

**WAIVING CHILDHOOD GOODBYE: HOW JUVENILE
COURTS FAIL TO PROTECT CHILDREN FROM
UNKNOWNING, UNINTELLIGENT, AND INVOLUNTARY
WAIVERS OF *MIRANDA* RIGHTS**

KENNETH J. KING*

I. INTRODUCTION

Juveniles, as a group, lack the psychosocial maturity and cognitive capacity to waive *Miranda*¹ rights. Consider the standard *Miranda* warning:

You have the right to remain silent.

If you choose to answer questions, anything you say can and will be used against you in a court of law.

You have the right to consult with an attorney before you answer any questions and to have an attorney present with you while you answer questions.

If you cannot afford an attorney, one will be appointed to represent you at no cost to you.

If you choose to answer any questions you have the right to stop answering at any time.

* Practitioner in Residence, Suffolk University Law School, Juvenile Justice Center. The author wishes to acknowledge research assistance from law students Michelle Lee, Rebecca Tran, and William Pepek, and overall assistance from his wife, Sandra Simpson. A special debt is owed to his son, Jackson King, who is a constant reminder that children do, indeed, think differently than adults, and to Professor Eric Blumenson who patiently read early drafts of this article.

1. *Miranda v. Arizona*, 384 U.S. 436 (1966). Courts review a juvenile's *Miranda* waiver to determine that the totality of the circumstances demonstrates that the waiver was knowingly, intelligently, and voluntarily made. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979) (citing *Miranda*, 384 U.S. at 475-77; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). In the juvenile context, this inquiry is to include consideration of whether the juvenile "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 (1979).

Having these rights in mind, will you waive your rights and answer my questions?²

To make this decision, a juvenile must have a working memory³ adequate to hold the five components of the warning in mind while processing the meaning of the words and the concepts they express and calculating how to answer.⁴ This calculation requires a child to reason about what happens right now and in the future⁵ if she does or does not answer questions. A child must consider what it means that any statement can and will be used against her in court—must she be polite or speak only when spoken to? She must understand what an attorney is and what one could do for her—especially if she is guilty or, more to the point, innocent. She 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. If she chooses to talk, she will have to reflect on what happens if she tells the truth or lies, tells part

2. See *Miranda*, 384 U.S. at 478-79. The above *Miranda* warning has been adapted from the requirements that the Supreme Court spelled out in *Miranda*. See *id.* at 479.

3. Working memory is “the immediately accessible form of memory in which information is held in mind and manipulated.” Russell A. Poldrack & Anthony D. Wagner, *What Can Neuroimaging Tell Us About the Mind?*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 177, 177 (2004).

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. See THOMAS GRISSO, FORENSIC EVALUATION OF JUVENILES 50-51 (1998).

5. First and foremost in the juvenile’s thoughts is what will get her home: talking or remaining silent. The rare juvenile will consider whether, at some time in the future, what is said will lead to prison, secure “treatment,” probation, house arrest, electronic monitoring, expulsion from school, loss of her family’s housing benefits, deportation, or denial of federal student loan assistance for higher education (all possible collateral consequences of a delinquency adjudication). This reasoning process requires a level of psychosocial maturity and brain development that most adolescents have not achieved. Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y B: BIOLOGICAL SCI. 1797, 1798-99, 1800 (2004). Consideration of the consequences of the decision requires a fund of basic knowledge as well as an understanding that a confession may be sufficient proof to convict her of a crime that may be beyond the child’s ken even when she has had previous court experiences. Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356-57 (2003).

of the truth and does not answer other questions, stops answering questions altogether, or tells some truths and some lies.⁶

This is a daunting challenge for most children, but especially for the children of our nation's juvenile delinquency sessions.⁷ Research demonstrates that only 21 percent of all children, as compared to 42.3 percent of adults, comprehend the meaning and significance of the *Miranda* warnings.⁸ The same study concluded that about 55 percent of juveniles, as compared to 23 percent of adults, did not understand at least one component of the warnings.⁹ These statistics, standing alone, suggest that great caution must be used when evaluating a child's waiver of *Miranda* rights. Additionally, children are uniquely vulnerable to modern interrogation techniques, which have led to numerous false confessions.¹⁰ This provides another and equally compelling reason for courts to safeguard children in the interrogation room.

This Article looks at how appellate courts in the fifty states and the District of Columbia evaluate a juvenile's waiver of *Miranda* rights. To ground the decisional law in an understanding of adolescent development, Part II provides an overview of well-established principles of adolescent psychosocial development and the emerging understanding of adolescent brain development. It concludes that the current understanding of adolescent psychosocial and cognitive development demonstrates that most children lack the cognitive capacity to both

6. This type of reasoning or counterfactual thought requires the smooth and efficient coordination of two-way communications between and amongst multiple regions of the brain. Baird & Fugelsang, *supra* note 5, at 1798-99.

7. The term "sessions," as used here, refers to the court rooms in which juvenile delinquency cases are heard.

8. Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1153 (1980).

9. *Id.* at 1153-54. According to Grisso's study, 63.3 percent of children misunderstood at least one word that is critical to the meaning of the *Miranda* warnings. *Id.* Similarly, 44.8 percent of children, compared with 14.6 percent of adults, did not understand the warning that they have the right to consult with an attorney before interrogation and to have an attorney with them during interrogation. *Id.* About 24 percent of children, compared with 8.5 percent of adults, did not understand what it means that anything you say can be used against you in court. *Id.* at 1154.

10. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004). Drizin and Leo have documented more than 125 demonstrably false confessions of which forty were elicited from suspects under eighteen at the time of questioning. *Id.* at 932, 944. The television news magazine *20/20*, which reported on the false confession of Anthony Harris, a twelve-year-old in Ohio, to the murder of his five-year-old neighbor, reported that it found more than a dozen false murder confessions elicited from children under seventeen in the two years from June 1997 to June 1999. *20/20: A Child's Confession* (ABC television broadcast June 18, 1999).

understand their *Miranda* rights and make a knowing and intelligent decision to waive or invoke these rights.

To set the legal context for an examination of state law, Part III discusses the major Supreme Court decisions on the admissibility of statements made by a child during custodial interrogation. Because the law of juvenile *Miranda* waivers has developed in tandem with adult *Miranda* jurisprudence, the states have largely abdicated their responsibility to review a juvenile's waiver of rights during custodial interrogation with the "special caution" required by due process.¹¹ As a consequence, the courts do not protect juveniles who lack the capacity to make a knowing, intelligent, and voluntary waiver of rights.

Finally, this Article argues for the adoption of a rule that a child cannot waive any rights during custodial interrogation, unless she is represented by counsel who is present and has had adequate time to interview and advise the child before questioning commences.

II. A BRIEF PRIMER ON PSYCHOSOCIAL DEVELOPMENT AND NEUROSCIENCE

Understanding the limits of an adolescent's capacity to waive rights requires a basic background in adolescent psychosocial and brain development.¹² Neuroscience, or the science of brain development, helps explain salient features of adolescent development, and points to the conclusion that children do not think and reason like adults because

11. See *In re Gault*, 387 U.S. 1, 45 (1967); *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

12. Our understanding of brain development has drastically expanded in the past ten years. This expansion of knowledge has been made possible by magnetic resonance imaging (MRI) and functional magnetic resonance imaging (fMRI) examinations, which allow scientists to study living brains. Previously, images now available from an MRI could be obtained only by use of x-rays, which exposed research subjects to unacceptable risks from radiation exposure. See Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 77 (2004). Knowledge of brain development was thus limited to what could be gleaned from the study of cadaver brains. Due to relatively low mortality rates in adolescents, the supply of adolescent cadaver brains was not adequate to draw conclusions about how, or if, the brain changed during adolescence. See Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 859 (1999). Living patients who had suffered a brain injury were also useful for studying how injuries to discrete parts of the brain altered behavior. This study, however, limited scientists to those injuries that fortuitously came to their attention. Moreover, neither the study of cadaver brains nor brain-damaged individuals gave scientists insights into the processes of working brains. The use of MRIs to study brain growth and fMRIs to study the brain as it processes stimuli has provided valuable new insights into adolescent decision-making and information processing and has led to a much broader understanding of the ongoing changes in adolescent brains. *Id.*

they cannot. Differences in adult and adolescent perception of the same experiences likely result from the different areas of the brain that each uses to analyze a situation and from the capacity of each to process and reason with information.

The following features of adolescent¹³ psychosocial development are central to an informed discussion of the issue:

- Adolescence is a period in which children undergo rapid and profound physical and emotional transformations; it is a period when the child's adult character, though not yet set, begins to emerge.¹⁴
- One of the main developmental tasks of adolescence is to learn to coordinate emotion, intellect, behavior, and ability while considering long-term goals and consequences.¹⁵
- Adolescents have a much different sense of time and are much more "present-focused" than adults.¹⁶
- Adolescents are much more impulsive than adults; they make decisions more rashly, with little consideration of consequences.¹⁷
- Adolescence is a period of extremely labile emotions.¹⁸

13. Adolescence is defined as the period from the onset of puberty to adulthood. Baird & Fugelsang, *supra* note 5, at 1800.

14. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

15. Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69 (2005). Laurence Steinberg, the chair of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, has written that "at the core of adolescent cognitive development is the attainment of a more fully conscious, self-directed and self-regulating mind. This is achieved principally through the assembly of an advanced 'executive suite' of capabilities, rather than through specific advancement in any one of the constituent elements." *Id.* at 70 (footnotes omitted).

16. Steinberg & Scott, *supra* note 14, at 1012. Adolescents focus almost exclusively on the immediate, making decisions based on immediate gratification with little regard to long-term consequences. See *id.* This may be due to their still-developing ability to reason hypothetically and hence to envision the future; or may be due to the simple fact that, having lived only a short time, each day or year is a proportionally longer experience than it is to an adult. *Id.*

17. *Id.* at 1012-13.

- Adolescents have a much differently calibrated risk-reward meter than do adults.¹⁹
- Adolescents are more susceptible to peer pressure than are adults.²⁰

Reasoning improves throughout adolescence and into adulthood but is always tied to and limited by the adolescent's psychosocial immaturity. Even if an adolescent has an "adult-like" capacity to make decisions, the adolescent's sense of time, lack of future orientation, labile emotions, calculus of risk and gain, and vulnerability to pressure will often drive him or her to make very different decisions than an adult would in similar circumstances.²¹ This is especially the case when an adolescent is called upon to make a decision while under stress and without adult support or guidance. The emerging neuroscience shows that adolescents' increased capacity to reason is not attributable to intellectual development alone,²² but that brain development and growth play a prominent and perhaps controlling role in this process.²³ A very

18. Studies demonstrate that adolescents' emotions change much more frequently and dramatically than do an adult's emotions. *Id.* at 1013.

19. *Id.* at 1012. Labile emotions and impulsiveness occur along with and may contribute to adolescent risk-taking. Increased risk taking by adolescents may stem from a lack of life perspective with which to evaluate risk, a weighing of the known and understood risks that differs from an adult's weighing of the same factors, or from spending more time in groups than do adults. *See id.* at 1012-13. Whatever the reason, adolescents are more likely to take more and greater risks than adults. *Id.* at 1012.

20. *Id.* This may be a consequence of the adolescent's developing identity and the need to fit in or simply because they tend to spend more time in groups than do adults. *See id.* Whatever the reason, peers can, fairly easily, lead a child into activities that, left to his or her own devices, the child would never consider. *Id.*

21. *Id.* at 1011-12.

22. By "intellectual development" I refer to an adolescent's improved capacity to efficiently process and organize information, which develops from expanding bodies of experience and knowledge. *See* THOMAS GRISSO, EVALUATING JUVENILE'S ADJUDICATIVE COMPETENCE, A GUIDE FOR CLINICAL PRACTICE 19 (2005); Steinberg & Scott, *supra* note 14, at 1011.

