

KIDS WAIVING GOODBYE TO THEIR RIGHTS: AN  
ARGUMENT AGAINST JUVENILES' ABILITY TO WAIVE  
THEIR RIGHT TO REMAIN SILENT DURING POLICE  
INTERROGATIONS

INTRODUCTION

An adolescent is arrested and taken to a police station. After he is offered food and asked to share "background information" with police, the teenager begins to talk. Meanwhile, the teen's guardian arrives at the station and is trying to reach him, but is rebuked by the authorities and threatened with trespass if he does not leave the premises. As time passes, the teen begins to talk more freely. He is then told that he has the right to remain silent and the right to an attorney; he is told anything he says can be used against him and is asked to sign a waiver surrendering his rights. Both his attorneys and his guardian have by this time contacted the prosecutor's office and insisted that the teen not be questioned without representation. While refusing to discuss certain aspects of the crime because he believes they might incriminate him, the teenager signs a waiver, surrendering his rights. Over the course of several hours, the teen confesses to multiple murders. After the interrogation and confessions, the teen's guardian and attorneys are allowed to see him. The following day, by motion on the teen's behalf, the attorneys seek to invalidate the waiver and exclude the transcript of the interrogation from trial.<sup>1</sup> Is the waiver valid?

Now imagine that a week prior to his arrest, the same adolescent signs a contract at a local computer store to purchase a video game to be specially ordered by the store. The store owner explains that the special order will be expensive and once ordered the customer is obligated to pay. After explaining the consequences of the order, the owner has the teenager sign a contract detailing the agreement. One week later, the same morning that the minor is arrested, the teenager's guardian learns of the teen's purchase. They return to the store and inform the owner that the contract is void. Is the contract valid?

Amazingly in the first case, the surrender of the minor's constitutional rights is valid and not voidable by the minor, but in the second case, the contract with the store is voidable.<sup>2</sup> Thus, the teen is prevented from binding himself to a decision to purchase a video game, but is not protected

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<sup>1</sup> Scenario liberally based on the facts of *Commonwealth v. Malvo*, 63 Va. Cir. 22 (2003).

<sup>2</sup> *Malvo*, 63 Va. Cir. at 22 (holding a similar waiver valid); *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 289-90 (Wis. 1968) (holding contract by minor voidable).

from strapping himself to a confession that may lead to the electric chair. In this way, the law regarding minors' ability to waive their Fifth Amendment right to remain silent appears inconsistent with the treatment of minors in other areas of the law. Analyzing the *Miranda* waiver as a contract, this comment argues that a waiver by a minor should be voidable unless affirmed by a parent or guardian of the minor or ratified by the minor after reaching the age of majority.

Part I.A briefly surveys the history of self-incrimination and the treatment of juveniles with regard to confessions. Part I.B examines the treatment of minors in contract law, discussing the incapacity of minors to enter into binding agreements, and considering the rationale and application of this rule of infant incapacitation. Part II argues that the infant incapacity rule of contracts should be applied to minors in the context of minors waiving their right to remain silent during police interrogations. Part II.A defends the common-law contract rule that contracts of minors are voidable by discussing scientific support for the rule and considering the benefits of a bright-line rule regarding minors' capacity. Part II.B describes the failure of the current test for considering minors' capacity to waive their rights by examining the case of *Commonwealth v. Malvo*. After concluding that the current test is failing to adequately protect minors, Part II.C considers the applicability of the contract rule to criminal law by first evaluating minors' waiver of their rights as a contract, and then considering how the application of the rule is supported by Supreme Court precedent. Part II.D briefly considers the best method for adopting the rule. Finally, Part II.E predicts the effects of adopting a per se rule of incapacity.

At the outset, it should be noted that contract law is civil, and that criminal law is not required to parallel civil law. There are sometimes legitimate reasons to have different rules depending on whether criminal or civil law is involved.<sup>3</sup> However, this comment relies on the assumption that while rules may vary between criminal and civil law, the *rationale* underlying *all* law should be consistent.

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<sup>3</sup> For example, civil and criminal laws generally operate with different burdens of proof. BLACK'S LAW DICTIONARY 190 (7th ed. 1999) (defining different burdens of persuasion for civil and criminal law).

## I. BACKGROUND OF LAW

### A. *Brief History of Self-Incrimination*

According to the United States Supreme Court, the protection against self-incrimination is “one of our Nation’s most cherished principles” and “[u]nless adequate protective devices are employed . . . no statement obtained from the defendant can truly be the product of free choice.”<sup>4</sup> This right to remain silent began as a common-law right in America, was added to the Virginia Bill of Rights by George Mason, and eventually adopted by the United States as part of the Fifth Amendment to the United States Constitution.<sup>5</sup> Over time the “privilege has come rightfully to be recognized in part as an individual’s substantive right.”<sup>6</sup>

#### 1. The Development of the Right to Remain Silent During Interrogations: the Road to and From *Miranda v. Arizona*

The right to remain silent during police interrogations was first recognized as a constitutional right in *Bram v. United States* in 1897.<sup>7</sup> The *Bram* Court concluded that the confession of a suspect who admitted to committing a crime after being interrogated and denied access to his attorney could not be used as evidence against the suspect in a federal court.<sup>8</sup> Writing for the Court, Justice White described the rule against self-incrimination that existed in England at the time the Fifth Amendment was adopted, and concluded that the U.S. Constitution prohibited not only physical abuse, but also the use of any methods to coax a confession by inducing in the defendant “hope or fear.”<sup>9</sup> “In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.”<sup>10</sup>

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<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

<sup>5</sup> Trey Meyer, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1035, 1037-39 (1999).

<sup>6</sup> *Miranda*, 384 U.S. at 460.

<sup>7</sup> *Bram v. United States*, 168 U.S. 532, 548 (1897).

<sup>8</sup> *Id.*

<sup>9</sup> *Id. Contra Colorado v. Connelly*, 479 U.S. 157, 164 (1986) (holding that a spontaneous confession is voluntary if it is not causally related to coercive police conduct); *People v. Bernasco*, 562 N.E.2d 958, 959 (Ill. 1990) (discussing *Connelly*).

<sup>10</sup> *Bram*, 168 U.S. at 548 (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)).

In 1964, the Supreme Court further protected the right against self-incrimination during interrogations in *Escobedo v. Illinois*, where the Court prevented an Illinois state court from admitting a confession obtained during an interrogation after a request for legal counsel was denied.<sup>11</sup> Noting that a majority of confessions are obtained during interrogations, rather than at trial, the Court concluded that an attorney must be made available to suspects being interrogated in order to protect their right to remain silent.<sup>12</sup> The Court explained that “our Constitution . . . strikes the balance [between police efficiency and the rights of the accused] in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.”<sup>13</sup>

Two years later, in *Miranda v. Arizona*, the Court attempted to establish a bright-line rule for determining whether a confession was voluntary by giving “concrete constitutional guidelines for law enforcement agencies and courts to follow.”<sup>14</sup> The *Miranda* Court held that “the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”<sup>15</sup> The Court expressed concern with “the modern practice of in-custody interrogation.”<sup>16</sup> Recognizing that “coercion can be mental as well as physical,” the Court discussed the psychological coercion exerted during interrogations and voiced concerns with police tactics.<sup>17</sup> Specifically, the Court reviewed instructions in manuals issued to police officers and found deeply troubling recommendations such as the following: “In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered: ‘The interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter.’”<sup>18</sup>

The *Miranda* Court concluded that “the Fifth Amendment is so fundamental to our system of constitutional rule,” that the Court will “not pause to inquire [as to] whether the defendant was aware of his rights” if no

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<sup>11</sup> *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964). Prior to this decision, the Court incorporated the Fifth and Sixth Amendments into the Fourteenth Amendment. *See* *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (incorporating the Fifth Amendment right to remain silent into the Fourteenth Amendment); *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (applying the Fifth Amendment to state proceedings); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (requiring states to provide attorneys to criminal defendants by incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment).

<sup>12</sup> *Escobedo*, 378 U.S. at 488.

<sup>13</sup> *Id.*

<sup>14</sup> *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

<sup>15</sup> *Id.* at 444.

<sup>16</sup> *Id.* at 448.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 454 n.21.

warning is given.<sup>19</sup> Instead, the Court will presume the defendant's ignorance and will not allow defendants to waive their rights without first being informed of them.<sup>20</sup> Even when defendants are repeat offenders, police officers, or lawyers, and know their rights, the Court found it necessary to provide a "warning at the time of the interrogation" to counter the inherent pressures created during in-custody interrogations.<sup>21</sup> The Court concluded that for a confession obtained through in-custody interrogations to be admissible in court, the defendant had to be informed of his or her right to remain silent and right to an attorney, and must have been warned of the consequences of speaking.<sup>22</sup> The Court explained that only through an awareness of the consequences of failing to remain silent could there "be any assurance of real understanding and intelligent exercise of the privilege."<sup>23</sup>

## 2. Voluntary Confessions: The Totality Test

According to the Supreme Court in *Miranda*, a suspect's right to remain silent and right to an attorney can be waived "provided the waiver is made voluntarily, knowingly and intelligently."<sup>24</sup> As the *Miranda* Court explained, unless defendants are informed of their constitutional rights at the time of the interrogation, the Court will not consider the waiver of their rights voluntary.<sup>25</sup> However, after *Miranda*, even informing defendants of their rights does not guarantee that a waiver is voluntary.<sup>26</sup> As the Court later explained in *Moran v. Burbine*, the validity of a waiver of *Miranda* rights has two dimensions.<sup>27</sup> First, the waiver must be made voluntarily; that is, it must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception."<sup>28</sup> Second, it must be made "with a full awareness of both the nature of the right . . . and the consequences of the decision to abandon it."<sup>29</sup> Therefore, "only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and

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<sup>19</sup> *Id.* at 468.

