

WAVING GOOD-BYE TO WAIVER: A DEVELOPMENTAL ARGUMENT AGAINST YOUTHS' WAIVER OF *MIRANDA* RIGHTS†

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INTRODUCTION¹

“Rights declared in words might be lost in reality.”

*Miranda v. Arizona*²

The U.S. Supreme Court has repeatedly struggled to balance an individual’s Fifth Amendment right against compelled self-incrimination with law enforcement’s need to investigate and solve crimes. *Miranda v. Arizona*, the Supreme Court’s decision mandating that prophylactic warnings be given to suspects prior to custodial interrogation by law enforcement,³ was decided in 1966, over fifty years ago. The oft-quoted *Miranda* warnings—that the suspect has, among other rights, the right to remain silent and the right to the presence of counsel⁴—were adopted to protect this Fifth Amendment right against self-incrimination⁵ from the “inherently compelling pressures” of questioning by the police.⁶ Although any police interview has “coercive aspects to it,”⁷ interviews which take place in police custody carry a heightened “‘risk’ that statements obtained are not the product of the suspect’s free choice.”⁸ *Miranda* expressly recognized that custodial interrogation in an “incommunicado police-dominated atmosphere”⁹ creates psychological pressures that “work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”¹⁰

Miranda warnings are specifically designed to protect the individual against the coercive nature of custodial interrogation.¹¹ As

1. Portions of this introduction have been quoted or adapted from Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501 (2012).

2. *Miranda v. Arizona*, 384 U.S. 436, 443 (1966) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)).

3. *Id.*

4. *Id.* at 444; see also *Florida v. Powell*, 559 U.S. 50, 60 (2010) (“The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed.”).

5. U.S. CONST. amend. V.

6. *Miranda*, 384 U.S. at 467.

7. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

8. *J.D.B. v. North Carolina*, 564 U.S. 261, 268–69 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

9. *Miranda*, 384 U.S. at 456.

10. *Id.* at 467.

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

such, they are required only when a person is “in custody.”¹² To determine whether a person is in custody, courts make two discrete, objective inquiries: “[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.”¹³ Thus, the custody analysis turns on whether a reasonable person would have believed herself to be under formal arrest or restrained in her freedom of movement to the degree associated with a formal arrest.

In 2010, in *J.D.B. v. North Carolina*,¹⁴ the Supreme Court ruled that a child suspect’s age was relevant to determining whether she has been taken into custody and therefore entitled to a *Miranda* warning.¹⁵ In *J.D.B.*, the Court reviewed the *Miranda* doctrine, adopted with adult suspects in mind, in the context of the interrogation of a thirteen-year-old middle-school student who was questioned in a closed-door school conference room by school administrators and members of law enforcement.¹⁶ Writing for the majority, Justice Sotomayor stated, “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.”¹⁷ Justice Sotomayor effectively characterized youth as an unambiguous fact that “generates commonsense

12. *Miranda*, 384 U.S. at 445 (“The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way.”).

13. *J.D.B.*, 564 U.S. at 270 (emphasis added) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)).

14. *Id.* at 261.

15. *Id.* at 277.

16. *Id.* at 264–81. Justice Sotomayor, writing for the majority, did not consider the school setting a proxy for age, as Justice Alito, in his dissent, seemed to suggest. *See id.* at 293 (Alito, J., dissenting). Justice Sotomayor countered that:

A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person “questioned in school” is a “minor,” the coercive effect of the schoolhouse setting is unknowable.

Id. at 276 (majority opinion) (citation omitted).

17. *Id.* at 277. Although the interrogation of *J.D.B.* took place in a school setting, the majority opinion took pains to point out that its holding did not turn on this fact. Responding to Justice Alito’s dissenting assertion that the traditional *Miranda* analysis accounts for the coercive nature of in-school interrogations, the majority noted that “the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned.” *Id.*

conclusions about behavior and perception,”¹⁸ and she noted that such conclusions are “self-evident to anyone who was a child once himself, including any police officer or judge.”¹⁹

The Court’s observation that age yields “objective conclusions” about youths’ susceptibility to influence or outside pressures was drawn directly from the Court’s earlier juvenile sentencing decisions in *Roper v. Simmons*²⁰ and *Graham v. Florida*.²¹ Those cases relied on research confirming widely held assumptions about certain developmental attributes of youth to ban the juvenile death penalty as well as life without parole sentences for juveniles convicted of non-homicide crimes. As the *J.D.B.* Court noted:

The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. . . . Like this Court’s own generalizations, the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal.²²

Underscoring the relevance of these demonstrated differences, the Court rejected the arguments of the State and the dissent that allowing consideration of age to inform the custody analysis would undercut the intended “clarity” of the *Miranda* custody test.²³ Instead, the majority noted that “ignoring a juvenile defendant’s age will often make the [*Miranda* custody] inquiry more artificial . . . and thus only

18. *Id.* at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

19. *Id.*

20. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

21. *Graham v. Florida*, 560 U.S. 48, 68 (2010).

22. *J.D.B.*, 564 U.S. at 273.

23. *Id.* at 279–80. In dissent, Justice Alito, with whom Justices Thomas and Scalia joined, argued that although *Miranda*’s requirements were “no doubt ‘rigid,’ . . . with this rigidity comes increased clarity . . . [and] [a]s has often been recognized, this gain in clarity and administrability is one of *Miranda*’s ‘principle advantages.’” *Id.* at 285 (Alito, J., dissenting) (quoting *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978), and *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984)). In Justice Alito’s view, “*Miranda* greatly simplified matters by requiring police to give suspects standard warnings before commencing any custodial interrogation.” *Id.* He warned that the rule announced by Justice Sotomayor would “[upset] the careful ‘balance’ that *Miranda* struck.” *Id.* at 289 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)). Justice Alito specifically distinguished the Court’s voluntariness test—which takes into account both “the details of the interrogation” and “the characteristics of the accused,” *id.* at 284 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973))—with *Miranda*’s “one-size-fits-all prophylactic rule,” *id.* at 290. Justice Alito insisted that the inclusion of the suspect’s age in the *Miranda* custody test “will be hard for the police to follow, and it will be hard for judges to apply.” *Id.* at 293.

add confusion.”²⁴ The Court faulted the State’s and the dissenters’ arguments that *Miranda* works only with a “one size fits all” analysis; the majority stated that age is both a relevant and an objective circumstance that cannot be excluded from the custody analysis “simply to make the fault line between custodial and noncustodial ‘brighter.’”²⁵ Justice Sotomayor likewise rejected the State’s and the dissent’s arguments that gradations among children of different ages would further erode the objectivity of the test. Disagreeing that such a concern justified “ignoring a child’s age altogether,”²⁶ Justice Sotomayor wrote:

Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. . . . The same is true of judges, including those whose childhoods have long since passed. . . . In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social or cultural anthropology to account for the child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.²⁷

Finally, the Court also rejected the State’s and the dissent’s argument “that excluding age from the custody analysis comes at no cost to juveniles’ constitutional rights because the due process voluntariness test independently accounts for a child’s youth.”²⁸ While acknowledging that the voluntariness test “permits consideration of a child’s age” and that it “erects its own barrier to admission of a defen-

24. *J.D.B.*, 564 U.S. at 279 (majority opinion). Justice Sotomayor stressed the objective nature of the *Miranda* custody test, reiterating that the “subjective views harbored by either the interrogating officers or the person being questioned are irrelevant.” *Id.* at 271 (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994)). Justice Sotomayor continued: “The test, in other words, involves no consideration of the ‘actual mindset’ of the particular suspect subjected to police questioning.” *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004)). Nevertheless, Justice Sotomayor found the State’s and the dissent’s arguments that consideration of the suspect’s age would undermine the objective nature of the test flawed. Without minimizing the important goal of clarity, Justice Sotomayor wrote:

[W]ere the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. But we have rejected that “more easily administered line,” recognizing that it would “simply enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.”

Id. at 280 (citation omitted) (quoting *Berkemer*, 468 U.S. at 441).

25. *Id.* at 280.

26. *Id.* at 279.

27. *Id.* at 279–80.

28. *Id.* at 280.

dant's inculpatory statements at trial,"²⁹ the Court explicitly noted that "*Miranda*'s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake."³⁰ To ignore a child's age in determining whether "a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."³¹

The question before the Court in *J.D.B.* was whether the Constitution demanded a more refined test for children when addressing the custody question that triggers *Miranda* warnings. The Court sidestepped the question about whether children actually understand the *Miranda* warnings such that they can effectively waive them once administered,³² observing that the inquiry was irrelevant because no warnings had even been issued. In the wake of *J.D.B.*, lower courts have assessed whether the interrogation was custodial with due consideration for whether the reasonable juvenile would have felt free to end or leave the interrogation, but the totality of circumstances test for determining the validity of a *Miranda* rights waiver has remained intact.³³

29. *Id.* at 280–81.

30. *Id.* at 281 (quoting *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."), and *Dickerson v. United States*, 530 U.S. 428, 442 (2000) ("[R]eliance on the traditional totality-of-the-circumstances test raise[s] a risk of overlooking an involuntary custodial confession.")).

31. *Id.* at 281.

32. *Id.* at 270 n.4.

33. This test, developed by the Court prior to the *Miranda* decision and reiterated again and again since, "permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare*, 442 U.S. at 725). For youth, this may include such factors as the "juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725. This analysis properly includes the due process voluntariness factors identified in the pre-*Miranda* jurisprudence, including "both the characteristics of the accused and the details of the interrogation," which—post-*Miranda*—allow for an analysis of the validity of a waiver once a suspect has been properly informed of his or her rights. *Dickerson*, 530 U.S. at 434. However, "all the factors that may conceivably make up the totality of the circumstances in any given case have never been definitively set forth by the Supreme Court[.]" 42 AM. JUR. PROOF OF FACTS 2D 617 § 4 (2017). Because of this, courts are left with a great deal of latitude in identifying

In this article, we address the question left unanswered by the Court in *J.D.B.*: In light of the substantial research establishing that children's understanding and appreciation of the *Miranda* warnings are quite limited, must the traditional test for assessing the validity of an individual's waiver of their *Miranda* rights be re-calibrated to take into account the developmental attributes of youth? Under the prevailing standard, a valid waiver must be both "voluntary" (i.e., the result of free choice) and "knowing and intelligent" (i.e., made with full awareness of the nature of the right being abandoned and the consequences of its abandonment).³⁴ As with other criminal laws, policies, and practices, what constitutes "voluntary" or "knowing and intelligent" for a child may not be the same as it is for an adult. It is not enough to ask only about the specific pre-conditions of the interrogation that trigger *Miranda*'s prophylactic rule for children; we must also consider whether the traditional test of a valid rights waiver adequately protects the rights of children against self-incrimination.

Part I of this article reviews the case law related to *Miranda* rights, waiver, and consideration of youth in this due process analysis. Part II provides an overview of social science research on child and adolescent development and, in particular, how research findings bear on children's comprehension of *Miranda* rights. Part III describes the particular ways in which children and adolescents are vulnerable to police pressure and examines certain police practices used during administration of *Miranda* warnings and interrogation that are particularly concerning in light of youths' developmental immaturity. Part IV discusses the limitations of current policy reforms designed to better protect youth during custodial interrogation. Finally, Part V proposes new rules for juvenile *Miranda* waivers to better reflect prevailing research: Waivers of *Miranda* rights by youth age fourteen and

which factors to consider and, accordingly, the totality test has received criticism for the way it is applied. As a paper on the topic noted:

The "totality of the circumstances" test, while affording judges flexibility in practice, has offered little protection to suspects. Without bright lines for courts to follow, and without a complete and accurate record of what transpired during the interrogation process, the end result has been largely unfettered and unreviewable discretion by judges. In practice, when judges apply the test, "they exclude only the most egregiously obtained confessions and then only haphazardly." The absence of a litmus test has also encouraged law enforcement officers to push the envelope with respect to the use of arguably coercive psychological interrogation techniques.

Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW HUM. BEHAV.* 3, 11–12 (2010) (citations omitted).

34. *Burbine*, 475 U.S. at 421.

younger should be prohibited; for youth ages fifteen and sixteen, there should be a rebuttable presumption that the waiver was invalid with a heavy burden placed on the state to overcome it by clear and convincing evidence; and for older teens ages seventeen to nineteen, although additional research is needed to better understand their *Miranda* waiver capacities, available research suggests that additional *Miranda* waiver protections may be needed for this group of teens as well.

I.

EVOLUTION OF *MIRANDA*'S KNOWING, INTELLIGENT, AND VOLUNTARY TEST

A. *The Historical Importance of the Right to Remain Silent*

The right to silence was included in the Fifth Amendment to protect those accused of committing crimes from being coerced into making involuntary confessions by state authorities during interrogation. Its adoption was an explicit rejection of past European inquisitorial systems and their “manifestly unjust methods of interrogating accused persons.”³⁵ In *Bram v. United States*, the Supreme Court centered questions of the voluntariness of confessions in the “portion of the [F]ifth [A]mendment . . . commanding that no person ‘shall be compelled in any criminal case to be a witness against himself’”; the Court referenced the long academic and judicial history behind the inadmissibility of involuntary statements taken from a suspect in custody.³⁶ The Court described the development of the proscription against involuntary confessions in English and American courts before and after the adoption of the Fifth Amendment and discussed how the

35. *Brown v. Walker*, 161 U.S. 591, 597 (1896). The Court noted:

So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of constitutional enactment.

Id.; see also ALAN GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, *EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS* 10–11 (2010).

36. *Bram v. United States*, 168 U.S. 532, 542 (1897). According to the Court: [A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

Id. at 542–43 (second alteration in original) (quoting 3 *RUSS CRIMES* 478 (6th ed.)).

right against self-incrimination—and, thus, the right to remain silent—became firmly embedded in our country’s criminal justice system.³⁷

B. *Due Process Voluntariness Before Miranda*

Prior to *Miranda*, the Supreme Court focused primarily on issues related to the voluntariness of confessions to determine admissibility. As early as 1896, the Court began articulating the foundational tenets of the voluntariness analysis. In *Wilson v. United States*, Chief Justice Fuller stated, “the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or indictment of any sort.”³⁸ Forty years later, in *Brown v. Mississippi*, the Supreme Court held that extracting confessions using “brutality and violence”³⁹ violated the Fourteenth Amendment’s Due Process Clause, which required “that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions.”⁴⁰ The facts of *Brown* depict stunning brutality and torture: The town’s deputy sheriff went to the home of Mr. Ellington, one of the accused, and, upon his denial of the crime, proceeded to hang him from a tree, let him down, and hung him again. As Ellington continued to protest his innocence, the deputy sheriff and the group of vigilantes tied Ellington to a tree and whipped him. When the assailants realized that he would not confess, he was released and allowed to return home. A day or two later, the deputy returned to Mr. Ellington’s home and arrested him. On the way to the jail, the deputy stopped the car, and proceeded to relentlessly whip Mr. Ellington, declaring that he would not stop until Mr. Ellington confessed. When it became unendurable, Mr. Ellington agreed to confess to any statement the deputy dictated.⁴¹ The *Brown* court noted that the physically torturous methods used to extract the confession were the precise abuses that led to the adoption of the Fifth Amendment in the first place.⁴²

A few years later, in *Johnson v. Zerbst*, the Court addressed how one evaluates the validity of a waiver of constitutional rights, stating:

37. *Bram*, 168 U.S. at 543–48; see also Michael Avery, *You Have a Right to Remain Silent*, 30 FORDHAM URB. L.J. 571, 576–77 (2003).

38. *Wilson*, 162 U.S. at 623.

39. *Brown v. Mississippi*, 297 U.S. 278, 279 (1936).

40. *Id.* at 286 (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)).

41. *Id.* at 281–82.

42. *Id.* at 285–87.

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.⁴³

Following these decisions, the Court continued to refine the voluntariness standard, placing an increased emphasis on whether the statement was made as a result of free choice.⁴⁴ However, the standard remained vague and provided little guidance to courts considering whether statements were made “freely” and “voluntarily” in cases in which the conduct in question was not plainly egregious.⁴⁵

C. *Miranda’s Knowing, Intelligent, and Voluntary Test*

In 1964’s *Malloy v. Hogan*, the Supreme Court held that the Fifth Amendment privilege against self-incrimination was binding upon states through the Due Process Clause of the Fourteenth Amendment.⁴⁶ Following *Malloy*, states were required to respect the right “of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.”⁴⁷ Two years later, the Supreme Court decided *Miranda v. Arizona* and attempted to ensure this right to silence by providing suspects with additional protections to safeguard their constitutional rights.⁴⁸ Recognizing that all suspects are vulnerable to the “compulsion inherent in custodial interrogations,”⁴⁹ the Court held that “[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”⁵⁰ “For those unaware of the privilege,” the Court stated, “the warning is needed simply to make

43. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

44. *See generally* *Rogers v. Richmond*, 365 U.S. 534 (1961) (holding that due process requires a confession to be voluntary as well as uncoerced); *see also* *Townsend v. Sain*, 372 U.S. 293, 307 (1963) (stating that “[i]f an individual’s ‘will was overborne’ or if his confession was not ‘the product of a rational intellect and a free will,’ his confession is inadmissible because coerced”).

45. *See* Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL’Y 109, 114 (2012).

46. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

47. *Id.*; *see also* *Avery*, *supra* note 37, at 578.

48. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

49. *Id.*

50. *Id.* at 444.

them aware of it” and “also of the consequences of forgoing it.”⁵¹ The Court believed that such a warning was “an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere,” as many individuals—“not just the subnormal or woefully ignorant”—were liable to succumb to pressure applied by an interrogator.⁵² The Court underscored that coercion can target the mind as well as the body and emphasized “that the modern practice of in-custody interrogation is psychologically rather than physically oriented.”⁵³

The Court held that a suspect could waive the right to silence, provided the waiver was “made voluntarily, knowingly and intelligently,” and explicitly stated that the prosecution could not use statements stemming from custodial interrogation⁵⁴ unless it demonstrated “the use of procedural safeguards effective to secure the privilege against self-incrimination.”⁵⁵ Though the Court did not explicitly define the terms “voluntarily,” “knowingly,” or “intelligently,” it did hold awareness of the privilege against self-incrimination to be “the threshold requirement of an intelligent decision as to its exercise” and that it was “only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege.”⁵⁶ In *Moran v. Burbine*, the Court provided some clarification, noting that the *Miranda* inquiry has “two distinct dimensions”:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver

51. *Id.* at 468–69.