23. Very basically, the brain is divided into two hemispheres, the left and the right, each of which is composed of lobes. *See* Lab. for Adolescent Sci., Dartmouth Coll., About the Brain, http://www.theteenbrain.com/resources/brain_science/about.php (last visited Feb. 13, 2006). The left hemisphere controls the right side of the body and is involved in the interpretation of information received from the brain's diverse regions or lobes. Areas within the left hemisphere control language, mathematics, and logical thought. Lab. for Adolescent Sci., *supra*. The right hemisphere controls the left side of the body, integrates sensory information, and controls visual skills, including the perception of spatial relationships. *Id.* Lobes of the brain responsible for memory and attention are found in both hemispheres. *Id.* The frontal

basic synthesis of recent developments in neuroscience yields the following principles:

- Physical changes in the structure and composition of the brain continue into adulthood and the second decade of life.²⁴
- Gray matter continues to grow into a person's twenties and goes through several periods of growth and shrinkage. There is a preadolescent increase in gray matter followed by a postadolescent decrease.²⁵

lobe of the brain, that portion of the brain just below the forehead, is responsible for higher-order processes including reasoning, decision-making, judgment, and so-called executive functions. *See id.* Other major lobes include the parietal lobe on the top of the brain, which is responsible for spatial orientation and map interpretation; the occipital lobe to the rear of the brain, responsible for, inter alia, vision; and temporal lobes on either side of the head, the responsibilities of which include hearing, language, memory storage, and emotion. *Id.*

All regions of the brain are composed of gray matter, white matter, and liquid. *Id.* Gray matter is that part of the brain that does the work; that is, stores learned knowledge, interprets the senses, processes information, makes logical connections, conceives of the hypothetical, and everything else the human brain does. White matter, or myelin, is the fatty sheathing of neurons that allows for the efficient transmission of information to and within the brain, including between the hemispheres and the different regions of the brain. *See id.*

The different components of the brain—gray matter, white matter, and fluid—create distinct images in MRI testing. Giedd, *supra* note 12, at 79. In longitudinal studies, neuroscientists have been able to track changes in living brains by analyzing changes in the patterns of gray matter, white matter, and fluid found in children of differing ages and in the same children through multiple MRIs taken over the course of years. *Id.* at 78.

fMRI images allow neuroscientists to track the flow of oxygenated blood in the brain and thereby determine which parts of the brain are being used to perform different tasks or to process different types of information. BARBARA STRAUCH, *THE PRIMAL TEEN* 68-69 (2004); Poldrack & Wagner, *supra* note 3, at 177.

24. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 *NATURE NEUROSCIENCE* 861, 861-62 (1999); Tomas Paus, *Mapping Brain Maturation and Cognitive Development During Adolescence*, 9 *TRENDS COGNITIVE SCI.* 60, 61-63 (2005). The relatively recent discovery that brain development continues into adulthood has turned the conventional wisdom that the brain is fully developed by early childhood on its head. Paus, *supra*, at 60; Robert M. Sapolsky, *The Frontal Cortex and the Criminal Justice System*, 359 *PHIL. TRANSACTIONS ROYAL SOCIETY B: BIOLOGICAL SCI.* 1787, 1792 (2004).

25. Giedd et al., *supra* note 24, at 861-62; *see also* Sowell et al., *supra* note 12, at 860. There is some thought that the preadolescent increase in gray matter is the brain's way of gearing up to have the capacity to learn information and acquire new skills. The brain "bulks up" to be able to make the jump from impulsive, immediate driven child-like thinking and behavior to more thoughtful, future-oriented adult thinking and behavior. STRAUCH, *supra* note 23, at 15. A surfeit of gray matter may be needed for an adolescent

- The brain matures from the bottom up.²⁶ That is, gray matter matures first in the regions of the brain that subserve primary functions, such as motor and sensory systems, and matures later in the higher-order association areas.²⁷
- Myelination, or the process by which neurons are sheathed in fat, continues throughout adolescence and into early adulthood. The sheathing of neurons allows information to be transmitted much faster and much more efficiently.²⁸
- By increasing the speed with which information can be processed and integrated, myelination facilitates more complex cognitive operations, which require the integration and interpretation of information from multiple sources and regions of the brain.²⁹

to learn to delay gratification, properly interpret others' emotions, think of consequences, plan for the future, and think hypothetically or abstractly.

Further, it is believed that gray matter grows and shrinks in a "use-dependent" fashion. Bruce D. Perry & John Marcellus, *The Impact of Abuse and Neglect on the Developing Brain*, 2 COLLEAGUES FOR CHILDREN 5, 5 (1997), available at <http://www.childtrauma.org/ctamaterials/abusebrain.asp>. That is, neurons and neural pathways that are used grow and are maintained. *See id.* Neurons and neural pathways that are not used are pruned. *See id.* This process is thought to make the processing of information more efficient by closing down pathways that are not used and maintaining those that are. *See Baird & Fugelsang, supra* note 5, at 1801; Perry & Marcellus, *supra*. Perry and Marcellus write that "[w]hile experience may alter and change the functioning of an adult, experience literally provides the organizing framework for an infant and child." Perry & Marcellus, *supra*.

26. Regions of the brain that control more primitive functions, like the body's autonomous systems, develop before the areas that control abstract thought and reasoning. Perry & Marcellus, *supra* note 25, at 5. For example, the amygdala is an almond-shaped area that sits above the brain stem in the center of the brain. The amygdala functions as the brain's alarm, or the fight-or-flight center. It tells the body to respond to its perception of danger. STRAUCH, *supra* note 23, at 65. In an adolescent, the amygdala is relatively more developed than are the prefrontal cortices and thereby plays a more prominent role in the interpretation of emotional images than it does in adults. Dr. Deborah Yurgelun-Todd, Presentation at the ABA National Juvenile Defender Leadership Summit, Oct. 2001 (notes on file with author).

27. Giedd, *supra* note 12, at 83.

28. *Id.* at 79-80; Paus, *supra* note 24, at 64.

29. Giedd, *supra* note 12, at 80. Inasmuch as one of the tasks of adolescence is to coordinate emotional reactions with cognition, incompletely myelinated neurons that connect the emotion processing centers of the brain with its information processing and reasoning centers interfere with this task. Paus, *supra* note 24, at 64.

- The frontal lobes, the parietal lobes, and the temporal lobes, all of which are needed to reason abstractly, mature later than other regions of the brain.³⁰ The frontal lobes are the part of the brain that enables abstract thought, inhibits impulsiveness, considers consequences, and weighs alternatives. The frontal lobes, which are commonly believed to be the site of reasoning and higher-order mental processes and have “reciprocal connections” with every other region of the brain and are responsible for “flexibly coordinating” with other regions of the brain, develop last.³¹
- Coordination across hemispheres of the brain is the job of the corpus callosum (CC).³²

While the growing body of research in brain development is still too young to make definitive correlations between brain development and reasoning ability or behavior, what is known strongly suggests that *adolescents do not think like adults because they are physiologically incapable of doing so*. Adolescents do not have the same access to their frontal lobes, nor the same ability to integrate the functions of different

30. See Giedd, *supra* note 12, at 83. The parietal lobes are associated with logic, the temporal lobes with language, and the frontal lobes with abstract thought. STRAUCH, *supra* note 23, at 16; Giedd et al., *supra* note 24, at 861-62. The frontal cortex allows us to understand abstract concepts, the parietal lobes assist us in logically manipulating these concepts, and the temporal lobes assist us in finding the words to articulate our understanding (or lack thereof) of the concepts and myriad possibilities that arise from manipulating them. Moreover, to reason abstractly with relative efficiency requires that all the wires connecting these areas are fully insulated. Full myelination occurs in these regions of the brain later than in regions associated with more basic functions. Paus, *supra* note 24, at 61.

31. Baird & Fugelsang, *supra* note 5, at 1798.

32. Giedd, *supra* note 12, at 80. The CC is a giant mass of white matter that connects similar parts of the brain’s left and right hemispheres. *Id.* The front-to-back organization of neurons in the CC seems to correspond with the brain’s topography. *Id.* Neurons on the front of the CC connect regions in the front of the brain and neurons in the middle and back of the CC connect regions in the middle and back of the brain, respectively. *Id.* A smooth-functioning CC is essential to the brain’s ability to unify sensory fields from each side of the body and coordinate the motor activities of both sides of the body. *See id.* The CC is also involved in “memory storage and retrieval, attention and arousal, [and] language and auditory functions.” *Id.* (footnote omitted). Because “[c]reativity and intelligence are linked to interhemispheric integration,” more complex cognitive tasks—like reasoning and problem solving—require smooth and efficient integration of regions in both hemispheres. *Id.* Recent MRI studies demonstrate that the CC changes “dramatically” during adolescence. *Id.* Unlike other regions of the brain, the CC develops from front to back. *Id.*

regions of their brains as adults. Hence, they have a lesser ability to reason and interpret information than adults have. Adolescents are not wired to process abstract information efficiently or to pick and choose between alternative actions while analyzing the consequences of each. Executive functions,³³ which are essential to reasoning, reside in the frontal cortex. It is the frontal cortex that gathers input from the various regions of the brain, sorts it out, decides what is important and what is not, and tells the person how to react or what to say.³⁴ This part of the brain, unarguably critical to making informed decisions with respect to legal rights, is the part of the brain that develops last.³⁵

Dr. Abigail Baird of the Laboratory for Adolescent Science at Dartmouth College has studied adolescents' ability to engage in consequential or "counterfactual" thought.³⁶ Baird describes counterfactual thought as "imagining a set of circumstances leading up to an event that may have had a different outcome *if only* a critical preceding event did not take place."³⁷ That is, the ability to imagine alternative courses of action based on changing facts, to sort through the alternatives and facts, and to decide which would produce the desired outcome.³⁸ Counterfactual thought requires the ability simultaneously to hold several different hypothetical, or abstract, ideas in working memory and to manipulate those ideas while imagining the consequences of different permutations of facts or circumstances. A child who is called on to waive or invoke her *Miranda* rights must have the ability to reason counterfactually. This child must consider the meaning of the rights and what happens if he or she chooses one course of action or another.

The Baird and Fugelsang article discusses the research concerning factors that affect counterfactual reasoning and brain activation during counterfactual reasoning, and applies these findings to the demands on adolescents in the juvenile justice system.³⁹ Their review, as well as research conducted in Baird's lab, strongly points to the conclusion that adolescents are much less able to engage in sound hypothetical, contingent reasoning than are adults and that the physiological

33. Lab. for Adolescent Sci., *supra* note 23. Executive functioning is "used to define complex cognitive processing requiring the flexible coordination of several subprocesses to achieve a particular goal." Baird & Fugelsang, *supra* note 5, at 1798 (citation omitted).

34. Lab. for Adolescent Sci., *supra* note 23.

35. Baird & Fugelsang, *supra* note 5, at 1798.

36. *Id.* at 1797.

37. *Id.*

38. *Id.* at 1798.

39. *Id.* at 1797-1804.

immaturity of adolescent brains is a major factor in adolescents' inability to perform these tasks.⁴⁰

Counterfactual reasoning is heavily intertwined with the brain's executive functions that are the domain of the prefrontal cortex.⁴¹ Baird and Fugelsang write that "the emerging view suggests" that to perform efficient counterfactual reasoning, "multiple brain regions combine with each other in vast numbers of ways, depending on the task requirements and, more generally, on the types of skills that a person, within a specific context, develops."⁴² To think counterfactually, the adolescent must utilize the late-developing prefrontal cortex as a command and control center to coordinate the smooth exchange of information between diverse regions of the brain and across the hemispheres of the brain. The research documenting the development of the prefrontal cortex during late adolescence and into early adulthood provides empirical support for Baird and Fugelsang's conclusion that "adolescents may lack the neural hardware to generate behavioral alternatives in situations demanding a response."⁴³ The circuitry simply is not sufficiently complete to allow the brain to exchange information among its regions while holding different pieces of information in working memory.⁴⁴ Baird and Fugelsang note that:

[it] is the interaction of continued experience and refinements in the adolescent brain that enable the emergence of counterfactual reasoning, as well as the appreciation of consequences, in the absence of actual experience. What the evidence . . . suggests is that it may be physically impossible for adolescents to engage in counterfactual reasoning, and as a result of this are often unable to effectively foresee the possible consequences of their actions.⁴⁵

40. *Id.* at 1801-02. In a talk at Suffolk University Law School, Baird described research that leads to the conclusion that while some adolescents can think of as many permutations of a hypothetical situation as can adults, the adolescent's permutations were not nearly as logical or practical as were the adults. Dr. Abigail Baird, Address at the Juvenile Justice Center Training Conference: Close Encounters with the Adolescent Mind (June 17, 2005) (transcript available at the Advanced Legal Studies office at Suffolk Law School).

