* BRADFORD, *supra* note 13, at 475 (citing *Leviticus* 20:15).

the colony's elders that the young man had sex with a mare.[15] Since the Puritan Separatists first arrived in New England in 1620, the law of this new plantation was a mix of the biblical and English common laws.[16] Justice was administered by individual church congregations and later by chosen elders.[17]

As the taking of a life for a crime, including a sexual crime, was a major ethical and legal question, the elders of Plymouth Plantation sought the advice of their most respected leaders and clergy. The discussion that the reverend elders of the colony had is recounted in the writing of William Bradford, leader of the Pilgrims[18] and governor of the colony intermittently for nearly thirty years.[19]

Three questions were posed to the elders in March 1642:

1. Was the act of bestiality a capital crime which required a death sentence?
2. Is one witness, plus a confession from the accused admitting his crime, sufficient to convict in a case of a capital crime?
3. How far may a magistrate go to extract a confession from a youth in a case of a capital crime?[20]

On the first two questions, elders John Reynor, Ralph Partrich, and Charles Channcy concluded bestiality was a crime against nature and God, punishable by death, as set forth in Leviticus 20:15.[21] But they felt one witness was not sufficient, absent other confirming evidence.[22] They did agree, however, that one witness, plus a confession from the accused admitting he had participated in the "unnaturall and unclainnes" of bestiality, was sufficient for a judgment of death.[23] However, there was much discussion on the question of: "[H]ow farr a magistrate may extracte a confession from a delinquente

15. BRADFORD, *supra* note 13, at 474–75.

16. Christopher Fennell, *Plymouth Colony Legal Structure*, PLYMOUTH COLONY ARCHIVE PROJECT (Dec. 14, 2007), www.histarch.illinois.edu/plymouth/ccflaw.html.

17. *Id.*; *Plymouth Colony*, ENCYCLOPEDIA.COM (Dec. 7, 2019), https://www.encyclopedia.com/history/united-states-and-canada/us-history/plymouth-colony; *see also* Rebecca Beatrice Brooks, *History of Plymouth Colony*, HIST. MASS. BLOG (Sept. 28, 2016), https://historyofmassachusetts.org/plymouth-colony-history/; *Plymouth Colony Drafts the First Laws in North America*, NEW ENG. HIST. SOC'Y, http://www.newenglandhistoricalsociety.com/plymouth-colony-drafts-first-laws-north-america-1636 (last updated 2017).

18. BRADFORD, *supra* note 13, at 472–73.

19. *Plymouth Colony*, *supra* note 17.

20. BRADFORD, *supra* note 13, at 464–74.

21. *Id.*

22. *Id.*

23. *Id.* at 466.

to acuse him selfe of a capital crime, seeing *Nemo tenetur prodere seipsum*."[24]

The Church of England separatists who fled to the new world were very familiar with persecutions by the English Crown[25] and the tactics of the Spanish Inquisition.[26] Therefore, the elders agreed caution should be taken so that "no one is bound to incriminate or accuse himself" falsely.[27] All three elders questioned the use of torture and even the administration of an oath to God when questioning a youth.[28] The elders concluded:

> [H]e [magistrate] may not extracte a confession of a capitall crime from a suspected person by any violent means, whether it be by an oath imposed, or by any punishmente inflicted or threatened to be inflicted, for so he may draw forth an acknowledgmente of a crime from a fearfull inocente . . . .[29]

So, the elders specifically ruled out torture as a means to extract a confession. And, they felt asking the youth to swear to tell the truth when charged with a capital crime would also produce no trustworthy confession.[30] Instead, the elders concluded:

> A magistrate is bound, by carfull examination of circumstancces & weighing of probabilities, to sifte ye accused, and by force of argumente to draw him to an acknowledgement of ye truth.[31]

Elder Charles Channcy ended his written remarks on how a magistrate should question a youth with this:

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24. *Id.* at 465–72 (emphasis added). *Nemo tenetur prodere seipsum* is Latin for "no one is bound to incriminate or accuse themselves." Nemo Tenetur Prodere Seipsum *Law and Legal Definition*, U.S. LEGAL, https://definitions.uslegal.com/n/nemo-tenetur-prodere-seipsum (last visited Feb. 23, 2020).

25. History.com Editors, *Plymouth Colony*, HISTORY (last updated Aug. 20, 2019), https://www.history.com/topics/colonial-america/Plymouth; *Plymouth Colony*, *supra* note 17.

26. *The Story of the Pilgrims II: The Leyden Years*, MILLS, MCLAUGHLIN, RADLOFF & RUTH FAMILY PAGES, http://www.millsgen.com/gen/hist/pilstor2.htm (last visited Feb. 23, 2020) ("If Spain renewed the war and re-took the Netherlands, it would bring with it the terrifying Spanish Inquisition, whose task it was to search out and destroy all forms of dissent against the Roman Catholic church."); *see also Who Were the Pilgrims?*, PLIMOTH PLANTATION, https://www.plimoth.org/learn/just-kids/homework-help/who-were-pilgrims (last visited Feb. 23, 2020) ("To make matters worse, the congregation worried that another war might break out between the Dutch and Spanish.").

27. Nemo Tenetur Prodere Seipsum *Law and Legal Definition*, *supra* note 24.

28. BRADFORD, *supra* note 13, at 464–74.

29. *Id.* at 467.

30. *Id.* at 465–67, 472–73.

31. *Id.* at 467.

> The Lord in mercie directe & prosper Ye desires of his servants that desire to walk before him in truth & righteousness in the administration of justice, and give them wisdome and largnes of harte.[32]

In a private meeting with the magistrate, Thomas at first denied the charges, but, after continued questioning, he confessed to his crime of bestiality.[33] There is no record of what the magistrate said to the young man.[34] Thus, we do not know how the magistrate weighed the probabilities or circumstances of Thomas Granger's denials. Most importantly, we do not know if the magistrate told the youth he had to confess if he ever expected to walk before God where "truth & righteousness prevails."[35]

But the magistrate's record does state that Thomas confessed to having sex with a mare, a cow, two goats, five sheep, two calves, and a turkey.[36] Thomas again confessed to his crimes in open court to a jury.[37] Given the witness's statement and Thomas's confession, a sentence of death was pronounced.[38] The animals involved were slaughtered in front of Thomas and buried in a large pit.[39] No part of them was allowed to be consumed by humans.[40] Thomas was then hanged.[41]

Thomas Granger, like so many other minors, was tried under adult law.[42] But he was the only minor put to death in Plymouth Colony for a sexual crime.[43] It is interesting to note that, nearly four hundred years ago, the issue about what is permissible when

32. *Id.* at 474.
33. *Id.* at 475.
34. *Id.* at 474–75.
35. *Id.* at 474.
36. *Id.* at 474–75.
37. *Id.* at 475.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* To read the original transcript of Governor Bradford's diary, see BRADFORD, *supra* note 13.
42. Alexandra Wilding, *Juvenile Justice System Stems from 1899 Illinois Law*, CUMBERLAND TIMES-NEWS (June 1, 2011), https://www.times-news.com/news/local_news/juvenile-justice-system-stems-from-illinois-law/article_a8065591-44a4-5b65-aa2a-bbbbed931e02.html; *see Plymouth Colony Drafts the First Laws in North America*, *supra* note 17 ("From the colonial period through most of the 1800s, children beyond the 'age of reason,' usually age 7, were held to adult standards of behavior," being tried under adult laws, and for the most part, sentenced as adults).
43. *Plymouth Colony Drafts the First Laws in North America*, *supra* note 17.

questioning a youth about a crime was heavily debated by those in authority in Plymouth Colony.