<sup>20</sup> *See Miranda*, 384 U.S. at 467-68.

<sup>21</sup> *See id.* at 468-69.

<sup>22</sup> *Id.* at 479.

<sup>23</sup> *Id.* at 469.

<sup>24</sup> *Id.* at 444.

<sup>25</sup> *Id.* at 467-69.

<sup>26</sup> *See Fare v. Michael C.*, 442 U.S. 707, 724-26 (1979) (evaluating a waiver to determine whether it was voluntary).

<sup>27</sup> *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

the requisite level of comprehension may a court properly conclude the *Miranda* rights have been waived.”<sup>30</sup>

The “totality of the circumstances” test requires courts to consider, among other things, the defendant’s age, education, intelligence, and prior experiences in order to determine whether a waiver has been made voluntarily and with full awareness.<sup>31</sup> This rule was not invented by the Court in *Moran*; it was the rule for determining whether confessions were voluntary before *Miranda* developed the procedural requirement of reciting the *Miranda* warnings.<sup>32</sup> However, *Miranda* rejected the sufficiency of the rule, explaining that “assessments of the knowledge the defendant possessed, based on [the totality of the circumstances] can never be more than speculation,” while the issuance of a warning regarding a waiver was clear and factually provable.

After *Miranda*, even if the totality of the circumstances weighs in favor of the confession being voluntary, if the warnings were not given, the court will consider the waiver of *Miranda* rights involuntary.<sup>33</sup> Therefore, today the totality of the circumstances test only becomes operative when police officers follow the procedures established in *Miranda* but the validity of the waiver is still in question.<sup>34</sup> For example, considering the totality of the circumstances, a court may reject a confession by a juvenile or mentally retarded defendant if it determines that the waiver was involuntary.<sup>35</sup>

Thus, even if the *Miranda* warnings are given, if a confession is deemed involuntary due to the circumstances under which it was acquired, then the waiver of rights is invalid.<sup>36</sup> In that way, while *Miranda* established a bright-line rule for considering confessions, whether a waiver is voluntary is determined by weighing multiple factors.<sup>37</sup> Courts consider the “location, timing, and length of the interview; nature and tone of the questioning;” whether the defendant voluntarily submitted to questioning; the use of physical contact or restraint; the demeanor of participants; the age of the suspect; educational background; intelligence; whether the defendant was advised of his or her rights; and the length of time the defendant was detained.<sup>38</sup>

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<sup>30</sup> *Id.* (quoting *Fare*, 442 U.S. at 725).

<sup>31</sup> *Fare*, 442 U.S. at 725.

<sup>32</sup> *See* *Dickerson v. United States*, 530 U.S. 428, 442-44 (2000) (refusing to overturn *Miranda*).

<sup>33</sup> *See id.* at 442.

<sup>34</sup> *See, e.g., Fare*, 442 U.S. at 725-26 (applying the totality of the circumstances test to a confession by a minor).

<sup>35</sup> *See, e.g., id.*

<sup>36</sup> Meyer, *supra* note 5, at 1047-48.

<sup>37</sup> *Id.* at 1048-49.

<sup>38</sup> *Id.*

### 3. Waiver by Minors

Early in American history, although most states considered small children incapable of forming criminal intent, minors who committed crimes and were deemed competent to stand trial were punished using the same courts, the same rules, and even the same prisons as adults.<sup>39</sup> By the 19th Century, state juvenile court systems were created to adjudicate crimes committed by minors.<sup>40</sup> The juvenile courts were initially built on the principle of *parens patriae*, that is, “the State acts as a surrogate parent to delinquent juveniles.”<sup>41</sup> Because the courts were viewed as helping rather than simply punishing minors, hearings were informal and lacked procedural safeguards.<sup>42</sup> By the 1960’s however, the Supreme Court recognized the severity of punishment minors faced in juvenile courts and concluded that due process was necessary to protect their interests.<sup>43</sup> In 1967, the Supreme Court held in *In re Gault* that minors in juvenile courts are entitled to due process, including the freedom against self-incrimination and the right to an attorney.<sup>44</sup> Even twenty years before *Gault*, the Court had recognized in *Haley v. Ohio* “that admissions and confessions of juveniles [being tried in criminal courts] require special caution.”<sup>45</sup>

In *Haley*, the Supreme Court reviewed a confession obtained from a minor who was being tried in criminal court.<sup>46</sup> In a plurality opinion, the *Haley* Court held that a confession obtained from a minor after five hours of interrogation was inadmissible.<sup>47</sup> Considering the age of the defendant, the hours he was interrogated, the lack of “friend or counsel,” and a “callous attitude” by the police toward his rights, the Court concluded that the confession by a fifteen-year-old boy was coerced.<sup>48</sup> Although the defendant was advised of his rights and signed a confession, the Court refused to assume that the boy had “a full appreciation of that advice.”<sup>49</sup> Explaining that “formulas of respect for constitutional safeguards cannot prevail over the

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<sup>39</sup> *Id.* at 1039.

<sup>40</sup> *Id.* at 1039-40.

<sup>41</sup> Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 493 (2002) (describing the “evolution of the juvenile justice system”).

<sup>42</sup> *Id.* at 493-94.

<sup>43</sup> *In re Gault*, 387 U.S. 1 (1967) (holding that minors in juvenile courts were entitled to due process).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 45 (discussing *Haley v. State of Ohio*, 332 U.S. 596 (1948)).

<sup>46</sup> Walters, *supra* note 41, at 494 (describing the “evolution of the juvenile justice system”).

<sup>47</sup> *Haley*, 332 U.S. 596.

<sup>48</sup> *Id.* at 601.

<sup>49</sup> *Id.*

facts of life which contradict them,” the Court concluded, “we cannot give any weight to recitals which merely formalize constitutional requirements.”<sup>50</sup> In the end, the Court’s greatest concern was the use of “private, secret custody . . . as a device for wringing confessions from [suspects].”<sup>51</sup> The holding in *Haley* was reaffirmed nearly fifteen years later in *Gallegos v. Colorado*, where the Court again applied the totality of the circumstances test to invalidate a confession by a minor.<sup>52</sup>

In 1979, the Supreme Court explicitly adopted the totality of circumstances test for determining whether a minor has voluntarily waived his or her *Miranda* rights in *Fare v. Michael C.*<sup>53</sup> In *Fare*, the Court deemed the totality of the circumstances approach “adequate” to determine whether there has been a voluntary waiver, “even where interrogation of juveniles is involved.”<sup>54</sup> *Fare* involved a sixteen-and-one-half-year-old who by his own statements to his probation officer was implicated in a murder.<sup>55</sup> Applying the totality of the circumstances test, the Supreme Court held that the minor was capable of voluntarily waiving his rights because he had considerable experience with the police, appeared to be sufficiently intelligent to understand his rights and the consequences of waiving them, and was “not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.”<sup>56</sup>

The Court was satisfied that the totality test was sufficient because it required courts to consider the “juvenile’s age, experience, education, background and intelligence, and [whether the juvenile had] the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”<sup>57</sup> Retreating from the bright-line approach adopted in *Miranda*, the Court refused to “impose rigid restraints on police and courts in dealing with an experienced older juvenile . . . who knowingly and intelligently waives his” rights.<sup>58</sup> Therefore, because age is only one factor in the totality test, under *Fare v. Michael C.*, minors may waive their right against self-incrimination as long as the court accepts the confession as voluntary.<sup>59</sup>

Some states have responded to the Supreme Court’s adoption of the totality of the circumstances test by legislating, or adopting judicially, a per

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962) (4-3 decision with two justices not participating).

<sup>53</sup> Meyer, *supra* note 5, at 1053-54.

<sup>54</sup> *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

<sup>55</sup> *Id.* at 710-11.

<sup>56</sup> *Id.* at 726-27.

<sup>57</sup> *Id.* at 725.

<sup>58</sup> *Id.* at 725-26.

<sup>59</sup> Meyer, *supra* note 5, at 1048-49.

se rule based on state constitutions or statutes that requires that certain prerequisites be satisfied for the admission of minors' confessions.<sup>60</sup> Prerequisites include procedural guarantees such as requiring consultation with an adult who is interested in protecting the minor and understands the constitutional rights of the minor before any confession may be received.<sup>61</sup> Other states have adopted the totality of circumstances test, citing with favor, *People v. Lara*, a California Supreme Court decision rejecting the per se rule of infant incapacitation.<sup>62</sup>

Although the appeal itself was heard after *Miranda*, because the trial court's decision being challenged in *People v. Lara* took place before *Miranda*, the court concluded that "the standards [Miranda] laid down [were] not controlling."<sup>63</sup> Even though it predates *Miranda*, the court's discussion of the totality test merits consideration since it has repeatedly been cited by other states applying the totality test.<sup>64</sup> In *Lara*, a seventeen-year-old defendant sought reversal of a murder conviction, claiming that his confession was not voluntary.<sup>65</sup> Refusing to overturn the conviction, the court explained that it could not accept the suggestion "that every minor is incompetent as a matter of law to waive his constitutional rights . . . unless the waiver is consented to by an attorney or by a parent or guardian."<sup>66</sup> While conceding that the law provides minors with a privileged status, the court distinguished the treatment of minors in contract and property laws from the treatment of minors as wrongdoers.<sup>67</sup>

The court explained that when a minor commits a tort or crime, "society's interest in self-preservation intervenes, and the resulting law is an attempt to reconcile that interest with the general concern for the minor's welfare."<sup>68</sup> For example, "a minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him."<sup>69</sup> Noting that the U.S. Supreme Court declined to hold minors per se incompetent to waive their rights in *Haley* and *Gallegos*, the court held that "with respect to tortious or criminal acts of minors, the law extends no blanket presumption of incapac-

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<sup>60</sup> *Id.* at 1054-55.