41. Lab. for Adolescent Sci., *supra* note 23.

42. Baird & Fugelsang, *supra* note 5, at 1799.

43. *Id.* at 1801.

44. The significant development in the corpus callosum late in adolescence also lends support to this conclusion. *See supra* note 32.

45. Baird & Fugelsang, *supra* note 5, at 1801.

Dr. Deborah Yurgelun-Todd of Harvard Medical School and McLeans Hospital in Belmont, Massachusetts has studied how adults and adolescents process emotional information as expressed by human faces. By asking both adults and adolescents to perform an exercise that required them to process emotional stimuli while they were in an fMRI machine, she was able to study which regions of the brain were active in each group. She determined that adults processed the stimuli with their frontal lobes, while adolescents processed it with the amygdala. As noted, the frontal lobes are the reasoning—the “stop and wait a moment”—centers of the brain. The amygdala, in contrast, is a much more primitive portion of the brain and is strongly associated with fight-or-flight, survival decisions. This suggests that adults are wired to be reflective when interpreting emotional stimuli while adolescents are wired to be reactive.⁴⁶ A child is more likely to react than to try to think through his or her options in an emotionally charged situation. In the same study, Yurgelun-Todd also found that adolescents frequently misidentified facial expressions and identified expressions as exhibiting anger or fear where adults saw something else.⁴⁷ These findings suggest that kids are doubly handicapped in stressful situations involving emotional stimuli. That is, they both misinterpret the stimuli they are trying to process and they lack the ability to access their higher-order reasoning centers when considering how to respond to the stimuli.

The developmental characteristics and neuroscience research findings listed above are based on so-called “normal” or healthy children.⁴⁸ The children who populate the nation’s delinquency sessions are, for the most part, not normal or healthy. As a group, the children of the delinquency court are markedly mentally ill.⁴⁹ Many suffer from co-

46. In this research, Yurgelun-Todd showed a set of pictures of faces, which had been well validated as depicting specific emotions, to adults and adolescents while in an fMRI and asked them to identify the emotion. See *Inside the Teenage Brain*: PBS Interview with Deborah Yurgelun-Todd, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html> (last visited Feb. 13, 2006) [hereinafter *Inside the Teenage Brain*]. By seeing which regions of the adolescents’ and adults’ brains showed an increased flow of oxygenated blood, she was able to determine which region of the brain they used to process the stimuli and identify the emotion. *Id.* Adolescents processed this stimuli through the amygdala, while adults used their frontal lobes. *Id.*

47. *Id.*

48. Giedd’s work was done on “healthy” children, and Yurgelun-Todd refers to testing “super normal” children; that is, children who are free of pathology, including mental illness, substance abuse, developmental delays, or learning disorders, and have no family history of pathology. Giedd, *supra* note 12, at 79; Yurgelun-Todd, *supra* note 26.

49. A 1994 study based on site visits to ninety-five public and private juvenile facilities found that 73 percent of the children reported mental health problems. Nat’l Mental Health Ass’n, Fact Sheet: Prevalence of Mental Disorders Among Children in the

occurring disorders such as a substance-abuse disorder and a mental health diagnosis or multiple mental health diagnoses.⁵⁰ A much higher percentage of children in delinquency detention centers suffer learning disabilities than do children in the population at large.⁵¹ Many of the children of the delinquency court have been abused or neglected and were in the custody of state child protective services before they were charged as delinquents.⁵² These children, laboring under the burdens of

Juvenile Justice System, <http://www.nmha.org/children/justjuv/prevalence.cfm> (last visited Feb. 13, 2006). A study of Maryland juvenile facilities revealed that 57 percent of the children had a history of mental illness and that 53 percent had at least one diagnosed mental disorder. *Id.* Approximately 77 percent of the children in Virginia secure detention facilities met diagnostic criteria for a mental health disorder, while research on children in Georgia's detention facilities indicates that 61 percent of the youth had a mental disorder, including substance-abuse disorders. *Id.* In South Carolina, a random sample of youth in state-run juvenile justice facilities found that 72 percent met all criteria for at least one mental-disorder diagnosis. *Id.* Of the children incarcerated by the California Youth Authority, 32 percent of boys and 49 percent of girls met full diagnostic criteria for post-traumatic stress disorder. *Id.* For further information concerning the mental health status of delinquent adolescents, see Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 33, 38-40 (Thomas Grisso & Robert G. Schwartz eds., 2000) (summarizing studies of disorders in adolescents and delinquent adolescents).

50. Approximately 45 percent of children in South Carolina juvenile justice facilities and 32 percent of those in Maryland facilities have had psychotic symptoms and psychotic disorders, respectively. Nat'l Mental Health Ass'n, *supra* note 49. Two-thirds of the incarcerated children in Maryland and 44 percent of the youths in Georgia had multiple diagnoses. *Id.* A review of the literature on the mental health needs of children in detention facilities found that between 74 percent of girls and 66 percent of boys met the criteria for a current mental disorder. BONITA M. VEYSEY, NAT'L CTR. FOR MENTAL HEALTH & JUVENILE JUSTICE, *ADOLESCENT GIRLS WITH MENTAL HEALTH DISORDERS INVOLVED WITH THE JUVENILE JUSTICE SYSTEM*, (2003) available at http://www.ncmhjj.com/pdfs/Adol_girls.pdf (citing L.A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133, 1133-43 (2002)). Further, according to Veysey, girls are more likely than boys to have co-occurring disorders such as a substance abuse disorder and a mental health diagnosis. *Id.* (citing T.P.M. Ulzen et al., *The Nature and Characteristics of Psychiatric Comorbidity in Incarcerated Adolescents*, 43 CANADIAN J. OF PSYCHIATRY 57, 57-63 (1998)); see also Kazdin, *supra* note 49, at 40.

51. While about 7 percent of all public school students have identified learning disabilities, estimates of children in detention with learning disabilities range from 12 percent to 70 percent. Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389, 389 (1995). The Coalition for Juvenile Justice estimates that between 70 percent and 87 percent of incarcerated children have learning or emotional disabilities that interfere with their education. COALITION FOR JUVENILE JUSTICE, *ABANDONED IN THE BACK ROW: NEW LESSONS IN EDUCATION AND DELINQUENCY PREVENTION* (2001); see also, Kazdin, *supra* note 49, at 40.

52. In 1995, a Massachusetts legislative report found that two-thirds of the children committed to the state Department of Youth Services (DYS, the Massachusetts

mental illness, substance abuse, impaired understanding, learning disabilities, or parental abuse and neglect, are at grave risk of making hasty, thoughtless decisions to waive rights—decisions that do not fairly qualify as “knowing, intelligent and voluntary.”⁵³ These children are not protected by the totality test as it has been developed in state courts. It is for the protection of these children that counsel must be present prior to and during any period of custodial interrogation.

III. SUPREME COURT JURISPRUDENCE AND THE INTERROGATION OF CHILDREN

The Supreme Court’s first decisions on the admissibility of a child’s statement obtained through custodial interrogation emphasized the child’s need for adult guidance to place him or her on more equal footing with the police and to ensure that constitutional rights were real, and not mere abstractions.⁵⁴ In *Haley* the Court held inadmissible a statement taken from a fifteen-year-old boy after he had been questioned for about five hours by “relays” of one or two police officers at a time.⁵⁵ The Court noted that, although the boy was not advised of his rights to counsel or to remain silent, his typed statement began with an advisement of rights.⁵⁶ Key to the Court’s determination that the

juvenile correctional agency) were in the custody of the state Department of Social Services (DSS, the state agency that provides services to abused and neglected children) before being committed to the DYS. DRAFT RESPONSE OF S. COMM. ON POST AUDIT AND OVERSIGHT TO THE MASS. S. RELATIVE TO S. ORDER 1896, at 3 (Comm. Print 1995) (on file with author). A history of abuse or neglect has been found to “increase[] the odds of future delinquency and future adult criminality overall by 29 percent.” CATHY S. WIDOM & MICHAEL G. MAXFIELD, NAT’L INST. JUSTICE, AN UPDATE ON THE “CYCLE OF VIOLENCE” 1 (2001), available at <http://www.ncjrs.org/pdffiles1/nij/184894.pdf>. A history of abuse or neglect as a child increases the likelihood of arrest as a juvenile by 59 percent. *Id.* As noted above, abuse and neglect have profound implications for brain development. Abuse and neglect tend to leave children focused on nonverbal cues or tuned out to varying degrees. Either way, the child is likely to miss important information in social interactions. See Bruce D. Perry, *The Neurodevelopmental Impact of Violence in Childhood*, in PRINCIPLES AND PRACTICE OF CHILD AND ADOLESCENT FORENSIC PSYCHIATRY 221, 221-38 (D. Shetky & E.P. Benedek eds., 2001).

53. See *Fare v. Michael C.*, 442 U.S. 707, 724 (1979).

54. See *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); *Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962).

55. *Haley*, 332 U.S. at 598.

56. *Id.* The statement began, “we want to inform you of your constitutional rights, the law gives you the right to make this statement or not as you see fit. It is made with the understanding that it may be used at a trial in court either for or against you,” and included an acknowledgment that the boy was under no force, duress, or compulsion, and that no promises had been made to him. *Id.*

statement was obtained in violation of the boy's due process rights was the fact that "no friend or counsel of the boy was present" during the interrogation.⁵⁷

The *Haley* Court's admonition that a juvenile's waiver of rights must be examined with "special care" was reinforced fourteen years later when the Court considered the admissibility of a confession obtained from a fourteen-year-old boy in the absence of a concerned adult or counsel.⁵⁸ The holding in *Gallegos* underscores that the child's age and the absence of an adult or counsel—not the length or the aggressive, accusatory nature of the questioning—were the critical factors in *Haley*'s due process analysis. *Gallegos* concerned the admissibility of the statements of a fourteen-year-old boy who was a suspect in the robbery and brutal beating of an elderly man.⁵⁹ The boy admitted his participation in the assault and robbery "immediately"⁶⁰ when he was picked up by the police. Five days later, the boy was questioned again to "formalize" the earlier confessions.⁶¹ Prior to the last statement, the boy

57. *Id.* The Court wrote:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion.

Id. at 599.

58. *Gallegos*, 370 U.S. at 54.

59. The victim died thirty-seven days after the assault and robbery. *Id.* at 49-50.

60. *Id.* at 50. The boy made his first admission prior to an arrest while he and his brothers were being questioned in a police cruiser. *Id.* at 56-57 (Clark, J., dissenting). A younger brother also admitted his complicity in the attack, and all stated that the third brother was not involved. *Id.* The fourteen-year-old's admission was repeated upon arrival at the juvenile hall. *Id.*

61. *Id.* at 59. In the intervening five days, the boy was held in a juvenile detention hall. *Id.* at 58-59. Though he was not permitted to attend classes with other boys during the day while he was assessed to determine if he would pose a danger to the

was told that he could be charged with murder, that he did not have to make a statement, and that he could have an attorney or his parents present if he chose.⁶² The admissibility of the formal confession was at issue before the Supreme Court.⁶³ Justice Douglas' plurality opinion made it clear that the chief concern about the admissibility of this statement arose from the questioning of a young boy who had no adult guidance.⁶⁴ It was of little importance to the Court that the formal statement merely confirmed the first confession, which was made immediately, without prolonged or abusive questioning, and was ratified in a second statement later the same day.⁶⁵ Justice Douglas wrote that:

a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

... He would have no way of knowing what the consequences of his confession were without advice as to his rights—*from someone concerned with securing him those rights*—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.⁶⁶

Haley and Gallegos set the stage for *Gault's* holding that the Fifth Amendment's protections against self-incrimination apply to juvenile

other boys, he did take his meals with the other boys, and conversed with his brother who had been detained for the same offense. *Id.* The boy's mother was not allowed to see him when she came to the detention facility outside regular visiting hours, but was told that she could visit him the following day during regular visiting hours. *Id.* at 58.