52. *Id.* at 468.

53. *Id.* at 448.

54. *Id.* at 444. The Court defined “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.*

55. *Id.*

56. *Id.* at 468–69. These terms, especially “knowing” and “intelligent,” remain somewhat ambiguous in the legal arena, and states have been left to craft their own interpretations. *See, e.g.,* GOLDSTEIN & GOLDSTEIN, *supra* note 35, at 41–43. However, “knowing” and “intelligent” have been more clearly defined in the field of psychology, which provides distinct definitions for each of these terms. *Id.* at 41.

For courts to evaluate whether *Miranda* rights waivers were made knowingly, intelligently and voluntarily, these legal concepts must be translated into analogous forensic mental health concepts that can be assessed. Consequently, “knowing” is translated into “understanding” and “intelligent” is translated into “appreciation.” “Voluntariness” is less directly translatable into the psychological construct, as it is much broader in scope, capturing both the characteristics of the interrogation and characteristics of the defendant.

Id.

must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.⁵⁷

Thus, the Court implied that for suspects to waive their rights “knowingly,” they must have at least a full awareness of the privilege against self-incrimination and the right to silence. To waive rights “intelligently,” suspects must comprehend the consequences of abandoning those rights. As Dr. Thomas Grisso later explained:

A suspect may understand that she has a right to speak with an attorney, as the *Miranda* warnings indicate; but she might not grasp the significance of being able to speak with an attorney (for example, might not know what an attorney is or does) and therefore be unable to “intelligently” decide to claim or waive the right.⁵⁸

Despite some uncertainty surrounding the “knowing and intelligent” requirements of the *Miranda* inquiry, the Court seemed to evaluate voluntariness of waivers the way it had historically evaluated the voluntariness of confessions—by assessing whether the suspect’s decision to waive the right to silence was made freely and deliberately or whether it was a result of the suspect’s will being overborne.⁵⁹

D. *Determining Voluntariness of Juvenile Confessions*

The Supreme Court first expressed its concern for the protection of juveniles during custodial interrogation in 1948 in *Haley v. Ohio*; there, the Court reversed the conviction of a fifteen-year-old “lad of tender years” who had been denied access to counsel, interrogated by police without interruption for five hours, and eventually confessed to murder.⁶⁰ The reversal was based on “undisputed evidence suggest[ing] that force or coercion was used to exact the confession.”⁶¹

The Court also found that the conditions of *Haley*’s interrogation would give it “pause for careful inquiry if a mature man were involved.”⁶² Beginning shortly after midnight, the police questioned

57. *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (citing *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)).

58. THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 152 (2d ed. 2003).

59. *Custodial Interrogations*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 216, 241–49 (2017).

60. *Haley v. Ohio*, 332 U.S. 596, 598–601 (1948).

61. *Id.* at 599.

62. *Id.* at 599–600.

Haley until about five in the morning; five or six officers questioned him in relays of one or two each. During this time, no friend or counsel was present. At around five a.m., after being shown alleged confessions of the other boys involved in the incident, Haley confessed. The police typed the confession using a question-and-answer format. Haley was never advised of his right to counsel. The Court explicitly noted that when “a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used,”⁶³ and declared that “neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”⁶⁴ Although the State argued that Haley had signed a written confession that began with a statement explaining his constitutional rights and acknowledging that he wished to waive those rights, the Court refused to “indulge th[e] assumptions” that a child his age, “without aid of counsel, would have a full appreciation” of what those rights entailed or “freedom of choice” under the circumstances.⁶⁵

The Supreme Court reiterated the need for “special caution” in analyzing juvenile waivers in *Gallegos v. Colorado*,⁶⁶ in which the Court reversed the conviction of a fourteen-year-old boy who was held in detention for five days and interrogated by police while deprived of contact with his mother, lawyer, or any “other friendly adult.”⁶⁷ Justice Douglas, writing for the majority, recognized that the young man

[W]ould 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.⁶⁸

The Court determined that Gallegos’s statement was involuntary based on the totality of circumstances in relation to the constitutional mandate of due process and protection against compelled self-incrimination—two legal conclusions that require close scrutiny of case-specific facts.⁶⁹ Here, the Court considered “[t]he youth of the petitioner, the long detention, the failure to send for his parents, the failure imme-

63. *Id.* at 599.

64. *Id.* at 601.

65. *Id.*

66. 370 U.S. 49 (1962).

67. *Id.* at 50.

68. *Id.* at 54.

69. *Id.* at 52.

diately to bring him before the judge of the Juvenile Court, [and] the failure to see to it that he had the advice of a lawyer or a friend.”⁷⁰

In 1967, the Supreme Court decided *In re Gault*,⁷¹ which extended both the Sixth Amendment right to counsel⁷² and the Fifth Amendment privilege against self-incrimination to juveniles.⁷³ The Court explicitly recognized that “special problems may arise with respect to waiver of the privilege by or on behalf of children,” and that those who administered the privilege to children may need to employ “some differences in technique . . . depending upon the age of the child and the presence and competence of parents.”⁷⁴ Following *Gault*, challenges to juvenile confessions relied more on *Miranda* and less on the due process involuntariness grounds underpinning *Haley* and *Gallegos*.⁷⁵

Notably, the Court ignored its concern about youths’ vulnerability when it decided *Fare v. Michael C.*, the first Supreme Court opinion to specifically address juveniles’ waiver of *Miranda* rights.⁷⁶ In *Michael C.*, the Court held that a seventeen-year-old suspect’s request to see his probation officer did not constitute a request for counsel, regardless of his age, and that the same totality of the circumstances standard used in adult court was “adequate to determine whether there has been waiver even where interrogation of juveniles is involved.”⁷⁷ In doing so, the Court explicitly rejected the notion that children deserved special protections during interrogation, despite developmental and psychological differences; rather, to be valid, a waiver must be made knowingly, intelligently and voluntarily under the totality of the circumstances.⁷⁸ Although the Court encouraged lower courts to analyze “the juvenile’s age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights,” it nevertheless expected

70. *Id.* at 55.

71. 387 U.S. 1 (1967).

72. *Id.* at 41. The Court in *In re Gault* held that the Due Process Clause of the Fourteenth Amendment requires that the child and his parents be notified “of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.” *Id.*

73. *Id.* at 55.

74. *Id.*

75. See Guggenheim & Hertz, *supra* note 45, at 131–33 (discussing defense attorneys moving away from due process based claims, instead relying on *Miranda*-based claims).

76. *Fare v. Michael C.*, 442 U.S. 707 (1979).

77. *Id.* at 724–25.

78. *Id.* at 725.

such a juvenile to invoke his right to silence or counsel clearly and unambiguously.⁷⁹

The Court did not revisit the importance of a child's age in the *Miranda* analysis again until more than thirty years later in *J.D.B. v. North Carolina*, where it held for the first time that a child's age is relevant to the analysis of whether an individual is in police custody and, therefore, entitled to *Miranda* warnings.⁸⁰ The Court recognized that "a child's age is far more than a chronological fact," as it "generates commonsense conclusions about behavior and perception."⁸¹ Noting that it had drawn these conclusions time and again, the Court reiterated that children are "generally less mature and responsible than adults" and "characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."⁸² The Court went on to note that legal disqualifications placed on children as a class exhibited "the settled understanding that the differentiating characteristics of youth are universal."⁸³ The Court recognized that "'[o]ur history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults;" provided either that the officer knew how old the child was at the time of the interview or that a reasonable officer would have observed the child's age, including age in the custody analysis is necessary.⁸⁴

The Court noted that "a reasonable child subjected to police interrogation will sometimes feel pressured to submit when a reasonable adult would feel free to go" and that courts could "account for that reality" without eroding the objective nature of the custody analysis.⁸⁵ *J.D.B.* was a positive step in recognizing the unique characteristics of childhood. However, the decision did not establish a different standard for juvenile waivers, leaving youth suspects vulnerable to the same *Miranda* waiver dangers they faced prior to *J.D.B.*—heightened risk of waiving the rights to silence and counsel without fulfilling the knowing, intelligent, and voluntary requirements.

79. *Id.*

80. *See generally* *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

81. *Id.* at 272.

82. *Id.* at 273.

83. *Id.*

84. *Id.* at 274.

85. *Id.* at 272.

II.

THE ADOLESCENT BRAIN AND BEHAVIOR: ASSOCIATIONS
WITH *MIRANDA* WAIVER CAPACITIES

In a series of decisions since 2005, the Supreme Court recognized that there are substantial developmental differences between youth and adults⁸⁶ and that those structural and functional differences between adolescent and adult brains impact adolescent behavior.⁸⁷ Finding certain sentencing practices unconstitutional as applied to juveniles,⁸⁸ the Court established a link between these scientific findings and the scope of Eighth Amendment protections for juveniles. The Court indicated that the scientifically-established differences between adolescent and adult decision making simply reflect what “any parent knows”⁸⁹—that adolescents’ incomplete neurological development is inextricably linked with youth behavior.⁹⁰ In particular, the Court has recognized three significant differences between adults and children:

First, children have a “lack of maturity and an undeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures[]”. . . And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievable depravity.”⁹¹

86. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016); *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); see also Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents’ Criminal Culpability*, 14 NATURE REVIEWS NEUROSCIENCE 513, 513 (2013) [hereinafter Steinberg, *The Influence of Neuroscience*].

87. See generally Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 158 (2013).

88. *Miller*, 567 U.S. at 465 (holding that mandatorily sentencing juveniles to life without parole violates the Eighth Amendment); *Graham*, 560 U.S. at 74 (holding that the Eighth Amendment prohibits the imposition of life without parole sentences for juvenile non-homicide offenders and that states must provide a meaningful opportunity to obtain release to such offenders currently sentenced to life without parole); *Roper*, 543 U.S. at 570–71 (holding that the Eighth and Fourteenth Amendments prohibit sentencing juveniles to the death penalty).

89. *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569).

90. *Id.* at 472 n.5 (“[A]dolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.”).

91. *Montgomery*, 136 S. Ct. at 733 (2016) (citations omitted) (quoting *Roper*, 543 U.S. at 569–70).

In line with the Court's recognition, neuroscience researchers have consistently found that adolescents, as a group, make decisions in ways that differ from adults and that those distinctions are at least partially attributable to developmental differences in a variety of brain regions.⁹² As we discuss below, these developmental differences impact adolescents' capacities to understand their *Miranda* rights, to appreciate the consequences of waiving those rights, and to make reasoned, independent decisions about waiving the rights to silence and counsel.

A. *The Links Between Adolescent Brain Development and Behavior*

An interplay between the brain regions responsible for cognitive and emotional processes contributes to child and adolescent functioning and behavior.⁹³ Cognitive and emotional development occur at different rates and have different patterns of development.⁹⁴ This section will discuss each in turn before reviewing their combined effects on adolescent functioning.

1. *Development of Brain Regions Implicated in Cognitive Functioning*

Throughout later childhood and early adolescence, the brain undergoes several substantial changes. The human brain contains roughly 100 billion neurons that communicate with one another by sending electrical impulses across synapses, the space between neurons.⁹⁵ Throughout childhood, the number of synapses greatly in-

92. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 83–92 (2008) [hereinafter Steinberg, *Adolescent Risk-Taking*].

93. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 465–71 (2009) [hereinafter Steinberg, *Adolescent Development*].

94. *Id.* at 466. Additionally, “[y]ouths acquire cognitive and emotional skills—as well as the ability to successfully integrate thoughts and feelings into behavioral decision making—at uneven rates, such that some fifteen-year-olds appear to behave more like children and other fifteen-year-olds appear to behave more like adults.” Naomi E. S. Goldstein et al., “*You’re on the Right Track!*” *Using Graduated Response Systems to Address Immaturity of Judgment and Enhance Youths’ Capacities to Successfully Complete Probation*, 88 TEMPLE L. REV. 803, 809–10 (2016). Accordingly, this section reviews typical development for children and adolescents, which may differ from the developmental timeline of an individual youth. *Id.*

95. Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain: Implications for Executive Function and Cognition*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296, 297 (2006). Each neuron, at its peak, may have thousands of synapses. Laurence Steinberg, *Demystifying the Adolescent Brain*, 68 EDUC. LEADER-

creases, with the volume of cell bodies and synapses increasing through adolescence in some brain regions.⁹⁶ However, beginning in childhood and continuing into early to mid-adolescence, the number of synapses begins to decrease through a process known as synaptic pruning.⁹⁷ Synaptic pruning occurs at different ages within different brain regions and involves a maturation of neural networks in which unused or inefficient connections are eliminated and more meaningful connections are reinforced.⁹⁸ This process is partially responsible for major improvements in basic cognitive abilities, including information processing and processing speed, and in logical reasoning.⁹⁹ As synaptic pruning occurs within a given region, the functions of that region generally become more efficient.¹⁰⁰

Beginning prenatally, the brain also undergoes a process called myelination in which nerve fibers become sheathed in myelin, a fatty substance that coats the portions of a neuron extending towards other neurons and terminating in a synapse (known as axons).¹⁰¹ Myelin “acts like plastic insulation around an electrical wire,”¹⁰² increasing the speed with which signals between neurons travel by as much as one hundred times.¹⁰³ Myelination continues throughout adolescence and into adulthood, moving from brain region to brain region and resulting in “faster and more efficient sharing of information within” brain regions “as well as smooth communication between” regions.¹⁰⁴

Together, synaptic pruning and myelination contribute to improvements in many cognitive skills across childhood and adolescence. Generally, through age sixteen, the abilities of children and adolescents to complete many cognitive tasks improve and, “[a]s a

SHIP 42, 44 (2011) [hereinafter Steinberg, *Adolescent Brain*]. Neuronal cell bodies and synapses, collectively, are referred to as “grey matter.”

96. Fergus I. M. Craik & Ellen Bialystok, *Cognition Through the Lifespan: Mechanisms of Change*, 10 COGNITIVE SCI. 131, 132 (2006).

97. Blakemore & Choudhury, *supra* note 95, at 300.

98. Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 PERSP. ON PSYCHOL. SCI. 59, 65 (2011).

99. See Terry A. Maroney, *The Once and Future Juvenile Brain*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 189, 193 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

100. Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397, 403 (2012).

101. Steinberg, *Adolescent Risk-Taking*, *supra* note 92, at 94. The portion of the brain made up of myelinated axons is frequently referred to as “white matter” because of myelin’s white color.

102. Steinberg, *Adolescent Brain*, *supra* note 95, at 45.

103. Blakemore & Choudhury, *supra* note 95, at 296.

104. Tomas Paus, *Mapping Brain Maturation and Cognitive Development during Adolescence*, 9 TRENDS COGNITIVE SCI. 60, 62 (2005).

result of these gains, individuals become more capable of abstract, multidimensional, deliberative, and hypothetical thinking as they develop from late childhood into middle adolescence.”¹⁰⁵ By the age of sixteen, many youths’ information processing and logical reasoning performance match those of adults¹⁰⁶—provided those youth are operating within conditions or contexts that support their optimal functioning.¹⁰⁷

Although general cognitive skills improve greatly by mid-adolescence, the development of some important cognitive functions lags behind. Different parts of the brain mature at different rates; myelination and pruning start at the back of the brain and move toward the front.¹⁰⁸ Areas implicated in more basic functions such as sensory information processing develop first, and brain regions implicated in more “top-down” control such as impulse control and planning ahead mature towards the completion of neurological development.¹⁰⁹ Both synaptic pruning and myelination occur relatively late in the prefrontal cortex, the area associated with executive functioning.¹¹⁰ Executive function “refers to the deliberate, top-down neurocognitive processes involved in the conscious, goal-directed control of thought, action, and emotion—processes that include cognitive flexibility, inhibitory control, and working memory.”¹¹¹ Synaptic pruning in the prefrontal cortex and other cognitive control regions occurs in middle adolescence, and myelination in those regions extends into adulthood, resulting in increased gains in complex cognitive functioning, including decision making, through later adolescence and early adulthood, into the twenties.¹¹² The creation of “[m]ore efficient neural connections within the prefrontal cortex” is critical for the development of “higher-order cognitive functions [that are] regulated by multiple prefrontal areas working in concert . . . such as planning ahead, weighing risks and rewards,

105. Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428, 433 (2012).

106. Steinberg, *Adolescent Development*, *supra* note 93, at 466–67. This includes increased abilities in “abstract, multidimensional, deliberative, and hypothetical thinking.” *Id.*

107. *See infra* notes 135–142 and accompanying text (discussing “hot” and “cold” contexts).

108. Maroney, *supra* note 99, at 193.

109. *Id.*

110. Blakemore & Choudhury, *supra* note 95, at 297.

111. Phillip David Zelazo & Stephanie M. Carlson, *Hot and Cool Executive Function in Childhood and Adolescence: Development and Plasticity*, 6 CHILD DEV. PERSP. 354, 354 (2012).

112. Cauffman & Steinberg, *supra* note 105.

and making complicated decisions.”¹¹³ Compared to the brain of a young teenager, the brain of a young adult displays a much more extensive network of myelinated tracts connecting brain regions,¹¹⁴ and evidence shows that adolescents become better at completing tasks that require self-regulation and management of processing as they age.¹¹⁵

2. *Development of Brain Regions Implicated in Emotions*

At the same time as a child’s brain undergoes changes in cognitive control regions, emotion control regions also undergo substantial changes. Two primary developments in the emotion centers of the brain involve changes in dopaminergic pathways and in the functioning of brain structures in the limbic system.¹¹⁶ Beginning in late childhood, levels of dopamine—a neurotransmitter implicated in emotional responses and processing of both pleasure and pain—increase in the limbic system and the prefrontal region,¹¹⁷ and the concentration of dopamine receptors changes, leading to an imbalance in dopamine receptors between cognitive control regions and emotional processing regions.¹¹⁸ These changes in the dopaminergic system lead to risk-seeking behaviors that rapidly stimulate the release of large quantities of the behavior-reinforcing chemical in the brain.¹¹⁹

Synaptic pruning of the limbic system also begins in late childhood and facilitates functioning in the brain regions responsible for emotion and motivation.¹²⁰ Limbic system activity is especially notable during tasks involving reward processing¹²¹ and peaks during ado-

113. Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implication for Adolescent Rights and Responsibilities*, in HUMAN RIGHTS AND ADOLESCENCE 59, 64 (Jacqueline Bhabha ed., 2014).