<sup>61</sup> *Id.* at 1048-49.

<sup>62</sup> *People v. Lara*, 432 P.2d 202 (Cal. 1967); *see, e.g., State v. Hunt*, 607 P.2d 297, 300 (Utah 1980) (adopting *Lara*); *People v. Irby*, 342 N.W.2d 303, 309 (Mich. 1983) (citing *Lara* with favor).

<sup>63</sup> *Lara*, 432 P.2d at 210 n.3.

<sup>64</sup> *See, e.g., Hunt*, 607 P.2d at 300 (Utah 1980) (adopting *Lara*); *Irby*, 342 N.W.2d at 303 (citing *Lara* with favor).

<sup>65</sup> *Lara*, 432 P.2d at 210.

<sup>66</sup> *Id.* at 212.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 380 (quoting CAL. CIV. CODE § 41 (Deering 2004)).

ity.”<sup>70</sup> Having rejected a per se rule, the court applied the totality of the circumstances test implicitly used in *Haley* and explicitly adopted in *Gallegos*.<sup>71</sup>

The *Lara* court’s distinction between contract law and criminal law is deceptively persuasive.<sup>72</sup> It mischaracterizes protecting minors’ right to remain silent as forgiving liability.<sup>73</sup> Preventing minors from waiving their right to remain silent does not forgive the criminal acts of the minors as the court’s opinion implies. Instead, preventing minors from waiving their rights protects the constitutional rights to which all individuals are entitled.

In a strong dissent, Justice Peters of the California Supreme Court protested the adoption of the totality of circumstances rule, claiming it “is based on outdated concepts, disregards the recent cases in this field, and deprives the minor of the constitutional protection to which he is entitled.”<sup>74</sup> The dissent asserted that the totality test wrongly focuses on police conduct, specifically coercion, rather than the competency of the minor to waive his rights.<sup>75</sup> This shift, it was argued, “reached its clearest expression” in *Escobedo* and *Miranda*, where the U.S. Supreme Court demanded more than just the lack of coercion.<sup>76</sup> The *Lara* dissent concluded that the totality test fails to address the real issue with waivers—“the intellectual capacity of the minor.”<sup>77</sup> Finally, the dissent asserted that the admissibility of statements by a minor should not “vary from case to case depending on criteria which could at best only partially indicate the child’s capacity to waive his rights.”<sup>78</sup>

## B. *Minors’ Capacity to Contract*

The common law distinguishes minors from adults with regard to their ability to enter into a contract.<sup>79</sup> The distinction in contracts has been traced all the way back to Roman law.<sup>80</sup> The law has deemed contracts of minors

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<sup>70</sup> *Id.* at 213.

<sup>71</sup> *Lara*, 432 P.2d at 214.

<sup>72</sup> *Id.* at 212.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 223 (Peters, J., dissenting).

<sup>75</sup> *Id.* (Peters, J., dissenting).

<sup>76</sup> *Id.* (citing *Miranda v. Arizona*, 384 U.S. 436, 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 478 (1964)).

<sup>77</sup> *Lara*, 432 P.2d at 228 (Peters, J., dissenting).

<sup>78</sup> *Id.* (Peters, J., dissenting) (quoting *Harling v. United States*, 295 F.2d 161 (1961) (rejecting a rule similar to the totality rule)).

<sup>79</sup> RESTATEMENT (SECOND) OF CONTRACTS § 12(1)(b) (1981).

<sup>80</sup> *Bestor v. Hickey*, 41 A. 555, 556 (Conn. 1898) (reviewing the history of the treatment of minors and giving two justifications for the distinction: paternalism and parental ownership of the minor’s

either void or voidable by recognizing a “minor’s natural [in]capacity to contract” and establishing bright-line rules to determine the enforceability of their contracts.<sup>81</sup> Under the old common law, individuals gained full capacity to contract the day before their twenty-first birthday.<sup>82</sup> Today, while several states have set the age at nineteen, most states have legislated the age of majority to be eighteen.<sup>83</sup> While the age of majority may vary from state to state, the infancy defense is adopted by all states.<sup>84</sup>

Absent a statute to the contrary, contracts with “infants” (persons under the age of majority) are voidable<sup>85</sup> by the infant while a minor and within a “reasonable time after reaching majority.”<sup>86</sup> While “reasonable time” has been left largely undefined, it generally means until the minor acts in a way that implies ratification of the contract or until the minor’s delay in disaffirming the contract can reasonably imply ratification.<sup>87</sup> For example, if a minor contracts to purchase a car, and after reaching the age of majority continues to pay for and use the car, it may be reasonably inferred that the contract has been implicitly ratified.<sup>88</sup>

Minors’ contracts are generally voidable regardless of their fairness to the minor.<sup>89</sup> This is because, under the law of contracts, bargains will only be enforced where the “parties to them have the psychological and intellectual capacity to understand and evaluate the consequences of their agreements.”<sup>90</sup> Generally, the only exception to the voidability of minors’ contracts in common law is in cases of contracts for necessities.<sup>91</sup> Necessities

services).

<sup>81</sup> *Id.*

<sup>82</sup> RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. a (1981).

<sup>83</sup> *Id.* For example, Virginia defines a minor as “a person under eighteen years of age.” VA. CODE ANN. § 1-13.42 (Michie 2004). New York and California also set the age of majority at eighteen years. N.Y. GEN. OBLIG. LAW §3-101 (McKinney 2004) (defining New York’s age of majority); CAL. FAM. CODE § 6500 (West 2004) (defining California’s age of majority). However, Mississippi sets the age of majority at twenty-one years. MISS. CODE ANN. § 1-3-27 (2004).

<sup>84</sup> ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 499-500 (3d ed. 2002) [hereinafter CONTRACT LAW]. The infancy defense is also adopted by the Uniform Commercial Code. See U.C.C. § 3-305(a)(1)(i) (2002).

<sup>85</sup> Voidable contracts are contracts “where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.” RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

<sup>86</sup> CONTRACT LAW, *supra* note 84, at 499.

<sup>87</sup> *Id.* (discussing *Bobby Floars Toyota, Inc. v. Smith*, 269 S.E.2d 320 (N.C. 1980) (finding ten months and continued payments on car was unreasonable time)).

<sup>88</sup> See, e.g., *Bobby Floars Toyota, Inc.*, 269 S.E.2d at 322-23.

<sup>89</sup> See, e.g., *Halbman v. Lemke*, 298 N.W.2d 562, 564-65 (Wis. 1980) (acknowledging “absolute right of a minor to disaffirm a contract for the purchase of items which are not necessities”).

<sup>90</sup> CONTRACT LAW, *supra* note 84, at 481.

<sup>91</sup> See *id.* at 499.

generally include “board, room, clothing, medical needs and education.”<sup>92</sup> Unless the contract is for necessities, even where minors misrepresent their age, their contracts are generally voidable.<sup>93</sup> However, in some states minors may also be required to provide restitution to the injured party.<sup>94</sup> Some modern statutes have also made an exception for certain transactions such as bank deposits and withdrawals and payment of life insurance premiums.<sup>95</sup> However, such exceptions may be explained as simply the application of the restitution doctrine.<sup>96</sup>

New Hampshire has liberalized the common-law rule by requiring minors to make restitution for any benefit they receive from a contract they wish to disaffirm.<sup>97</sup> In *Porter v. Wilson*, the Supreme Court of New Hampshire required a minor to pay restitution for legal services, but the minor was not required to pay the contracted price.<sup>98</sup> The court’s rationale was based on the necessities exception.<sup>99</sup> The New Hampshire court concluded that the necessities exception is founded on the premise that minors should pay for the benefit they receive from a contract, although they cannot bind themselves to the agreement.<sup>100</sup> The court concluded that to only allow minors to bind themselves for the purchase of necessities mistakes the purpose of the necessities exception.<sup>101</sup> However, the New Hampshire court’s rationale is the minority rule.<sup>102</sup> Most states have not expanded the necessities exception, which may better be characterized as an exception to enable minors to contract for their livelihood.<sup>103</sup>

In some states, even emancipated minors may disaffirm their contracts.<sup>104</sup> For example, in *Kiefer v. Fred Howe Motors, Inc.*, an emancipated

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<sup>92</sup> *Id.* (quoting *Valencia v. White*, 654 P.2d 287 (Ariz. Ct. App. 1982)).

<sup>93</sup> CONTRACT LAW, *supra* note 84, at 498; *see also, e.g.*, *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 292 (Wis. 1968) (voiding a contract despite minor’s signature affirmation that, “I represent that I am 21 years of age or over and recognize that the dealer sells the above vehicle upon this representation.”).