62. *Id.* at 59.

63. *Id.* at 50.

64. *Id.* at 54.

65. *See id.* at 50, 56-59.

66. *Id.* at 54 (emphasis added).

court proceedings.⁶⁷ In *Gault*, the Court emphasized that “admissions and confessions of juveniles require special caution”⁶⁸ and quoted at length from *Haley* about a juvenile’s need for adult guidance when waiving Fifth Amendment protections.⁶⁹ The court observed that:

[i]f counsel was not present for some permissible reason when an admission was obtained [from a child], the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.⁷⁰

Adolescent fantasy, fright, or despair do not come into play when an adult’s *Miranda* waiver is assessed. Moreover, the Court that decided *Gault* in 1967 was the same Court that decided *Miranda* a year earlier. It is therefore significant that, in discussing the admissibility of a child’s statements, the *Gault* Court relied on *Haley*’s due process formulation as the framework for discussion rather than on *Miranda*’s adult-focused warnings.⁷¹

Though the recognition that juveniles are different from adults permeated the due process analysis of *Haley*, *Gallegos*, and *Gault*,⁷² this recognition was seemingly forgotten in the Court’s decision in *Michael C.*, where the Court abandoned reliance on adult guidance as the measure of the admissibility of a juvenile’s statement in favor of the “totality of the circumstances” test.⁷³ *Michael C.* was the Court’s first post-*Miranda* decision on the admissibility of a child’s confession. Though the Court wrote broadly in *Michael C.*, the case presented a very narrow question.⁷⁴

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

68. *Id.* at 45.

69. *Id.* at 45-46.

70. *Id.* at 55.

71. *Id.* at 45-47, 52, 55.

72. Considerations of fairness, as mandated by the due process clause, animated all of the Court’s early juvenile cases. These decisions recognized that what is fair when a child is concerned may be different from what is fair when adults are involved. *See* *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (holding that there is no right to a jury trial in delinquency proceedings); *In re Winship*, 397 U.S. 358, 368 (1970) (requiring proof of guilt beyond a reasonable doubt in delinquency proceedings); *Kent v. United States*, 383 U.S. 541, 557 (1966) (holding that under the D.C. juvenile code, due process requires a hearing prior to the transfer of a case from juvenile court to adult criminal court for prosecution).

73. *See* *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979).

74. *Id.* at 709.

In *Michael C.*, a sixteen-year-old boy was taken into custody as a suspect in the murder of an elderly man.⁷⁵ He was read the *Miranda* warnings and asked if he would give up his right to an attorney and speak with the police.⁷⁶ The boy responded by asking if he could have his probation officer present.⁷⁷ The interrogating police officer stated that he would not call the probation officer and again asked if the juvenile would talk.⁷⁸ After some additional conversation, which included the juvenile's asking, "How I know you guys won't pull no police officer in and tell me he's an attorney?" the juvenile agreed to waive his *Miranda* rights and gave an inculpatory statement.⁷⁹ The statement was admitted at his trial over counsel's objection that the boy's request to see his probation officer invoked the Fifth Amendment's right to counsel and protection against self-incrimination.⁸⁰ The California Supreme Court reversed the boy's conviction, agreeing that the juvenile had invoked his rights based on its determination that the probation officer occupied a position of trust in the juvenile's life and, that by exercising the *parens patriae* authority of the state, the probation officer was bound to protect the child.⁸¹

The Supreme Court granted certiorari solely to consider whether the California court had extended the *Miranda* holding and reversed.⁸² The Court held that the boy's request to see his probation officer was not the equivalent of a request for an attorney due to the unique role of attorneys in our criminal justice system—especially considering the attorney-client privilege—and that the probation officer had a mixed role of protecting the juvenile while also being the officer of the court responsible for filing delinquency petitions against the juvenile.⁸³ The Court dismissed the boy's argument that by requesting the presence of his probation officer he had invoked his right to remain silent, holding that there was "nothing inherent in the request for a probation officer that requires [the Court] to find that a juvenile's request to see one necessarily constitutes an expression of the juvenile's right to remain silent."⁸⁴

75. *Id.* at 709-10.

76. *Id.* at 710.

77. *Id.*

78. *Id.* at 710-11.

79. *Id.* at 710-11.

80. *Id.* at 711-12.

81. *In re Michael C.*, 579 P.2d 7, 9-11 (Cal. 1978).

82. *Michael C.*, 442 U.S. at 717, 728.

83. *Id.* at 718-23.

84. *Id.* at 724.

Michael C. was argued and decided as a *Miranda* case.⁸⁵ It was not argued as a juvenile interrogation case. That is, unlike *Haley* and *Gallegos*, which were pre-*Miranda* cases that expressly considered a juvenile's need for adult counsel and guidance when subject to custodial interrogation as a requirement of the Due Process Clause of the Fourteenth Amendment, *Michael C.* was premised solely on the Fifth Amendment's guarantee of a privilege against self-incrimination as interpreted by the *Miranda* jurisprudence. For this reason, it is likely that no attention was given to the *Haley* and *Gallegos* decisions or their fundamental import, that is, it is unfair and a violation of due process to allow children to be subjected to custodial interrogation unless a supportive adult is present. As the *Haley* Court recognized, "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."⁸⁶ In *Gallegos*, Justice Douglas, writing for a plurality of the court, expressly addressed the need for adult guidance when a child is questioned, noting that "adult protection" was required lest the child be treated "as if he had no constitutional rights."⁸⁷ Since *Michael C.*'s departure to standard *Miranda* analysis, the law of juvenile waivers has moved away from the notions of fairness that drove the Court's earlier decisions to application of a totality of the circumstances test.

As the Supreme Court articulated in *Michael C.*,

[the] totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.⁸⁸

85. The Supreme Court brief filed on behalf of the respondent juvenile made it clear that the case was argued under the Court's *Miranda* jurisprudence and not under its due process, child-in-need-of-adult-guidance, jurisprudence. Brief of Respondent, *Fare v. Michael C.*, 442 U.S. 707 (1979) (No. 78-334), 1979 WL 199891. Nearly every paragraph in the brief cited to the *Miranda* decision as controlling authority for the juvenile's arguments. *See id.*

86. *Haley v. Ohio*, 332 U.S. 596, 599-600; *see also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

87. *Gallegos*, 370 U.S. at 54-55. The child in *Gallegos* had been advised that he could be charged with murder, that he did not have to make a statement, and that he could have his parents or an attorney with him if he wished. *Id.* at 59 (Clark, J., dissenting).

88. *Michael C.*, 442 U.S. at 725.

The Court's undeniably broad language and its direction to inquire into the juvenile's capacity to understand the warnings, Fifth Amendment rights generally, and the consequences of a waiver of those rights more specifically, suggests that the determination of whether a juvenile has knowingly, intelligently, and voluntarily waived rights will be a broad, probing inquiry. As applied in most state courts, however, there is little examination of a child's capacity to waive rights and little or no deference given to a child's unique vulnerabilities or nascent psychosocial and brain development.

IV. JUVENILE *MIRANDA* WAIVERS IN THE STATE COURTS: THE FAILURE TO PROTECT CHILDREN

A. Overview

Seven states⁸⁹ have created presumptions that a juvenile under a set age cannot waive *Miranda* rights or cannot waive these rights without an opportunity to consult with a parent.⁹⁰ Seven states require that a parent is present during questioning only when the child is younger than a

89. Iowa, IOWA CODE ANN. § 232.11 (West 2000) (stating that a child's right to counsel attaches upon being "taken into custody for any alleged delinquent act that constitutes a serious or aggravated misdemeanor or felony under the Iowa criminal code" and expressly applies to any subsequent questioning by a peace officer or a probation officer; a child under sixteen cannot waive the right to counsel without the written consent of the child's parent; a waiver from a child who is at least sixteen years old is valid "only if a good faith effort has been made to notify the child's parent"); *see* State v. Means, 547 N.W.2d 615, 620 (Iowa Ct. App. 1996); Kansas, *In re B.M.B.*, 955 P.2d 1302, 1312-13 (Kan. 1998) (stating that a child under the age of fourteen cannot waive the rights to silence or an attorney without first having an opportunity to consult with a parent who is informed of the child's rights); Massachusetts, *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) (stating that a child under the age of fourteen cannot waive *Miranda* rights without consulting with an adult who is interested in the child's welfare, who understands the warnings, and who has the opportunity to explain the rights and the significance of waiver to the child; if a child is fourteen or older, he or she should ordinarily be given an opportunity to consult with an interested adult, and in the absence of such opportunity the waiver will be upheld only if the evidence shows that the child has a "high degree of intelligence, experience, knowledge, or sophistication"); Montana, MONT. CODE ANN. § 41-5-331 (2005) (stating that 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); New Jersey, *State v. Presha*, 748 A.2d 1108, 1114 (N.J. 2000) (stating that a juvenile under fourteen cannot waive *Miranda* rights in the absence of a parent unless the parent is actually unavailable or unwilling to be present for questioning); *see also* State *ex rel.* Q.N., 843 A.2d 1140, 1146-47 (N.J. 2004) (stating that a parent who refused to remain in the room while a twelve-year-old child was being interrogated was available); New Mexico, N.M. STAT. ANN. § 32A-2-14 (LexisNexis 2004) (providing a statutory prohibition on the admission of a statement by a child under thirteen in the adjudicatory phase of a delinquency proceeding and a presumption that a child between thirteen and fourteen is incapable of making a valid waiver of *Miranda* rights; and establishing totality factors for assessing waivers of children over fourteen years old); Washington, WASH. REV. CODE ANN. § 13.40.140(10) (West 2004) (stating that a parent must waive rights when a child is under twelve years of age); *see also* Dutil v. State, 606 P.2d 269, 270-72 (Wash. 1980) (noting a totality analysis if a child is over twelve years old).

90. For convenience, the term "parent" is used to refer to all persons who have a caretaking relationship with a child and includes grandparents, adult siblings or other relatives, legal guardians, kinship caretakers, foster parents, and other adults who care for or are interested in the child's welfare.

designated age, typically thirteen or fourteen.⁹¹ Thirty-five states and the District of Columbia apply the totality-of-the-circumstances test derived from *Michael C.*, essentially without modification.⁹² In the states that

91. Colorado, COLO. REV. STAT. ANN. § 19-2-511 (West 2005) (stating that—subject to exceptions for emancipated children, children who misrepresent their age, and runaways from another state—if the child is under eighteen, a parent or the child’s legal counsel must be present and informed of the child’s rights for any custodial statement to be admissible; the child *and* the parent may waive parental presence in writing); Connecticut, CONN. GEN. STAT. ANN. § 46b-137 (West 2004) (stating that no statement of a child made during custodial interrogation is admissible unless a parent is present and advised of the child’s rights); *see also* *State v. Ledbetter*, 818 A.2d 1, 8 (Conn. 2003) (limiting the statute’s protection to those children who are prosecuted in juvenile court); Indiana, IND. CODE ANN. § 31-32-5-1 (LexisNexis 2003) (stating that a child’s rights can be waived only by a parent or legal counsel unless the child has been emancipated); North Carolina, N.C. GEN. STAT. ANN. § 7B-2101 (2003) (stating that a child under fourteen cannot waive his or her rights unless a parent or attorney is present; if an attorney is not present, the parent and child must be advised of the child’s rights, including the right to have a parent present during interrogation); North Dakota, N.D. CENT. CODE § 27-20-26 (2005) (stating that a child has a nonwaivable right to be represented either by counsel or by a parent); *see also* *State v. Ellvanger*, 453 N.W.2d 810, 813 (N.D. 1990) (holding that a child’s right to counsel extends to investigative interviews once the investigation has focused on the child); Oklahoma, OKLA. STAT. ANN. tit. 10, § 7303-3.1 (West 1998) (stating that advisement of rights attendant to custodial interrogation must take place in the presence of either the parent or legal counsel); Vermont, *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982) (holding that, under the Vermont Constitution, a juvenile must be given the opportunity to consult with an adult who is interested in the welfare of the juvenile, is independent from the prosecution, and has been informed of the juvenile’s rights).