III. WESTWARD HO

As the colonies grew, settlers moved across the Appalachian Mountains into the Appalachian Plateaus and the Adirondacks, in a great migration westward that did not stop until the settlers reached the Pacific Ocean.[44] In this migration west, justice for the settlers was formed by the harsh environments of the land, diseases, hostile Native Americans, isolated living conditions, the lack of organized law, and the need for swift, individual justice.[45] Often times, talion law prevailed:[46]

> And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.[47]

Most of the time, there was no trial. Rather, justice was dispensed by gun or hanging as determined by those present or by vigilante mobs.[48] In San Francisco, public trials were staged outdoors and often resulted in public corporal punishment and executions.[49]

California, more than any other western territory, attracted thousands of immigrants from all over the world with the discovery of gold on January 24, 1848.[50] At the signing of the Treaty of Guadalupe Hidalgo, which ended the Mexican-American War on February 2, 1848, the population of the California territory was approximately 6,500 Californios, people of Spanish or Mexican decent; 700

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44. History.com Editors, *Westward Expansion*, HISTORY (last updated Sept. 30, 2019), https://www.history.com/topics/westward-expansion/westward-expansion.

45. Carleton W. Kenyon, *Legal Lore of the Wild West: A Bibliographical Essay*, 56 CALIF. L. REV. 681, 686–99 (1968); *see also* GEORGE D. LANGDON, JR., PILGRIM COLONY: A HISTORY OF NEW PLYMOUTH 1620–1691 93 (1966) ("different circumstances" in the hazardous territory made "rigid adherence to English law" less impelling).

46. "Talion, Latin *lex talionis*, principle developed in early Babylonian law and present in both biblical and early Roman law that criminals should receive as punishment precisely those injuries and damages they had inflicted upon their victims. Many early societies applied this 'eye-for-an-eye' principle literally." *Talion*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/talion (last visited Feb. 23, 2020).

47. *Exodus* 21:23–25 (King James); *see also Talion*, *supra* note 46.

48. *1800–1860: Law and Justice: Overview*, ENCYLOPEDIA.COM (last updated Dec. 2, 2019), https://www.encyclopedia.com/history/news-wires-white-papers-and-books/1800-1860-law-and-justice-overview.

49. *Id.*

50. *The California Gold Rush*, PBS: THE GOLD RUSH (Sept. 13, 2006), http://www.shoppbs.pbs.org/wgbh/amex/goldrush/peopleevents/e_goldrush.html.

foreigners, primarily American; and 150,000 Native Americans.[51] In 1846, the population of San Francisco was barely 200.[52] By the end of 1848, San Francisco and the surrounding area had a non-Native-American population of over 100,000.[53] By the height of the gold rush in 1850, the total population in California was 200,000, of which 180,000 were men and 20,000 were women.[54] This gender imbalance brought thousands of single women from all over the world who were seeking not only their fortune, but also mates in a state with an abundance of men.[55]

Some of the innocent victims of this California migration were the neglected, abandoned, and illegitimate children whose parents died, abandoned them, or could not control them due to the harsh conditions of life.[56] When possible, these wayward children were cared for by relatives, neighbors, churches, orphan societies, and later, state-run homes.[57] However, large numbers of young children were found begging, wandering the streets in the company of thieves and prostitutes, or frequenting dance halls, saloons, or any other place that might provide temporary comfort, food, and shelter.[58] Left alone to fend for themselves, these children became a burden and a threat to the communities they lived in.[59] This was especially true in the gold-crazed city of San Francisco, which had a fast-growing population of

51. *Id.*

52. *San Francisco Population*, SFGENEALOGY: SAN FRANCISCO HISTORY, https://www.sfgenealogy.org/sf/history/hgpop.htm (last updated Jan. 5, 2018).

53. *Id.*

54. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 25 (1975).

55. Nancy J. Taniguchi, *Weaving a Different World: Women and the California Gold Rush*, CAL. HIST., Summer 2000, at 141, 143; History.com Editors, *California Gold Rush*, HISTORY (last updated Aug. 29, 2019), https://www.history.com/topics/westward-expansion/gold-rush-of-1849.

56. Diane Nunn & Christine Cleary, *From the Mexican California Frontier to Arnold-Kennick: Highlights in the Evolution of the California Juvenile Court, 1850–1961*, 5 J. CTR. FAM., CHILD. & CTS. 3, 6–10 (2004); *see also* Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2003); Unknown Author, *Untitled Article*, DAILY DRAMATIC CHRONICLE, Dec. 4, 1865, at A1.

57. Nunn & Cleary, *supra* note 56, at 3–6; *see also* Juvenile Court Law §§ 8–9, 1909 CAL. STAT. 213–16.

58. *Inauguration of the Industrial School Address by Colonel J.B. Crockett*, S.F. DAILY BULL., May 17, 1859, at 1; Macallair, *supra* note 56, at 13; Unknown Author, *Untitled Article*, DAILY DRAMATIC CHRON., Dec. 4, 1856, at A1.

59. THOMAS J. BERNARD, THE CYCLE OF JUVENILE JUSTICE 60 (1992).

children under the age of fifteen.[60] How to manage these youthful offenders plagued local authorities.

IV. CHILDREN AS ADULTS

The problems San Francisco and its charitable societies faced can be found in the newspapers of the time:

> John Murphy, a thirteen-year-old hoodlum, who spends half his time in the clutches of the police, stabbed a boy in the Everett House yesterday during a quarrel. . . . Young Murphy fled, but was soon afterward caught by the police and locked up in the City Prison charged with assault with intent to commit murder.[61]
>
> Another of the boy criminals . . . is a gawky, dirty faced little youngster . . . 15 years old. He looks about 10 years. Judge Smith obviously don't know what to do with an infant charged with a crime [stealing a bicycle] punishable by imprisonment in the penitentiary. He ordered the case postponed.[62]

One wonders what eventually happened to these particular children and the hundreds like them. At the time, children who committed serious crimes were tried under adult laws and consequently sentenced to jail or prison along with adult men.[63] In the late 1850s, the California Prison Committee reported that San Quentin State Prison, an adult facility, housed over 300 boys, some as young as twelve years old.[64] The report listed an additional 600 children confined in adult jails throughout the state.[65]

60. Macallair, *supra* note 56, at 12 (1860 census: number of San Francisco children under 15 were 12,116; 1867 census: number of San Francisco children under 15 were 34,710).

61. *A Boy Stabber*, S.F. CHRON., Jan. 18, 1888, at 3; Angus Macfarlane, History of California's Juvenile Court, ch. 33, at 7 (unpublished manuscript) (on file with author).

62. *Boy Criminal: He Perplexes Court*, L.A. DAILY TIMES, May 15, 1903, at 2; Macfarlane, *supra* note 61, at 12.

63. EDWIN M. LEMERT, SOCIAL ACTION & LEGAL CHANGE: REVOLUTION WITHIN THE JUVENILE COURT 33 (1970); *Juvenile Justice History*, CTR. JUV. & CRIM. JUST., http://www.cjcj.org/Education1/Juvenile-Justice-History.html (last visited Feb. 23, 2020).