<sup>94</sup> RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. c (1981).

<sup>95</sup> *Id.* at § 14 cmt. b.

<sup>96</sup> This is clearly true with regard to bank deposits and withdrawals. However, life insurance premiums may not be easily explained as restitution since they are not simply the cost to the insurer, but include profit.

<sup>97</sup> *Porter v. Wilson*, 209 A.2d 730, 732 (N.H. 1965) (requiring a minor to “make restitution to the extent that he received a benefit”).

<sup>98</sup> *Id.* at 732-33.

<sup>99</sup> *Id.* at 732.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See* CONTRACT LAW, *supra* note 84, at 499 (discussing the necessity exception).

<sup>104</sup> *See Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 290-91 (Wis. 1968) (discussing minors’ capacity to contract in Wisconsin and comparing the rules of other states).

minor purchased a car three months before reaching the age of majority.<sup>105</sup> After the purchase, the minor disaffirmed the contract.<sup>106</sup> Affirming a trial court's ruling that even an emancipated minor is not responsible for his contracts, the Supreme Court of Wisconsin responded to criticisms of this general rule.<sup>107</sup> The court explained that the underpinnings of the rule were to protect minors from their immaturity "in both mind and experience," and that minors should be protected from their "own bad judgments as well as from adults who would take advantage of [them]."<sup>108</sup> The court continued, noting that emancipation, usually the result of marriage, is not an indication of superior wisdom and maturity; rather youthful marriages are "oftentimes indicative of a lack of wisdom and maturity."<sup>109</sup>

While minors ordinarily cannot bind themselves by contract, parents or guardians of minors do normally have the ability to bind the minor. For example, in *Fischer v. Rivest*, the Superior Court of Connecticut barred a suit for negligence for injuries suffered by a teenaged hockey player because the teen *and his father* signed a waiver and release form barring such a suit.<sup>110</sup> It may be argued that allowing parents to sign consent or waiver and release forms is binding the parent more than the child since the financial impact of the waiver will generally rest on the parent. In fact, the waiver binds the child, preventing the child from seeking damages for personal injuries.<sup>111</sup>

The binding nature of parental consent on the minor was made clear in *Shields v. Gross*.<sup>112</sup> There, Shields, a well-known actress, attempted, at age seventeen, to "disaffirm a prior unrestricted consent executed on her behalf by her parent."<sup>113</sup> Shield's mother (and legal guardian) sold the rights to photos of a nude, ten-year-old Shields.<sup>114</sup> The photos were not immediately used. When Shields discovered their use five years later and was embarrassed by the images, she attempted to disaffirm the contract.<sup>115</sup> The court

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<sup>105</sup> *Id.* at 292.

<sup>106</sup> *Id.* at 289.

<sup>107</sup> *Id.* at 290-91.

<sup>108</sup> *Id.* 290.

<sup>109</sup> *See id.* at 291 (discussing minors' capacity to contract).

<sup>110</sup> *Fischer v. Rivest*, No. X03CV00509627S, 2002 Conn. Super. LEXIS 2778 (Aug. 15, 2002) (denying right to sue after his father signed a waiver). *Contra* *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1231 n.4 (Colo. 2002) (holding that parental releases of liability for minors are invalid, however emphasizing that the holding does not apply to "parental consent forms for medical services such as surgery and the like").

<sup>111</sup> *See Fischer*, 2002 Conn. Super. LEXIS 2778 (denying minor right to sue after his father signed a waiver).

<sup>112</sup> *Shields v. Gross*, 448 N.E.2d 108 (1983).

<sup>113</sup> *Id.* at 109.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

refused her request explaining, “as a matter of law . . . once a parent consents to the invasion of privacy of a child, the child is forever bound by that consent and may never disaffirm the continued invasion of his or her privacy, even where [the invasion] may cause the child enormous embarrassment, distress and humiliation.”<sup>116</sup>

## II. ANALYSIS

Criminal and civil law have different procedures, involve different due process rights, and arguably, even serve different purposes.<sup>117</sup> It is not necessary, or even desirable, to make one mirror the other in these respects. However, the assumptions on which the rules of the criminal and civil justice systems are based should be consistent. Whether or not a child actually lacks the experience, wisdom, and self-control necessary to recognize the consequences of entering into an agreement should not depend on whether the child is in criminal or civil court. However, courts come to different conclusions as to a child’s competency depending on whether the child is being charged with a crime or accused of breaching a contract.<sup>118</sup>

At first glance, the inconsistency in courts’ treatment of children may appear well-reasoned. There is something different about criminal courts from civil courts. In civil law, if a party risks contracting with a minor, they risk disaffirmation of the contract.<sup>119</sup> In criminal law, an innocent, unsuspecting victim may have been harmed, and society seeks retribution.<sup>120</sup> Therefore, it can be argued that courts should allow minors to disaffirm contracts but should bind minors to waivers signed during interrogations.<sup>121</sup> While this is virtually the effect of Supreme Court decisions regarding minors’ ability to waive their *Miranda* rights, the dicta and holdings of the Supreme Court and modern science better support the conclusion that the infant incapacity doctrine of contract law should apply to the waiver of *Miranda* rights during interrogations.

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<sup>116</sup> *Id.* at 112 (Jansen, J., dissenting).

<sup>117</sup> JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* § 1-4 (2d ed. 1999) (describing the source of criminal law and distinguishing its traditional purpose from that of civil law).

<sup>118</sup> *Compare* *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (holding a minor competent to waive his rights), *with* *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 289 (Wis. 1968) (holding a minor incompetent to contract).

<sup>119</sup> *See, e.g., Kiefer*, 158 N.W.2d at 290-91 (discussing minors’ capacity to contract in Wisconsin and comparing the rules of other states).

<sup>120</sup> Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1452 (1990) (discussing society’s desire to seek revenge).

<sup>121</sup> *See* *People v. Lara*, 432 P.2d 202, 220 (Cal. 1967).

### A. *Defense of the Incapacity Rule as Applied in Contract Law*

As adolescents have appeared to become more and more sophisticated, and as society has perceived more and more adolescent misconduct, some have argued that minors, or at least teenagers, should not be given special treatment, and instead should be held accountable for their actions.<sup>122</sup> Despite this push for accountability, courts and legislatures have recognized that minors have less experience, less wisdom, and less self-control than adults, and should not generally be allowed to bind themselves by contract.<sup>123</sup> This traditional rationale for treating minors differently is now backed and expanded upon by scientific research.<sup>124</sup>

#### 1. Scientific Support of the Incapacity Rule

Science now supports the proposition that minors by definition “have diminished capacities to understand and process mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”<sup>125</sup> In fact, according to recent studies, the frontal lobe, which controls the brain’s most advanced functions, changes rapidly during adolescence.<sup>126</sup> These studies have shown that the teenage brain goes through important changes which temporarily reduce the efficiency of the frontal lobe.<sup>127</sup> This is especially relevant to minors’ capacity to contract since the frontal lobe allows the brain to “think in the abstract, anticipate consequences, plan, and control impulses.”<sup>128</sup>

While individual brains differ, it has been discovered that there is an increase in size of the frontal lobe just prior to puberty, which is followed by a “pruning” of the newly developed brain matter.<sup>129</sup> During this time of extreme change to the frontal lobe, adolescents are forced to rely more

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<sup>122</sup> See, e.g., *Kiefer*, 158 N.W.2d at 290-91 (discussing minors’ capacity to contract in Wisconsin and comparing the rules of other states).

<sup>123</sup> See *id.*

<sup>124</sup> See NATIONAL INST. OF MENTAL HEALTH, PUB. NO. 01-4929, *TEENAGE BRAIN: A WORK IN PROGRESS* (2001) (discussing recent discoveries of physical changes affecting the adolescent brain), available at <http://www.nimh.nih.gov/publicat/teenbrain.cfm> (last visited Nov. 13, 2004).

<sup>125</sup> ADAM ORTIZ, AM. BAR ASSOC., *ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY* (2003) (analogizing the adolescent brain to that of a mentally retarded adult and quoting *Adkins v. Virginia*, 536 U.S. 304, 319-21 (2002) (banning the execution of the mentally retarded)), at [www.abanet.org/crimjust/juvjus/factsheets\\_brain\\_development.pdf](http://www.abanet.org/crimjust/juvjus/factsheets_brain_development.pdf) (last visited Nov. 13, 2004).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> NATIONAL INST. OF MENTAL HEALTH, *supra* note 124.

heavily on the amygdala, the instinctual part of the brain.<sup>130</sup> Evidence suggests that as a result of these changes, the parts of the brain “that govern impulsivity, judgment, planning for the future, [and] foresight of consequences” do not completely mature until the early twenties.<sup>131</sup> What before was labeled a simple lack of maturity is now understood to be caused by physical changes in the brain as it develops during adolescence.<sup>132</sup>

While it has long been common knowledge that minors are generally less successful at attempts to calculate risks and control impulses than adults, this new understanding of the causes of adolescent behavior may further reduce minors’ culpability and lends credence to the courts and legislatures that recognized minors’ incapacity long before science could identify it.<sup>133</sup> However, such an acceptance and application of this new understanding lends itself to a new danger in criminal law: as anti-social behavior is explained by physiology, there becomes an apparent risk that all wrongs will be excused. Some may wish to ignore the implications of scientific discoveries that are said to reduce culpability for fear that there are no limits to science’s ability to explain dangerous and forbidden behavior, thus excusing all behaviors and potentially destroying the American justice system’s foundational principle of retribution.