92. These states are: Alabama, *C.M.B. v. State*, 594 So.2d 695, 700-01 (Ala. Crim. App. 1991); Alaska, *Quick v. State*, 599 P.2d 712, 719 (Alaska 1979); *Watkinson v. State*, 980 P.2d 469, 472 (Alaska Ct. App. 1999); Arizona, *In re Andre M.*, 88 P.3d 552, 555 (Ariz. 2004); Arkansas, *Matthews v. State*, 991 S.W.2d 639, 643-44 (Ark. Ct. App. 1999); ARK. CODE ANN. § 9-27-317(i)(2)(A)-(C) (2002) (stating that police cannot question a juvenile in custody if the juvenile indicates in any manner a desire to end the questioning, to speak with a custodial caretaker, or to consult counsel); California, *Ahmad A. v. People*, 263 Cal. Rptr. 747, 752-53 (Ct. App. 1989); Delaware, *Marine v. State*, 607 A.2d 1185, 1195-96 (Del. 1992); District of Columbia, *In re M.A.C.*, 761 A.2d 32, 36 (D.C. 2000); Florida, *J.P. v. State*, 895 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2005); Georgia, *State v. Rodriguez*, 559 S.E.2d 435, 437 (Ga. 2002); Hawaii, *In re Doe*, 978 P.2d 684, 691-92 (Haw. 1999); Idaho, *State v. Doe*, 50 P.3d 1014, 1018 (Idaho 2002); Illinois, *People v. Lee*, 781 N.E.2d 310, 316 (Ill. App. Ct. 2002); Kentucky, *Brasher v. Commonwealth*, No. 2000-SC-130-MR, 2003 WL 1204081, at *2 (Ky. Feb. 20, 2003); Louisiana, *State v. Fernandez*, 96-2719, p.5 (La. 4/14/98); 712 So. 2d 485, 487; Maine, *State v. Nicholas S.*, 444 A.2d 373, 376 (Me. 1982); Maryland, *McIntyre v. State*, 526 A.2d 30, 37 (Md. 1987); Michigan, *People v. Hall*, 643 N.W.2d 253, 257 (Mich. Ct. App. 2002); Minnesota, *State v. Burrell*, 697 N.W.2d 579, 592-93 (Minn. 2005); Mississippi, *Woodham v. State*, 98-KA-01689-SCT (¶ 17); 800 So. 2d 1148, 1154 (Miss. 2001); Missouri, *State v. Barnaby*, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997); Nebraska, *State v. J.G.*, 437 N.W.2d 153, 155 (Neb. 1989); Nevada, *Quiriconi v. State*, 616 P.2d 1111, 1114 (Nev. 1980); New Hampshire, *State v. Farrell*, 766 A.2d 1057, 1061 (N.H. 2001); New York, *In re Phillip J.*, 683 N.Y.S.2d 293, 295 (App. Div. 1998); Ohio,

have a parental-presence rule or a presumption that some children cannot waive their *Miranda* rights, the totality test is used to evaluate waivers made in the presence of a parent or by a child of the presumed age of capacity to waive *Miranda* rights. Because the totality test is common to all states, the application of this test is the focus of the following discussion.⁹³

B. *The Totality Test as Applied by the States*

Through the totality analysis, a court determines whether the *Miranda* waiver was voluntary, knowing, and intelligent. A waiver is voluntary if it “was the product of a free and deliberate choice rather than intimidation, coercion, or deception.”⁹⁴ It is knowing and intelligent when “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”⁹⁵ The *Miranda* waiver will be upheld only when the totality of the circumstances shows “both an uncoerced choice and the requisite level of comprehension.”⁹⁶ Though each state⁹⁷ defines the totality that is

In re Goins, 738 N.E.2d 385, 388 (Ohio Ct. App. 1999); Oregon, State *ex rel.* Juvenile Dep’t v. Deford, 34 P.3d 673, 684 (Or. Ct. App. 2001); Pennsylvania, Commonwealth v. Carter, 855 A.2d 885, 890 (Pa. 2004); Rhode Island, *In re Joseph B.*, 822 A.2d 172, 174 (R.I. 2003); South Carolina, *In re Williams*, 217 S.E.2d 719, 722 (S.C. 1975); South Dakota, State v. Horse, 2002 SD 47, ¶ 13, 644 N.W.2d 211, 218; State v. Caffrey, 332 N.W.2d 269, 271 (S.D. 1983); Tennessee, Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975); Utah, State v. Dutchie, 969 P.2d 422, 427 (Utah 1998); Virginia, Grogg v. Commonwealth, 371 S.E.2d 549, 556 (Va. Ct. App. 1988); West Virginia, State v. Jones, 607 S.E.2d 498, 504-05 (W. Va. 2004); Wisconsin, *In re Jerrell C.J.*, 2005 WI 105, ¶ 43, 283 Wis. 2d 145, ¶ 43, 699 N.W.2d 110, ¶ 43; Wyoming, Rubio v. State, 939 P.2d 238, 242 (Wyo. 1997).

93. The remaining state, Texas, requires that *Miranda* warnings be given to the child by a magistrate and in the absence of a law enforcement official. TEX. FAM. CODE ANN. § 51.095(a)(1) (Vernon Supp. 2005). The magistrate is required to inform the juvenile of the right to remain silent, that any statement can be used against the juvenile in court, and that he or she has the right to the assistance of counsel, including appointed counsel. The magistrate must also witness the juvenile signing the statement outside the presence of any law enforcement officials. *Id.* An unarmed bailiff or law enforcement officer may be present if necessary for the personal safety of the magistrate or other court personnel. *Id.* § 51.095(a)(1)(B)(i). The magistrate must be “fully convinced that the child understands the nature and contents of the statement and that the child is signing the same voluntarily, and . . . the magistrate must sign a written statement verifying the foregoing requisites have been met.” *Id.* § 51.095(a)(1)(B)(ii).

94. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). As part of the adult *Miranda* jurisprudence, understanding the consequences of a waiver means no more than knowing that the statement may be used in court, and does not require any real understanding of the law. *Colorado v. Spring*, 479 U.S. 564, 574 (1987).

95. *Moran*, 475 U.S. at 421.

96. *Id.*

relevant to this determination somewhat differently, most of the definitions contain common features.⁹⁸ A very few states expressly require consideration of whether the juvenile's level of knowledge and maturity enabled the juvenile to make a reasoned decision in the totality calculus.⁹⁹ A handful more track *Michael C.*'s language and consider whether the child "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights"¹⁰⁰ as part of the totality analysis.

97. The New Hampshire Supreme Court uses the most explicitly expansive definition of the totality of the circumstances, having set out the following fifteen factors to be examined by the courts when passing on a juvenile's waiver of *Miranda* rights:

(1) the chronological age of the juvenile; (2) the apparent mental age of the juvenile; (3) the educational level of the juvenile; (4) the juvenile's physical condition; (5) the juvenile's previous dealings with the police or court appearances; (6) the extent of the explanation of rights; (7) the language of the warnings given; (8) the methods of interrogation; (9) the length of interrogation; (10) the length of time the juvenile was in custody; (11) whether the juvenile was held incommunicado; (12) whether the juvenile was afforded the opportunity to consult with an adult; (13) the juvenile's understanding of the offense charged; (14) whether the juvenile was warned of possible transfer to adult court; and (15) whether the juvenile later repudiated the statement.

State v. Benoit, 490 A.2d 295, 302 (N.H. 1985); *see also Hall*, 643 N.W.2d at 257 (providing a nine-factor test that includes consideration of law enforcement compliance with statutes and court rules on parental notification); *C.M.B.*, 594 So. 2d at 700-01 (providing a nine-factor test that is modified to include consideration of whether the interrogation is before or after formal charges have been filed); *Rodriguez*, 559 S.E.2d at 436 (providing a nine-factor test that includes consideration of whether the youth refused to give a statement on any prior occasion); *Comer v. Tom A.M.*, 403 S.E.2d 182, 186-87 (W. Va. 1991) (same).

98. *See In re Andre M.*, 88 P.3d 552, 555 (Ariz. 2004). Other states that use the same or a similar totality test include: Arkansas, *Matthews v. State*, 991 S.W.2d 639, 643 (Ark. Ct. App. 1999); Idaho, *State v. Doe*, 50 P.3d 1014, 1018 (Idaho 2002) (adding a consideration of whether the juvenile had been deprived of food or sleep); Illinois, *People v. Lee*, 781 N.E.2d 310, 316-17 (Ill. App. Ct. 2002); Louisiana, *State ex rel. J.M.*, 99-1271, p. 2 (La. App. 4 Cir. 6/30/99); 743 So. 2d 228, 229; Ohio, *In re Goins*, 738 N.E.2d 385, 388 (Ohio Ct. App. 1999).

99. Alaska, *State v. J.R.N.*, 861 P.2d 578, 581 (Alaska 1993); Florida, *J.P. v. State*, 895 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2005); Nebraska, *State v. Stewart*, 250 N.W.2d 849, 856 (Neb. 1977); New York, *In re Phillip J.*, 683 N.Y.S.2d 293, 295 (App. Div. 1998).

100. District of Columbia, *In re M.A.C.*, 761 A.2d 32, 36 (D.C. 2000) (quoting *Fare v. Michael C.*, 442 U.S. 707, 725 (1979)); Hawaii, *In re Doe*, 978 P.2d 684, 691 (Haw. 1999) (same); Minnesota, *State v. Burrell*, 697 N.W.2d 579, 592-93 (Minn. 2005) (same); Missouri, *In re A.D.R.*, 603 S.W.2d 575, 584 (Mo. 1980) (same); Virginia, *Grogg v. Commonwealth*, 371 S.E.2d 549, 556 (Va. Ct. App. 1988) (same); Wyoming, *Rubio v. State*, 939 P.2d 238, 242 (Wyo. 1997) (same). States that explicitly apply the reasoning of *Michael C.* without directly quoting the case include Mississippi, *Woodham v. State*, 98-KA-01689-SCT (¶ 17); 800 So. 2d 1148, 1154 (Miss. 2001); Oregon, *State*

The most common features of the states' formulations of the totality test are: consideration of the child's age, intelligence, education and mental condition; whether a parent or other adult advisor is present; prior experience with courts or law enforcement, if any; and the nature of the questioning (including the length, tone, accusatory nature, police tactics, and time and place of questioning). Though *Michael C.* demands that attention be paid to the child's capacity to understand and waive the *Miranda* rights and to appreciate the consequences of the waiver, scant attention is given to these factors in the reported decisions. Common features of the totality tests are discussed in greater detail below.

The Maine Supreme Court has cautioned that use of the totality test to evaluate a juvenile's *Miranda* waiver requires

[I]bberal application of the rule in favor of juvenile rights Objective satisfaction by the State of several of the relevant factors articulated in case law can not substitute for a critical examination of the circumstances surrounding the confession and a sensitive understanding of a juvenile's vulnerability in a custodial atmosphere. The simple balancing of factors can only lead to a cursory appraisal of the juvenile's position thereby threatening the protection of his fundamental constitutional rights.

. . . In appraising [the totality] factors, however, courts must never lose sight of the fact that a juvenile's vulnerability and immaturity places him at a greater disadvantage than an adult when dealing with the police.¹⁰¹

Maine's application of the totality test is in line with the Supreme Court's directive in *Haley* and *Gallegos* that due process requires that a juvenile's waiver of rights be reviewed with extra caution.¹⁰² A review of several hundred juvenile *Miranda* cases suggests that few states follow Maine's articulated, solicitous approach to the appraisal of juvenile waivers. Rather, the cases reflect grudging, if any, accommodations to the youth of the accused. State courts routinely rely on analysis developed in the adult *Miranda* jurisprudence—ignoring that children are not adults—to defeat a child's claim that the waiver was not

ex rel. Juvenile Dep't v. Deford, 34 P.3d 673, 684 (Or. Ct. App. 2001); Rhode Island, *In re Joseph B.*, 822 A.2d 172, 174 (R.I. 2003); South Carolina, *In re Williams*, 217 S.E.2d 719, 722 (S.C. 1975); Utah, *State v. Dutchie*, 969 P.2d 422, 427 (Utah 1998).