64. Macallair, *supra* note 56, at 24 (citing California Youth Authority, The History of Juvenile Detention in California and the Origins of the California Youth Authority 1850–1980 39–41 (1981) (unpublished manuscript) (on file with the California Youth Authority in Sacramento, CA)).

65. *Id.* (citing California Youth Authority, *supra* note 64).

V. PARENS PATRIAE

In the later part of the 1800s, a widespread disillusionment developed with the practice of jailing children with adults and the maltreatment of children by supposed enlightened reform schools. Movements sprang up demanding that children not be prosecuted under adult criminal laws and delinquency be treated in more humane ways.[66] Judge Ben Lindsey of Colorado was one of the first judges to establish a way to treat children differently than adults.[67] At first, the Denver judge used both probation and the state's truancy laws of 1899 to keep children in school rather than sending them to jail or reform schools.[68] Later, he used the ancient common law doctrine of parens patriae[69] to assert jurisdiction over children, not as criminals, but as "Civil Wards of the State" in need of correction.[70]

The concept of parens patriae, where the state steps in civilly and not criminally when dealing with juvenile delinquency, raised a theoretical question about how the state may deprive children of their liberty. As time went on, many states, courts, and scholars argued that judges should have unlimited scope and power over juvenile delinquents.[71] They theorized that "the child is not entitled, either by the laws of nature or of the State, to absolute freedom, but is subjected to the restraint and custody of a natural or legally constituted guardian to whom it [the child] owes obedience and subjection."[72] Thus, the

66. *In re* Gault, 387 U.S. 1, 14–16 (1967); LEMERT, *supra* note 63, at 34–35; Nunn & Cleary, *supra* note 56, at 10–12.

67. Nunn & Cleary, *supra* note 56, at 10–12; *see also Judge Benjamin Barr Lindsey (1869–1943)*, DENVER PUB. LIBRARY: GENEALOGY, AFRICAN AM. & WESTERN HIST. RESOURCES, https://history.denverlibrary.org/colorado-biographies/judge-benjamin-barr-lindsey-1869-1943 (last visited Feb. 23, 2020).

68. Paul Colomy & Martin Kretzmann, *Projects and Institution Building: Judge Ben B. Lindsey and the Juvenile Court Movement*, 42 SOC. PROBS. 191, 197 n.1 (1995).

69. Parens patriae is Latin for "parent of his or her country," the power of the state to act for those who are unable to care for themselves, such as the public policy of the state to act as the parent of any child who needs protection. *Parens Patriae*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/parens_patriae (last visited Feb. 23, 2020).

70. CHARLES LARSEN, THE GOOD FIGHT 28–29 (1972); Nunn & Cleary, *supra* note 56, at 11; *see also Judge Benjamin Barr Lindsey (1869–1943)*, *supra* note 67 (describing Judge Lindsey's biography).

71. James E. Duffy, Jr., In re Gault *and the Privilege Against Self-Incrimination in Juvenile Court*, 51 MARQ. L. REV. 68, 70 (1967).

72. *Id.*

theory of parens patriae granted the nation's judges nearly absolute power when dealing with juvenile delinquency.[73]

As the theory of parens patriae started to be applied to juveniles, the state of Illinois passed the Juvenile Court Act, creating the first juvenile court and probation system for children in the nation.[74] This legislation provided a civil law model where children were treated not as criminals, but as youths in need of reform. The Illinois system was soon duplicated throughout the nation.[75]

A. Individualized Juvenile Justice

Throughout this time, California law was developing. While of English common law in origin, the California justice system had a unique Western-Spanish influence through the concept of the Mexican alcaldes, where local elders administered justice in a paternalistic and benevolent, if not dictatorial, manner.[76] This form of justice fit well with the old west tradition of personal self-reliance and stubborn individuality.[77] However, at the time, individualized justice meant that treatment or punishment was dispensed depending on who a person was, whether they had committed an offense before, and the type of offense they were now charged with.[78]

One judge in 1910 summarized the role of parens patriae in California's juvenile justice system as follows:

> I sincerely trust no attempt will be made to prescribe the exact processes that the court should follow in these [juvenile] cases. The legislature should lay down the essentials which are to govern. That ground has generally

73. *In re* Gault, 387 U.S. 1, 14–17 (1967). This would be the state of juvenile law until *Kent v. United States*, 383 U.S. 541 (1966), and *In re Gault*, 387 U.S. 1 (1967).

74. Nunn & Cleary, *supra* note 56, at 11–12.

75. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42, 42–46 (Margaret K. Rosenheim et al. eds., 2002); Nunn & Cleary, *supra* note 56, at 11–12.

76. DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821–1846 37–40 (1987) (explaining that these local mayors or judges ruled as they saw fit, undeterred by legal precedents or standards); WILLIAM J. PALMER & PAUL P. SELVIN, THE DEVELOPMENT OF LAW IN CALIFORNIA 3–13 (1983).

77. Nunn & Cleary, *supra* note 56, at 1.

78. *See In re Gault*, 387 U.S. at 7–9 ("The penalty specified in the Criminal Code [of Arizona], which would apply to an adult, is $5 to $50, or imprisonment for not more than two months."). Fifteen-year-old Gault, who was on probation for assisting another boy steal a wallet out of a purse, was sentenced to the State Industrial School for the period of his minority (that is, until twenty-one), unless sooner discharged by due process of law. *See id.* at 4.

> been covered . . . beyond that the legislature should not circumscribe the exercise of judicial authority in these cases.[79]

B. Denial of Constitutional Rights

As the juvenile courts applied the civil doctrine of parens patriae, constitutional rights guaranteed to adults were unnecessary for children because the state was acting civilly in the best interest of the child.[80] "These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae."[81] It should be noted that the phrase parens patriae was taken from English common law, wherein the state acts *in loco parentis* for the purpose of protecting the property interests and the person of a child.[82] However, there is no history of the parens patriae doctrine in English criminal law.[83] The use of the doctrine in juvenile criminal cases was a legal fiction created in an effort to decriminalize juvenile delinquency.[84]

Because the courts relied on individualized justice, the courts' treatment of juveniles was uncoordinated and inconsistent. Thus, two boys could be treated differently when committing the same criminal act due to the child's history, prior encounters with the law, or family circumstances.[85] In California, punishment for crimes was also treated

79. LEMERT, *supra* note 63, at 41; Nunn & Cleary, *supra* note 56, at 16.

80. *In re Gault*, 387 U.S. at 15–16; STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825–1920 10, 31–38 (1977); Janet Friedman Stansby, In Re Gault: *Children Are People*, 55 CALIF. L. REV. 1204, 1207 (1967); Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547, 549 (1957); *see, e.g.*, *In re* Holmes, 109 A.2d 523, 525 (Pa. 1954); Paul W. Alexander, *Constitutional Rights in the Juvenile Court*, *in* JUSTICE FOR THE CHILD: THE JUVENILE COURT IN TRANSITION 82, 90–91 (Margaret Keeney Rosenheim ed., 1962); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109–10 (1910).

81. *In re Gault*, 387 U.S. at 16.

82. *Id.*

83. TIMOTHY D. HURLEY, ORIGIN OF THE ILLINOIS JUVENILE COURT LAW 320, 328 (3d ed. 1907); Paulsen, *supra* note 80, at 548–49 (1957).