While the truth behind the French saying, “tout comprendre c’est tout pardonner,” or “to know is to forgive,” may present a real threat to criminal law, the use of science to justify accommodating adolescents need not open the flood gates to reduce crime to a physiological reaction. The rationale of the infancy incapacitation rule may appear to be a step toward a defense for anyone claiming diminished intelligence or bad decision-making skills; however, this is not a significant danger for two reasons. First, special treatment of minors has been successfully contained to minors in the past.<sup>134</sup> Second, minors are distinguishable from other defendants in that, by definition, their condition is temporary.<sup>135</sup> Special treatment of minors is simply recognition that they have not yet had the opportunity to fully develop into socially functioning individuals. Once given the opportunity to develop into adults, minors will be governed by the same rules that apply to adults.

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<sup>130</sup> ORTIZ, *supra* note 125, at 2.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See, e.g.,* Bestor v. Hickey, 41 A. 555, 556 (Conn. 1898).

<sup>135</sup> ORTIZ, *supra* note 125.

## 2. Empirical Research on Minors' Capacity

Studies to evaluate the ability of juveniles to understand the *Miranda* warnings have produced conclusions similar to those offered by scientific research.<sup>136</sup> In one study, eighty-six of ninety juveniles studied, waived their *Miranda* rights and confessed.<sup>137</sup> The study dealt primarily with fourteen-year-olds and concluded that as a group, they were likely incapable of "knowingly and intelligently understanding their rights."<sup>138</sup> Another study found that comprehension of *Miranda* warnings was tied to age, and that understanding did not increase with prior criminal experience.<sup>139</sup> Although both of these tests found increasing comprehension after age fourteen, neither study evaluated older minors' ability to fully appreciate the consequences of waiving their rights.<sup>140</sup> Together, these studies indicate that minors have a difficulty fully comprehending their rights; that prior experience does not have a significant impact on comprehension; and that minors confess more often than adults.<sup>141</sup> A third study showed that minors under the age of sixteen are unable to fully understand their constitutional rights.<sup>142</sup> In this study, four-fifths of the minors interviewed did not understand at least a portion of the *Miranda* warnings; the minors had special difficulty applying the right to remain silent.<sup>143</sup> A majority of the minors thought that a court could compel their testimony.<sup>144</sup> Of the minors studied, ninety percent waived their right to remain silent.<sup>145</sup> When this understanding of minors' relative inability to comprehend the *Miranda* warnings is joined by evidence that minors are physically less capable than adults of controlling their impulses and appreciating the consequences of their actions, it becomes apparent that the common-law infant incapacity rule is well-grounded.<sup>146</sup>

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<sup>136</sup> Elizabeth J. Maykut, *Who is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1368-71 (1994).

<sup>137</sup> *Id.* at 1369 (citing A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 44 (1970)).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1369-71 (citing Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1155 (1980)).

<sup>140</sup> *See id.* at 1368-71 (describing studies as dealing with comprehension of the terms used).

<sup>141</sup> *See id.*

<sup>142</sup> THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 128 (1981).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 129.

<sup>145</sup> *Id.*

<sup>146</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(b) (1981) (infant incapacity exception).

### 3. The Benefit of a Bright-Line Rule

Another complaint that is likely to be raised against the infant incapacity rule is the arbitrariness of selecting the age eighteen to designate adulthood. Certainly a suspect who is one day over eighteen-years-old is not necessarily substantially more mature than a suspect who is one day less than eighteen-years-old, but the infant incapacity rule will assume the former is capable of entering a binding agreement while the latter is not, assuming the age of majority is eighteen. It is undeniable that assigning an age at which individuals become competent to take part fully in society is imperfect. However, in light of recent research indicating that the brain remains underdeveloped until as late as the early twenties, eighteen is not unreasonably old.<sup>147</sup> America sets such rites of passage in other areas of the law; for example, U.S. citizens must be at least eighteen to vote or serve in the military; in most states, individuals must be at least twenty-one to drink alcohol; and the President must be thirty-five or older.<sup>148</sup>

Bright-line rules can be applied more efficiently and consistently than rules based on the balancing of factors.<sup>149</sup> While considering the capacity to contract of every minor individually would be ideal if it could be done *ex ante*, when done *ex post*, it creates uncertainty for those considering contracting with minors and invites disparity of treatment of similarly situated minors. Therefore, a general *per se* rule is required to establish the capacity of all minors in order to establish a clear standard.

#### B. *The Case Against the Totality of the Circumstances Test: Commonwealth v. Malvo*

Although the Supreme Court concluded in *Fare v. Michael C.* that the totality of the circumstances test would be adequate to determine whether a minor voluntarily waived his or her rights, the amount of discretion that the totality test leaves to courts and the lack of clear guidance it gives to police is counter to the spirit of *Miranda*.<sup>150</sup>

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<sup>147</sup> ORTIZ, *supra* note 125.

<sup>148</sup> U.S. CONST. art. II, § 1, cl.5 (setting age for President); U.S. CONST. amend. XXVI, § 1 (setting voting age at eighteen); VA. CODE ANN. § 4.1-304 (Michie 2004) (prohibiting the sale of alcohol to persons under the age of twenty-one).

<sup>149</sup> See *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966) (discussing weakness of totality of circumstances test and establishing bright-line rule).

<sup>150</sup> See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (describing inferiority of totality of the circumstances test to a bright-line rule); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *Miranda*, 384 U.S. at 478-79.

For example, in 2003, the totality of circumstances test was applied in the high-profile murder case *Commonwealth v. Malvo*.<sup>151</sup> There, the defendant moved to suppress statements taken while he was in police custody.<sup>152</sup> While the trial court granted the defendant's motion to suppress a statement given prior to the recitation of the *Miranda* warnings, it denied the motion to suppress the confessions received after warnings were given.<sup>153</sup> The court applied the totality of the circumstances test to evaluate the validity of the waiver of the defendant's right to remain silent.<sup>154</sup> Although the opinion is that of a trial court, and has no precedential value, the facts of this case and the discussion of the totality of the circumstances test in the court's opinion perfectly illustrate the flaws of the test.<sup>155</sup> While the defendant, known as one of the "D.C. snipers," may be a defendant for whom it is hard to sympathize, it is at times when society's rage and passion is at its greatest that the Constitution must protect the rights of all citizens and prevent injustice.<sup>156</sup>

### 1. The Facts: The Interrogation of Malvo

Lee Boyd Malvo was arrested in Maryland on October 24, 2002, at age seventeen, and charged in federal court for a stream of fatal shootings in the Washington, D.C. metropolitan area.<sup>157</sup> Two guardians *ad litem* and three attorneys were appointed by a United States Magistrate in Baltimore to represent Malvo.<sup>158</sup> On November 7, 2002, all federal charges were dropped in Maryland and Malvo was transferred to Virginia to be charged with the murder of a woman in Virginia.<sup>159</sup> Malvo's attorneys were not told where Malvo was moved, but one of his attorneys faxed a letter to the United States Attorney for the Eastern District of Virginia, where Malvo was then in custody.<sup>160</sup> The letter requested that "no law enforcement offi-

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<sup>151</sup> *Commonwealth v. Malvo*, 63 Va. Cir. 22, 22 (2003).

<sup>152</sup> *Id.* at 28.

<sup>153</sup> *Id.* at 45-46.

<sup>154</sup> *Id.* at 43-44.

<sup>155</sup> *See id.*

<sup>156</sup> *See, e.g.*, Stephanie Gibson, Editorial, *Revenge Run Amok*, BALT. SUN, Nov. 15, 2002, at 17A (describing reaction of the public to Malvo's capture as "turn[ing] from the fear people felt during the reign of the alleged snipers to how best to kill them").

<sup>157</sup> *Malvo*, 63 Va. Cir. at 23.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 23-24. This transfer was recognized by observers as a move to take advantage of Virginia's death penalty. *See, e.g.*, Gibson, *supra* note 156.

<sup>160</sup> *Malvo*, 63 Va. Cir. at 23-24.

cer make any attempt to interrogate our juvenile client until we are present,” and that local authorities be informed of their request.<sup>161</sup>

Despite the requests by Malvo’s Maryland attorneys, Malvo was placed in an interview room to be interrogated by a local detective and an agent from the Federal Bureau of Investigation.<sup>162</sup> Malvo was offered food and drink and the questioning began.<sup>163</sup> Meanwhile, Malvo’s new guardian *ad litem*, appointed by the juvenile court in Virginia, was attempting to reach Malvo, but was rebuked by police and ordered to leave the facilities.<sup>164</sup> He then attempted to contact the Commonwealth’s Attorney’s office with the same result.<sup>165</sup> During a five hour interrogation by the investigators, Malvo confessed to several murders.<sup>166</sup>

## 2. Application of the Totality Test

Applying the totality of the circumstances test, the court considered several factors: Malvo was only three months from his eighteenth birthday; “he had prior experience with the criminal justice system” where his *Miranda* rights were explained to him; he had exercised his right to remain silent while in Maryland; “he related that his Maryland attorneys told him not to talk to the police;” “he said he understood his *Miranda* rights;” “he signed a waiver and consent form with an ‘X’ indicating that he knew” his rights, but refused to sign his name for fear of self-incrimination; and police even “fed [him] a dinner of his choosing.”<sup>167</sup> Here, the court arguably correctly applied the totality of the circumstances test, but its conclusions are not consistent with *Miranda*.<sup>168</sup>

*Miranda* expressed grave concern over non-violent tactics used by police to illicit confessions.<sup>169</sup> One method identified and disfavored by the *Miranda* Court was to create the impression that the interrogator is assisting the suspect.<sup>170</sup> Suggesting legal excuses in order to obtain a confession was

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 25.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 27-28. Actual issuance of the order appointing Malvo’s new guardian *ad litem* was not entered until the following day; however, this did not appear to factor into the court’s decision. *Id.* at 28.