101. *State v. Nicholas S.*, 444 A.2d 373, 377 (Me. 1982).

102. *Gallegos v. California*, 370 U.S. 49, 53 (1962) (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948)).

knowing, intelligent, or voluntary. This approach does not protect children and reinforces the wisdom of the requirement of *Haley* and *Gallegos* that a child have the benefit of adult guidance whenever subjected to custodial interrogation.

1. AGE, EDUCATION, INTELLIGENCE, AND MENTAL CONDITION

This combination of closely related factors is typically analyzed together. Logic dictates that age and educational achievement are often directly related, as are intelligence and mental condition. Young children, children with little formal education, children of limited intelligence, and children who suffer mental disabilities should be more likely to be held to be incapable of making valid waivers of their rights. However, review of the decisional law demonstrates that neither youth, limited intelligence, nor mental disorder is a bar to a court's finding a waiver to be valid.

Miranda waivers by children as young as eleven have been upheld in South Carolina,¹⁰³ Ohio,¹⁰⁴ and Oregon,¹⁰⁵ even when no parent was

103. *In re Christopher W.*, 329 S.E.2d 769, 769-70 (S.C. Ct. App. 1985). In *Christopher W.*, a police officer asked an eleven-year-old boy found at the scene of a fire at a church why the boy was out past his probation curfew. *Id.* at 769. The boy replied that he had not set the fire. *Id.* Finding this answer suspicious, the officer took the boy to the police station where he read *Miranda* warnings and brought out a copy of the New Testament. *Id.* He then asked the boy a series of questions about the boy's belief in God and his understanding of a church as God's home. *Id.* The officer then asked the boy if he could put his hand on the Bible, look the officer in the eye, and deny setting the fire. *Id.* at 770. After failing in this, the boy stated, "I didn't know it was going to be that big a fire." *Id.* The waiver was upheld on appeal without discussion of the boy's understanding of the warnings, how his understanding was determined, his intelligence, grade level, or prior court experience (except for a reference to the fact that he was on probation). *Id.* The opinion also did not discuss the use of the Bible as a tactic designed to overbear the child's will.

104. *Goins*, 738 N.E.2d at 386, 390. In *Goins*, an eleven-year-old boy was accused of sexually abusing his six-year-old cousin, with whom he and his mother lived. *Id.* at 386. The six-year-old reported the abuse to his mother, who told the eleven-year-old's mother. *Id.* The suspect's mother subsequently called the county sheriff and made arrangements for both families to go to the county children's services office for interviews. *Id.* There, they were met by a child-abuse investigator and a deputy sheriff. *Id.* After the younger boy was interviewed, the eleven-year-old and his mother were taken to a room with the deputy and the child services worker. *Id.* The deputy took about ten to fifteen minutes to explain and review each of the *Miranda* rights with the boy and his mother. *Id.* at 386-87. If either indicated that they did not understand a right, the deputy explained it until they did. *Id.* at 387. The boy testified that the deputy read and explained his rights and that he knew that "silent" meant "[t]o not say anything . . . [l]ike, be quiet" and that when he told the deputy that he did not understand a right, "[the deputy] sort of explained it." *Id.* at 389. The testimony showed that at the deputy's request, the boy and his mother consented to her leaving the interview. *Id.* at

present to support the child during interrogation and when the child had little or no relevant court experience to draw from.¹⁰⁶ These cases highlight how the result might have been different if *Haley's* and *Gallegos's* requirement that young children receive adult guidance was the primary reference point for evaluation of a juvenile's waiver of rights rather than *Michael C.'s* totality analysis. When ruling on the admissibility of a statement made by a particularly young child or one of limited intelligence, courts routinely note that youth and lack of intelligence alone do not disqualify a person from making a knowing and intelligent waiver of rights.¹⁰⁷ Courts often reason by analogy to cases involving adults of low intelligence, comparing the waiver of rights by the youth in the case before them to waivers by mentally impaired adults that were upheld in earlier cases.¹⁰⁸ In contrast, a minority of courts

387. The deputy testified that he made this request for the boy's "comfort level." *Id.* The boy testified that he was not sure whether he wanted his mother present during the interview. *Id.* The interview lasted about thirty minutes and reducing the statement to writing took an additional fifteen or twenty minutes. *Id.* Twice during the interview the deputy accused the boy of lying and eventually gained the boy's admission to performing oral sex on his cousin. *Id.*

105. *Deford*, 34 P.3d at 685. In this case, the eleven-year-old child was interrogated alone. *Id.* at 676-77. The court upheld his waiver based in considerable part on evidence that the child knew his rights because he watched *Cops* on television. *Id.* at 677, 685.

106. If functioning at grade level, an eleven-year-old would be reading books like *Garfield Counts to Ten*, by Jim Davis; *Charlotte's Web*, by E.B. White; *The Wizard of Oz*, by Frank L. Baum; or *Tales of a Fourth Grade Nothing*, by Judy Blume. See Reading is Fundamental, Inc., Reading Is Fundamental Reading List, <http://www.udel.edu/ETL/RWN/ReadingLists.html> (last visited Feb. 13, 2006).

107. See *Watkinson v. State*, 980 P.2d 469, 472 (Alaska Ct. App. 1999) (holding that age alone is not a bar to a valid waiver); *Ingram v. State*, 918 S.W.2d 724, 728 (Ark. Ct. App. 1996) (holding that youth alone does not invalidate a waiver and upholding the waiver of a twelve-year-old sixth grader with below-average intelligence and ADHD, whose mother was present during questioning and agreed to the waiver); *Riley v. State*, 226 S.E.2d 922, 926 (Ga. 1976); *State ex rel. J.M.*, 99-1271, p. 4 (La. App. 4 Cir. 6/30/99); 743 So. 2d 228, 230 (citing *State v. Lavalais*, 95-0320, p. 8 (La. 11/25/96)); 685 So. 2d 1048, 1054 (upholding a *Miranda* waiver by a mentally deficient adult); *Miller v. State*, 247 A.2d 530, 539 (Md. 1968); *State v. Gray*, 100 S.W.3d 881, 886-87 (Mo. Ct. App. 2003) (upholding the waiver of a sixteen-year-old, mentally retarded boy who suffered anxiety and depression who was interrogated without a parent present; and reasoning that youth and mental condition alone are not bars to a valid waiver).

108. See *Ingram*, 918 S.W.2d at 728 (citing *Hart v. State*, 852 S.W.2d 312, 315 (Ark. 1993) (upholding a *Miranda* waiver by a mentally deficient adult)); *State v. Mays*, 85 P.3d 1208, 1220-21 (Kan. 2004) (upholding a sixteen-year-old borderline-retarded juvenile's waiver) (citing *State v. Lane*, 940 P.2d 422, 432 (Kan. 1997) (upholding a mentally impaired adult's waiver)); *State v. Fernandez*, 96-2719, p. 8-9 (La. 4/14/98); 712 So. 2d 485, 489 (expressly stating, in a decision abandoning the judicially created interested-adult rule, that "the special needs of juveniles . . . are analogous to the special need of individuals with mental deficiencies which are simply factored into the totality of

acknowledge that “‘youth is more than a chronological fact’” and that “‘simple immaturity that would not affect an adult [can taint a] juvenile’s confession.’”¹⁰⁹

Equating young children or those of limited intelligence with equally limited adults wholly undermines the rationale for separate juvenile courts—children are different from adults and require protection from their youth when enmeshed with law enforcement. This is the teaching of *Haley* and *Gallegos*. Moreover, cognitive reasoning ability is a function of learning, physiological development, and experience. All adults have more experience to draw upon than do children. The lack of both worldly and reasoning experience distinguishes a young, limited-intelligence, mentally ill, or mentally handicapped child from an equally impaired adult. Adults of limited intelligence almost invariably have better cognitive skills than equally limited children because the adult’s brain is physiologically more mature and the adult has more life and reasoning experience to draw upon in decision-making.¹¹⁰

As the totality test is applied, little effort is made to determine whether a child actually knew his or her rights and could apply them to the situation. In many cases involving young children, or children of limited intelligence, evidence that the child said he or she understood a right after it was read, or could paraphrase each right after it was read, was taken as proof that the child knew and understood his or her rights.¹¹¹ A child’s affirmative response or parroting a right is not,

the circumstances” and concluding that there is “no reason to treat the impediments of youth any differently”); *In re Abraham*, 599 N.W.2d 736, 741 (Mich. Ct. App. 1999) (citing *People v. Cheatham*, 551 N.W.2d 355, 373 (Mich. 1996) (upholding a waiver by a mentally retarded adult)); *State v. Fincher*, 305 S.E.2d 685, 690 (N.C. 1983) (citing *State v. Jenkins*, 268 S.E.2d 458, 463 (N.C. 1980)).

109. *In re Jerrell C.J.*, 2005 WI 105, ¶ 28, 283 Wis. 2d 145, ¶ 28, 699 N.W.2d 110, ¶ 28 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Hardaway v. Young*, 302 F.3d 757, 765 (7th Cir. 2002)); *see also* *People v. Lee*, 781 N.E.2d 310, 316 (Ill. App. Ct. 2002) (holding that a juvenile’s individual emotional characteristics are relevant to a waiver analysis).

110. *See* Grisso, *supra* note 8, at 1157 (reporting findings that children under the age of fifteen have “significantly poorer” comprehension of the *Miranda* warnings than do adults of comparable intelligence and that sixteen-year-olds have poorer comprehension of the rights than subjects age twenty-three and older with comparable intelligence).

111. *See, e.g.*, *Matthews v. State*, 991 S.W.2d 639, 643 (Ark. Ct. App. 1999) (noting that a thirteen-year-old was interrogated without a parent present and police said she “verbally and physically” indicated understanding of her rights); *Ingram v. State*, 918 S.W.2d 724, 727 (Ark. Ct. App. 1996) (noting that a twelve-year-old represented that he understood each right); *Marine v. State*, 607 A.2d 1185, 1196 (Del. 1992) (observing that rights were “explained” using the same words as in the warning, and that the child said he understood the explanation); *State v. Ramos*, 24 P.3d 95, 96, 99 (Kan. 2001) (upholding a waiver where a sixteen-year-old who had been up all night was read his rights twice and

however, proof of understanding or comprehension. Similarly, a child's bald assertion of understanding is not proof of understanding.¹¹² As a rule, children do not like to admit that they do not understand, especially if they think they should understand. The fact that the child can repeat each right just after it is read, or even understand each right as it is read, may be of assistance in deciding the relevant issue, but it is not the relevant issue itself. The relevant issue is whether the child comprehended the meaning and interrelationship of the *Miranda* rights as a whole and understood how to apply those rights to his or her circumstances.¹¹³ To protect the child from an unknowing waiver, there must be a probing inquiry into the child's understanding of the situation at the time of questioning as well as an understanding of how the *Miranda* rights could protect the child.¹¹⁴

Concern that younger children lack the capacity to waive *Miranda* rights has been reinforced by scientific studies of adolescents' understanding of *Miranda* rights and, as a related matter, of their competence to stand trial. A 1981 study of juveniles' understanding of *Miranda* rights found that children under sixteen had a markedly poorer

said he understood); *State ex rel. J.M.*, 99-1271, p. 1 (La. App. 4 Cir. 6/30/99); 743 So. 2d 228, 228; *State v. Barnaby*, 950 S.W.2d 1, 4 (Mo. Ct. App. 1997); *State ex rel. Q.N.*, 843 A.2d 1140, 1142 (N.J. 2004); *State v. Thornton*, No. COA01-352, 2002 WL 1791202, at *2, *9-10 (N.C. Ct. App. Aug. 6, 2002) (upholding waiver where a fifteen-year-old with no prior police experience said he understood his rights); *State v. Doe*, 50 P.3d 1014, 1019 (Idaho 2002); *People v. Hall*, 643 N.W.2d 253, 257 (Mich. Ct. App. 2002); *People v. Lee*, 781 N.E.2d 310, 313 (Ill. App. Ct. 2002); *Marine*, 607 A.2d at 1196; *State v. Setser*, 1997-NMSC-004, ¶ 10, 122 N.M. 794, 932 P.2d 484, 487; *State v. Starcher*, No. 2004CA00025, 2004 WL 2955219, at *1, *6, *7 (Ohio Ct. App. Dec. 20, 2004) (noting that a sixteen-year-old with no prior police experience said he understood his rights); *J.D.L., Jr. v. State*, 782 P.2d 1387, 1390 (Okla. Crim. App. 1989); *State v. Manus*, 632 S.W.2d 137, 138-39 (Tenn. Ct. App. 1982); *State v. Loukaitis*, No. 17007-1-III, 1999 WL 1044203, at *1, *7 (Wash. Ct. App. Nov. 16, 1999) (finding a waiver knowing where a fourteen-year-old eighth-grader with no prior police experience smiled and said, "I know my rights, man" prior to being questioned about schoolhouse shootings); *State v. Dutchie*, 969 P.2d 422, 425, 429 (Utah 1998) (finding the waiver of a fifteen-year-old who was interrogated alone to be knowing based on "his ability to parrot back portions of the warnings" and prior police experience, which was not known to include either administration of *Miranda* warnings or waiver of the same).