114. *Id.*

115. Kuhn, *supra* note 98, at 60–61.

116. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 450 (2013). The limbic system is located deep within the brain and includes a variety of structures—including the amygdala, hippocampus, hypothalamus, and ventral striatum—that function in concert with each other to regulate emotion and motivation. *Id.* at 453.

117. See Dustin Wahlstrom et al., *Developmental Changes in Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment*, 72 BRAIN COGNITION 146, 151–57 (2010).

118. Steinberg, *Adolescent Risk-Taking*, *supra* note 92, at 84.

119. Wahlstrom et al., *supra* note 117, at 151–57.

120. 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, 127 (2010).

121. *Id.* at 127–29.

lescence and early adulthood.¹²² However, white matter tracts connecting the limbic system with prefrontal regions are not yet fully developed during adolescence; consequently, the less developed cognitive control regions of the prefrontal cortex do not quickly and easily regulate the emotional responses produced by the limbic system.¹²³ This results in the limbic system exerting a stronger influence on youth behavior than on adult behavior.¹²⁴

As a result of the greater availability of dopamine and the increased activity of the limbic system, adolescents are much more emotionally reactive than either children or adults and are primed to make decisions based on emotional salience and to engage in reward-seeking behaviors.¹²⁵ As will be described below, although adolescents often can accurately assess the objective risks of a given behavior, particularly when they remain calm and unemotional, most youth continue to struggle with this cognitively based risk analysis and subsequent decision making when they are in emotionally charged situations.¹²⁶

3. *Interplay Between the Cognitive Control and Emotion Regulation Systems*

Taken together, the current prevailing view of adolescent decision making is that these two separate neural systems, the cognitive control system and the emotion regulation system, mature at different rates during childhood and adolescence.¹²⁷ This contributes to adolescent immaturity in decision-making capacities.¹²⁸ The cognitive control system develops slowly and linearly, with development of these regions continuing into the third decade of life.¹²⁹ The result is that adolescents are not able to efficiently and optimally utilize these cognitive control regions, the function of which is improved through greater connectivity and communication with other brain regions during the maturation into adulthood.¹³⁰ In contrast, the reward system, or

122. Wahlstrom et al., *supra* note 117, at 148.

123. Steinberg, *Recent Decisions*, *supra* note 86, at 516.

124. Somerville et al., *supra* note 120, at 130–31.

125. Steinberg, *Adolescent Development*, *supra* note 93, at 466.

126. Sarah-Jayne Blakemore & Trevor W. Robbins, *Decision-Making in the Adolescent Brain*, 15 *NATURE NEUROSCIENCE* 1184, 1186 (2012).

127. See generally Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 *J. RES. ADOLESCENCE* 211 (2011); see also Steinberg, *Adolescent Development*, *supra* note 93, at 464–65.

128. *Id.*

129. *Id.* at 219; Blakemore & Robbins, *supra* note 126, at 1184; Steinberg, *Adolescent Development*, *supra* note 93, at 465–67.

130. See Steinberg, *Adolescent Risk-Taking*, *supra* note 92.

socioemotional system, develops more rapidly,¹³¹ plateauing by mid-adolescence.¹³² As a result, adolescents are generally overly responsive to reward because executive functioning and cognitive control regions are not sufficiently developed to inhibit the rapidly developing reward system.¹³³ Additionally, with pathways between cognitive control regions and the socioemotional system relatively underdeveloped, youth are less able to inhibit impulses; self-control increases gradually throughout adolescence and into young adulthood as cognitive control regions exert greater influence on behavior.¹³⁴

Importantly, researchers and scholars have determined that decision-making processes for both children and adults differ based on the situation, distinguishing between decision making in “cold” and “hot” contexts.¹³⁵ Cold contexts are non-emotional situations, whereas hot contexts are emotionally arousing situations.¹³⁶ Cold, low-arousal contexts maximize individuals’ abilities to carefully consider possibilities and consequences and make deliberate, well-reasoned choices;¹³⁷ in cold contexts, adolescent decision making approximates that of an adult.¹³⁸ By contrast, in hot, high-arousal contexts, adolescents have difficulty relying on objective information to make rational decisions.¹³⁹ As a result, in hot contexts, adolescents are more prone to act emotionally and impulsively, without the controlled influence of a formal decision-making process.¹⁴⁰ When emotionally aroused, ado-

131. Steinberg, *Adolescent Development*, *supra* note 93, at 465–67.

132. Somerville et al., *supra* note 120, at 126–27.

133. Linda Van Leijenhorst et al., *Adolescent Risky Decision-Making: Neurocognitive Development of Reward and Control Regions*, 51 *NEUROIMAGE* 345, 353–54 (2010).

134. Somerville et al., *supra* note 120, at 129–31.

135. *See* Albert & Steinberg, *supra* note 127, at 212 (noting the “wide-spread adoption of “dual-process models of cognitive development” which describe separate “cold” and “hot” systems of information processing).

136. *Id.*; Blakemore & Robbins, *supra* note 126, at 1185.

137. *See* Arain et al., *supra* note 116, at 455 (noting that adolescents “tend to make better decisions” in cold cognition); Blakemore & Robbins, *supra* note 126, at 1186 (noting that adolescents exhibited “sub-optimal decision-making” in hot, but not cold, contexts).

138. *See* Blakemore & Robbins, *supra* note 126, at 1186–87 (explaining that “in ‘cold’ tasks . . . risk-taking is either similar in adolescents and adults or there is a reduction with age).

139. *See id.* at 1186 (“[A]lthough judgments about probability and value seem to be mature by mid-adolescence, the use of this information to guide decisions in ‘hot’ contexts, characterized by high emotion or arousal, is still developing.” (footnotes omitted)).

140. *See* Arain et al., *supra* note 116, at 455 (noting that in hot contexts, teens are “thinking under conditions of high arousal and intense emotion” resulting in poorer decisions); *id.* at 1187 (noting that “adolescents are more likely than children and adults to make risky decisions in emotionally ‘hot’ contexts”).

lescents discount the potential for negative consequences and weigh the potential for reward more heavily than adults do, impacting their decision-making abilities.¹⁴¹ Additionally, adolescents experience some situations as hot contexts that adults experience as cold contexts, such as the presence of peers.¹⁴² This means that adolescents may have even greater difficulty with decision making when peers are present than when they are not, as adolescent behavior in these subjectively hot situations tends to be driven more by the socioemotional parts of the brain than by the cognitive and executive controls.

B. Using Child and Adolescent Development as a Framework for Understanding Miranda Waiver Capacities

In light of these developmental features of adolescence, making a knowing, intelligent, and voluntary waiver of *Miranda* rights requires capacities most youth in early- and mid-adolescence do not adequately possess. As researchers have found, with respect to cognitive abilities,

[V]erbal fluency, memory and learning, sustained attention, abstract thinking, and executive abilities . . . are [all] required for youth to pay attention during the administration of *Miranda* warnings, to process and retain the warnings, to decipher the meaning of the warnings, to evaluate the significance and consequences of waiving rights, and to make a final decision about whether or not to waive the *Miranda* rights.¹⁴³

If youth are unable to function sufficiently in any one of these domains, their ability to provide a valid *Miranda* waiver will be substantially compromised.

1. Children and Younger Adolescents May Lack the Cognitive Capacities to Understand Miranda Rights

At the most basic level, a knowing and intelligent *Miranda* waiver requires cognitive capacities for information processing, which—in most youth age sixteen and under—are still developing.¹⁴⁴ For a juvenile to make a reasoned decision about whether to waive

141. See Albert & Steinberg, *supra* note 127, at 218–19; Blakemore & Robbins, *supra* note 126, at 1185–1186.

142. Blakemore & Robbins, *supra* note 126, at 1188.

143. Naomi E.S. Goldstein et al., *Potential Impact of Juvenile Suspects' Linguistic Abilities on Miranda Understanding and Appreciation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 299, 307 (Lawrence M. Solan & Peter M. Tiersma eds., 2012) [hereinafter Goldstein et al., *Linguistic Abilities*] (citations omitted).

144. Cauffman & Steinberg, *supra* note 105. See *infra* Section II.C for a review of research on juvenile understanding of *Miranda* warnings, which details the ways in which youth, in particular, struggle to grasp the meaning of their rights.

Miranda rights, the youth “must have a working memory adequate to hold [all] components of the [*Miranda*] warning”—for example, that you have the right to remain silent, that anything you say can be used against you, that you have the right to counsel, that if you cannot afford an attorney one will be appointed for you, and that you have the right to stop answering questions at any time—“in mind while processing the meaning of the words and concepts they express and calculating how to answer.”¹⁴⁵ A youth suspect also “must think through what questions will be asked, what facts are known or may be ascertained by the questioner, and why the questioner is interested in the answers.”¹⁴⁶

2. *Underdeveloped Abstract Reasoning and Decision-Making Skills May Compromise Adolescents’ Miranda Comprehension*

Beyond basic information processing, an intelligent *Miranda* waiver also requires the juvenile suspect to imagine and reason about what will happen if she waives or invokes rights—that is, if she chooses to answer questions or remain silent. This requires an understanding of both short- and long-term consequences of a waiver and a deliberative decision-making process—but children and adolescents have difficulty effectively weighing behavioral options because they overemphasize the probability of short-term benefits over long-term consequences and are prone to act impulsively rather than make thought-out decisions.¹⁴⁷ Once a waiver is provided, these same developmentally based limitations reduce the abilities of children and adolescents to manage decisions during police questioning, such as decisions regarding what questions to answer, what information to re-

145. Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 WIS. L. REV. 431, 431–432 (2006) (footnotes omitted); *see also id.* at 432 n.4 (“To waive *Miranda* rights, a juvenile must: (1) understand the meaning of the words and concepts expressed, (2) understand how the warnings relate to the situation, and (3) use knowledge of the *Miranda* rights and of how courts function to make a choice about waiving or invoking the rights.” (citing THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 50–51 (1998)). “Working memory is ‘the immediately accessible form of memory in which information is held in mind and manipulated.’” *Id.* at 432 n.3 (quoting Russell A. Poldrack & Anthony D. Wagner, *What Can Neuroimaging Tell Us About the Mind?*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 177, 177 (2004)).

146. *Id.* at 433.

147. *See* Cauffman & Steinberg, *supra* note 105, at 433. Many police practices during the pre-interrogation and interrogation process capitalize on suspect impulsivity and limit opportunities for decision making. *See infra* Section III.A for a discussion of police approaches to eliciting *Miranda* waiver. *See infra* Section III.B for a discussion of post-waiver police interrogation tactics with youth.

veal, to whom they should speak, and whether to invoke the right to silence or counsel at a later stage in questioning.

3. *Stressful Situations—Like Police Questioning—Can Further Compromise Youth Reasoning About Miranda*

In stressful situations, or hot contexts, these hallmarks of child and adolescent decision making are amplified. “[A]dolescents are more susceptible to stress than are adults” and, under the stress of interrogation, “adolescents’ already skewed cost-benefit analyses are vulnerable to further distortion.”¹⁴⁸ Although older adolescents (i.e., late teens) may exhibit better information processing and decision making than children and younger adolescents, they still “may be less able to deploy their cognitive capacities as effectively as adults . . . when decisions are influenced by emotional and social variables.”¹⁴⁹ That is, even if older youth with adult levels of functioning in some basic cognitive skills provide a waiver based on a factual understanding of the rights (i.e., a knowing waiver), their developmentally based decision-making deficits in hot contexts may still preclude such a waiver from being an intelligent waiver. The intelligent requirement demands a more complex appreciation of the consequences of waiving the rights to silence and counsel and talking with police. Because contexts involving peers are emotionally charged for adolescents, the decision-making process may be further undermined if peers are invoked in the interrogation as potential witnesses or fellow suspects—an interrogation tactic recommended by the most widely disseminated approach to police questioning.¹⁵⁰

4. *Children and Adolescents Are Susceptible to Adult Pressure*

Children and adolescents are also more suggestible than adults are; they are more susceptible to having their thoughts, speech, and behaviors influenced by others.¹⁵¹ This fact is pertinent to the question of waiver. Adolescents have “a much stronger tendency . . . to make choices in compliance with the perceived desires of authority figures”

148. Jessica Owen-Kostelnik et al., *Testimony & Interrogation of Minors: Assumptions about Maturity and Morality*, 61 AM. PSYCHOL. 286, 295 (2006).

149. Cauffman & Steinberg, *supra* note 105, at 434; see also Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, & Psychological Symptoms*, 29 LAW & HUM. BEHAV. 723, 738–39 (2005).

150. See generally FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESIONS 248–49 (5th ed. 2013).

151. Fiona Jack et al., *Age-Related Differences in the Free-Recall Accounts of Child, Adolescent, and Adult Witnesses*, 28 APPLIED COGNITIVE PSYCHOL. 30, 30 (2014).

than do adults.¹⁵² In situations wherein police officers present the waiver decision as an inconsequential formality or imply that waiver is in the youth's best interests, the youth faced with the question may be ill-equipped to independently grasp the significance of waiving rights. That youth may also be less able to resist the perceived pressure to submit to the officers' continued questioning.

"Psychologically coercive strategies that contribute to interrogative suggestibility play on young suspects' eagerness to please, firm trust of people in authority, lack of self-confidence, increased desire to protect friends/relatives and to impress peers, and increased desire to leave the interrogation sooner."¹⁵³ The Supreme Court acknowledged this in *J.D.B.*: "Neither officers nor courts can reasonably evaluate the [coercive] effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances."¹⁵⁴ Because of this, even youth who sufficiently understand and appreciate the nature of the *Miranda* rights—who can fulfill the knowing and intelligent requirements—may have deficits in their capacities to validly waive those rights because of difficulties in resisting outside influences. This susceptibility has implications for fulfilling the voluntariness requirement of a valid waiver.

Taken together, various aspects of developmental immaturity endanger children and younger adolescents: they are disadvantaged in comprehending the meaning and significance of the *Miranda* warnings, reasoning about their rights waiver, and withstanding pressure from authority figures.

5. *Intellectual Disabilities Can Compromise Miranda Waiver Capacities and Decision Making Among Youth*

In Section II.C below, we review in detail the research findings regarding the relationships between age and intelligence and *Miranda* comprehension. In brief, although youth in mid- to late-adolescence tend to demonstrate better *Miranda* waiver capacities than younger youth, comprehension, decision-making skills, and suggestibility can vary tremendously from individual to individual, with intelligence playing a critical role during waiver decisions in this developmental

152. Cauffman & Steinberg, *supra* note 105, at 440.

153. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 764 (2007).

154. *J.D.B. v. North Carolina*, 564 U.S. 261, 276 (2011).

period.¹⁵⁵ As such, age by itself may not be a reliable indicator of cognitive capacities.

Youth—particularly those ages fifteen and sixteen—with lower intelligence scores tend to demonstrate *Miranda* waiver capacities similar to those of younger adolescents.¹⁵⁶ Given that justice-involved youth, as a group, score lower on intelligence tests than non-justice-involved youth,¹⁵⁷ there is an increased probability that suspects in mid-adolescence are equally impaired in their *Miranda* waiver capacities as younger youth. Thus, they are more likely to have difficulties understanding the basic content of *Miranda* warnings, applying the warnings' significance to their own situations, resisting coercion, and independently making the *Miranda* waiver decision.¹⁵⁸ “The bulk of research supports a strong negative relationship between intelligence and suggestibility, indicating that less intellectually capable adolescents and adults tend to be more suggestible.”¹⁵⁹ Even among adults, lower cognitive ability is significantly related to poorer decision-making competence,¹⁶⁰ and the impact of these cognitive limitations on *Miranda* waiver capacities is especially pronounced among youth in mid-adolescence.¹⁶¹

C. Juveniles' Miranda Rights Comprehension

Consistent with research on child and adolescent development and decision making, decades of *Miranda* waiver research indicate

155. See *infra* notes 166-171 and accompanying text.

156. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1155 (1980) [hereinafter Grisso, *Juveniles' Capacities*].

157. Among detained youth, average IQ scores have been reported between 78 and 86, lower than the general population average of 100. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 348-50 (2003); Viljoen & Roesch, *supra* note 149, at 723.

158. See, e.g., Grisso, *Juveniles' Capacities*, *supra* note 156, at 1159-60.

159. Kaitlyn McLachlan et al., *Examining the Role of Interrogative Suggestibility in Miranda Rights Comprehension in Adolescents*, 35 LAW & HUM. BEHAV. 165, 167 (2011).

160. Wandl Bruine de Bruin et al., *Individual Differences in Adult Decision-Making Competence*, 92 J. PERSONALITY & SOC. PSYCHOL. 938, 946 (2007).

161. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1159-60. Brendan Dassey's case illustrates these limitations. At the age of sixteen, Brendan's basic cognitive skills, likely, were mostly developed, but “Dassey was a sophomore who received special education services, and whose IQ had been measured at various times between 74 and 81, falling fairly far below an average range of intelligence.” Dassey v. Dittmann, 860 F.3d 933, 939, *rev'd*, 877 F.3d 297 (7th Cir. 2017) (en banc). Brendan was also “shy, passive, subdued and dependent—qualities that make one more susceptible to suggestion.” *Id.* at 945.

that youth (particularly children and younger adolescents) do not function at the same level as adults in navigating the waiver decision. First, around ninety percent of youth waive their *Miranda* rights, an alarming rate by itself but also much higher than the rate for adults.¹⁶² Second, children and adolescents who waive their rights often do so with poor comprehension of what is at stake.