84. *See* BRADFORD, *supra* note 13, at 464–74; *Judge Benjamin Barr Lindsey (1869–1943)*, *supra* note 67; Duffy, *supra* note 71, at 69 n.3 (arguing that the philosophy of parens patriae through individual justice was undoubtedly a backlash from the pre-1899 treatment of children in adult criminal courts).

85. Duffy, *supra* note 71, at 69.

differently from county to county.[86] This emphasis on individualized justice by a benevolent, parent-like state was stressed in juvenile courts to the point where due process was ignored and, many times, justice denied.[87]

Through the years, due process for juveniles in California was completely circumvented by the courts.[88] For example, in *Ex parte Ah Peen*,[89] the California Supreme Court ruled that a sixteen-year-old boy who was "leading an idle and dissolute life" in San Francisco and whose parents were unknown should be sent to a state school for children until he was reformed or reached legal adulthood.[90] Even though confinement was ordered, this ruling was handed down without a jury trial because the purpose was not to punish the child for any criminal behavior but to reform and train him.[91]

The California Supreme Court reiterated this philosophy of juvenile law in its 1924 decision *In re Daedler*[92] when it denied a jury trial to a fourteen-year-old accused of murder.[93] The court stated that "[t]he processes of the Juvenile Court Law are, as we have seen, not penal in character, and hence said minor has no inherent right to a trial by jury."[94]

VI. *IN RE GAULT*: A REVOLUTION IN JUVENILE LAW

In 1965, the Arizona Supreme Court, in denying a writ of habeas corpus filed by the parents of fifteen-year-old Gerald Gault, summarized the then-philosophy many juvenile court systems throughout the United States believed in and followed:

> [J]uvenile courts do not exist to punish children for their transgressions against society. The Juvenile court stands in the position of a protecting parent rather than a prosecutor. It is an effort to substitute protection and guidance for

86. LEMERT, *supra* note 63, at 61 (noting that drinking, fighting or sexual experimentation may be overlooked, while damaging ranch equipment or stealing cattle could elicit a strong, punitive reaction).

87. *See In re* Holmes, 109 A.2d 523, 535 (Pa. 1954); LANGUM, *supra* note 76, at 30–31.

88. Juvenile Court Law §§ 8–9, 1915 CAL. STAT. 1231–32; *In re* Gault, 387 U.S. 1, 1 (1967); LEMERT, *supra* note 63, at 31–32.

89. 51 Cal. 280 (1876).

90. *Id.* at 281.

91. *Id.*

92. 228 P. 467 (Cal. 1924).

93. *Id.* at 472.

94. *Id. But see Ex parte* Becknell, 51 P. 692 (Cal. 1897).

> punishment, to withdraw the child from criminal jurisdiction, and use social science regarding the study of human behavior which permit flexibilities within the procedures. The aim of the court is to provide individualized justice for children.[95]

On December 6, 1966, the United States Supreme Court heard the appeal of the Gaults from the Arizona Supreme Court ruling.[96] In appealing the Arizona court's rulings, the Gaults challenged the philosophy of both parens patriae and individualized justice by claiming such juvenile processes violated their Fourteenth Amendment rights.[97]

The United States Supreme Court upheld the philosophy of parens patriae by accepting the entire premise of the juvenile court model—juveniles were delinquents, not criminals; juveniles should be reformed, not criminally punished; juvenile proceedings were civil in nature; and the juvenile courts are not open to the public so as to protect the child's delinquent acts from the public[98]—but the Supreme Court did not accept the premise that these benefits could only be preserved if juvenile offenders were not afforded due process rights.[99] The Supreme Court firmly rejected the argument that introducing due process rights for children would prevent the juvenile courts from performing their quasi-parental function of protecting and reforming the child.[100]

The Supreme Court found such rationalization unconstitutional and determined children are persons protected by the Fourteenth Amendment when accused of crimes in a delinquency proceeding.[101] As such, youthful offenders must be given many of the same due process rights as adults. Accordingly, the Court went on to require certain criminal trial procedures as part of a juvenile's due process rights. These due process rights included: (1) the right to legal counsel; (2) the privilege against self-incrimination (i.e., children do not have to admit charges or testify against themselves); (3) the right to confrontation and cross-examination of witnesses and the evidence; (4) the right to notice of the charges and all hearings; (5) the right to

95. *In re* Gault, 407 P.2d 760, 765 (Ariz. 1965), *rev'd*, *In re* Gault, 387 U.S. 1 (1967).
96. *See In re Gault*, 387 U.S. 1.
97. *Id.* at 10.
98. *Id.* at 11 n.7, 22–27, 31 n.48.
99. *Id.* at 30–31.
100. *Id.*
101. *Id.* at 41.

transcripts of all proceedings; and (6) the right to appellate review.[102] The most significant of these six was the right to counsel. For the first time, juvenile courts were required to allow defense attorneys in the adjudication of delinquency proceedings and, through the other enumerated due process rights, the ability to mount a defense to the charges.

A. Due Process Incomplete

While *In re Gault* signaled a new approach to delinquency proceedings, the constitutional rights of children have not always been protected to the same extent as the courts protect adult rights. This is because juvenile courts still grapple with their dual charge of protecting the community while at the same time acting in the best interest (parens patriae) of youths. As a consequence, in some states, juveniles can waive their right to legal counsel. For example, in Maryland, Louisiana, Florida, Ohio, and Kentucky, more than half of the children waive their right to counsel, and these waivers are accepted by the court.[103] But can a youth waive the right to counsel and fully understand the consequences of such a waiver, especially at sentencing? In adult court, "judges are reluctant to grant a waiver of counsel unless the accused understands the nature of the charge and its statutory requirements, the range of punishments, the possible defenses and circumstances of mitigation, and other facts necessary to defend against the charges."[104] The question of whether youthful offenders can understand their constitutional rights, knowingly waive those rights, and fully comprehend the nature of a police investigation, the meaning of their own interrogation, and the consequence of being arrested, tried, and sentenced in juvenile court, reveals a fundamental flaw in the way children are treated in the criminal justice system.[105]

B. Due Process and Juvenile Interrogation

In *In re Gault*, the Supreme Court questioned the ability of a child in juvenile court proceedings to comprehend and knowingly waive his

102. *Id.* at 41–59.

103. Cheryl D. Wills, *Right to Counsel in Juvenile Court 50 Years After* In re Gault, 45 J. AM. ACAD. PSYCHIATRY & L. 140, 142 (2017) (citing Wallace J. Mlyniec, In re Gault *at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3 CRIM. L. BULL. Art. 5, 1, 7 (2008)).

104. *Id.*; *see In re Gault*, 387 U.S. at 41–42.

105. *See In re Gault*, 387 U.S. at 36–37 (right to counsel); *id.* at 55–57 (right to confrontation, cross-examination, and self-incrimination); Wills, *supra* note 103, at 142.

or her constitutional rights.[106] The same must also be asked regarding a child's ability to understand and knowingly waive those same rights when being questioned by the police. The Supreme Court in *In re Gault* further questioned the veracity of juvenile confessions by quoting Dean Wigmore:

> [B]ased on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives . . . .[107]

Further, the Supreme Court held that one of the purposes of the right against self-incrimination was to prevent the state, "whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving that person of the freedom to decide whether to assist the state in securing their conviction."[108] The Court went on to find:

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.[109]

Justice Douglas stated, "Neither man *nor child* can be allowed to stand condemned by methods which flout the constitutional requirements of due process of law."[110] Applying such constitutional standards to interrogation, the Court said, "It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles."[111] Why is this? It is our belief that there is a parental urge in all of us that dictates how we as adults approach children, in particular when a child appears to have gone astray.