112. No parent merely accepts that their child, particularly a young child, understands an important direction merely because the child says he or she does. A parent tests the child's understanding by asking questions about it. See *Inside the Teenage Brain*, *supra* note 46.

113. *GRISSE*, *supra* note 4, at 50-51.

114. This can be a difficult retrospective inquiry, in which counsel for the child must be careful not to educate the child about his or her rights before the child's understanding of the rights at the relevant time can be determined through an interview with a forensic psychologist and relevant testing.

understanding of the *Miranda* rights than their older peers.¹¹⁵ Less than 25 percent of “delinquent adolescents” understood that a right is an entitlement that cannot be taken away and only 40 percent of adolescents understood that suspects do not have to answer a police officer’s questions.¹¹⁶ Similarly, a broad study of adolescent competence to stand trial found that competence was closely related to intelligence.¹¹⁷ This study found that children under sixteen show significant impairment in competence-related abilities such as knowledge of relevant legal concepts and decision-making ability, and scored similarly to seriously mentally ill adults on competence-evaluation measures.¹¹⁸ The study concluded that “juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial.”¹¹⁹ Significantly, the same study found that children involved in delinquency cases tend to score lower on IQ tests than do children in the community at large.¹²⁰ Moreover, the tests relied on to determine that children have a poorer understanding of legal rights generally, and *Miranda* rights specifically, are conducted under relatively non-stressful conditions that permit reflection and likely maximize performance.¹²¹ These conditions do not apply to custodial interrogations where the stress and isolation of the experience diminish an adolescent’s capacity to understand the warnings.¹²² Given the recognized impact of stress on reasoning capacity, it is likely that older adolescents’ comprehension of their rights while being interrogated is more like that of their younger peers than older adults.

Children, eventually outgrow adolescence; their characters form, and they become more future-oriented and risk averse; their brains organize, grow, and rewire; and they begin to reason abstractly, to

115. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 11 (1997) (citing THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981)).

116. *Id.* (compiling and synthesizing other studies) (citing GRISSO, *supra* note 115).

117. Grisso et al., *supra* note 5, at 356.

118. *Id.*

119. *Id.*

120. *Id.*; see also Method, Measures, and Procedures for the Juvenile Adjudicative Competence Study 11 (Aug. 2002) (unpublished working paper for the MacArthur Research Network on Adolescent Development and Juvenile Justice), available at <http://www.mac-adoldev-juvjustice.org/METHOD%20ARCHIVAL%20and%20TABLES.pdf> (reporting that the mean IQ of detained youth was approximately 11.88 points lower than children in the community); Grisso et al., *supra* note 5 (providing a narrative summary of the raw data presented in this working paper).

121. See Grisso, *supra* note 8, at 1151 n.76.

122. See *id.* at 1150-51 & n.76.

consider consequences, and to weigh alternative behaviors.¹²³ It is this potential—the virtually unlimited capacity of children to grow and overcome disadvantage—that the due process cases, *Haley* and *Gallegos*, protect. This protective feature of due process has been lost in the application of adult *Miranda* jurisprudence to the custodial interrogation of children. The contemporary understanding of adolescent brain and psychosocial development shows that juvenile courts' reliance on adult *Miranda* jurisprudence is misplaced and at odds with the due process roots of the protections for children.

The decisions that uphold *Miranda* waivers by particularly young children not only apply the totality test in a manner that fails to consider the child's immaturity and incomplete development, but essentially say that such considerations are irrelevant. The developing body of neuroscience highlights the error in these decisions. Compared to adults, adolescents have limited access to their frontal lobes and limited ability to coordinate the different brain regions needed for reasoning and problem solving. They are unlikely to have working memories adequate to hold all the *Miranda* warnings in mind while considering the ramifications of talking or not talking. Formulations of the totality test—of which the cited cases involving young children are merely illustrative¹²⁴—that do not take these factors into account support the conclusion that the totality test, as applied, does not protect children from their immaturity.

123. For better or worse, the character of most adults is largely fixed. While their disabilities may be treated or managed more or less successfully, they do not have the same, nearly universal, untapped potential for change that children have.

124. See cases cited *supra* notes 92-94. There are other cases in which the court conducted a very narrow totality analysis. *Torres v. State*, No. 151,1990, 1992 WL 53406, at *1, *4 (Del. Feb. 7, 1992) (upholding a waiver from an intellectually limited, emotionally immature fifteen-year-old who had limited prior experience hearing *Miranda* rights); *In re D.L.*, 486 A.2d 1180, 1181 (D.C. 1985) (upholding a waiver from an unaccompanied thirteen-year-old with limited prior court experience); *State v. Doe*, 50 P.3d 1014, 1018 (Idaho 2002); *Brown v. State*, 751 N.E.2d 664, 669-71 & n.8 (Ind. 2001) (upholding a waiver and finding fulfillment of the parental presence requirement, even though the father who was present had a history of paranoid schizophrenia and was not advised of the child's rights before consultation); *In re Abraham*, 599 N.W.2d 736, 748 (Mich. Ct. App. 1999) (upholding a waiver from an emotionally immature, learning disabled eleven-year-old who was questioned in the presence of his mother); *State v. Manus*, 632 S.W.2d 137, 138-39, 141 (Tenn. Ct. App. 1982) (upholding a waiver from a fourteen-year-old seventh grader questioned with his father present); *State v. Dutchie*, 969 P.2d 422, 425, 428, 429 (Utah 1998) (upholding a waiver by a fifteen-year-old who was interrogated alone and who suffered from ADHD, oppositional defiant disorder, and four psychotic disorders including auditory hallucinations, and had a verbal IQ of 79; noting that the child had prior police experience, though not clearly with police interrogations).

2. THE PRESENCE OF A PARENT

The presence of a parent during a child's custodial interrogation is a near-universal factor in the totality calculus. Parental presence is considered to produce waivers that are voluntary in fact; that is, are not the product of overbearing police conduct.¹²⁵ Parental presence is also intended to promote the juvenile's awareness of his or her rights and the consequences of waiver, thereby ensuring that waivers are knowingly and intelligently made.¹²⁶ The presence of a parent serves the additional purpose of easing a court's determination that the waiver was knowing, intelligent, and voluntary by providing a clear, "ascertainable basis" by which the waiver can be measured.¹²⁷ The importance of parental presence during questioning is reflected by the almost outcome-determinative weight uniformly placed on parental presence when waivers are upheld.¹²⁸ However, the way that states treat parental absence varies widely.

125. *In re Andre M.*, 88 P.3d 552, 555 (Ariz. 2004) (noting that the presence of a parent helps to ensure that the child will not be "intimidated, coerced or deceived" during interrogation); *In re B.M.B.*, 955 P.2d 1302, 1311-12 (Kan. 1998) (discussing a collection of cases regarding the rationale for parental presence rules); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 656 (Mass. 1983); *State v. Presha*, 748 A.2d 1108, 1113 (N.J. 2000) (noting that a parent is an advisor to a child during interrogation).

126. *A Juvenile*, 449 N.E.2d at 656; *see also Andre M.*, 88 P.3d at 555; *Abraham*, 599 N.W.2d at 742; *State v. Barnaby*, 950 S.W.2d 1, 3 (Mo. Ct. App. 1997); *State v. Farrell*, 766 A.2d 1057, 1062 (N.H. 2001); *Presha*, 748 A.2d at 1114.

127. *A Juvenile*, 449 N.E.2d at 656; *see also Dutil v. State*, 606 P.2d 269, 274 & n.3 (Wash. 1980) (collecting cases regarding the "difficulty of ascertaining" whether a child's waiver was knowing and intelligent).

128. *See, e.g., Ingram v. State*, 918 S.W.2d 724, 727 (Ark. Ct. App. 1996) (upholding a waiver where a twelve-year-old fourth grader who had ADHD and below-age-level reading and comprehension skills was interrogated in the presence of parent); *In re Jonathan M.*, 700 A.2d 1370, 1371-73 (Conn. App. Ct. 1997) (upholding a fifteen-year-old's waiver where the warnings were administered and questioning commenced in the presence of his mother, although the mother absented herself when it became clear that the boy was involved in the murder of his maternal grandmother); *Abraham*, 599 N.W.2d at 742, 748 (upholding a learning-impaired eleven-year-old's waiver where the rights were read to the mother, the mother agreed to the waiver, and the interrogation was conducted in her presence); *Barnaby*, 950 S.W.2d at 3 (noting that parental presence is of "great importance" in the totality analysis); *Presha*, 748 A.2d at 1114 (holding that the presence of a parent is "highly significant" in evaluating a juvenile's waiver); *J.D.L., Jr. v. State*, 782 P.2d 1387, 1388, 1389-90 (Okla. Crim. App. 1989) (noting that a fourteen-year-old was read his rights and interrogated in the presence of his parents); *In re Joseph B.*, 822 A.2d 172, 173-75 (R.I. 2003) (upholding a waiver where rights were read in the presence of the mother and both mother and a child of unspecified age signed the waiver, though there was no evidence beyond signing of the waiver that the child understood the waiver or of the child's educational level or intelligence); *State v. Horse*, 2002 SD 47, ¶ 22, 644 N.W.2d 211, 223 (noting that in a "close case," the presence of a parent will tip

Most states treat the absence of a parent or the failure of law enforcement to fulfill a duty to notify parents of questioning as just one of the totality factors.¹²⁹ Some give this factor greater weight, particularly if there is a statutory requirement that parents are notified when a child is taken into custody.¹³⁰ The efficacy of parental presence requirements is often undermined by the failure of courts to require that interrogating officers inform the parent and child that they may consult privately if they wish or that they should discuss the child's rights, and the consequences of waiving his or her rights.¹³¹ Some courts have

the balance in favor of upholding a waiver); *Haywood v. State*, No. W2001-00451-CCA-R3-PC, 2001 WL 1690199, at *3 (Tenn. Crim. App. Dec. 17, 2001) (upholding a waiver where a fifteen-year-old boy who read at the third-grade level was read his rights and interrogated in the presence of his grandmother); *Manus*, 632 S.W.2d at 140.

129. See, e.g., *State v. J.R.N.*, 861 P.2d 578, 580 (Alaska 1993); *Ramirez v. State*, 739 So. 2d 568, 577 (Fla. 1999) (holding that failure to comply with Florida Statute section 985.207, which requires that police attempt and continue to attempt to notify a child's parent when the child is questioned, is only one factor in the totality analysis); *In re Doe*, 978 P.2d 684, 690-91 (Haw. 1999) (holding that a violation of Hawaii Revised Statutes section 571-3, which requires immediate notice to a parent when a child is taken into custody, does not require suppression of a statement as the statute does not require police to allow a parent to speak with a child before or during questioning); *Murphy v. Commonwealth*, 50 S.W.3d 173, 184-85 (Ky. 2001) (holding that a violation of Kentucky Revised Statutes section 610.200, requiring that parents be notified upon the arrest of child, is just one factor in the totality analysis); *McIntyre v. State*, 526 A.2d 30, 38 (Md. 1987); *People v. Hall*, 643 N.W.2d 253, 256-57 (Mich. Ct. App. 2002) (holding that the violation of a statute requiring the presence of a parent during interrogation is a totality factor); *Abraham*, 599 N.W.2d at 742; *State v. Burrell*, 697 N.W.2d 579, 595 (Minn. 2005) (stating that a request to see a parent before questioning is "just one" totality factor); *In re J.G.*, 437 N.W.2d 153, 155 (Neb. 1989); *Elvik v. State*, 965 P.2d 281, 286 (Nev. 1998); *In re Goins*, 738 N.E.2d 385, 386, 387 (Ohio Ct. App. 1999) (upholding waiver even though the parent was excluded from the interview, with the parent and child's consent); *Commonwealth v. Carter*, 855 A.2d 885, 890 (Pa. Super. Ct. 2004); *State v. Caffrey*, 332 N.W.2d 269, 271, 274 (S.D. 1983).