Children may have many motivations for waiving *Miranda*: From childhood on, parents teach their children to tell the truth—a social duty and a value in itself. The compulsion inherent in the interrogation room amplifies social pressure to speak when spoken to and to defer to authority. Justice personnel suggested that juveniles waived to avoid appearing guilty, to tell their story, or to minimize responsibility. Some thought they waived because they did not expect severe sanctions or believed that they could mitigate negative consequences. Others ascribed waivers to naive trust and lack of sophistication. Others attributed waivers to a desire to escape the interrogation room—the compulsive pressures *Miranda* purported to dispel.¹⁶³

The greater suggestibility and deference to authority exhibited by youth relative to adults may make them more likely to waive their rights to silence and counsel, regardless of whether they fully comprehend the rights they are forfeiting. That very few children and adolescents invoke their *Miranda* rights underscores the importance of considering the extent to which youth comprehend their rights before they should be allowed to waive them.¹⁶⁴

Nearly forty years ago, researchers began examining adolescents' decision making, *Miranda* waiver capacities, and adjudicative competence to determine whether juveniles possess the cognitive abilities and judgment needed to exercise their legal rights. In 1980, Dr. Thomas Grisso published the seminal study on juveniles' capacities to waive *Miranda* rights. He developed a set of four measures designed

162. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 429 (2013) [hereinafter Feld, *Cops Question Kids*]. On average, police interrogators estimate that sixty-eight percent of adult suspects waive their rights and undergo interrogation. Saul M. Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 389 (2007).

163. Feld, *Cops Question Kids*, *supra* note 162, at 429–30.

164. The Supreme Court has held that the prosecution must make the additional showing that the accused understood the *Miranda* rights; it is not enough to show only that the warnings were administered. *See Colorado v. Spring*, 479 U.S. 564, 573–75 (1987). But because of Supreme Court doctrine requiring an unambiguous invocation, failing to invoke unambiguously effectively means waiving. *See, e.g., Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010).

to assess understanding of the *Miranda* warnings and appreciation of the “function and significance” of the rights in interrogation situations.¹⁶⁵

In this study, Grisso found that comprehension of *Miranda* rights was related to age, with younger youth demonstrating poorer understanding than older youth or adults: 88% of ten- and eleven-year-olds, 73% of twelve-year-olds, 65% of thirteen-year-olds, and 54% of fourteen-year-olds had inadequate comprehension of at least one *Miranda* right.¹⁶⁶ For fifteen- and, particularly, sixteen-year-olds, intelligence quotient (IQ) scores better explained *Miranda* comprehension; fifteen- and sixteen-year-olds with lower IQ scores demonstrated *Miranda* comprehension similar to younger youth. In contrast, fifteen- and, particularly, sixteen-year-olds with more average IQ scores demonstrated *Miranda* comprehension that was more similar to adults'.¹⁶⁷ Dr. Grisso noted, “These findings do not necessarily indicate, however, that either sixteen-year-olds or the adults understand the warnings well enough to make an informed decision; they merely indicate that juveniles under the age of fifteen do not meet an adult level of understanding, while sixteen-year-olds [with more average IQ scores] generally do.”¹⁶⁸ Separate from age, intelligence was also related to *Miranda* comprehension. Eighty-one percent of juveniles with IQ scores below 70 demonstrated inadequate comprehension of at least one right, compared to fifty-eight percent of juveniles with IQ scores

165. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1143–49. The first three of the four measures were designed to assess comprehension of vocabulary and phrases commonly used in *Miranda* warnings. The Rights test asked participants to paraphrase each of the four *Miranda* warning statements; their responses were then scored “adequate,” “questionable,” or “inadequate.” *Id.* at 1144–46. The second measure, the Vocab test, asked participants to define six words from the *Miranda* warnings: “consult,” “attorney,” “interrogation,” “appoint,” “entitled,” and “right.” *Id.* at 1146–47. As with the Rights test, responses were labeled “adequate,” “questionable,” or “inadequate.” For the third measure, the Rights T/F test, a panel created three rewordings of each of the four statements in *Miranda* using paraphrased responses provided by juveniles during the Rights test. During the Rights T/F test, participants were shown a *Miranda* warning statement followed by a reworded version of the statement. After both were read, participants were asked to identify whether the second sentence meant the same as the first. *Id.* at 1147. The fourth measure used hypotheticals to assess whether participants understood how their rights functioned during interrogation scenarios. This measure, the Function test, involved the administration of three types of questions in conjunction with pictorial stimuli measuring understanding of the adversarial nature of police interrogation, the attorney-client relationship, and the right to silence and its application in interrogations and in the courtroom. *Id.* at 1148–49.

166. *Id.* at 1155.

167. *Id.* at 1157.

168. *Id.*

between 81 and 90 and thirty-five percent of juveniles with IQ scores over 100.¹⁶⁹

Dr. Grisso's findings have persisted. More recent research confirms that younger age, lower intelligence, lower academic achievement, lower socioeconomic status, and greater interrogative suggestibility predict poorer *Miranda* comprehension,¹⁷⁰ with large numbers of juveniles having inadequate comprehension of at least one right.¹⁷¹ Consistent with Dr. Grisso's findings in 1980, a similar study of twelve- to nineteen-year-olds three decades later found substantial deficits in *Miranda* comprehension, with sixty-nine percent of youth demonstrating inadequate understanding of at least one *Miranda* right.¹⁷² Another study in 2008 reported that 70% of eleven- to thirteen-year-olds, 48% of fourteen- to fifteen-year-olds, and 26% of sixteen- to seventeen-year-olds demonstrated impaired understanding of at least one right, compared to 23% of adults.¹⁷³ For those youth who do not understand the basic meaning of the rights to silence and to counsel, the ability to appreciate the significance of these rights to interrogations is even more difficult.

Even many of those youth who have a basic understanding of the words and phrases used in *Miranda* warnings still have difficulty appreciating the significance of the warnings and how their rights apply to interrogation contexts;¹⁷⁴ youths' appreciation appears much worse than that of adults. In fact, approximately ninety-four percent of youth ages twelve to nineteen demonstrated less than adequate appreciation of the significance and consequences of waiving their rights.¹⁷⁵ They had the greatest difficulty understanding the implications of waiving the right to silence, with ninety-nine percent demonstrating less than

169. *Id.* at 1155.

170. Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 *ASSESSMENT* 359, 365–66 (2003) [hereinafter *Comprehension and False Confessions*]; McLachlan et al., *supra* note 159, at 170–72; Allison D. Redlich et al., *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 *BEHAV. SCI. & L.* 393, 400–04 (2003); Jennifer L. Woolard et al., *Examining Adolescents' and their Parents' Conceptual & Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 *J. YOUTH & ADOLESCENCE* 685, 690–94 (2008); Heather Zelle et al., *Juveniles' Miranda Comprehension: Understanding, Appreciation, and Totality of Circumstances Factors*, 39 *LAW & HUM. BEHAV.* 281, 287–88 (2015).

171. McLachlan et al., *supra* note 159, at 170–72.

172. NAOMI E. S. GOLDSTEIN ET AL., *MIRANDA RIGHTS COMPREHENSION INSTRUMENTS (MRCI)* 93 (2014).

173. Woolard et al., *supra* note 170, at 690–94.

174. GOLDSTEIN ET AL., *supra* note 172, at 93–122.

175. *Id.* at 104.

adequate appreciation.¹⁷⁶ For example, youth regularly fail to grasp that police must stop questioning once *Miranda* rights are invoked, that judges do not punish suspects for refusing to talk to police, and that individuals cannot be forced to talk in court.¹⁷⁷ A majority of juveniles believe that, even if they stay silent with police, they will be unable to maintain silence in front of a judge;¹⁷⁸ for those youth, resisting police pressure to talk merely delays the inevitable.

Moreover, youths' understanding and appreciation of the *Miranda* rights remain poor, even as *Miranda* warnings have proliferated in popular media and culture.

Like adolescents three decades ago, juveniles frequently misunderstood that they were entitled to consult with an attorney before interrogation and to have an attorney present during interrogation. Furthermore, similar percentages of youth mistakenly believed that lawyers only protect the innocent and that the right to silence can be revoked at a later date by a judge. The two most commonly misunderstood vocabulary words at both time points were "interrogation" and "consult." Juveniles understood the former to be analogous with a court hearing, and youth often failed to understand the advisory purpose of "consultation," describing it as a simple conversation instead.¹⁷⁹

Even among adults, significant misconceptions about *Miranda* rights are common, including beliefs that silence is incriminating and may be punished by police retaliation, that a waiver must be signed to be valid, that comments can be made "off the record," that questioning can continue until the lawyer arrives, that they will not be able to consult privately with counsel, and that rights cannot be asserted after waiver.¹⁸⁰ For younger youth, research has clearly established that these misconceptions are significantly greater and the tendency to act without forethought more pronounced.

This problem is even more severe for justice-involved youth, who tend to demonstrate lower average intelligence and academic achievement scores than youth in the general population.¹⁸¹ Such

176. *Id.* at 103.

177. Redlich et al., *supra* note 170, at 400–04.

178. *Id.*

179. Goldstein et al., *Comprehension and False Confessions*, *supra* note 170, at 366.

180. Richard Rogers et al., "Everyone Knows Their *Miranda* Rights": *Implicit Assumptions and Countervailing Evidence*, 16 *PSYCHOL., PUB. POL'Y & L.* 300, 307–08 (2010).

181. See generally Amy E. Lansing et al., *Cognitive and Academic Functioning of Juvenile Detainees: Implications for Correctional Populations and Public Health*, 20 *J. CORRECTIONAL HEALTH CARE* 18 (2014); see also *supra* note 157 and accompanying text.

youth may be unable to retain the *Miranda* warnings in working memory long enough to parse their meanings. Among justice-involved thirteen- to seventeen-year-olds, even the most sophisticated and mature youth were able to recall only fifty percent of *Miranda* warning content one minute after the warnings were administered.¹⁸² For youth with a low or medium level of sophistication and maturity, performance was even worse, with less than one-third of content retained after one minute.¹⁸³

Notably, research showing the challenges youth face comprehending *Miranda* warnings has been conducted in low-stress, research-based settings—or cold contexts. In sharp contrast, interrogations are inherently high-stress, hot contexts.¹⁸⁴ Accordingly, research on *Miranda* comprehension likely overestimates the abilities of children and adolescents to fully understand their rights during interrogation. In his 1980 study, Dr. Grisso cautioned,

[T]he studies only addressed juveniles' comprehension of the *Miranda* rights and perception of their significance. They did not measure juveniles' abilities during actual interrogation proceedings, nor did they test juveniles' capacities to withstand intimidating police questioning. Given the emotionally charged circumstances that older juveniles actually face, courts must, at the least, continue to heed Gault's admonition that their waivers receive special consideration.¹⁸⁵

Even among adults, the stress of accusation and interrogation significantly reduces *Miranda* comprehension.¹⁸⁶ Scientific findings on adolescent development suggest this compromising effect would be substantially heightened for juvenile suspects.

Even for youth who are able to more effectively manage the stress of interrogation, the warnings themselves may be written above the level that youth can comprehend. *Miranda* warnings vary substan-

182. Richard Rogers et al., *Mired in Miranda Misconceptions: A Study of Legally Involved Juveniles at Different Levels of Psychosocial Maturity*, 32 BEHAV. SCI. & L. 104, 111 (2014). Sophistication and maturity are components of psychosocial maturity, which were measured in this study using standardized research assessment tools. *Id.*

183. *Id.*

184. See Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In re Gault*, 60 RUTGERS L. REV. 125, 162–63 (2007) (noting that research studies do not have the same emotional stresses and situational constraints as an arrest); see also *supra* notes 135–41 and accompanying text.

185. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1165.

186. See Kyle C. Scherr & Stephanie Madon, *You Have the Right to Understand: The Deleterious Effect of Stress on Suspects' Ability to Comprehend Miranda*, 36 LAW & HUM. BEHAV. 275, 278–79 (2012).

tially in complexity, and warnings in some jurisdictions are written at a post-graduate reading level.¹⁸⁷ The complexity of the warnings may leave youth, particularly younger youth, those with lower IQ scores, or those with low academic achievement, unable to understand the meaning of each warning.¹⁸⁸ In *Duckworth v. Eagan*, the Supreme Court rejected the idea that *Miranda* warnings had to be delivered according to a strict verbal formula and stated that as long as a warning conveyed the substance of the rights, it was valid.¹⁸⁹ Researchers have reported many versions of *Miranda* warnings: one survey of 560 *Miranda* warnings reported 532 unique wordings, and a second survey of 385 warnings reported 356 unique wordings.¹⁹⁰ Consequently, existing research findings on juvenile *Miranda* comprehension may substantially overestimate youths' comprehension in jurisdictions with more complex warnings, as the research was conducted using standardized versions of *Miranda* warnings written at lower grade levels.

Furthermore, “[e]ven if a juvenile suspect can decipher the language of a very simplified warning, the suspect may be unable to comprehend the basic meaning of the rights or the significance of waiving them due to developmental immaturity.”¹⁹¹ True understanding of the warnings requires a complex interplay of many skills. Youth—particularly those ages fourteen and under and those ages sixteen and under with lower IQ scores—demonstrate troubling levels of *Miranda* comprehension even with simplified warnings in cold contexts that minimize emotionality and allow for maximal use of cognitive skills. Their comprehension of the rights to silence and counsel are even more concerning in the hot context of a stressful interrogation, during which

187. See Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 182–86 (2007) (reporting warnings range from a 2.8 grade reading level to a post-graduate reading level); Rachel Kahn, Patricia A. Zapf & Virginia G. Cooper, *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCHOL. REV. 119, 132 (2006) (reporting *Miranda* warnings vary in readability from a 5.7 grade to a twelfth grade reading level).

188. For a detailed discussion of the impact of linguistic skills on *Miranda* warning comprehension for juveniles, see Goldstein et al., *Linguistic Abilities*, *supra* note 143.

189. *Duckworth v. Eagan*, 492 U.S. 195, 202–03 (1989) (“We have never insisted that *Miranda* warnings be given in the exact form described in that decision. . . . In *California v. Prysock* . . . we stated that ‘the “rigidity” of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant,’ and that ‘no talismanic incantation [is] required to satisfy its strictures.’” (alterations in original) (footnote omitted) (citation omitted) (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981))).

190. See BARRY C. FELD, *KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 72* (2013) [hereinafter FELD, *INSIDE THE INTERROGATION ROOM*].

191. Goldstein et al., *Linguistic Abilities*, *supra* note 143, at 307.

complex versions of the warnings may be presented and police can provide inaccurate and misleading information.

III.

CURRENT INTERROGATION PRACTICES INCREASE THE RISK OF INVALID *MIRANDA* WAIVERS BY YOUTH

Research on youth *Miranda* waivers and confessions has generally examined youths' capacities under ideal circumstances that are highly unlikely to exist in an interrogation room.¹⁹² In reality, police often exploit the vulnerabilities of youth by capitalizing on both their susceptibility to pressure and authority, as well as their difficulties with abstract thinking and reasoning.

A. *Misleading Police Practices when Mirandizing Youth*

In *Miranda*, the Court adopted "a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination," recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements."¹⁹³ However, "*Miranda* has had little effect on police behavior during interrogation."¹⁹⁴ Police continue to use the same techniques with juveniles that *Miranda* criticized decades ago,¹⁹⁵ both prior to reading *Miranda* warnings and while youth are deciding whether to waive their *Miranda* rights.

"One of *Miranda*'s root contradictions is that 'it assumes that . . . suspects can receive adequate advice and counseling about their constitutional rights from adversaries who would like nothing more than to see those rights surrendered.'"¹⁹⁶ Though *Miranda* requires police officers to warn suspects of their rights, the main objective of those same officers is to gain information needed to solve crimes through interrogation. Because that objective is more difficult to accomplish if suspects choose to exercise their right to silence, officers are incentivized to make sure that suspects waive those rights.

192. Bishop & Farber, *supra* note 184, at 162–63; Grisso, *Juvenile's Capacities*, *supra* note 158, at 1165. In research contexts, information is presented to youth clearly; they are not under significant stress; they are given time to think through the situation in which they find themselves; and they are asked questions that lead them to think through the meaning of their rights. See Bishop & Farber, *supra* note 184, at 162–63.

193. *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)).

194. Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 310 (2003).

195. See generally Feld, *Cops Question Kids*, *supra* note 162.

196. *Id.* at 76.

Police typically use one or more of the following three tactics to obtain a waiver:

First, the police may deliver the warnings in a neutral manner; second, they may de-emphasize the warnings' significance by delivering them in a manner that is designed to obscure the adversarial relationship between the interrogator and the suspect; and, third, they may deliver the warnings in a way that communicates to the suspect that waiving his rights will result in some immediate or future benefit for him.¹⁹⁷

In the beginning of an interrogation, officers attempt to establish rapport and develop a level of comfort with the suspect. This is accomplished through asking background questions, engaging in small talk, and creating the illusion of a non-threatening, non-adversarial encounter.¹⁹⁸ Once officers have achieved some level of rapport, they strategically embed and blend the delivery of *Miranda* warnings into the conversation.¹⁹⁹ Most often, *Miranda* warnings are delivered without preamble and in a seemingly neutral tone.²⁰⁰ By doing this, police officers give the impression that they are indifferent to the suspect's response and that the warnings are a mere formality that do not merit the suspect's concern.²⁰¹ Another common tactic is referring to the dissemination of *Miranda* rights in popular media, thus trivializing the warnings' legal significance and lulling the suspect into falsely believing that cultural exposure to *Miranda* translates into understanding of its meaning or consequences.²⁰²

The ultimate hope is that "the suspect will not come to see the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation, but as equivalent to other standard bureaucratic forms that one signs without reading or giving much thought."²⁰³ Officers treat the suspect's waiver as a foregone conclusion and often move directly from reading *Miranda* warnings into interrogation without explicitly asking the suspect for a waiver.²⁰⁴ Officers convince the suspect that they want to hear his or her side of the story but that they will not be able to

197. Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 432 (1999).

198. FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 76.

199. Leo & White, *supra* note 197, at 433.

200. FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 79.

201. *Id.*

202. *Id.* at 81.