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106. *See In re Gault*, 387 U.S. at 41–42, 55–56.

107. *Id.* at 44–45 (quoting 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940)).

108. *Id.* at 47; *see also* Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) (convictions based on involuntary confessions "cannot stand").

109. *In re Gault*, 387 U.S. at 20; *see also id.* at 20 n.26 (discussing impact of denying due process to juveniles).

110. *Id.* at 13 (emphasis added) (quoting Haley v. Ohio, 332 U.S. 596, 601 (1948)).

111. *Id.* at 14.

C. The Role of Parens Patriae Post In re Gault

Many are of the belief that, when juveniles confess to a criminal act, they are not incriminating themselves since no criminal conviction may result in juvenile court. Indeed, most children also hold this belief not knowing that they may be tried as adults in many instances. This is nothing more than a continuing belief in the practice of parens patriae when dealing with juveniles. Others believe that confessing is good for the soul and is the first step toward reformation, an important part of juvenile justice. Accordingly, the refusal to admit one's wrongs indicates that the child does not understand his or her antisocial behavior and needs further reform, which again is a reflection of the parens patriae theory.[112] However, despite these beliefs, history has shown that "confessing" oftentimes yields problematic results for juveniles.

In *In re Gault*, the Arizona juvenile court took the young fifteen-year-old boy from his family and committed him to a state school simply because he made an obscene phone call to a female neighbor.[113] In *Kent v. United States*,[114] a sixteen-year-old boy was arrested for burglary and rape.[115] He was interrogated for a day and a half and, ultimately, admitted to participating in the crimes.[116] The juvenile court waived jurisdiction and remitted the boy to adult court for trial where the boy's confession was used to convict.[117]

In the summer of 1989, five juveniles confessed to raping and beating a New York woman.[118] Later called "the Central Park Five," these youths were tried as adults and convicted based on their confessions.[119] The police were criticized for the tactics they used to elicit the confessions. The defense argued to the courts that the juveniles did not understand their right to remain silent or their right to an attorney, and consequently, they unknowingly waived their

112. *See* Gilbert T. Venable, *The* Parens Patriae *Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 PITT. L. REV. 894, 910 (1966).

113. *In re Gault*, 387 U.S. at 4.

114. 383 U.S. 541 (1966).

115. *Id.* at 543.

116. *Id.* at 543–44.

117. *Id.* at 551.

118. Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 216–17 (2006).

119. Selwyn Raab, *Central Park Case Puts Focus on Tough Juvenile Law*, N.Y. TIMES, May 15, 1989, at B1.

Miranda rights.[120] Eventually, the convictions were overturned when another man confessed to the attack and his confession was confirmed through DNA evidence.[121]

In 1998, in the matter of *Crowe v. County of San Diego*,[122] teams of police continuously interrogated three fourteen-year-old boys for over eight hours throughout the night regarding the murder of Michael C.'s twelve-year-old sister.[123] During a juvenile court hearing to determine the suitability of the boys for juvenile court treatment, the confessions elicited by the police were, in part, allowed and disallowed due to violations of Fifth Amendment warning requirements.[124] All three boys were ordered to stand trial as adults for murder.[125] As one of the boys' trials was commencing, DNA testing found the deceased girl's blood on a vagrant's clothing.[126] The charges against the boys were dropped, and the vagrant was tried for the girl's murder.[127] The three boys were later found by a judge to be "factually innocent" of the murder.[128] Although found innocent, the three nevertheless had to suffer through their teen years under the specter of being involved in a murder. These cases, like so many others, raise the issue of the ability of juveniles to knowingly waive their constitutional rights when questioned by the police or other state authorities.

The United States Supreme Court has explicitly highlighted the vulnerability of juveniles when dealing with the criminal justice system. In *Haley v. Ohio*,[129] Justice Douglas wrote:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of

120. Davies, *supra* note 118, at 216–19.

121. Karen Freifield, *A 2002 Report on the Central Park 5 Convictions Being Overturned*, AMNY, https://www.amny.com/news/central-park-five-1-32018864/ (Dec. 20, 2002).

122. 608 F.3d 406 (9th Cir. 2010).

123. *Id.* at 417.

124. *Id.* at 425.

125. *Id.*

126. *Id.* at 417.

127. *Id.*

128. Teri Figueroa, *Escondido: Michael Crowe and Friend 'Factually Innocent,' Judge Says*, SAN DIEGO UNION-TRIB. (May 22, 2012, 11:44 AM), https://www.sandiegouniontribune.com/sdut-escondido-michael-crowe-and-friend-factually-2012may22-story.html.

129. 332 U.S. 596 (1948).

> night by relays of police, is a ready victim of the inquisition.[130]

In 1962, the Supreme Court reiterated its position in regard to juveniles' ability to waive their constitutional rights in *Gallegos v. Colorado*:[131]

> [A fourteen-year-old boy] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. . . . Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights . . . . To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.[132]

The United States Supreme Court has, for over seventy years, recognized the inability of children to understand their constitutional rights and make a knowing and intelligent waiver of those rights. Yet, the courts still allow the police to admonish children of their *Miranda* rights and then proceed, through deceit, intimidation, and psychological manipulation, to extract confessions from their hapless victims. The justification for allowing such an abuse of constitutional rights is that the courts prefer to look at the totality of the circumstances surrounding the interrogations in determining whether the confessions are reliable.[133]

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130. *Id.* at 599.

131. 370 U.S. 49 (1962).

132. *Id.* at 54–55. Gallegos, age fourteen, and another juvenile followed an elderly man to a hotel room where they assaulted him and stole thirteen dollars. Arrested later, Gallegos, after being held five days without seeing an attorney, parent, or any other friendly adult, confessed. In juvenile court he was sentenced to the state industrial school. After the sentencing, the elderly victim died. Gallegos was charged with first-degree murder and tried as an adult. His confession, made and signed before the victim died, was used in adult court to convict him. *Id.* at 49–50.

133. *In re* Gault, 387 U.S. 1, 44–46 (1967) (discussing confessions and citing Dean Wigmore on the necessity to examine the conditions surrounding the confession to determine its trustworthiness).

VII. THE INTERSECTION OF JUVENILE DEVELOPMENT AND DUE PROCESS

When a person doesn't understand his or her Miranda *rights, those rights have no meaning.*[134]

By the end of the twentieth century and the beginning of the twenty-first century, multiple disciplines, including neuroscience, psychology, and sociology, came to a conclusion that Aristotle and subsequent generations of parents, scholars, and societies had known for centuries: adolescents are less able to control themselves and are more prone to risk-taking compared to adults.[135] But now these modern multiple disciplines had incontrovertible evidence that adolescence is a period of significant change in a youth's brain structure and function, and a period of change in which the adolescent is extremely susceptible to peer or group pressure.[136]

One of the most significant scientists in adolescent brain development is Laurence Steinberg. Through numerous studies, he has determined that there are four significant "structural" brain changes a youth experiences while going through adolescence:

1. There is a decrease in gray matter in the prefrontal regions of the brain due to the elimination of unused neuron connections. This occurs mainly during pre-adolescence to early adolescence when children experience increases in basic cognitive abilities and reasoning.[137]
2. In early adolescence, especially during puberty, there is a substantial increase in the amount of dopamine receptors,

134. Hum. Rts. Watch, *You Have the Right to Remain Silent—California Bill Strengthens Miranda for Kids*, YOUTUBE (Aug. 17, 2016), https://www.youtube.com/watch?v=Z-VW8Ldw6YI&t=30s (noting that children have "less capacity to understand their rights.").