<sup>165</sup> *Id.* at 27-28.

<sup>166</sup> *Id.* at 27.

<sup>167</sup> *Id.* at 44.

<sup>168</sup> See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) (requiring procedural guards to protect suspects’ Fifth Amendment privilege).

<sup>169</sup> *Id.* at 448-57.

<sup>170</sup> See *id.* at 453-54 (discussing police manuals that instruct interrogators soliciting statements to appear to assist the suspect in order to create social pressure not to disappoint).

also discouraged by the Court.<sup>171</sup> The Court described these and other non-violent tactics as psychological coercion, and required a warning not only of the suspects' rights, but of the consequences of waiving their rights in order to counter the psychological power that police possess during in-custody interrogations.<sup>172</sup> The Court explained that informing suspects of their rights, and the consequences of waiving them, would enable the intelligent exercise of the right to remain silent.<sup>173</sup>

The interrogation tactics employed against Malvo are almost identical to those disfavored in *Miranda*.<sup>174</sup> According to the transcript of the interrogation of Malvo, the police worked hard over five hours to encourage Malvo to speak.<sup>175</sup> While the court accurately described the interrogation when it noted that Malvo was not threatened in any way, a reading of the transcript of the interrogation reveals a tactic arguably more influential to minors than threats: the interrogators acted as if they would be fair and help Malvo in order to get him to waive his rights.<sup>176</sup> The beginning of the interrogation appears more like a counseling session than an interrogation; the detectives offered Malvo a meal of his choice and asked if they could talk, explaining that they were “interested in hearing what [Malvo] had to say.”<sup>177</sup> By page two of the transcript, one detective explained that they were responsible for Malvo having received something to eat, that they had talked with his co-defendant—who he considered his father—and they described the food they gave his “father.”<sup>178</sup> The detective explained that Malvo could trust the detectives because they talked with his co-defendant and his co-defendant was able to eat.<sup>179</sup>

Continuing, the detective said, “[W]e were the reason for why you got the food you got . . . there [sic] other things . . . that your father might want . . . that we’ll be able to accommodate . . . he’s cooperating with us, we’re cooperating with him . . . .”<sup>180</sup> Malvo then responded, “I will cooperate with you.”<sup>181</sup> The detective replied, “[A]nd that’s all we’re asking you . . . you can’t loose [sic] anything by talking to us . . . you have everything to

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<sup>171</sup> *Id.* at 451.

<sup>172</sup> *See id.* at 448-69.

<sup>173</sup> *See id.* at 469.

<sup>174</sup> *See Miranda*, 384 U.S. at 448-69.

<sup>175</sup> *See* Transcript of taped interview at 1, *Commonwealth v. Malvo*, 63 Va. Cir. 22 (2003) (Crim. No. 102888).

<sup>176</sup> *See id.*

<sup>177</sup> *Id.* at 1-2.

<sup>178</sup> *See id.* at 2.

<sup>179</sup> *See id.* at 3 (The detective said, “[S]o because we were talking to him and he ate . . . so you know we’re not pulling your leg.”).

<sup>180</sup> *Id.*

<sup>181</sup> *See* Transcript of taped interview at 3, *Commonwealth v. Malvo*, 63 Va. Cir. 22 (2003) (Crim. No. 102888).

gain.”<sup>182</sup> Malvo answered, “I know where it’s going to lead to . . . I’m never going to be set free . . . .”<sup>183</sup> The detective responded by asking “[W]hat would be the next best thing?”<sup>184</sup> Malvo briefly depicted his expectations by describing the control that he expected the “Consulate” (apparently intending the warden) to have over him.<sup>185</sup> In response, the detective said, “[S]o what if what you’re asking for you’re able to get? Would that make your life better? . . . Did the food tonight make your life better? . . . [T]hat’s what we’re trying to do . . . to be hospitable.”<sup>186</sup>

By page five of the transcript, the detective reminds Malvo that his father figure is cooperating and has been helped and begins to explain, “I feel that you can probably help [your dad], as well as help yourself, okay . . . simply by helping us understand some things.”<sup>187</sup> The detective suggested that if Malvo was the shooter, then telling the police would help his father, apparently suggesting that since Malvo had no hope of being free, he could help his father by confessing to the shootings.<sup>188</sup> A few pages later, the detective suggested that Malvo’s age would help him.<sup>189</sup> Although Virginia executes offenders who commit crimes as minors,<sup>190</sup> the detective suggested that “in some states you can’t . . . put to death a juvenile.”<sup>191</sup> Repeatedly referring to Malvo as very intelligent, the detective suggested that if Malvo didn’t tell his side, a jury would be left to “believe whatever they want to believe . . . and stack the deck against you . . . .”<sup>192</sup> At another point during the interrogation, the detective suggested that talking would “develop a rapport with” the detectives, explaining that “if you face anybody in the . . . court . . . it’s going to be us,” and that if Malvo talked, they could tell the jury that “even though he didn’t have to talk to us, he talked with us . . . was honest . . . [and] was candid.”<sup>193</sup>

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182 *Id.*

183 *Id.*

184 *Id.*

185 *See id.* at 4. Malvo explained that if he will “ask the Consulate for a television, and if they give it, or if they don’t give it, then so be it then.” *Id.*

186 *Id.* at 3

187 Transcript of taped interview at 5, *Commonwealth v. Malvo*, 63 Va. Cir. 22 (2003) (Crim. No. 102888).

188 *See id.* at 8.

189 *See id.* at 13.

190 VA. CODE ANN. § 18.2-10 (Michie 2004) (authorizing execution “if the person so convicted was 16 years of age or older at the time of the offense”).

191 Transcript of taped interview at 13, *Commonwealth v. Malvo*, 63 Va. Cir. 22 (2003) (Crim. No. 102888).

192 *Id.* at 14.

193 *Id.* at 6.

Malvo eventually implicated himself as part of a two-person sniper team that was responsible for multiple killings.<sup>194</sup> Before recording statements that were later used to prosecute him for murder, the detectives discussed the *Miranda* warnings with Malvo, and Malvo acknowledged his understanding of the warnings, while he refused to sign his name on the *Miranda* waiver for fear of implicating himself.<sup>195</sup> While this was cited by the court as an indication of Malvo's understanding of the *Miranda* warnings,<sup>196</sup> it better illustrates his inability to understand the effects of his statements, confessing to murders while refusing to give a sample of his handwriting for fear of implicating himself in the murders.

Under the totality of the circumstances test, the *Malvo* trial court found this interrogation to be constitutional.<sup>197</sup> If this court is right as a matter of law, then the law is not sufficiently protecting minors' right to protection from self-incrimination. If this court is wrong, then the case illustrates the difficulty of applying the test. The totality test is unfair to all parties involved: police do not have clear guidance; courts are faced with an almost entirely discretionary decision as to whether or not to admit evidence; and minors are left vulnerable to the discretion of law enforcement and the courts.

The difficulty executing the totality test has been recognized by the Supreme Court. In 2000, refusing to overturn *Miranda*, the Court explained that "experience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."<sup>198</sup> The Court noted that "the line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw."<sup>199</sup> *Miranda* held that the privilege against self-incrimination is "accorded a liberal construction."<sup>200</sup> However, because the totality of circumstances test requires courts to draw the line between appropriate and inappropriate conduct ex post, courts are likely to be reluctant to suppress statements near the margins after law enforcement has relied on them. One of the benefits of *Miranda* is that it created a bright-line test to protect defendants' constitutional rights; the same should be done to protect minors.

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<sup>194</sup> Commonwealth v. Malvo, 63 Va. Cir. 22, 27 (2003).

<sup>195</sup> *Id.* at 25.

<sup>196</sup> *Id.* at 44.

<sup>197</sup> *Id.*

<sup>198</sup> Dickerson v. United States, 530 U.S. 428, 444 (2000) (refusing to overturn *Miranda*).

<sup>199</sup> *Id.* (quoting Haynes v. Washington, 373 U.S. 503, 515 (1963)).

<sup>200</sup> *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).