203. Leo & White, *supra* note 197, at 435.

204. *Id.* at 437.

do so until the suspect waives the *Miranda* rights.²⁰⁵ “When effectively employed, this strategy will often have the effect of totally undermining the *Miranda* warnings’ effect . . . the suspect becomes so eager to tell his side of the story that he views the warnings as a needless impediment to his goal.”²⁰⁶

As with adults, police officers satisfy the requirements laid out in *Miranda* by simply advising juveniles of their rights—they have no obligation to emphasize the significance of *Miranda* warnings or to encourage suspects to invoke their rights.²⁰⁷ Although tactics designed to induce waivers may be considered appropriate when used with adult suspects, these tactics are much more likely to be coercive when used with juvenile suspects because of their immaturity and relative susceptibility to persuasion.²⁰⁸

A study by Professor Barry Feld analyzing recordings of the administration of *Miranda* warning to youth revealed widespread use of these same tactics.²⁰⁹ In roughly half of the juvenile interrogations, police asked routine booking questions, including demographic and contact information, prior to informing youth of their *Miranda* rights, “to engage in casual conversations, to put youths at ease, and to accustom them to answering questions.”²¹⁰ Many of these officers then presented the warnings in ways that minimized their significance:

Police conveyed to juveniles the value of talking—“telling their story” and “telling the truth”—before they gave a warning. They characterized it as an administrative formality to complete before the suspect can talk. They sometimes referred to it as “paperwork” to emphasize its bureaucratic quality. A waiver form provides a vehicle to convert *Miranda* into a bureaucratic exercise. Officers

205. *Id.* at 435–36.

206. *Id.* at 436.

207. FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 82 (noting that, in fact, the police have the contrary motive of discouraging invocations).

208. *Id.* at 46 (“Immaturity, impulsivity, and sensitivity to social influences heighten their vulnerability to coercive pressures and compromise their competence to exercise rights in the interrogation room.”).

209. *See generally id.*

210. Feld, *Cops Question Kids*, *supra* note 162, at 425; *see also* Hayley M. D. Cleary & Sarah Vidal, *Miranda in Actual Juvenile Interrogations: Delivery, Waiver, and Readability*, 41 *CRIM. JUST. REV.* 98, 104 (2016) (reporting that, in forty-three percent of cases reviewed, police provided *Miranda* warnings only after booking questions or a rapport-developing period were completed). *But see* *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990) (recognizing a “routine booking question” exception to *Miranda* and allowing police to ask basic biographical questions before administering *Miranda* warnings).

sometimes preceded the warning with a recital of evidence against a youth, which created a pressure to waive and explain it.²¹¹

It should thus be unsurprising that the utilization of these techniques on a population with underdeveloped cognitive reasoning skills and increased susceptibility to pressure from authority figures²¹² results in adolescents waiving their *Miranda* rights at alarmingly high rates.²¹³ Pressures that adults may be able to withstand can become insurmountable for youth.

These environmental pressures are compounded by youths' naiveté. Many youths have a difficult time understanding that police are not necessarily on their side. Though juveniles appear to be as aware of the adversarial nature of interrogation as adults, twenty-nine percent of juveniles attributed friendly or apologetic feelings to the police, in comparison to twelve percent of adults. This signals that many youth do not fully grasp that an interrogating officer's interests may be adverse to their own.²¹⁴

Questions of mental health add yet another layer of complexity to the puzzle of justice-involved youth. Research has shown increased rates of psychopathology among justice-involved youth.²¹⁵ This intersection of mental health and age was central to a recent ruling by the United States Court of Appeals for the Ninth Circuit in *Rodriguez v. McDonald*.²¹⁶ There, the court found a fourteen-year-old's *Miranda* waiver to be invalid based on the tactics police employed.²¹⁷ The court

211. Feld, *Cops Question Kids*, *supra* note 162, at 426.

212. *See supra* Part II.

213. I.e., rates at around ninety percent. Feld, *Cops Question Kids*, *supra* note 162, at 429.

214. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1158.

215. As many as seventy percent of justice-involved youth have received a diagnosis of a mental health disorder, compared to between nine and thirteen percent of youth generally. Emily Haney-Caron et al., *Diagnostic Changes to DSM-5: The Potential Impact on Juvenile Justice*, 44 J. AM. ACAD. PSYCHIATRY & L. 457, 460 (2016).

216. *Rodriguez v. McDonald*, 872 F.3d 908 (9th Cir. 2017).

217. *Id.* at 926. The Ninth Circuit specifically found that:

The tactics employed by police in this case further support the conclusion that Mr. Rodriguez's confession was not voluntary. The officers suggested to Mr. Rodriguez that cooperation would result in leniency: they told him they would take "what you tell us" to the district attorney "and say, hey man, you know what, this guy—we think—he's—you know, he's 14 maybe there was a little bit of influence from the other guys the older guys, you know, he still—we can still save him he's not an entirely bad dude." Even more explicitly, they suggested that cooperating was the only way to "save [his] life": "I mean, that's it what's done is done, but this is like the rest of your life now, this is the difference, you[re] only 14, man. It's not like you[re] 18, 19 and you know, you're 14 years old, man, you can still save your life. You still have a lifetime." Further: "You

wrote: “In the context of the requisite waiver analysis, Mr. Rodriguez’s youth is impossible to ignore. Mr. Rodriguez was fourteen years old at the time of his arrest and interview. As the Supreme Court has repeatedly recognized, ‘youth are particularly susceptible to pressure from police.’”²¹⁸ The court acknowledged that Mr. Rodriguez had attention-deficit/hyperactivity disorder and a “borderline” IQ of 77, noting the likely impact of these additional impairments: “Like youth, ‘mental condition is surely relevant to an individual’s susceptibility to police coercion.’”²¹⁹

B. High-Pressure and Coercive Interrogation Tactics

After a youth waives his or her *Miranda* rights, police use of psychologically pressuring tactics continues. Police often are trained to use interrogation techniques designed to break down youths’ defensiveness and resistance to confessing.²²⁰

The most commonly used police interrogation training manual, featuring the Reid Technique, explains that, for the interrogation of juveniles, “the same general rules prevail as for adults.”²²¹ During at least one Reid Technique training session that lasted a total of thirty-two hours, “[o]nly 10 minutes of instruction were dedicated to youth and this was to advocate the use of the same strategies with youth as with adults.”²²² Though the body of research on interrogation techniques used with juveniles is small and only includes information from a limited number of jurisdictions, police report using interrogation tactics with juveniles that mirror techniques used with adults, and they report using them at similar rates as with adults.²²³ More troubling, some officers report using some techniques more often with

got a chance to set things right, take responsibility for what you did, and then whatever happens happens but be assured that what we would like to do is talk to the district attorney tell him that you were cooperative and being truthful and [accept] the responsibility.”

Id. at 923–24 (alterations in original) (emphasis in original).

218. *Id.* at 922 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 272–73 (2011)).

219. *Id.* at 923 (quoting *Colorado v. Connelly*, 479 U.S. 157, 165 (1986)); *cf.* *United States v. Garibay*, 143 F.3d 534, 538 (9th Cir. 1998) (“A defendant’s mental capacity directly bears upon the question whether he understood the meaning of his *Miranda* rights and the significance of waiving his constitutional rights.”).

220. Feld, *Cops Question Kids*, *supra* note 162, at 432–40.

221. FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 99 (4th ed. 2001). The Reid Technique is an interrogation technique used by many law enforcement agencies that consists of factual analysis, a behavioral analysis interview, and the interrogation. *Id.*; *see also* Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 *LAW & PSYCHIATRY* 19, 20 (2004).

222. Meyer & Reppucci, *supra* note 153, at 761.

223. *Id.* at 771.

juveniles than with adults, including presenting false evidence and discouraging the suspect from making denials.²²⁴ Although police officers are able to accurately identify some of the ways in which youth are different from adults, they fail to adjust their interrogation approaches to account for youths' developmental immaturity and do not appreciate the myriad ways that youth immaturity may increase youth susceptibility to suggestive interrogation techniques.²²⁵

As previously noted, in the vast majority of police interrogations studied, police used maximization strategies, which include confronting the youth with evidence (real or fabricated) of their guilt, accusing the youth of lying about events that occurred, fixating on inconsistencies in the youth's narrative, and stressing how serious the potential charges against the juvenile could be.²²⁶ These techniques, inadvertently or not, play on the susceptibility to pressure and developmental immaturity that are the hallmarks of childhood and adolescence.²²⁷ Lies regarding the existence of seemingly incontrovertible evidence of guilt are especially convincing to youth, who are very susceptible to influence exerted by authority figures and may be reluctant to correct misinformation presented by such figures.²²⁸ During recorded juvenile interrogations, officers in fifty-four percent of cases confronted youth with evidence against them.²²⁹ Although there is no way to be certain which cases had genuine evidence of guilt, the study's author noted that, at the time of the interrogations, laboratory analyses of DNA, fingerprints, or similar evidence were generally not yet available; claims of the physical evidence's strength were thus more likely to be fabrications or exaggerations.²³⁰ Because youth commonly believe police cannot lie,²³¹ they may be especially likely to find fabricated evidence compelling. This is particularly problematic, as false confession studies have demonstrated that informing in-

224. *Id.*

225. *Id.* at 775.

226. Feld, *Cops Question Kids*, *supra* note 162, at 433 ("Maximization strategies overstate the seriousness of a crime, exaggerate the strength of the evidence, and emphasize the futility of denials."); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 222, 261-63 (2006).

227. Owen-Kostelnik et al., *supra* note 148, at 295.

228. *Id.*

229. Feld, *Cops Question Kids*, *supra* note 162, at 434.

230. *Id.*

231. Woolard et al., *supra* note 170, at 692. A study of knowledge of police interrogation revealed that, although 68% of sixteen- and seventeen-year-olds were aware that police can lie during interrogation, only 50% of fourteen- and fifteen-year-olds and 30% of eleven- to thirteen-year-olds realized this. *Id.*

dividuals that proof of their guilt exists creates a high risk of internalized confessions in which individuals (incorrectly) believe in their own guilt.²³²

In contrast to maximization techniques, minimization techniques are designed to express empathy for the suspect. Approaches include creating a narrative for the suspect that diminishes her moral culpability, emphasizing the importance of truthfulness, and appealing to the suspect's self-interest or suggesting that the interrogator may be able to help the suspect.²³³ Police are taught "how to provide moral justifications or excuses (e.g., suggesting that the suspect's action was spontaneous, accidental, provoked, brought on by peer pressure, or drug-induced) to make confession seem like an expedient means of departure from the current situation."²³⁴ These techniques are more likely to persuade juveniles than adults, as the former may lack the requisite capacity and savvy to resist subtle pressures exerted through a minimization narrative:

As adolescents are frequently more susceptible to authority figures, they may also be more open than adults to the rationale that detectives express through the minimization process. Moreover, adolescents' truncated future orientation and risk perception/appreciation could make the departure from the current situation that much more attractive and the minimized "themes" that much more tempting to endorse. In the Central Park jogger case, each boy bought into the "theme" developed by the police by placing his cohorts at center stage of the crime and minimizing his own involvement; each boy said afterward that he thought he would go home after confessing.²³⁵

Minimization techniques may be used much less frequently than maximization techniques. When used, however, they are tailored by police to be especially persuasive to children and adolescents, creating narratives more likely to be compelling to youth.²³⁶ Due to their develop-

232. Kassin et al., *supra* note 33, at 17.

233. Feld, *Cops Question Kids*, *supra* note 162, at 436–37; see also Saul M. Kassin et al., *supra* note 162, at 389–90.

234. Owen-Kostelnik et al., *supra* note 148, at 295.

235. *Id.* The Central Park jogger case was a high-profile case involving the conviction of five teenagers (ages fourteen to sixteen) for the "brutal attack" of a female jogger in Central Park. During lengthy interrogations, all five teenagers independently confessed to the crime, were convicted, and served years in prison before being exonerated via a confession and DNA evidence linking a convicted rapist and murderer to the crime. *Id.* at 286–87.

236. Feld, *Cops Question Kids*, *supra* note 162, at 438–40. As Feld noted: Police sometimes suggested that getting mad, losing control, or excitement accounted for youths' misconduct. Intoxication explains bad behavior and drinking alcohol or using drugs lessened a juvenile's

mental immaturity, minimization techniques can overwhelm youth and result in confessions that, although legally considered voluntary, may nevertheless be coerced.

C. *Risk of Juvenile False Confessions*

Once youth waive their *Miranda* rights, the suggestibility of children and adolescents places them at even greater risk of providing information (however unreliable or misleading) to police.²³⁷ More than a quarter of youth incarcerated for serious offenses reported having given true confessions, and seventeen percent reported having given false confessions.²³⁸ Indeed, three-quarters of juvenile interrogations end within fifteen minutes of starting, and over ninety percent end within thirty minutes,²³⁹ suggesting that children and adolescents provide confessions readily once *Miranda* rights are waived. Professor Feld's study, which reviewed 227 recorded interrogations of sixteen- and seventeen-year-olds, found that almost all youth who quickly waived their rights made self-incriminating statements: seventy-one percent provided full confessions, and twenty-five percent made some admission.²⁴⁰ Even among youth who initially resisted the interrogation, the majority ultimately provided incriminating information: nine percent confessed, and forty-eight percent made an admission.²⁴¹

Among suspects later proven to have given false confessions, children and adolescents are grossly overrepresented, as they are "less equipped to cope with stressful police interrogation and less likely to possess the psychological resources to resist the pressures of accusato-

responsibility for his behavior. Juveniles are more likely than adults to commit crimes in groups, and police diffuse responsibility by suggesting they succumbed to negative peer influences, shifting blame to others. Parents regularly refer to errant children's behavior as a mistake, and police regularly described juveniles' delinquency as a mistake to mitigate responsibility. Police appealed to juveniles' self-interest in one-tenth (12%) of cases. They told them they would feel emotional relief, prosecutors and judges would view them more favorably, and intimidated they might deal with them more leniently. Officers minimized a youth's crime by comparing it with more serious offenses. Even a serious crime—a drive-by shooting—could have been worse if the shooter had hit the intended target. The rationale of juvenile courts—treatment rather than punishment—provides a theme with which to minimize seriousness.

Id.

237. Owen-Kostelnik et al., *supra* note 148, at 291.

238. Lindsay C. Malloy et al., *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 LAW & HUM. BEHAV. 181, 186 (2014).

239. Feld, *Cops Question Kids*, *supra* note 162, at 445.

240. *Id.* at 441.

241. *Id.*

rial police questioning” than adults.²⁴² Adolescents recognize this vulnerability in themselves; approximately one-quarter of youth in a study reported that they would definitely offer a false confession in response to at least one commonly used interrogation technique, and this rate was highest among the youngest adolescents.²⁴³ In laboratory studies of false confessions in which participants are falsely accused of wrongdoing, juveniles age sixteen and under falsely confessed at higher rates than young adults, and fifteen- and sixteen-year-olds confessed at significantly higher rates when presented with false evidence of guilt.²⁴⁴ Additionally, suggestive interviewing techniques such as presenting false evidence, using social pressure, asking leading questions, and taking advantage of suspect suggestibility may result in creating false memories of committing a crime, even among adults.²⁴⁵ Police interrogators recognize this risk; they estimate that false confessions are elicited from ten percent of innocent suspects.²⁴⁶

Juveniles’ immaturity in decision-making capacities likely contributes to their greater likelihood of falsely confessing; youth are generally less able to accurately balance the seriousness of the charges or the sufficiency of the evidence against them with the desire to escape a pressure-filled interrogation.²⁴⁷ Because a confession makes conviction nearly certain,²⁴⁸ youth are likely to experience adverse outcomes from difficulties understanding and appreciating their rights to silence and counsel before and during questioning. In *Dassey v. Dittman*,²⁴⁹ a

242. Legal scholars have analyzed cases of proven false confession and found that juveniles comprise at least one third of those cases—a disproportionate percentage. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004); Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 400 (2015).

243. Goldstein et al., *Comprehension and False Confessions*, *supra* note 170, at 365.

244. See, e.g., Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 148–49 (2003).

245. See generally Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOL. SCI. 291 (2015). In one study in which participants were interviewed using these suggestive techniques, seventy percent of participants came to remember and report committing an assault or theft—even though they had actually never done so. *Id.* at 296.

246. Meyer & Reppucci, *supra* note 153, at 770–71.

247. Kassin et al., *supra* note 33, at 19–20.

248. See Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misperceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1315 (2008).

249. The documentary “Making a Murderer” covered the investigation and subsequent prosecution of Dassey for the murder of Theresa Halbach in 2005. See generally *Making a Murderer* (Netflix Dec. 18, 2015). Dassey confessed to police in a videotaped interrogation. The Wisconsin trial court found the confession voluntary and thus admissible; their findings were affirmed by the Wisconsin Court of Appeals. *State v. Dassey*, 827 N.W.2d 928 (Wisc. Ct. App. 2013). In a subsequent federal habeas pro-

case involving the admissibility of a murder confession made by then sixteen-year-old Brendan Dassey, the Seventh Circuit addressed this concern as well:

Dassey quickly learned that “honesty” meant telling the investigators what it was that they wanted to hear. When they did not like his answer, they told him things like “Come on Brendan. Be honest. I told you that’s the only thing that’s gonna help ya here;” and “[w]e don’t get honesty here, I’m your friend right now, but I gotta believe in you and if I don’t believe in you, I can’t go to bat for you.” Every time the investigators said “tell us the truth” or “we know what the truth is,” Dassey altered his story just a bit. As Dassey got closer and closer to the answers the investigators were looking for, his statements were rewarded with affirmations like “that makes sense. Now we believe you,” and in doing so, they cemented that version of the facts. But when Dassey deviated from the expected narrative, the investigators either offered no reward, ignored the comments, steered him away, or let him know that they thought he was not telling the truth. In short, as the examples clearly demonstrate, “be honest,” “tell the truth,” and similar pleas became code for “guess again, that is not what we wanted you to tell us.” And “now we believe you” and “that makes sense” became code for “that’s what we want to hear. Stop right there.” Dassey’s reaction to these cues is not unique. Experts on confessions have noted that “though courts are reluctant to find that police officers have overwhelmed a child’s will by repeatedly admonishing the child to ‘tell the truth,’ many children will eventually hear ‘tell the truth’ as, ‘tell me what I want to hear.’”²⁵⁰

D. Opinions and Recommendations of Professional Organizations

Professional organizations with expertise in policing and child and adolescent development have increasingly recognized the unique vulnerabilities of juvenile suspects during interrogations and have called for policy changes to better protect children’s rights in this context. Professional organizations of psychologists and psychiatrists

ceeding, the Seventh Circuit disagreed. *Dassey v. Dittmann*, 860 F.3d 933, 982, *rev’d*, 877 F.3d 297 (7th Cir. 2017) (en banc). The federal appellate court found that, even though the trial and state appellate courts acknowledged Dassey’s youth and related characteristics, “it did not do the one thing that the Supreme Court requires[,] which is to use ‘special caution’ when assessing the voluntariness of juvenile confessions.” *Id.* at 947. Although *Dassey v. Dittman* was reversed by a sharply divided en banc panel of the Seventh Circuit, the factual description of the case was undisturbed by the reversal, which rested on the majority’s analysis of the standard of review under the Antiterrorism and Effective Death Penalty Act. *Dassey*, 877 F.3d at 301.