135. Steinberg, *supra* note 9, at 72. For examples of the different disciplines' literature on the adolescent mind, see Alison S. Burke, *Under Construction: Brain Formation, Culpability, and the Criminal Justice System*, 34 INT'L J. L. & PSYCHIATRY 381, 382–83 (2011); Eveline A. Crone & Maurits W. van der Molen, *Developmental Changes in Real Life Decision Making: Performance on a Gambling Task Previously Shown to Depend on the Ventromedial Prefrontal Cortex*, 25 DEVELOPMENTAL NEUROPSYCHOLOGY 251, 251–52 (2004); Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, ANNALS N.Y. ACAD. SCI., June 2004, at 77, 83.

136. Steinberg, *supra* note 9, at 71; *see also* Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD RTS. J. 16, 16–17 (1999) (discussing adolescent brain development and their inability to use advanced judgment under stress); *Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates*, NAT'L JUV. JUST. NETWORK (Sept. 2012), http://www.njjn.org/our-work/adolescent-brain-research-inform-policy-guide-for-juvenile-justice (discussing teens' susceptibility to peer pressure "[b]ecause of the changes in the emotional and decision-making centers of the brain").

137. Steinberg, *supra* note 9, at 70.

which connect the limbic system and prefrontal cortex, enhancing how humans experience pleasure, such as sensation seeking.[138]

3. There is an increase in the nerve networks connecting brain regions, in particular a strengthening between the prefrontal cortex and limbic system. This increases communication between different brain systems. This process continues into late adolescence.[139]
4. There is an increase in white matter that results in myelination, the process through which nerve fibers become sheathed in myelin, improving the efficiency of brain circuits. This increase in efficiency produces higher-order cognitive functions, such as planning ahead, risk versus reward analysis, and complicated decisions. This process continues into late adolescence and early adulthood.[140]

Professor Steinberg also found, "Adolescence is not just a time of tremendous change in the brain's structure. It is also a time of important changes in how the brain works."[141] He found three distinct changes in brain functions:

1. During adolescence and into early adulthood, there is a strengthening of brain activity involving self-regulation. It appears a wider area of brain regions are used by adults, which makes self-control easier than during adolescence.[142]
2. Brain scans show that adolescents' reward centers are more active than in young children or adults. Anticipated rewards appear to motivate adolescents to engage in risky acts.[143] This hypersensitivity is increased when in groups or with friends.[144]
3. As the adolescent enters adulthood, there is an increase in the number of brain regions involved in response to arousing stimuli. Before adulthood, the adolescent has less cross talk

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 70–71.
143. *Id.* at 71; GIDEON YAFFE, THE AGE OF CULPABILITY: CHILDREN AND THE NATURE OF CRIMINAL RESPONSIBILITY 18 (2018).
144. Steinberg, *supra* note 9, at 71.

> between brain systems that regulate rational decision-making and those that regulate emotional arousal.[145]

Science has concluded that these structural and functional changes do not occur at the same time in all youths.[146] Further, brain areas used in cognitive processing reach adult levels by mid-adolescence, whereas brain self-regulation does not fully mature until late adolescence or even into early adulthood.[147] "In other words, adolescents mature intellectually before they mature socially or emotionally."[148]

Although the understanding of how juvenile minds develop has progressed, the law has been slow to catch up. The United States Supreme Court has acknowledged that adolescents are not on the same "developmental playing field" as adults.[149] However, despite this delayed "developmental playing field," juveniles are read the same *Miranda* warnings as adults.[150] Consequently, these warnings are often futile due to juveniles' inability to understand and exercise these rights.[151] It is no surprise that only about 10 percent of juvenile suspects invoke their *Miranda* rights[152] compared to the 40 percent of adult suspects who invoke their rights.[153] This low percentage for juveniles can likely be attributed to two factors: (1) juveniles fail to

145. *Id.*

146. *Id.*; Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1, F2 (2011).

147. Steinberg, *supra* note 9, at 71.

148. Steinberg, *supra* note 9, at 70–71; *see also* Adam Ortiz, *Adolescence, Brain Development, and Legal Culpability*, AM. B. ASS'N: JUV. JUST. CTR., Jan. 2004, at 1, 2–3; Leah H. Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124, 124–26 (2010) ("Common behavioral changes during adolescence may be associated with a heightened responsiveness to incentives and emotional cues while the capacity to effectively engage in cognitive and emotion regulation is still relatively immature.").

149. Pamela Witmer, *Statistically Speaking: Juveniles, Interrogation Techniques and Development: Do Law Enforcement Officers Really Understand the Adolescent Brain?*, CHILD LEGAL RTS. J. 60, 60 (2011); *see* Roper v. Simmons, 543 U.S. 551, 553 (2005).

150. Lorelei Laird, *Police Routinely Read Juveniles Their Miranda Rights, but Do Kids Really Understand Them?*, AM. B. ASS'N. J. (June 1, 2016, 2:50 AM), http://www.abajournal.com/magazine/article/police_routinely_read_juveniles_their_miranda_rights_but_do_kids_really_und.

151. Jamie Knight, *When Miranda Misses Its Mark: A Proposal for Heightened Protections for Juvenile Interrogations*, 31 CHILD. LEGAL RTS. J. 28, 30 (2011).

152. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977); Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 65 (2008).

153. Grisso & Pomicter, *supra* note 152.

comprehend the *Miranda* warnings themselves; and (2) juveniles fail to understand the dangers of waiving their *Miranda* rights.

In the 1970s and 1980s, studies by Thomas Grisso looked at juvenile and adult comprehension of the *Miranda* warnings.[154] Grisso found that only 20.9 percent of juveniles understood each of the four *Miranda* warnings.[155] In contrast, about 42.3 percent of the adults understood the *Miranda* warnings.[156] Additionally, even if juveniles understood the *Miranda* warnings, many were unable to effectively exercise these rights because "[j]uveniles [did] not fully appreciate the function or importance of [these] rights."[157]

In a study at the turn of the twenty-first century by Naomi E. Sevin Goldstein et al., comparisons were made to the earlier studies by Grisso.[158] The more-recent testers found:

> *Miranda* comprehension in the early 21st century is similar to the levels of understanding of delinquent boys in the 1970s. Despite speculation that youth are more knowledgeable about police interactions and *Miranda* rights than children 3 decades ago, this research suggests that adolescents' *Miranda* comprehension has not significantly improved over time. This continuity across generations suggests that *Miranda* comprehension may be a developmental skill beyond the capacity of young adolescents.[159]

Similarly, like the adolescents in the Grisso study three decades prior, juveniles in the Goldstein 2003 study did not know that they were entitled to speak with an attorney before questioning and have an attorney present during the interrogation.[160] In addition, a similar percentage of youths "mistakenly believed that lawyers only protect[ed] the innocent and that the right to silence can be revoked at a later date by a judge."[161] Vocabulary played an important part in both survey results, with "interrogation" and "consult" being the most

154. *See* Grisso, *supra* note 9.

155. *Id.* at 1153.

156. *Id.*

157. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 409–10 (2013).