### C. *Applicability of Contract Rule to the Fifth Amendment*

The appearance of increasing commissions of violent crimes by minors has made some seek to reduce the special treatment afforded minors.<sup>201</sup> It is understandable that society has become frustrated and has begun to question the treatment of minors in the criminal justice system.<sup>202</sup> The suggestion that courts should prevent minors from effectively waiving their rights will undoubtedly receive at best a lukewarm response. However, society's fears and desire for retribution should not cloud the judgment of America's justice system, and should not impair the constitutional rights of minors. Today, as in 1966, when *Miranda* was decided, there will surely be those who argue that "society's need for interrogation outweighs the privilege" against self-incrimination.<sup>203</sup> However, with research indicating the physiological incapacity of minors to recognize the consequences of their actions or to fully control their responses, such an argument is even less tenable in the case of minors than it was for adults when it was rejected by the *Miranda* court.<sup>204</sup>

#### 1. *Miranda* Waiver as a Contract

In reality, the waiver of a person's Fifth Amendment right to remain silent is a simple contract, but with constitutional ramifications. True, a contract generally requires an offer, acceptance and consideration,<sup>205</sup> and on the surface none of these may appear to be present; but with a closer look, each requirement is satisfied. The waiver works essentially as a release form. The government offers to receive a statement from the suspect; the suspect accepts the offer by signing the waiver. For consideration, the suspect is allowed to make a statement, and the police receive a release from future claims that the *Miranda* rights of the suspect were violated. While this may be a poorly bargained agreement on the suspect's part, contracts are not required to be in the interest of the parties.

Viewing the waiver as a release also may seem unappealing because confessions are routinely challenged after waivers have been signed; however, any future challenge to the confession will not be aimed directly at the

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<sup>201</sup> See, e.g., Sewell Chan, *Violent Crime Arrests Up for D.C. Juveniles; Slight Rise Cited After Years of Decline*, WASH. POST, Dec. 5, 2003, at B1 (reporting Washington, D.C. Council plans to make it easier to try juveniles as adults).

<sup>202</sup> See, e.g., *id.*

<sup>203</sup> *Miranda*, 384 U.S. at 479.

<sup>204</sup> See *supra* Part II.A.2.

<sup>205</sup> RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

confession, but instead at the waiver itself.<sup>206</sup> Just as a person who signs a medical release agreement might challenge the validity of the agreement, so may a defendant challenge the validity of a *Miranda* waiver.

Waiving the Fifth Amendment right to remain silent essentially has the same legal effect as a contract acknowledging liability or waiving the right to sue; both surrender a right the waiving party otherwise enjoys.<sup>207</sup> The most significant difference between a *Miranda* waiver and other contracts is that with a *Miranda* waiver a constitutional right is being surrendered. As such, minors should be afforded at least as much protection as they are guaranteed in other agreements. Therefore, as the waiver is a contract of great importance, it is appropriate that the rules of contract that protect minors also apply to waivers. However, even without viewing the waiver as a contract, the opinions of the Supreme Court have laid the grounds for adopting the infant incapacity rule of contracts with regard to confessions by minors.

## 2. Guidance Provided by the Supreme Court

Under the common law, capacity to contract was largely based on the ability to appreciate the consequences of contracts; although more generally, it was to protect minors from their own inexperience and immaturity.<sup>208</sup> Whether the defendant can appreciate the consequences of waiving his or her rights was also an important consideration for the Supreme Court in *Miranda*.<sup>209</sup> The *Miranda* Court recognized that even for adults, in-custody interrogations “[i]n the incommunicado police-dominated atmosphere,” can be overwhelming.<sup>210</sup> Not only did the Court express a concern for the autonomy of the defendant, it also recognized that “[i]nterrogation procedures may even give rise to a false confession.”<sup>211</sup>

The Supreme Court's later decisions also indicate a concern for the mental awareness of the defendant at least as much as the conduct of the police. Although *In re Gault* addressed the rights of minors in juvenile courts, its holding expresses a concern of the Court that is even more appli-

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<sup>206</sup> See, e.g., *Fare v. Michael C.*, 442 U.S. 707, 707 (1979) (considering whether waiver of right to remain silent was voluntary).

<sup>207</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 74 (1981) (discussing forbearance of legal claim or defense).

<sup>208</sup> See *Bestor v. Hickey*, 41 A. 555, 556 (Conn. 1898). (discussing reasons for treating minors differently).

<sup>209</sup> *Miranda v. Arizona*, 384 U.S. 436, 469 (1966) (requiring awareness of the consequences of waiving rights).

<sup>210</sup> *Id.* at 456.

<sup>211</sup> *Id.* at 456 n.24.

cable to criminal courts.<sup>212</sup> In *Gault*, the Court “appreciate[ed] that special problems may arise with respect to waiver of the privilege by or on behalf of children.”<sup>213</sup> While the Court accepted the use of different methods for protecting minors’ privilege against self-incrimination, it prescribed “the greatest care must be taken to assure that the admission was voluntary.”<sup>214</sup> The Court made clear that by “voluntary,” it meant more than “not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”<sup>215</sup> According to *Gault*, special care was necessary when “counsel was not present for some permissible reason,” however, the Court did not elaborate on when absence of counsel would be permissible.<sup>216</sup>

Even in *Fare v. Michael C.*, where the Supreme Court adopted the totality of the circumstances test, the Court focused not on the conduct of the police alone, but on the capacity of the minor to understand the *Miranda* warnings.<sup>217</sup> While the totality test fails to adequately evaluate the capacity of minors to waive the privilege against self-incrimination, the test is intended to be an estimation of the capacity of a minor to understand the consequences of waiving his or her *Miranda* rights.<sup>218</sup>

Thus, when considering *Miranda* waivers, the Supreme Court has always focused its inquiry not only on the conduct of the police, but also on the capacity of the defendant to recognize the consequences of their actions.<sup>219</sup> Through centuries of adjudications at common law, courts have determined that minors do not have the capacity to recognize the consequences of their actions. This fact has been recognized by legislatures and confirmed by science.<sup>220</sup> The totality of the circumstances test attempts to determine whether an individual minor is competent to waive his or her rights, but the Court has said it is ineffective, and the test establishes no clear line for police to follow.<sup>221</sup> The solution to the Court’s struggle to ascertain the competency of minors to waive rights that are so fundamental to our justice system is to risk overprotecting minors’ rights by creating a

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<sup>212</sup> *In re Gault*, 387 U.S. 1, 55 (1967).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (questioning whether the minor had the “capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights”).

<sup>218</sup> *See id.* (emphasizing the importance of the minor’s capacity).

<sup>219</sup> *See supra* Part II.C.

<sup>220</sup> *See supra* Part II.A-C.

<sup>221</sup> *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (describing the totality test as less effective than the *Miranda* test and refusing to overturn *Miranda*).

bright-line rule deeming minors incompetent to waive the right to remain silent during interrogations.

D. *The Plan: The Application of the Infant Incapacity Rule to Miranda Waivers*

1. How to Adopt the Rule

Because the capacity of minors to waive their *Miranda* rights is a question of constitutional significance, the best means for adopting a rule of infant incapacitation is through the U.S. Supreme Court. By declaring that, as a matter of constitutional law, the protection of the Fifth Amendment rights of minors cannot be waived by minors without the informed consent of a responsible adult or legal counsel, the Court would establish a uniform standard that would protect minors from the inherent coercion of incommunicado interrogations. The Court may hesitate to adopt the rule in light of its explicit adoption of the totality of the circumstances test in *Fare v. Michael C.*<sup>222</sup> However, new research about the mental capacity of minors supports the need for a new rule in order to address the underlying concern for minors' mental capacity expressed in *Fare*, and every other case where the Court has dealt with confessions by minors.<sup>223</sup> Therefore, by taking note of the new understanding of the mental capacity of minors, and by recognizing the failure of the totality of the circumstances test to adequately protect minors' right to remain silent, the Court could reconsider and adopt the *per se* rule of infant incapacity.

While adoption of the rule by the Supreme Court would ensure a more permanent and uniform application of the rule, it may be argued that the Court is not the appropriate venue for changing the rules governing minors' ability to waive their rights. The problem with the Court adopting the rule of infant incapacity is that it must to some extent reverse its holding in *Fare*. For the Court to change the rules *ex post* would also burden law enforcement officers who relied on *Fare* and accepted confessions from minors incommunicado. However, while it is important for laws to be predictable, constitutional rights should not be thwarted out of convenience to law enforcement.<sup>224</sup> It is also important to realize that this rule will only prevent prosecutors from using minors' confessions in court; if an entire case is

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<sup>222</sup> *Fare*, 442 U.S. at 707.

<sup>223</sup> See *supra* Parts II.A.1, II.C.2.

<sup>224</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (abandoning separate but equal doctrine despite precedent).

supported only by the confession of a minor, considering such confessions are arguably unreliable, the loss of such a case will not be a threat to the criminal justice system.<sup>225</sup> Therefore, in light of new understanding, the Court should, at the next available opportunity, adopt a per se rule against minors' capacity to waive their right to remain silent absent a parent, guardian, or other interested adult.<sup>226</sup>

## 2. How to Apply the Rule

While the common law has adopted a per se rule for contracts, and this comment recommends a per se rule against minors' capacity to waive their rights, it is possible, instead, to employ a rebuttable presumption of incapacity.<sup>227</sup> This approach is similar to the court's treatment of minors in other areas of the law, where age limits are treated as presumptions only, and those on the cusp of a limit may be treated as though they were above it. For example, although minors are generally dealt with by juvenile courts, when courts are convinced that a minor is unlikely to be successfully rehabilitated and is charged with committing a serious crime, or is a threat to public safety, the minor may be waived to criminal court.<sup>228</sup> However, a rebuttable presumption lacks the value added by establishing a bright-line rule that is easy for law enforcement officials to implement.<sup>229</sup> Rather than ending the ineffective use of the totality of the circumstances test with minors, creating a rebuttable presumption will result in the reliance on the totality test.<sup>230</sup> Therefore, while creating a rebuttable presumption against voluntary waiver for minors may enhance the protection of their rights, the better response to the failure of the totality test is a per se rule against minors waiving their rights without an adult advocate present.