250. *Dassey*, 860 F.3d at 963 (citations omitted) (quoting King, *supra* note 144, at 472).

agree that children should not be treated the same as adults when questioned by police.

The American Psychological Association “recommends that particularly vulnerable suspect populations, including youth, persons with developmental disabilities, and persons with mental illness, be provided special and professional protection during interrogations such as being accompanied and advised by an attorney or professional advocate.”²⁵¹ The American Academy on Child and Adolescent Psychiatry “believes that juveniles should have an attorney present during questioning by police or other law enforcement agencies” and that “when interviewing juvenile suspects, police should use terms and concepts appropriate to the individual’s developmental level. Any written material should also be geared to the person’s grade level and cognitive capacity. In general, it is not sufficient to simply read or recite information to a juvenile.”²⁵²

Legal and police organizations have made similar calls for protections for youth based on their developmental immaturity. The American Bar Association’s (ABA) Task Force on Youth in the Criminal Justice System found that “[s]tatements made during the course of custodial interrogation in the absence of counsel and the youth’s parent or parents should be carefully scrutinized, and such interrogation of a youth who has not yet reached his or her sixteenth birthday should not take place outside the presence of counsel.”²⁵³ A Federal Bureau of Investigation bulletin lists youth as one of many characteristics that make individuals “overly susceptible to police interrogation techniques.”²⁵⁴ The International Association of Chiefs of Police (IACP), a leading association of law enforcement officers, and the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention identified juvenile vulnerability to police pressure, not just during interrogation, but also during *Miranda* waiver; “[e]ven intelligent children and teenagers often do not fully understand their *Miranda* rights, which can require a tenth-grade level of

251. *Resolution on Interrogations of Criminal Suspects*, AM. PSYCHOL. ASS’N (2014), <http://www.apa.org/about/policy/interrogations.aspx>.

252. *Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), https://www.aacap.org/aacap/policy_statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx.

253. ROBERT E. SHEPHERD, JR., *YOUTH IN THE CRIMINAL JUSTICE SYSTEM: AN ABA TASK FORCE REPORT 2* (2002).

254. Michael R. Napier & Susan H. Adams, *Criminal Confessions: Overcoming the Challenges*, FED. BUREAU INVESTIGATION L. ENFORCEMENT BULL., Nov. 2002, at 9.

comprehension.”²⁵⁵ The IACP also published training materials on interviewing and interrogating juveniles, with specific recommendations for administering *Miranda* warnings to juveniles given their limitations in comprehension.²⁵⁶

Finally, some police training organizations have begun to recognize the need for special precautions when questioning children or adolescents. Wicklander-Zulawski’s interrogator training materials provide several requirements for interrogating youth. First, the interrogator “must constantly be aware of the unique position of power that he holds” because “the child learns what is expected and what is positively reinforced from his interviewer adult.”²⁵⁷ Second, coercive techniques must be avoided with juveniles; juveniles are at risk for incorporating information provided by investigators into their memories, thereby contaminating their recollections of what occurred.²⁵⁸ Youth are also overly influenced by positive reinforcement and may acquiesce to officer confrontation.²⁵⁹ Even John E. Reid & Associates, Inc., the organization that trademarked the aforementioned Reid technique and conducts trainings on the interrogation approach, has begun to recognize that:

Every interrogator must exercise extreme caution and care when interviewing or interrogating a juvenile or a person who is mentally or psychologically impaired. Certainly these individuals can and do commit very serious crimes, but since many false confession cases involve juveniles and/or individuals with some significant mental or psychological disabilities, extreme care must be exercised when

255. INT’L ASS’N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE’S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 7 (2012).

256. *Interview and Interrogation of Juveniles*, TRAINING KEY (Int’l Ass’n of Chiefs of Police, Alexandria, Va.), no. 652, 2011, at 1, 3. Specifically, the recommendation noted that:

When reciting *Miranda* warnings to a child, the best practice is to read each warning slowly and one at a time. After each warning, the child should be asked to explain it in his or her own words. This is the only real way that an officer can be satisfied that the child has a solid understanding of his rights. It is not sufficient if the child merely repeats the same words back; in fact, that may indicate that the child is inappropriately focused on saying things in an effort to please. Further, the same terminology used with a seasoned adult suspect should not carry over to a juvenile; rather, the following model should be utilized, which uses short sentences and language understandable to children who can read at the third-grade level[.]

Id. at 3.

257. DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 82 (2002).

258. *Id.* at 81.

259. *See id.* at 82.

questioning these individuals and the investigator has to modify their approach with these individuals. Furthermore, when a juvenile or person who is mentally or psychologically impaired confesses, the investigator should exercise extreme diligence in establishing the accuracy of such a statement through subsequent corroboration. In these situations it is imperative that the interrogator does not reveal details of the crime so that they can use the disclosure of such information by the suspect as verification of the confession's authenticity.²⁶⁰

IV.

CURRENT REFORMS FAIL TO ADEQUATELY PROTECT YOUTHS' *MIRANDA* RIGHTS

Because of increasing awareness of youth vulnerability during the interrogation process, jurisdictions have increasingly shown interest in identifying potential solutions to better protect youth. Nonetheless, current solutions have proven inadequate to ensure that youths' waivers of their *Miranda* rights are knowing, intelligent, and voluntary. We examine four approaches here: using specialized juvenile *Miranda* warnings; requiring the presence of an interested adult in interrogations; videotaping interrogations; and developing a special standard for evaluating juvenile waivers.

A. *Specialized Juvenile Miranda Warnings*

Some jurisdictions have adopted specialized *Miranda* warnings for juveniles that utilize terms and language that are purportedly easier for children and youth to understand. These specialized warnings themselves vary substantially in complexity. Some juvenile warnings are twice as long as standard adult versions and require greater reading ability;²⁶¹ indeed, some juvenile-specific warnings are written at a post-college reading level,²⁶² likely leaving the vast majority of justice-involved youth unable to comprehend their meaning. Although a few states require that officers take certain measures to ensure that

260. *Investigator Tips: Making a Murderer: The Reid Technique and Juvenile Interrogations*, JOHN E. REID & ASSOCIATES, INC. (Jan.–Feb. 2016), http://www.reid.com/educational_info/r_tips.html?serial=20160101-1; see also *Suggested Reading*, INTERVIEWS & INTERROGATIONS INST., <http://www.getconfessions.com/suggested-reading/> (last visited Feb. 10, 2018).

261. See Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL., PUB. POL'Y & L. 63, 72 (2008) (stating that the Flesch-Kincaid reading levels for juvenile *Miranda* warnings are approximately one-half grade more difficult than for general warnings).

262. *Id.* at 71–75. Juvenile-specific *Miranda* warnings vary from a 2.2 grade reading level to a post-college reading level. *Id.*

youth truly comprehend *Miranda* warnings, such as advising juveniles of their rights using language the child can understand,²⁶³ using “developmentally appropriate language,”²⁶⁴ or using simplified juvenile warnings,²⁶⁵ no states have provided specific guidance as to what exact words or combination of words should be used or how officers are to determine whether the particular version they are using is actually understandable to the child or “developmentally appropriate.”

Studies have shown that “specialized vocabulary deficits likely have widespread effects on one’s ability to interpret and reason with the complex verbal information contained in the *Miranda* warnings.”²⁶⁶ With the below-grade level reading abilities of most youth in the justice system,²⁶⁷ it has been suggested that juvenile *Miranda*

263. See, e.g., ALA. CODE § 12-15-202(a) (2017) (“When a child is taken into custody, the person taking the child into custody shall inform the child of all of the following, in language understandable to the child”); ARK. CODE ANN. § 9-27-317 (2017) (“A law enforcement officer who takes a juvenile into custody for a delinquent or criminal offense shall advise the juvenile of his or her *Miranda* rights in the juvenile’s own language.”).

264. For example, Nebraska’s statute provides that:

All law enforcement personnel or other governmental officials having custody of any person under eighteen years of age shall inform the person in custody, using developmentally appropriate language and without unnecessary delay, of such person’s right to call or consult an attorney who is retained by or appointed on behalf of such person or whom the person may desire to consult and, except when exigent circumstances exist, shall permit such person to call or consult such attorney without delay.

NEB. REV. STAT. ANN. § 43-248.01 (LexisNexis 2017).

265. For example, the Supreme Court of New Hampshire noted in *State v. Benoit*:

[B]ecause accused citizens must understand their rights in order to effectuate a valid waiver, the greatest care must be taken to assure that children fully understand the substance and significance of their rights. . . . We recommend therefore the use of the simplified juvenile rights form set out in the appendix attached to this opinion if an incriminating statement is offered as evidence in our courts. While we urge law enforcement agencies to use a simplified juvenile *Miranda* form, failure to do so will not, in and of itself, render a juvenile’s statements inadmissible. . . . [H]owever, if a juvenile is not given a statement of his or her rights in the simplified fashion, this court will presume, when evaluating the circumstances surrounding the giving of the statement, that the juvenile’s explanation of his or her rights was inadequate.

490 A.2d 295, 304 (N.H. 1985).

266. Sharon Lynn Kelley, Addressing Relative Criteria for *Miranda* Waivers: A Comparison of Juvenile Justice Youths’ and Adult Offenders’ Understanding and Appreciation of the Rights to Silence and Legal Counsel During Police Interrogations 31 (May 2014) (unpublished Ph.D. dissertation, Drexel University) (on file with Drexel Libraries iDEA E-Repository and Archives) (summarizing the body of research).

267. Regina M. Foley, *Academic Characteristics of Incarcerated Youth and Correctional Educational Programs: A Literature Review*, 9 J. EMOTIONAL & BEHAV. DISORDERS 248, 252 (2001).

warnings should be brought down to a third-grade level.²⁶⁸ Regardless of the simplicity of the language used to convey *Miranda* warnings, children and adolescents may still prove incapable of grasping the complex concepts involved, as they may be developmentally unable to engage in the abstract reasoning, cost-benefit analysis, and weighing of short- versus long-term gains required to make a valid waiver.²⁶⁹

268. Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 53 (2013). LaMontagne's proposal is as follows:

One model for an ideal *Miranda* warning would resemble this: The police want[s] to ask you some questions. You do not have to talk with them. You do not have to answer their questions. They can use anything you say in trying to figure out if you did something that was against the law. If you do not want to talk with the police, you will not get in trouble for being quiet. If you would like an adult to help you decide what to do, you can have your parents here. You can also have a lawyer. A lawyer is someone who is trained in helping you make the best decision for you. This will not cost you any money. If you want to talk to the police, you can stop answering their questions whenever you want. Do you understand what I have just told you? What would you like to do?

Id.

269. See *supra* Part II. Even when jurisdictions work to write juvenile warnings at lower reading levels, the reading levels are usually still above the skill levels of many youth suspects; the calculated reading levels typically fail to account for the more complex legal definitions of words with simple homonyms (e.g., "right"); the simplified language often fails to accurately convey these complex rights; and even comprehensible, simplified descriptions of rights often fail to improve appreciation of the rights during interrogation, a skill that requires mature and well-reasoned decision-making skills during stressful situations. For example, King County, Washington recently adopted a set of juvenile *Miranda* warnings developed through collaboration between the King County Sheriff's Office and the Department of Public Defense, with input from a non-profit organization working with system-involved children. Press Release, John Urquhart, Sheriff, King County Sheriff's Office, Sheriff's Office Simplifies [sic] *Miranda* Warnings for Juveniles (Sept. 27, 2017), <http://www.kingcounty.gov/depts/sheriff/news-media/news/2017/September/Miranda-warnings-simplified-for-juveniles.aspx>. These thoughtfully designed warnings are written at a 4.8 Flesch-Kincaid grade level and seek to both simplify and explain the warnings. Despite this well-intentioned approach, these warnings still may be too complicated linguistically for many youth, and the conceptually complex nature of the rights, combined with the emotional stress of the interrogation, may do little to facilitate appreciation of the warnings' significance during the interrogation and balanced reasoning about the waiver decision. In stressful situations, adolescents' verbal processing, reasoning, and decision-making skills are particularly compromised. See *supra* Part II. As a result, even a clear version of the *Miranda* warnings would be relatively meaningless if a youth is emotionally stressed to the point that her processing of the warnings is severely compromised—if information about the warnings are not meaningfully absorbed, the youth is likely to have great difficulty recalling, considering, and using this information to guide decision making about the *Miranda* waiver.

B. Requiring the Presence of an “Interested” Adult

Recognizing that most juveniles lack the ability to make a valid *Miranda* waiver unaided, several jurisdictions require that an “interested adult” assist them.²⁷⁰ Although the majority of states recognize parents, guardians, and custodians as “interested,” the expectations or assumptions about how these interested adults may actually assist juveniles during the interrogation process vary across jurisdictions. A majority of states require that an official who is taking a child into custody “immediately notify a parent or guardian,”²⁷¹ but most fail to specify whether the parent or guardian is permitted to join the youth in the interrogation room or whether questioning may occur while the notification is underway.

Nine states require that a parent, guardian, or legal custodian be present and informed of the youth’s *Miranda* rights before the youth can validly waive them,²⁷² with some holding that statements made

270. See Grisso, *Juveniles’ Capacities*, *supra* note 156, at 1135; see also FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 43 (noting that at least ten states have this requirement).

271. These states include Arkansas, ARK. CODE ANN. § 9-27-313(a)(2) (2017); California, CAL. WELF. & INST. CODE § 627(a) (West 2017); Delaware, DEL. CODE ANN. TIT. 10, § 1004 (2017); Georgia, GA. CODE ANN. § 15-11-501(b) (2017); Hawaii, HAW. REV. STAT. ANN. § 571-31(b) (LexisNexis 2017); Idaho, IDAHO JUV. R. 8(a); Illinois, 705 ILL. COMP. STAT. ANN. 405 / 5-405(1) (West 2017); Iowa, IOWA CODE ANN. § 232.19(2) (West 2017); Louisiana, LA. CHILD. CODE ANN. art. 814(C) (2017); Maine, ME. REV. STAT. tit. 15, § 3203-A(2)(A) (2017); Maryland, MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-14(b) (2017); Massachusetts, MASS. GEN. LAWS ANN. ch. 119, § 67 (2017); Michigan, MICH. COMP. LAWS ANN. § 712A.14 (LexisNexis 2018); Mississippi, MISS. CODE ANN. § 43-21-303 (2017); Missouri, MO. SUP. CT. R. 127.02(a); Montana, MONT. CODE ANN. § 41-5-331 (2017); Nevada, NEV. REV. STAT. ANN. § 62C.010(2)(a) (West 2017); New Hampshire, N.H. REV. STAT. ANN. § 594:15 (2017); New Jersey, N.J. STAT. ANN. § 2A:4A-33 (West 2017) (effective Dec. 31, 1983); New York, N.Y. FAM. CT. ACT § 305.2(3) (McKinney 2017); North Carolina, N.C. GEN. STAT. ANN. § 15A-505(a) (West 2017); Oregon, OR. REV. STAT. ANN. § 419C.097(1) (West 2017); Pennsylvania, 42 PA. STAT. AND CONS. STAT. ANN. § 6326(a) (West 2018); South Carolina, S.C. CODE ANN. § 63-19-810(A) (2018); South Dakota, S.D. CODIFIED LAWS § 26-7A-15 (2018); Tennessee, TENN. CODE ANN. § 37-1-115(2) (West 2017); Texas, TEX. FAM. CODE ANN. § 52.02(b)(1) (West 2017); Utah, UTAH CODE ANN. § 78A-6-112(3)(a)(i) (West 2017); Virginia, VA. CODE ANN. § 16.1-247(A) (West 2017); West Virginia, W. VA. CODE ANN. § 49-4-705(c)(1) (West 2017); Wisconsin, WIS. STAT. ANN. § 938.19(2) (West 2017); and Wyoming, WYO. STAT. ANN. § 14-6-206(b) (West 2017).