158. *See* Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 366 (2003).

159. *Id.* at 366.

160. *Id.*

161. *Id.*

commonly misunderstood words.[162] Juveniles understood the word "interrogation" to have something to do with a court hearing, and "consultation" to mean a simple conversation.[163]

In another recent study, researchers Richard Rogers, Lisa Hazelwood, and Kenneth Sewell concluded that the standard *Miranda* warnings are indeed far beyond the cognitive abilities of juveniles.[164] More specifically, the study concluded that juveniles thirteen years or younger cannot "grasp key *Miranda* components related to their right to an attorney or parental assistance."[165] The research found that to understand the word "right," suspects must possess at least an eighth-grade education.[166] To understand the word "waive," juvenile suspects must possess more than a high school education.[167] Researchers also noted that, as a result of stress, a suspect's comprehension level decreases by at least 20 percent during an interrogation.[168] Consequently, many juvenile suspects simply lack the comprehension skills required to fully understand the *Miranda* warnings being read to them.[169] For juvenile suspects to meaningfully waive their rights, they must do so "knowingly."[170] Yet, the above research demonstrates that juveniles lack the ability to understand each right. Thus, it is questionable whether juveniles may even knowingly waive their *Miranda* rights—which demonstrates all the more the need to be assisted by legal counsel. Such a conclusion is significant since more than 1.5 million juveniles are arrested and Mirandized each year.[171]

Moreover, along with an inability to understand *Miranda* rights, juveniles also face problems invoking their *Miranda* rights.[172] In a study by Nicole Bracy, researchers looked at whether juveniles aged twelve to seventeen understood their *Miranda* rights and how juveniles perceived the interrogating officers.[173] This study revealed that, along with a low understanding of legal vocabulary, "juveniles

162. *Id.*
163. *Id.*
164. Rogers et al., *supra* note 152, at 75.
165. *Id.*
166. *Id.* at 72.
167. *Id.* at 78.
168. Laird, *supra* note 150.
169. *See* Rogers et al., *supra* note 152, at 75.
170. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966).
171. Rogers et al., *supra* note 152, at 63.
172. Brian Werner, *Did They Ever Stand a Chance? Understanding Police Interrogations of Juveniles*, 3 THEMIS 158, 171 (2015).
173. *Id.* at 170–71.

are not independently capable of understanding the consequences of waiving their *Miranda* warnings, and youth expressed overconfidence in being able to resist police pressure."[174] Not surprisingly, these results intensified as the juveniles' age decreased.[175]

Additionally, juveniles are taught from an early age to obey and answer authority figures.[176] These social expectations leave juveniles in a vulnerable position because interrogators can easily persuade juveniles to waive their *Miranda* rights.[177] Consequently, "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent."[178]

This trend is demonstrated in a 2003 study by Hayley M. D. Cleary. One thousand three hundred juveniles and young adults were asked to choose the best scenario for "a vignette character (among confessing to the offense, denying the offense, and refusing to speak)."[179] Roughly half of the eleven- to thirteen-year-old juveniles indicated confession as the best option.[180] However, the number of people picking confession declined considerably with age.[181]

Ultimately, "*Miranda* warnings and waivers require sufficient ability to understand their constitutional protections and rationally apply them to waiver decisions at the pre-interrogation stage."[182] Without a complete understanding of *Miranda*, children often waive these protections, which leaves their basic constitutional rights vulnerable.[183] Despite the studies showing the underdeveloped juvenile brain and its inability to fully understand the *Miranda* warnings, juveniles are still provided the same *Miranda* warnings as adults—warnings that are wholly insufficient to protect juveniles' constitutional rights. Without an adequate understanding of their

174. *Id.* at 171.

175. *Id.*

176. Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 715–16 (1992).

177. Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 916–17 (2017).

178. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333, 357 (2003).

179. Hayley M. D. Cleary, *Police Interviewing and Interrogation of Juvenile Suspects: A Descriptive Examination of Actual Cases*, 38 L. & HUM. BEHAV. 271, 271 (2014).

180. *Id.*

181. *Id.*

182. Rogers et al., *supra* note 152, at 66.

183. Hum. Rts. Watch, *supra* note 134 (noting that children have "less capacity to understand their rights").

Miranda rights, juveniles consequently speak with law enforcement, subjecting themselves to challenging and deceptive interrogation techniques.

A. Interrogation Techniques of Juveniles

One of the consequences of juveniles waiving their constitutional rights is they are subjected to police interrogation techniques, which even adults find challenging. Teenagers may appear adult-like because they have gone through puberty and have some adult features. But their brains still have years of developing to do before they will have the cognitive abilities to even understand the consequences of their actions.[184] Nonetheless, interrogation techniques used on juveniles over the age of fourteen tend to mirror those used with adult suspects.[185]

The use of adult interrogation techniques is likely the result of law enforcement's misconception of juvenile mental development.[186] More specifically, one study found that law enforcement views juveniles similarly to adults in interrogation settings.[187] Further, "police indicated that suspects of all ages understand their rights and intent of interrogations."[188] This misconception is problematic because children have a reduced ability to withstand coercive interrogation techniques—techniques that cause false confessions.[189]

Researchers who study false confessions have concluded that the following factors play a role in or cause false confessions:

- Real or perceived intimidation of the suspect by law enforcement;
- Use of force by law enforcement during the interrogation or perceived threat of force;
- Compromised reasoning ability of the suspect due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations or limited education;

184. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449 (2013).

185. Werner, *supra* note 172, at 168.

186. *Id.* at 171.

187. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 773–74 (2007).

188. Werner, *supra* note 172, at 171–72.

189. Tamar Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 414 (2008); Knight, *supra* note 151, at 28.

- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence; and
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment.[190]

Such factors also adversely affect juveniles fourteen years or older.[191] A study by B. C. Feld found that the top five interrogation techniques used with juveniles included confronting the juvenile with evidence, accusing the juvenile of lying, presenting the juvenile with inconsistencies, compelling the juvenile to answer honestly, and questioning the juvenile with behavioral analysis interview questions.[192] Ultimately, the researchers found that juveniles were subjected to the same coercive strategies and tactics used on adults during interrogations.[193]

"While many adults often succumb to the pressure of interrogation, such tactics more often result in false confessions in juveniles due to their still-maturing psychological, emotional, and cognitive abilities."[194] For one, juveniles are particularly susceptible to suggestive questioning by authority figures.[195] As a result, juveniles are more likely to adopt an inaccurate version of events during police interrogations.[196] Additionally, juveniles fail to consider the long-term consequences of confessing to a crime because of their underdeveloped prefrontal cortex.[197] This is especially "problematic in custodial interrogations because police often tell juveniles that, in order to go home, they must tell them what they want to hear."[198] Thus, a juvenile's "eagerness to comply with adult authority figures, impulsivity, immature judgement, and inability to recognize and

190. *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes/false-confessions-admissions/ (last visited Feb. 23, 2020).

191. Werner, *supra* note 172, at 166–67.

192. Barry C. Feld, *Police Interrogations of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 263–71 (2006).

193. *Id.*; *see also* Cleary, *supra* note 179, at 276–77 (finding that the interrogations averaged about forty-six minutes, parents were often not contacted, there were frequent interruptions to the questioning, juveniles sat in the corner, police stood between the juveniles and the door, and police often stood close to the juvenile).