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<sup>225</sup> Walters, *supra* note 41, at 489 (reporting that "seventy-three percent of false confessions led to convictions").

<sup>226</sup> If the Supreme Court fails to adopt the infant incapacity rule, state legislatures and state courts should follow the lead of states that have adopted a rule against minors waiving their right to remain silent.

<sup>227</sup> See N.M. STAT. ANN. § 32A-2-14 (Michie 2003) (creating a rebuttable presumption that statements by a child "thirteen or fourteen years old" are inadmissible).

<sup>228</sup> See, e.g., *In re Bobby C.*, 426 A.2d 435, 437 (Md. 1981) (identifying the criteria for determining whether a minor is waived from juvenile court to criminal court in Maryland). The factors considered include: "(1) Age of the child; (2) Mental and physical condition of the child; (3) The child's amenability to treatment in any institution, facility, or program available to delinquents; (4) The nature of the offense and the child's alleged participation in it; and (5) The public safety." *Id.*

<sup>229</sup> See *supra* Part II.A.2 (discussing benefit of bright-line rule).

<sup>230</sup> See N.M. STAT. ANN. § 32A-2-14 (Michie 2003) (detailing the circumstances to be considered when determining whether minors' rights were voluntarily waived).

There are at least four options for implementing a per se infant incapacity rule: (1) requiring minors to have a parent or guardian sign on their behalf before any confession is deemed voluntary; (2) accepting a waiver as voluntary only if an attorney advised the minor of his or her rights prior to the waiver; (3) requiring an "interested adult" to be present; or (4) a combination of these three options. Because each of these options would protect minors' constitutional rights, law makers rather than the courts should determine which alternative to select.

The first option is identical to the common-law treatment of minors wishing to enter into a contract. There are two major problems with this approach. First, when a parent signs a contract on behalf of a minor, the parent takes on the responsibility of satisfying the minor's obligations; the parent accepts the burden of the consequences of the agreement.<sup>231</sup> In the case of a *Miranda* waiver, the parent is unlikely to be able to accept the likely consequences of the waiver: self-incrimination. Instead the burden remains on the child as it did in *Shields v. Gross*.<sup>232</sup> This problem is exacerbated by the second concern for allowing parents to sign for their children: parents may not know the best interest of the child.<sup>233</sup>

Both of these concerns illustrate the possibility that minors will still act against their interest even if the contract rule of incapacity to contract is adopted. However, the intent of the rule is not to prevent individuals from surrendering their rights, but to protect minors from their own immaturity. Even if a parent is not helpful to a minor, requiring their presence may remove the incentive for minors to provide false confessions in an ill-advised attempt to remedy their situation without informing their parents.<sup>234</sup>

The second option, requiring that an attorney be present, could solve the problem of parents being poor advocates by replacing parents with legal representation. However, there is a significant problem with this approach: unless the rule granted power of attorney to the lawyer, the child would still control the privilege.<sup>235</sup> While the attorney could counsel the child concerning the right to remain silent, despite evidence that minors are deficient

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<sup>231</sup> *Fischer v. Rivest*, No. X03CV00509627S, 2002 Conn. Super. LEXIS 2778, at \*39 (Aug. 15, 2002) (denying father's right to sue for damages from child's injury after signing waiver).

<sup>232</sup> *Shields v. Gross*, 448 N.E.2d 108, 112 (N.Y. 1983) (Jasen, J., dissenting).

<sup>233</sup> For example, parents may acquiesce to police requests for a statement, or even encourage minors to talk, believing that their child is innocent and can avoid punishment by telling the truth. *See, e.g., Oliver v. State*, 907 S.W.2d 706, 708-09 (Ark. 1995) (statement implicating minor in a murder made in the presence of his mother).

<sup>234</sup> It may be argued that parents, believing their child is guilty, may coax a confession from them; however, the Constitution does not protect minors from their parents' interrogations, only those of the government. *See Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (describing concern with police interrogations).

<sup>235</sup> *See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2* (2002).

decision-makers as a result of changes in the brain during adolescence, the minor would retain final authority.<sup>236</sup>

The third option will provide the most flexibility for law enforcement officials, but also leads to ambiguity as to who constitutes an “interested adult.” This approach would allow police to question minors whose parents are not available by providing an adult advocate. Whether the interested adult is an attorney, a relative, or simply an adult who agrees to represent the interests of the child, this rule would prevent minors from being alone against their adult interrogators. This may reduce the inherent coercion of the interrogation incommunicado discussed in *Miranda*.<sup>237</sup> However, like the attorney requirement, it leaves the child with final authority. Allowing law enforcement to choose the adult may also result in abuse of the rule; in an effort to obtain a confession, authorities might seek adults who are more interested in facilitating cooperation with the police than with protecting the rights of the minor.

Finally, the fourth and best solution may be to combine the three approaches already considered. To establish a bright-line rule, and to recognize the incapacity of minors, a parent’s consent would be required for a minor to waive his or her right to remain silent. However, in the absence of an available parent, the government would be allowed to question a minor so long as an adult advocate for the minor is present during any interrogation of the minor. This approach calls for the adoption of the contract rule of infant incapacity, but, recognizing the restraints that such a rule may impose on law enforcement, where a good faith effort to include a parent or guardian fails, it is reasonable to include an exception for cases where the parent is unavailable.

This alternative is in accord with the spirit of *Miranda*, where the Supreme Court recognized the inherent coercion of in-custody interrogations, required waivers to be voluntary, and sought a bright-line rule to enable law enforcement to do their jobs while preventing their encroachment on the rights of defendants.<sup>238</sup> If this fourth option were adopted, the exception would need to be very narrow in order to avoid diluting the benefit of a bright-line rule and to prevent abuse of the exception.

#### E. *Effects of Protecting Minors*

The greatest obstruction to the adoption of the infant incapacity rule in interrogations is likely to be the fear that such a rule will unduly interfere

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<sup>236</sup> *Id.*

<sup>237</sup> *Miranda*, 384 U.S. at 455-56.

<sup>238</sup> *See id.* at 444.

with police efforts to fight crime. Although always a valid concern, the efforts of law enforcement are preempted by protections guaranteed by the Constitution.<sup>239</sup> However, just as the Court in *Miranda* used a bright-line rule to provide law enforcement officials and courts with concrete constitutional guidelines, a bright-line rule with regard to minors' confessions will enable police and court officials to better predict the admissibility of confessions gleaned from interrogations, and therefore improve their ability to effectively investigate and prosecute criminals.<sup>240</sup>

It is also important to recognize that preventing minors from waiving their right to remain silent would not prevent the use of evidence obtained as a result of interrogations.<sup>241</sup> Unlike the fruits of illegal searches, evidence gained through illegal interrogations may be used in court.<sup>242</sup> Therefore, the most likely effect of restricting minors' ability to confess would be a reduction in convictions based on false-confessions.

Some might be concerned that minors, knowing that they will receive special treatment, will act out, but the proposed rule would not reduce the minors' culpability; it would only protect their now existing rights.<sup>243</sup> More likely, as was argued in *Miranda*, "[c]hanges in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."<sup>244</sup> Therefore, by creating a bright-line rule, courts and law enforcement will have a clear standard by which to judge the admissibility of confessions, and minors' Fifth Amendment privilege against self-incrimination will be more securely guaranteed.<sup>245</sup>

## CONCLUSION

The Supreme Court has sought through the totality of the circumstances test to determine the capacity of minors to understand the consequences of waiving their rights on a case-by-case basis; but the totality test

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<sup>239</sup> U.S. CONST. art. VI, cl. 2.

<sup>240</sup> See *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (refusing to overturn *Miranda*).

<sup>241</sup> *Oregon v. Elstad*, 470 U.S. 298 (1985) (rejecting application of the "fruits" doctrine in cases of involuntary confessions).

<sup>242</sup> *Id.*

<sup>243</sup> See *supra* Part II.D.2.

<sup>244</sup> *Miranda v. Arizona*, 384 U.S. 436, 441 n.3 (1966) (quoting Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 500 n.270 (1964) (quoting David C. Acheson, Address at the Central Eastern Area Armed Forces Disciplinary Control Board Semi-Annual Meeting (Oct. 15, 1964))) (discussing suggested effects of requiring defendants to be apprised of their rights).

<sup>245</sup> It is also likely that adoption of this rule will reduce the number of false confessions by minors. See Walters, *supra* note 41, at 490.

is a poor measure for determining minors' capacity and is difficult to administer. The Court has also sought to protect the right to remain silent and to reduce the inherent coercion of in-custody interrogations by establishing bright-line rules. Yet, the current rule for interrogating minors provides no clear standard and allows law enforcement to place the power of the state against a lone minor. Considering the failure of the totality test, and the Supreme Court's disfavor for in-custody interrogations, and in light of new scientific evidence that minors are likely to be less capable of making intelligent choices than adults, a new rule is required to protect minors' constitutional right to remain silent. Therefore, the contract rule of infant incapacitation should be adopted in criminal law. Doing so would make the waiver of *Miranda* rights by minors in the absence of endorsement by their parent or legal guardians voidable, except in exceptional cases where the minor's legal guardian is unavailable.

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