272. To date, they are Colorado, Connecticut, Kansas, Massachusetts, Montana, New Jersey, North Carolina, Oklahoma, and Vermont. See COLO. REV. STAT. ANN. § 19-2-511 (West 2018) (subject to listed exceptions, if the child is under eighteen, a parent, guardian, or legal or physical custodian of the juvenile must be present and advised of the juvenile’s *Miranda* rights; the child and the parent, guardian or legal custodian may waive parental presence in writing, prior to a custodial statement being taken, only after the parent, guardian or legal custodian and the child have been fully advised

of the juvenile's rights.); CONN. GEN. STAT. ANN. § 46b-137 (West 2017) ("Any admission, confession or statement, written or oral, made by a child under the age of sixteen to a police officer or Juvenile Court official shall be inadmissible . . . unless made by such child in the presence of the child's parent or parents or guardian and after the parent, parents or guardian and child have been advised" of the child's *Miranda* rights. "Any admission, confession or statement, written or oral, made by a child sixteen or seventeen years of age to a police officer or Juvenile Court official . . . shall be inadmissible" unless "(1) the police or Juvenile Court official has made reasonable efforts to contact a parent or guardian of the child, and (2) such child has been advised" of his or her *Miranda* rights and that "the child has the right to contact a parent or guardian and to have a parent or guardian present during any interview[.]"); *In re B.M.B.*, 955 P.2d 1302, 1312–13 (Kan. 1998) (holding that a child under the age of fourteen cannot waive the rights to silence or an attorney without first having the "opportunity to consult with his or her parent, guardian, or attorney. . . . Both the parent and the juvenile shall be advised of the juvenile's right to an attorney and to remain silent. Absent such warning and consultation, a statement or confession cannot be used against the juvenile at a subsequent hearing or trial."); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) ("[F]or the Commonwealth successfully to demonstrate a knowing and intelligent waiver by a juvenile, in most cases it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights. For the purpose of obtaining the waiver, in the case of juveniles who are under the age of fourteen, we conclude that no waiver can be effective without this added protection."); MONT. CODE ANN. § 41-5-331 (2017) (a child under sixteen can waive rights only with a parent's agreement; when a parent does not agree, the child can waive after consulting with counsel; a child who is at least sixteen can make an effective waiver without a parent present); *State v. Presha*, 748 A.2d 1108, 1114 (N.J. 2000) ("In respect of confessions by juveniles of any age, courts should consider the adult's absence as a highly significant factor among all other facts and circumstances. By 'highly significant factor' we mean that courts should give that factor added weight when balancing it against all other factors. . . . In respect of a juvenile under the age of fourteen, we believe an evaluation of the totality of circumstances would be insufficient to assure the knowing, intelligent, and voluntary waiver of rights. Accordingly, when a parent or legal guardian is absent from an interrogation involving a juvenile that young, any confession resulting from the interrogation should be deemed inadmissible as a matter of law, unless the adult was unwilling to be present or truly unavailable."); N.C. GEN. STAT. ANN. § 7B-2101 (West 2017) ("When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights[.]"); OKLA. STAT. ANN. tit. 10A, § 2-2-301 (West 2017) ("No information gained by a custodial interrogation of a youthful offender under sixteen (16) years of age or a child nor any evidence subsequently obtained as a result of such interrogation shall be admissible unless the custodial interrogation . . . is done in the presence of the parents, guardian, attorney, adult relative, adult caretaker, or legal custodian of the juvenile. No such custodial interrogation shall commence until the [juvenile] and the parents, guardian, attorney, adult relative, adult caretaker, or legal custodian of the [juvenile] have been fully advised of the [youth's] constitutional and legal rights[.]"); *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982) (holding that, under the Vermont Constitution, a juvenile under the age of eighteen must be "given the opportunity to consult with an adult . . . who is not only genuinely interested in the welfare of the juvenile but completely

before a juvenile had the opportunity to consult with a parent or guardian who had been apprised of that juvenile's rights are per se inadmissible. Unlike the totality of the circumstances test, the per se rule automatically excludes any waiver made by juveniles in violation of a state's requirements, so courts retain discretion only to determine whether the applicable per se requirements have been satisfied.²⁷³ Other states have employed two-tiered rules that prevent juveniles younger than a certain age from validly waiving their *Miranda* rights unless a parent or guardian is present, yet only create a rebuttable presumption of inability to validly waive *Miranda* rights for juveniles older than that age. Still other states require that younger juveniles meet with a parent but allow the police to merely offer this opportunity to older juveniles.²⁷⁴

Though states adopted these rules in an attempt to provide greater protection to juveniles, studies suggest that the presence of a parent neither increases juveniles' assertion of their rights nor mitigates the coercive circumstances inherent in police interrogations.²⁷⁵ Requiring parental presence during juvenile interrogations assumes that a parent can enhance a child's understanding of rights, provide legal advice, and mitigate the danger of unreliable statements by reducing isolation and coercive influences.²⁷⁶ However, parents are unlikely to serve as protective forces for several reasons: parents may have divergent interests from their children, may not fully understand *Miranda* warnings themselves, and may themselves be overwhelmed by police pressures.

First, parents may prioritize goals other than reducing the legal jeopardy their children may be facing.

For example, a parent may wish for this experience to serve as an educational experience for her child, so she might encourage him to be honest and take responsibility for his actions. Alternately and perhaps simultaneously, she may feel compelled to defend her child against police accusations in the interrogation room. It is also plausible that some exasperated parents who struggle with their children's antisocial behavior may view police as an ally in the process

independent from and disassociated with the prosecution" and "informed of and aware of the rights guaranteed to the juvenile").

273. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1135.

274. FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 44.

275. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 *LAW & HUM. BEHAV.* 321, 340 (1997).

276. *See* FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 44.

of restoring order to the household, a perspective likely at odds with youths' interests in this process.²⁷⁷

Parents often insist that a juvenile should "confess" or "tell the truth," as such advice is consistent with respected child-rearing philosophies, which emphasize obedience to authority and assuming responsibility for the consequences of one's actions.²⁷⁸ Accordingly, "a good parent may be a lousy source of guidance for the protection of the child's constitutional rights."²⁷⁹ Parents may also be motivated by a desire to help their community and do their part in solving a crime, failing to take into account the possibility that their children may say something incriminating.²⁸⁰

Any number of these competing motivations can result in parents' failures to take action in protecting their children from incriminating themselves. One study found that "nearly three-quarters of a sample of parents disagreed with the premise that children should be allowed to withhold information from the police when suspected of a crime."²⁸¹ Another study reported that "more than two-thirds of the parents present during actual pre-interrogation waiver proceedings offered no comments or advice to their children."²⁸² Surveys of parents of high school students found that more than half disagreed with the idea that their children should withhold information to avoid self-incrimination, and a survey of middle-income parents reported that the majority would tell their child to waive their rights.²⁸³ Youth who have been questioned by police with a parent present reported that parents did not encourage them to invoke their rights: forty percent did not know whether the parent wished them to make a statement, about thirty-three percent reported that the parent wanted them to confess, about twentypercent reported that the parent wanted them to "tell the truth," and only about seven percent reported that the parent wanted them to deny guilt.²⁸⁴ "No youth reported that their parents advised them to remain silent."²⁸⁵ Accordingly, presence of a parent may weigh more heavily in favor of *Miranda* waiver than against it.

277. Woolard et al., *supra* note 170, at 695–96.

278. *Id.*

279. King, *supra* note 144, at 468.

280. *Id.* at 467.

281. Grisso, *Juveniles' Capacities*, *supra* note 156, at 1163.

282. *Id.*

283. FELD, *INSIDE THE INTERROGATION ROOM*, *supra* note 190, at 44.

284. Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 *LAW & HUM. BEHAV.* 253, 261 (2005).

285. *Id.*

Even for parents whose primary motivation is to protect their children from legal consequences, failure to appreciate the consequences of waiving *Miranda* rights or holding onto the belief that confessing will result in more lenient treatment may make it difficult for parents to effectively advise youth. In a study of parents of eleven- to seventeen-year-olds, twenty-three percent of parents scored in the “clinically impaired” range when evaluated for *Miranda* comprehension,²⁸⁶ and nearly all parents held certain misconceptions that might doom their provision of adequate advice to a child undergoing interrogation.²⁸⁷ Many lay adults do not understand the complexities and dangers of the legal system and, thus, cannot properly help protect their children’s *Miranda* rights, regardless of sincerity and motivation.²⁸⁸

Finally, parents may themselves give in to police pressure and have difficulty advising their children when confronted with police tactics designed to limit parental involvement. A child’s arrest is an extremely stressful experience for most parents. Although parents are less prone to poor decision making under stress than their children, they may still be unable to rationally consider what will serve their children’s best interests in the long term during these stressful encounters.

Some police officers are also trained to use parents to their advantage and minimize parental protection. Some may encourage parents to tell their children to cooperate or seat them where they cannot be seen by the child, who may otherwise look to their parent for guidance.²⁸⁹ Thus, although the adoption of an “interested adult” policy is commendable, it nevertheless fails to provide adequate protection.²⁹⁰

286. Scores fell in the “clinically impaired” range when the participant received a score of zero on any item on the Comprehension of *Miranda* Rights scale of the Instruments for Assessing Understanding and Appreciation of *Miranda* Rights. This scale asks individuals to paraphrase each of the *Miranda* warnings in their own words; a score of zero on an item indicates the individual demonstrated *no* understanding of that warning. Woolard et al., *supra* note 170, at 689.

287. *Id.* at 694. “Virtually all” parents believed police would inform them if their child was considered a witness or suspect; half believed police are not permitted to lie during interrogation, and a majority believed youth would have at least one type of protection not actually constitutionally required. *Id.*

288. Abigail Kay Kohlman, Note, *Kids Waive the Darndest Constitutional Rights: The Impact of J.D.B. v. North Carolina on Juvenile Interrogation*, 49 AM. CRIM. L. REV. 1623, 1639 (2012).

289. INBAU ET AL., *supra* note 150, at 252.

290. Although state statutes providing for parental presence frequently also allow for a non-parent interested adult to be present, many of the problems with parental presence would also apply to lay, non-parental advocates. Even if such advocates were trained in the meaning of the *Miranda* warnings, an explanation by a knowledgeable

C. Videotaping Interrogations

To minimize false confessions, the ABA has long recommended that law enforcement agencies should videotape the entirety of custodial interrogations of all criminal suspects; when videotaping is impractical, they should audiotape the entirety of such interrogations.²⁹¹ Videotaping has been widely encouraged as a solution to the problem of false confessions for a variety of reasons. First, “the presence of a camera may deter interrogators from using the most egregious, psychologically coercive tactics—and deter frivolous defense claims of coercion where none existed.”²⁹² Additionally, when a videotape exists, factfinders have an “objective and accurate record of the process by which a statement was taken—a common source of dispute that results from ordinary forgetting and self-serving distortions in memory.”²⁹³

Although the ABA has urged state legislatures and courts to enact rules or laws of procedure mandating video or audiotaping, many state supreme courts have declined to do so, finding that due process does not require it.²⁹⁴ Out of at least twenty-five states that mandate

adult will not overcome a youth’s inability to comprehend the *Miranda* rights concepts when that inability is due to developmental immaturity. Furthermore, even non-parental lay advocates may have ideas about what course of action may be best for the youth—including taking responsibility and being held accountable. Ultimately, any interested adult other than the youth’s attorney will be ill-equipped to fully consider the implications of any statement made during an interrogation.

291. Am. Bar Ass’n, Criminal Justice Section, *Achieving Justice: Freeing the Innocent, Convicting the Guilty: Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 Sw. U. L. REV. 763, 887 (2008).

292. Kassir et al., *supra* note 33, at 26.

293. *Id.*

294. *See e.g.*, *People v. Raibon*, 843 P.2d 46, 49 (Colo. App. 1992) (stating that although recording an interview might “remove some questions that may later arise with respect to the contents of that interview” and be a better investigative practice, the court would not “mold our particular view of better practice into a constitutional mandate which would restrict the actions of law enforcement agents in all cases”); *State v. Kekona*, 886 P.2d 740, 745–46 (Haw. 1994) (“Although having an electronic recording of all custodial interrogations would undoubtedly assist the trier of fact in ascertaining the truth, we do not agree that the due process clause of our State Constitution requires such a practice.”); *State v. Rhoades*, 822 P.2d 960, 970 (Idaho 1991) (holding that although each state may extend the protections of its own constitution beyond the parameters guaranteed by the federal constitution, the Due Process Clause of the Idaho state constitution does not require that statements made by defendants be recorded to be admissible); *People v. Everette*, 543 N.E.2d 1040, 1047 (Ill. App. Ct. 1989), *rev’d on other grounds*, 565 N.E.2d 1295 (Ill. 1990) (declining to interpret the Illinois Constitution to require recording because “the most appropriate means of augmenting the due process rights of citizens, especially in view of the ramifications of the rule urged by defendant, is through legislation”); *State v. Buzzell*, 617 A.2d 1016, 1018 (Me. 1992) (“While there are obvious benefits to be realized when statements

the recording of custodial interrogations by either statute or case law, only eight specifically address the recording of juvenile interrogations.²⁹⁵ Even in states with recording statutes, the efficacy of these

are recorded, [the defendant] has not persuaded us that recording is essential to ensure a fair trial, or that the due process clause of our state constitution requires electronic recording of custodial interrogation.”); Mississippi, *Williams v. State*, 522 So. 2d 201, 208 (Miss. 1988) (“We accept that whether or not a statement is electronically preserved is important in many contexts. If a recording does exist it will often help to demonstrate the voluntariness of the confession, the context in which a particular statement was made, and of course, the actual content of the statement. However, this Court has never held nor does our constitution require that the mere absence of a tape recording renders such statements inadmissible.”); Vermont, *State v. Gorton*, 548 A.2d 419, 422 (Vt. 1988) (“The most appropriate means of prescribing rules to augment citizens’ due process rights is through legislation. . . . In the absence of legislation, we do not believe it appropriate to require, by judicial fiat, that all statements taken of a person in custody be tape-recorded.”) (Internal citations omitted); Washington, *State v. Spurgeon*, 820 P.2d 960 (Wash. Ct. App. 1991) (holding that the Washington State Constitution does not require “police officers to tape record interrogations conducted at the jail house on penalty of exclusion of the evidence if they fail to do so. . . . such a sweeping change in long standing police practice should be made only. . . in the form of the adoption of a rule of evidence or a statute mandating recording. We hold the Washington constitution does not require taping of custodial interrogations.”).

295. See CAL. PENAL CODE § 859.5 (West 2018) (mandating that any custodial interrogation of a detained individual suspected of murder “be electronically recorded in its entirety”); CAL. WELF. & INST. CODE § 626.8 (West 2018) (applying CAL. PENAL CODE § 859.5 to children in juvenile court accused of murder); 705 ILL. COMP. STAT. 405 / 5-401.5 (2018) (“An oral, written, or sign language statement of a minor who, at the time of the commission of the offense was under the age of 18 years, made as a result of a custodial interrogation conducted at a police station or other place of detention . . . shall be presumed to be inadmissible as evidence against the minor in any criminal proceeding or juvenile court proceeding” for any felony and for certain misdemeanor sex offenses “unless: (1) an electronic recording is made of the custodial interrogation; and (2) the recording is substantially accurate and not intentionally altered.”); MO. ANN. STAT. § 211.059 (West 2018) (mandating that recordings of juvenile interrogations be presumed admissible as long as the recordings meet certain requirements related to reliability); N.C. GEN. STAT. ANN. § 15A-211 (West 2018) (“Any law enforcement officer conducting a custodial interrogation in an investigation of a juvenile shall make an electronic recording of the interrogation in its entirety.”); *State v. Barker*, 73 N.E.3d 365, 375–77 (Ohio 2016) (finding that, as applied to juveniles, the statutory presumption that an electronically recorded custodial statement is voluntary violates due process because it eliminates the state’s burden of proving, by a preponderance of the evidence, that the confession was voluntary, and removes “all consideration of the juvenile’s unique characteristics . . . from the due-process analysis unless the juvenile introduced evidence to disprove voluntariness when the interrogation was electronically recorded”); OR. REV. STAT. ANN. § 133.400 (West 2018) (“A custodial interview conducted by a peace officer in a law enforcement facility shall be electronically recorded if the interview is conducted . . . (b) with a person under 18 years of age in connection with an investigation into a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult, would constitute a felony.”); TEX. FAM. CODE ANN. § 51.095 (West 2018) (stating that a child’s custodial statement is admissible in evidence if “the statement was made orally . . . is recorded by an electronic recording device” and certain enumerated

statutes is highly variable, given the wide range of penalties imposed for non-compliance. Some jurisdictions bar entirely the confession's admission;²⁹⁶ other jurisdictions admit the confession and defer to the factfinder as to its probative value in determining guilt.²⁹⁷ With such a wide range of consequences, some law enforcement agencies may be

conditions are met); WIS. STAT. ANN. § 938.195 (West 2018) (“(a) A law enforcement agency shall make an audio or audio and visual recording of any custodial interrogation of a juvenile that is conducted at a place of detention” and “(b) If feasible, a law enforcement agency shall make an audio or audio and visual recording of any custodial interrogation of a juvenile that is conducted at a place other than a place of detention” unless the juvenile refuses to cooperate if recorded, the statement was a response to routine booking questions, the failure to record was in good faith, the statement was spontaneous, or there were exigent public safety circumstances.).

296. *See, e.g.*, *Stephan v. State*, 711 P.2d 1156, 1164 (Alaska 1985) (holding that “exclusion is the appropriate remedy for an unexcused failure to electronically record an interrogation, when such recording is feasible”); IND. R. EVID. 617(a) (stating that “[i]n a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof” that one of seven exceptions was met excusing the lack of recording); UTAH R. EVID. 616(b) (stating that “evidence of a statement made by the defendant during a custodial interrogation in a place of detention shall not be admitted against the defendant in a felony criminal prosecution unless an electronic recording of the statement was made and is available at trial” unless one of several exceptions applies).

297. *See, e.g.*, NEB. REV. STAT. ANN. § 29-4504 (West 2018) (indicating that, if a law enforcement officer fails to record a custodial interrogation regarding certain felonies and no exception applies or the prosecution cannot meet its burden of proof, “a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer’s failure to comply with such section”); VT. STAT. ANN. tit. 13, § 5585 (2017) (“If law enforcement does not make an electronic recording of a custodial interrogation as required by this section” and no exception applies, “the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation”); WIS. STAT. ANN. § 972.115 (West 2017) (permitting the court to instruct the jury, upon the defendant’s request, that they “may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case” only absent certain conditions or a showing of good cause “[i]f a statement made by a defendant during a custodial interrogation is admitted into evidence in a trial for a felony before a jury and if an audio or audio and visual recording of the interrogation is not available”); *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533–34 (Mass. 2004) (citations omitted) (“[W]hen the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction. . . cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care. Where voluntariness is a live issue and the humane practice instruction is given, the jury should also be advised that the absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt.”).

inadequately motivated to ensure that interrogations are recorded. However, some agencies have recognized that the ability to review the record is critical to ensure that juveniles were not prompted with leading questions or supplied with details that later became mistakenly attributed to the juveniles themselves.²⁹⁸

However, even a videotaped interrogation and confession cannot ameliorate the risk that an inadequately understood *Miranda* waiver poses for child and adolescent suspects. First, videotaped confessions are prone to bias based on the perspective of the camera; research of videotaped confessions from three different angles found that “[l]ay participants who saw only the suspect judged the situation as less coercive than those focused on the interrogator. By directing visual attention toward the accused, the camera can lead jurors to underestimate the amount of pressure actually exerted by the ‘hidden’ detective,” and the same may be true even for experienced trial judges.²⁹⁹ Second, judges may believe that they can tell a juvenile’s understanding of *Miranda* from cursory comments made during taping, but “[b]eing able to watch a young person answer ‘yes’ in response to short questions about his understanding of his rights gives little aid in determining whether he truly understood his rights and whether his waiver was voluntary.”³⁰⁰ Third, judges may incorrectly assume that a juvenile who appears calm during *Miranda* warnings and interrogations is not under substantial stress or may believe a juvenile who appears mature in the video does not have the same developmental vulnerabilities as other youth.