194. Witmer, *supra* note 149, at 60.

195. Birckhead, *supra* note 189, at 417.

196. *Id.*

197. Werner, *supra* note 172, at 166.

198. *Id.*

weigh risks in decision-making" may lead them to falsely confess rather than consider the consequences.[199] As noted by other experts:

> Drizin and Leo explained the young persons' vulnerabilities in terms of being less mature and having had less life experience than older suspects, leaving them feeling more intimidated and coerced and less able to cope with the demand characteristic of the police interrogation. The younger the person, the greater the likelihood that he/she will waive their rights to legal advice and give a false confession.[200]

Ultimately, the fundamental brain differences between juveniles and adults place juveniles at a significant disadvantage in criminal interrogations.[201] Thus, given that juveniles face a greater vulnerability to police coercion and yet are subjected to adult interrogation techniques, it is no surprise that children falsely confess.

B. False Confession Rates

The exposure to sophisticated psychological techniques of interrogation, in turn, has produced an unacceptably high number of false confessions. According to FalseConfessions.org, of the two million men and women imprisoned in the United States, as estimated by the Department of Justice, "as many as 50,000 involved false confessions."[202] Further, 63 percent of known false confessors were under the age of twenty-five, and 32 percent were under the age of eighteen.[203] Of those under eighteen years old, 16 percent were juveniles arrested for murder and rape.[204] Another study established that 42 percent of juvenile exonerations involved false confessions in comparison to only 13 percent of adult exonerations.[205] Today, juveniles "are over-represented" in false confessions, which

199. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 1005 (2004).

200. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF FALSE CONFESSIONS: FORTY YEARS OF SCIENCE AND PRACTICE 124 (2018) (citations omitted).

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

202. *Facts and Figures*, FALSECONFESSIONS.ORG, https://falseconfessions.org/fact-sheet/ (last visited Feb. 23, 2020).

203. *Id.*; GUDJONSSON, *supra* note 200, at 134–35; Witmer, *supra* note 149, at 60.

204. *Facts and Figures*, *supra* note 202.

205. Witmer, *supra* note 149, at 60.

"suggest[s] that children . . . may be especially vulnerable to the pressures of interrogation and the possibility of false confession."[206]

C. No Specific Rules Exist for Questioning Juveniles

Despite the alarming rate of false confessions, the Supreme Court has failed to proscribe special procedures for juvenile interrogations beyond those delineated in *J.D.B. v. North Carolina*.[207] States are afforded great freedom to determine their own rules for interrogating juveniles.[208]

For example, several states, including California, have no rules requiring the police to notify the parents of a juvenile when their child is being questioned.[209] The police are required to read juveniles the *Miranda* warnings at the time of arrest though if the juvenile is arrested.[210] If the officers do not question a juvenile again for several hours, they are not required to repeat the *Miranda* warnings to the juvenile.[211]

The mounting evidence and research on child brain development indicates that more reform is needed to protect the constitutional rights of children during the police investigation stage. More specifically, reform in police interrogation techniques and the development of new juvenile *Miranda* warnings is wholly overdue.

VIII. MODIFIED *MIRANDA* WARNINGS FOR CHILDREN

To improve children's comprehension of their constitutional rights, the following modified *Miranda* warnings are suggested:

A. Children's Miranda *Warnings*

1. You have the right to remain silent. This means you do not have to say anything or answer my questions or any other officer's questions.

206. Drizin & Leo, *supra* note 199, at 944.

207. 564 U.S. 261, 262–63 (2011) (holding that a child's age is a relevant factor to consider in determining whether the child is in custody for purposes of *Miranda v. Arizona*); *see* Feld, *supra* note 157, at 399.

208. GEORGE COPPOLO, CONN. GEN. ASSEMBLY OFFICE OF LEGISLATIVE RESEARCH, INTERROGATION OF MINORS-PRESENCE OF PARENTS OR GUARDIANS (2000), https://cga.ct.gov/2000/rpt/2000-R-0282.htm; Werner, *supra* note 172, at 168.

209. Werner, *supra* note 172, at 168.

210. *Id.*

211. *Id.*

2. Anything you say may be used against you. This means what you say can be used against you in juvenile court or, if charged as an adult, in adult court. This means what you say can get you in serious trouble.
3. Before and during all questioning, you may have your parent or guardian present and may talk privately with your parent or guardian. This means before you say anything to us or at any time during our conversation, you may talk with your parent or guardian.
4. You or your parent or guardian may talk to an attorney, free of charge, before talking to us.
5. You or your parent or guardian may stop the interview at any time.
6. You or your parent or guardian may, at any time, have an attorney with you during questioning for free.

Do you want to talk to your parent or guardian?

Do you want to have an attorney present?

Do you want to talk to us?

Miranda warnings are only effective if those warnings are fully understood. To advance the understanding of their rights, a Children's Bill of Rights is proposed:

B. Children's Bill of Rights

1. A child shall have the same constitutional rights as an adult.
2. A child has the right to be advised of his or her *Miranda* rights when detained and questioned, in a manner suited to the child's intellectual development.
3. A child shall have present, before and during any questioning, a parent or guardian or legal caregiver ("custodial parent") who shall exercise the child's *Miranda* rights in the best legal interest of the child.
4. A request by a child to talk to a custodial parent shall constitute the invocation of the child's *Miranda* right to remain silent.
5. No child or custodial parent shall waive the *Miranda* rights of a child fourteen years or younger without first talking to an attorney, who must agree that the child's *Miranda* rights may be waived.

6. A child fifteen years or older may waive his or her *Miranda* rights only after the child and the child's custodial parent consult with an attorney.
7. If the child or the child's custodial parent cannot afford an attorney, one shall be provided at no cost before the child is questioned.
8. The child, the child's custodial parent, and the child's attorney shall be advised of the nature of the matter being investigated and why the child is being questioned.
9. When the custodial parent is suspected of committing a crime, an attorney shall be provided, at no cost, to represent and advise the child regarding the child's *Miranda* rights, and the attorney shall be present during questioning of the child.
10. If the child is suspected of a criminal offense, the child's attorney shall advise the child and the child's custodial parent that the child may be charged as a juvenile offender subject to detention and rehabilitation under juvenile law, or, when allowed by law, charged and sentenced as an adult, including a sentence of life in prison.
11. All questioning of a child who has been detained shall be video recorded. The recording shall be preserved for use in a court of law irrespective of whether the child is charged with a criminal offense.
12. A child shall not be questioned for more than four hours in a twenty-four-hour period and shall be allowed to eat and rest for eight hours between periods of questioning.

IX. CONCLUSION

While the United States Supreme Court and lower court rulings acknowledge juveniles are a susceptible class of the population that warrant unique safeguards, the constitutional rights of children in the investigatory stage of criminal cases are wholly deficient. The proposed modified *Miranda* warnings will assist youths in better understanding their constitutional rights. However, given the sophisticated techniques used by today's police and the vulnerability of juveniles to adult authority, more is needed to ensure that children know the consequences of waiving their rights.

The reliance on parental or guardian advice raises problematic issues when the interests of the custodial adult do not coincide with

those of the juvenile. Further, few adults understand the consequences of waiving *Miranda* rights, and can themselves be subject to persuasive tactics by the police, resulting in the parent telling the child to cooperate with the police. Thus, there is a need to ensure juveniles are provided conflict-free support and appropriate legal advice. To this end, the Children's Bill of Rights offers protection presently not available to the children of our nation.