The case of California’s Joseph Hall is a clear illustration of how videotaping can fail to protect juveniles from the admission of an invalid waiver.³⁰¹ Joseph was accused of killing his father in 2011 when Joseph was ten years old.³⁰² His stepmother, Krista, was present for his interrogation,³⁰³ but “had clear conflicts of interest. Krista’s husband (Jeffrey) had just been killed. She immediately faced criminal charges of her own for her involvement in the offense after Joseph was questioned. And ultimately, she testified as one of the prosecu-

298. LaMontagne, *supra* note 268, at 51–52.

299. Kassir et al., *supra* note 33, at 27.

300. Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 933 (2017).

301. *In re Joseph H.*, 188 Cal. Rptr. 3d 171 (Cal. Ct. App.), *review denied*, 367 P.3d 1 (Cal. 2015), *cert. denied*, 137 S. Ct. 34 (2016).

302. *Id.* at 177–78.

303. *Id.* at 186.

tion's key witnesses against Joseph at trial."³⁰⁴ During the interrogation, "Krista encouraged Joseph to continue answering questions, urging him that everything would be fine 'as long as you told . . . about . . . [w]hat you did.'"³⁰⁵

The California appellate court held that the stepmother's presence could not be coercive because "Joseph frequently looked to his stepmother for support."³⁰⁶ The court referenced the video several times, each time determining that his behavior in the recording showed the waiver's validity.³⁰⁷ Seeing Joseph on video led the court to believe that it could intuit his comprehension level from his cursory responses, understand his susceptibility—or lack thereof—to pressure based on his expressed emotions, and identify the impact of his stepmother's presence based on the number of times he looked at her.³⁰⁸ The videotape preserved his interrogation but provided no real protection or insights into Hall's mental functioning or comprehension.

Finally, the moment a camera is turned on or off can be decisive. A truncated recording showing only the final confession can often make a confession appear spontaneous, voluntary, and uncoerced when, in fact, it followed a protracted, pressure-laden interrogation process. "Law enforcement often records these recaps after asking suspects to recount their story multiple times. Thus, by the time the camera is recording, the suspect's statements may contain little of the emotion and agitation that may have been present initially."³⁰⁹ Ultimately, in ideal circumstances, videotaping *Miranda* waivers and interrogations can assist judges in identifying invalid waivers, but it will not fix a youth's inadequate comprehension of *Miranda*, developmental immaturity, or vulnerability to police pressure—and it may not

304. See Petition for Writ of Certiorari, *J.H. v. California*, 2016 WL 792197, at *29–30 (U.S. Jan. 4, 2016) (No. 15-1086).

305. *Id.* (alterations in original).

306. *In re Joseph H.*, 188 Cal. Rptr. 3d at 186.

307. Specifically, the court noted:

The videotape of the interview shows he had no trouble communicating, aside from needing explanation of a few terms. . . . The video (which we have viewed) reveals that Joseph frequently looked to his stepmother for support, so we are not persuaded [that her presence was coercive]. . . . [T]he record does not support the minor's assertion that his hesitation, confusion, and misunderstanding of the full scope of what it meant to "waive" his rights, showed involuntariness. To the contrary, the video shows he felt guilty for what he had done.

Id. at 186–87.

308. *Id.*

309. Michael Kiel Kaiser, *Wrongful Convictions: If Mandatory Recording Is the Antidote, Are the Side Effects Worth It?*, 67 ARK. L. REV. 167, 184 (2014).

even protect against admission of confessions following involuntary or uninformed waivers.

D. Changing the Legal Standard for Valid Waiver

As research on youth vulnerability during interrogation has gained prominence, some states have taken other, more progressive steps to protect juveniles from invalid waivers and subsequent confessions. Such protections include implementing a modified totality of circumstances test to determine the validity of a juvenile waiver and creating a rebuttable presumption that a waiver is invalid.³¹⁰ Although these policies will protect some youth, they leave open the possibility that many juvenile suspects will still waive *Miranda* rights without sufficient understanding and appreciation of those rights or that they will do so as a result of susceptibility to police pressure.

In addition to the factors required when determining the validity of an adult waiver, some states require consideration of a juvenile's life circumstances apart from age alone.³¹¹ This variation on the standard totality test appears to recognize the role of underdeveloped cognitive and socioemotional capacities in limiting a child's or adolescent's abilities to provide a knowing and intelligent waiver. Although this modified totality test would be a step in the right direction if juvenile waiver capacities varied dramatically from individual to individual, the test fails to appreciate that most younger juveniles do not adequately understand and appreciate their rights to silence and counsel. By using a case-by-case analysis to determine a youth's maturity and the impact of maturity on waiver, these states leave many

310. *See, e.g.*, N.M. STAT. ANN. § 32A-2-14 (West 2018) (creating "a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible" and detailing factors a court should consider in "determining whether the child knowingly, intelligently and voluntarily waived [her] rights"); ARK. CODE ANN. § 9-27-317 (2017) (listing circumstances the court should consider in "determining whether a juvenile's waiver of the right to counsel at any stage of the proceeding was made freely, voluntarily, and intelligently" as well as circumstances under which a juvenile's waiver shall *not* be accepted).

311. *See, e.g.*, ARK. CODE ANN. § 9-27-317 (the court should consider "[t]he juvenile's physical, mental, and emotional maturity"); *State v. Jimenez*, 799 P.2d 785, 792 (Ariz. 1990) ("[W]e evaluate whether police conduct was coercive in the context of a juvenile confession by carefully scrutinizing not only the external circumstances under which the juvenile was questioned but also the juvenile's reasonably apparent cognitive abilities."); *State v. Kim Thul Ouk*, 516 N.W.2d 180, 184-85 (Minn. 1994) (citation omitted) ("[T]he determination whether a waiver of rights if voluntarily and intelligently made by a juvenile is a fact question dependent upon the totality of the circumstances. Factors to be considered in this test include the child's age, maturity, intelligence, education, experience, and the presence or absence of parents.").

youth unprotected when facing the consequences of an uninformed but still legally acceptable waiver.

To date, only New Mexico has completely barred *Miranda* waivers by children under age thirteen and has created a rebuttable presumption against waiver validity for those ages thirteen to fourteen.³¹² This provides greater protection than almost any other jurisdiction for the youngest juveniles. However, no extra protections are provided for youth older than fourteen, despite the reduced comprehension observed among many youth ages fifteen and sixteen.

V.

RECOMMENDATIONS

As noted in this article, the increasingly settled recognition that children cannot be treated the same as adults for purposes of *Miranda* waiver has led to a variety of reforms aimed to temper the coercive character of police interrogation and lessen the risk of false confessions by juveniles. But these reforms repeatedly fall short of the mark. We can, and must, do more to protect children and youth facing custodial interrogation. Forty years of research on juveniles' *Miranda* waiver capacities, combined with more recent scientific findings on adolescent brain development and youth behavior, firmly establish that youth are substantially compromised in their abilities to provide knowing, intelligent, and voluntary waivers of their *Miranda* rights. The warnings themselves are insufficient to guard against these innate deficits in understanding, appreciation, and waiver-related decision making.

To ensure meaningful application of the intended protections of *Miranda* for youth subject to custodial interrogations, we make the following recommendations:

Youth Who Are Age Fourteen or Younger Should Be Prohibited from Waiving Miranda Rights

Given the high percentage of youth age fourteen and younger who lack the requisite comprehension and decision-making skills to provide knowing, intelligent, and voluntary waivers of *Miranda* rights,³¹³ law enforcement should never interrogate these youth in custodial settings without the presence and assistance of a lawyer. The chief objection to such a requirement is the concern that providing lawyers in the interrogation room will result in a net loss for public

312. N.M. STAT. ANN. § 32A-2-14 (West 2018).

313. See *supra* Part II.

safety: critics suggest that lawyers will advise juveniles to remain silent and deprive police of an important crime-fighting tool.³¹⁴ This concern is likely exaggerated. Not all children who are advised to remain silent will take this advice. More importantly, however, this rationale is insufficient to justify the forfeiture of key constitutional rights. As the Supreme Court stated in *Escobedo v. Illinois*:

[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.³¹⁵

The Court also addressed the connection between the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination:

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly, because most confessions are obtained during the period between arrest and indictment, and "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice. Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.³¹⁶

314. See, e.g., King, *supra* note 144, at 475.

315. *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

316. *Id.* at 488–89. The Court went on to quote Dean Wigmore, a leading authority on the law of evidence:

[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself

For more than a century, the Court's interrogation decisions have attempted to strike a balance between the state's need to maintain public safety while protecting an individual's interest in personal autonomy and freedom from police coercion.³¹⁷ In extending the Fifth Amendment right to the interrogation room—the most inquisitorial stage of the adversarial process—the Court attempted to protect suspects from the intense pressures of custodial interrogation by requiring police to advise suspects of the rights to remain silent and to assistance of counsel via the *Miranda* warning.³¹⁸ Ironically, although *Miranda* was meant to empower suspects to terminate questioning, the law requires that they affirmatively invoke their rights at the moment when they are likely most isolated and subjected to the coercive pressures of custody.³¹⁹ The unwaivable right to assistance of counsel in the interrogation room for youth fourteen and younger is imperative to ensuring that the rights of youth in this age group are fully protected.

For Youth Ages Fifteen and Sixteen, There Should Be a Rebuttable Presumption of an Invalid Waiver

In this mid-adolescent period, *Miranda* waiver capacities are tied closely to intelligence.³²⁰ Given that many youth who come into contact with the juvenile justice system have below average IQ scores,³²¹ which police are generally unable to discern at the time of questioning, there should be a robust rebuttable presumption that youth in this age group cannot provide a valid waiver. A rebuttable presumption would place the burden on the prosecution to show that a particular fifteen- or sixteen-year-old defendant waived his or her *Miranda* rights knowingly, intelligently, and voluntarily. This would recognize and acknowledge the limitations of fifteen- and sixteen-year-old sus-

suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.

Id. (quoting 8 WIGMORE ON EVIDENCE 309 (3d ed. 1940)).

317. FELD, INSIDE THE INTERROGATION ROOM, *supra* note 190, at 4.

318. *Id.* at 5.

319. *See supra* Part III; *see also supra* notes 196–214 and accompanying text.

320. *See supra* notes 153–161 and accompanying text.

321. *See supra* notes 153–161 and accompanying text.

pects as a group and still allow prosecutors to rely on valid *Miranda* waivers. The inquiry should require proof that a fifteen- or sixteen-year-old suspect genuinely understood their *Miranda* rights, appreciated the consequences of waiving them, and independently waived their rights free from police coercion. Meeting the burden would require more than a showing that the defendant was read the rights and then subsequently confessed; rather, it would require evidence that the youth, at the time he or she waived the rights, had the requisite capacities to understand the nature and meaning of those rights, appreciated the implications of waiving and of invoking those rights, and resisted police pressure and made an independent waiver decision.

The *Miranda* Court held that “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”³²² The Supreme Court has since addressed the prosecution’s burden in a few cases, most often addressing the question of whether waiver occurred, rather than the validity of the waiver.³²³ In some cases, dissenting justices have opined that the prosecution’s burden should be higher than the current standard of a preponderance of the evidence. Some dissenters have also noted that the Court has allowed for confessions to be admitted in cases in which the prosecution failed to meet even the low preponderance standard.³²⁴

Although at least one court has noted in a juvenile *Miranda* waiver case that the prosecution currently “bears the heavy burden of showing that a waiver was valid,”³²⁵ this “heavy burden” does not actually amount to a meaningful presumption that a waiver was inva-

322. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

323. In *North Carolina v. Butler*, the Court held that there is a presumption “that a defendant did not waive his rights” such that the prosecution must put forth some evidence that the defendant actually waived (e.g., silence alone does not prove waiver). 441 U.S. 369, 373 (1979). The Court in *Colorado v. Connelly* clarified that this standard also applies to analysis of the voluntariness of the statement such that “[w]henver the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence.” 479 U.S. 157, 168 (1986). More recently, in *Berghuis v. Thompkins*, the Court held that, “[i]f the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate ‘a valid waiver’ of *Miranda* rights. The prosecution must make the additional showing that the accused understood these rights” by a preponderance of the evidence. 560 U.S. 370, 384 (2010) (citation omitted). However, in *Berghuis*, the Court also noted that “the lack of any contention that he did not understand his rights indicates that he knew what he gave up when he spoke.” *Id.* at 371.

324. See, e.g., *Berghuis*, 560 U.S. at 411 (Sotomayor, J., dissenting); *Connelly*, 479 U.S. at 185 (Brennan, J., dissenting).

325. *Rodriguez v. McDonald*, 872 F.3d 908, 922 (9th Cir. 2017).

lid. Certainly, the current presumption as applied to adult *Miranda* waiver cases does not offer meaningful protection to fifteen- and sixteen-year-olds who are at substantial risk of invalid waivers, but whose confessions are too often deemed admissible. The presumption of invalidity we propose would require an in-depth analysis of facts surrounding the waiver and should require that the state establish validity of the waiver by clear and convincing evidence.³²⁶

For Older Teens Ages Seventeen to Nineteen, Although Further Research on Miranda Waiver Capacities Is Needed, Available Research Suggests Special Protections May Be Required

Research on the *Miranda* waiver capacities of older adolescents and young adults is more limited, but there is some research suggesting that this age group may still have difficulty fulfilling the intelligent/appreciation requirement.³²⁷ Although the legal system typically uses ages eighteen and twenty-one as dividing lines between youth and adults, extant research suggests that individuals up to age nineteen appear to appreciate their rights in ways similar to younger adolescents.³²⁸ Additionally, emerging brain science research suggests the decision-making processes of this age group are affected by ongoing brain development that continues through the mid-twenties.³²⁹ With continuing neurological and behavioral research on this age group, as well as ongoing policy debates about whether older adolescents also require differentiated treatment in the justice system, the

326. The clear and convincing standard “is deemed appropriate when there are particularly important individual interests or rights at stake.” Michael S. Greger, *Preliminary Questions of Fact for the Judge: The Standard of Proof for Pre-trial Admissibility Problems*, 20 Sw. U. L. REV. 453, 461–62 (1991). As the Supreme Court has noted, “not only does the standard of proof reflect the importance of a particular adjudication, it also serves as ‘a societal judgment about how the risk of error should be distributed between the litigants.’ The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.” *Cruzan ex rel. Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 283 (1990) (citations omitted) (quoting *Santosky v. Kramer*, 455 U.S. 745, 755 (1982)). The Supreme Court has also found that the clear and convincing standard is justified by “the weight of the defendant’s liberty interests.” Scott M. Brennan, *Due Process Comes Due: An Argument for the Clear and Convincing Evidentiary Standard in Sentencing Hearings*, 77 IOWA L. REV. 1803, 1821 (1992). In the context of juvenile *Miranda* waiver, a clear and convincing standard would appropriately recognize youths’ developmental vulnerabilities by placing the risk of error on the prosecution, realizing the “heavy burden” intended by the courts in this context.

327. *See supra* Part II.

328. *Id.*

329. *Id.*

laws, practices, and policies governing the *Miranda* waiver capacities of seventeen- to nineteen-year-olds should receive further scrutiny.

Research is insufficient for strong policy recommendations at this stage, but the *Miranda* comprehension abilities of this young adult age group and their decision making during interrogation should be examined in future research. In particular, careful attention should be paid to both invocation of *Miranda* rights and the application of the voluntariness test, including whether the totality of circumstances analysis needs to be particularized to the developmental attributes of this older adolescent population in the same way it should be particularized for younger teens. With respect to invocation, the Supreme Court appears to have suffered from at least a mild case of “buyer’s remorse,” walking back earlier strictures on law enforcement’s ability to interrogate suspects once a request for counsel was made³³⁰ to a more relaxed view that looks at how explicit the invocation was,³³¹ the timing of the request,³³² or even the amount of time between an initial request for counsel and later interrogation.³³³ Even in the absence of an express presumption against waiver for this group, their potential “intelligent” waiver difficulties may require a tighter rein on law enforcement in the interpretation of these tests than currently is applied to adult suspects.

330. See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966) (“If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.”).

331. See *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (“There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.”) (citation omitted) (alterations in original) (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)); *Davis*, 512 U.S. at 459 (“Although a suspect need not ‘speak with the discrimination of an Oxford don,’ he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.”).

332. See *Michigan v. Mosley*, 423 U.S. 96, 105–06 (1975) (holding that when a suspect invokes his right to silence during an interrogation, the police may still question him later about other crimes unrelated to the subject matter of the first interrogation).

333. See *Maryland v. Shatzer*, 559 U.S. 98, 109–10 (2010) (holding a fourteen-day break in custody is sufficient to dissipate custody’s coercive effects for purposes of *Miranda* analysis).

CONCLUSION

Aligning *Miranda v. Arizona* with *J.D.B. v. North Carolina* and current scientific research is essential if we are to give youth the full measure of the protections against self-incrimination that the Supreme Court first spelled out over fifty years ago. Knowing that youth are both more vulnerable and susceptible to the coercive pressures of a custodial law enforcement interrogation requires that we view their Fifth and Fourteenth Amendment rights through a different lens than that commonly used for adult suspects. Scientific findings contraindicate a one-size-fits-all totality of the circumstances test that simply takes the age of the suspect into account. A substantial number of young suspects lack the requisite skills to make a voluntary, knowing, and intelligent waiver of their rights, even with special protections; even youth with stronger skill sets still need special consideration given their reduced capacity to meet the requirements of a valid waiver. Just as the Supreme Court articulated a distinctive Eighth Amendment jurisprudence for youth facing the harshest penalties in the criminal justice system, the Fifth and Fourteenth Amendment protections against compelled self-incrimination must likewise yield to the scientific reality that our understanding of youths' constitutional rights may need to be recalibrated to conform to recent research and related scientific findings.