130. See *Horse*, 644 N.W.2d at 221-22 (summarizing cases where parental notification statutes were violated and concluding that many states suppress a child's statement when made after such a violation). States that accord parental absence particular weight include: Arizona, *Andre M.*, 88 P.3d at 555 (noting presumption of involuntariness in the absence of a parent); Florida, *Ramirez*, 739 So. 2d at 576; Illinois, *People v. Fuller*, 686 N.E.2d 6, 17 (Ill. App. Ct. 1997) (holding that the relevant showing is whether the parent's absence contributed to the coerciveness of the atmosphere); New Jersey, *Presha*, 748 A.2d at 1117; Wisconsin, *Jerrell C.J.*, 2005 WI 105, ¶¶ 37, 43, 283 Wis. 2d 145, ¶¶ 37, 43, 699 N.W.2d 110, ¶¶ 37, 43 (holding that the failure to call a parent upon request will be taken as "strong evidence" of coercion, though there is no per se rule "excluding in-custody admissions" by a juvenile who was not able to "consult with a parent or interested adult").

131. See *State v. Means*, 547 N.W.2d 615, 620 (Iowa Ct. App. 1996) (stating that, although Iowa Code section 232.11(2) requires that a good faith effort be made to contact a parent of a child over sixteen prior to custodial interrogation, there is no obligation to tell the child and parent that they can confer privately); *Commonwealth v.*

seemed almost hostile to parental involvement. For example, one court noted that the child had presented no evidence that his mother was able to advise him of the consequences of waiving his rights.¹³² Another declined to “undermine” *Miranda* by making accommodations for a juvenile’s parents to be informed of the *Miranda* rights or for the juvenile to have a parent present during questioning.¹³³

Some of the states that do not mandate the presence of a parent during questioning nonetheless affirmatively provide that the child may be accompanied by a parent during questioning. These states are split, however, on whether the child must be informed of this right,¹³⁴ or need not be told of it,¹³⁵ and whether the child can waive this right.¹³⁶ Even

Philip S., 611 N.E.2d 226, 232 n.5 (Mass. 1993) (“We have never stated that investigating officials must expressly inform a juvenile and his or her parent that they should use their opportunity to confer for a discussion of the juvenile’s rights, and we do not do so now.”); *K.J.M. v. State*, 811 P.2d 103, 105 (Okla. Crim. App. 1991) (stating that a parent and child need not be given an opportunity to consult alone unless they request it, in this case between the time they entered the interrogation room and when questioning began).

132. *State v. Gray*, 100 S.W.3d 881, 889 (Mo. Ct. App. 2003) (“Defendant presented no evidence that Mother had the ability to advise him of his rights and the consequences of waiving them.”); *see also J.G.*, 437 N.W.2d at 154 (1989) (upholding a waiver though the guardian tried to assert the child’s rights after the child waived them).

133. *See Marine v. State*, 607 A.2d 1185, 1196-97 (Del. 1992) (rejecting a proposed expansion of *Miranda* by rejecting the requirement that police inform parents of their child’s *Miranda* rights and give the child and parents an opportunity to consult prior to questioning).

134. *See, e.g., C.M.B. v. State*, 594 So. 2d 695, 700 (Ala. Crim. App. 1991) (holding that a *Miranda* waiver is invalid if a child is not informed of the right to communicate with the child’s parents prior to questioning); *State v. Thornton*, No. COA01-352, 2002 WL 1791202, at *8-9 (N.C. Ct. App. Aug. 6, 2002) (upholding a fifteen-year-old defendant’s waiver, after he was told of the right to consult with a parent, but not told that the parent was on the way to police station; noting that police said the child expressed a desire to talk before the parents arrived).

135. *See, e.g., Matthews v. State*, 991 S.W.2d 639, 642-43 (Ark. Ct. App. 1999) (holding that there is no requirement that a juvenile be informed of his or her right to parental assistance, despite Arkansas Code section 9-27-317, which provides that questioning must stop if the juvenile indicates in any way a wish to speak with a parent or to have a parent present before or during custodial interrogation); *Isbell v. State*, 931 S.W.2d 74, 77 (Ark. 1996) (placing the burden on a fourteen-year-old to request parental presence). Connecticut conditions notice of the right to have a parent present during questioning on whether the child is to be tried in juvenile or adult court. *State v. Ledbetter*, 818 A.2d 1, 8 (Conn. 2003). If the trial is to be in juvenile court, the child must be advised of this right; however, if the child is to be tried as an adult, he or she need not be so advised. *Id.* (citing CONN. GEN. STAT. ANN. § 46b-137(A) (West 2004)); *see also People v. Hall*, 643 N.W.2d 253, 257 (Mich. Ct. App. 2002) (stating that a violation of the statute requiring notice to a parent that a child is to be questioned is just one factor in the totality analysis).

when a parent is present, not all states require that they are informed of the child's rights before questioning¹³⁷ or that the parent and child be told that they can consult in private if they choose.¹³⁸ Occasionally, statements are admitted even though the juvenile's requests to see his or her parents were ignored.¹³⁹

136. States that allow a child to waive the presence of a parent include: Alaska, *State v. J.R.N.*, 861 P.2d 578, 580 (Alaska 1993); Florida, *Ramirez v. State*, 739 So. 2d 568, 577 (Fla. 1999) (noting that while a child can waive parental presence, if a parent asks to see the child, questioning must stop) (citing *Allen v. State*, 636 So. 2d 494, 496 (Fla. 1994)); Missouri, *Gray*, 100 S.W.3d at 886; North Carolina, *State v. Gibson*, 463 S.E.2d 193, 197 (N.C. 1995) (upholding a waiver obtained without notice to the child that the parent was at the police station to see the child, although the child had to be told that he had a right to have a parent present during questioning). States that do not allow a child to waive parental presence include: South Dakota, *State v. Horse*, 2002 SD 47, ¶ 22, 644 N.W.2d 211, 223 (stating that failure to notify parents and whether parents are present are included in the totality factors); Massachusetts, *Commonwealth v. Alfonso A.*, 780 N.E.2d 1244, 1251-52 (Mass. 2003) (holding that when a child fourteen or older declined a police offer to bring his mother to the place of questioning so they could consult, the child was not given an opportunity to consult with a parent and the validity of any subsequent waiver was evaluated to determine whether the child had a "high degree of intelligence, experience, knowledge, or sophistication" and could therefore waive his *Miranda* protections without the benefit of parental consultation).

137. *Brown v. State*, 751 N.E.2d 664, 670 (Ind. 2001) (holding that the statutory mandate of consultation is met even if the parent and child are not advised of their rights before questioning commences and when the father declines to consult with the child after the rights are read); *State v. Michael L.*, 441 A.2d 684, 688 (Me. 1982) (upholding waiver when the juvenile defendant was advised of his rights prior to the arrival of his father, even though the father was never advised of the child's rights).

138. *See, e.g., In re Enrique S.*, 629 A.2d 476, 478-79 (Conn. App. Ct. 1993) (holding that the statute on parental consultation is satisfied if rights are read to the child in the presence of the parent); *State v. Means*, 547 N.W.2d 615, 620 (Iowa Ct. App. 1996); *Commonwealth v. Ward*, 590 N.E.2d 173, 174 (Mass. 1992) ("We adopt no fixed rule that a minor's opportunity to have a meaningful consultation with an interested adult requires that the police expressly inform the minor and the adult that they may confer in private." (citation omitted)); *In re C.L.*, 87 P.3d 462, 464 (Mont. 2004) (observing that the child and parent need not be in the same place when they agree to waive the child's rights); *K.J.M. v. State*, 811 P.2d 103, 105 (Okla. Crim. App. 1991) (holding that the denial of a mother's request to see her child before questioning did not invalidate the waiver, when at the outset of the questioning the mother and child were advised of the child's rights and neither requested the opportunity to speak alone); *J.D.L., Jr. v. State*, 782 P.2d 1387, 1389 (Okla. Crim. App. 1989) (indicating that there is no requirement to tell the parent and child that they can consult alone, but that rights must be explained in the presence of the parent).

139. *See, e.g., United States ex rel. Riley v. Franzen*, 653 F.2d 1153, 1161 (7th Cir. 1981) (stating that not every request to speak with a parent prior to questioning is an invocation of Fifth Amendment rights because it is to be decided on a case-by-case basis); *McIntyre v. State*, 526 A.2d 30, 31, 39 (Md. 1987) (upholding waiver despite the fifteen-year-old suspect's multiple requests to talk to his mother prior to questioning); *State v. Loukaitis*, No. 17007-1-III, 1999 WL 1044203, at *8 (Wash. Ct. App. Nov. 16,

States that treat the absence of a parent as just one factor, which has no extra weight in the totality test, often do so by summarily proclaiming that youth alone does not preclude a valid waiver,¹⁴⁰ or by equating a child's psychosocial and physiological immaturity with an adult's low intelligence or mental disability.¹⁴¹ For the reasons discussed above, these decisions ignore the realities of adolescence by applying adult legal standards to children.

An issue related to the absence of a parent arises when the police obstruct a parent from being present during the questioning. In some jurisdictions, when this happens, any ensuing statement is deemed involuntary;¹⁴² in others, there is a strong presumption of involuntariness when a statement is obtained after a parent's presence has been obstructed.¹⁴³ Some decisions, however, condone police behavior that results in a parent's absence during questioning.¹⁴⁴

Courts hamstringing a parent's ability to assist the child by failing to require that the parent and child must be advised to discuss the child's rights and the waiver of those rights, and must be left alone to do so after the *Miranda* warnings have been read and explained.¹⁴⁵ Without such a

1999) (holding that the child's multiple requests to see his parents did not amount to an invocation of rights).

140. See *supra* note 107 and accompanying text.

141. See, e.g., *People v. Abraham*, 599 N.W.2d 736, 741 (Mich. Ct. App. 1999) (citing *People v. Cheatham*, 551 N.W.2d 355, 370 (Mich. 1996) (upholding a waiver by a mentally retarded adult)); *State v. Fincher*, 305 S.E.2d 685, 690 (N.C. 1983) (citing *State v. Jenkins*, 268 S.E.2d 458, 463 (N.C. 1980)).

142. See, e.g., *Sublette v. State*, 365 So. 2d 775 (Fla. Dist. Ct. App. 1978) (holding that a juvenile's request to call a parent was an assertion of the Fifth Amendment privilege against self incrimination); *State v. Johnson*, 719 P.2d 1248, 1255 (Mont. 1986) (same); *People v. Townsend*, 300 N.E.2d 722, 725 (N.Y. 1973) (holding a confession inadmissible when access to the suspect's parent was deliberately impeded).

143. *State v. Presha*, 748 A.2d 1108, 1116 (N.J. 2000) (stating that it is difficult to imagine the prosecution carrying its burden of proof if a parent is deliberately excluded from interrogation, but providing no per se rule).

144. In *State v. Gray*, 100 S.W.3d 881, 884 (Mo. Ct. App. 2003), the sixteen-year-old child was first questioned in the absence of his mother and refused to answer questions unless she was present. When his mother was present, he answered some questions, then refused a gunshot residue test, which was taken anyway. *Id.* at 884, 885 & n.5. The next morning, the police obtained a search warrant for hair samples and fingernail scrapings and picked up the boy to collect the samples. *Id.* at 885. When they did so, they told his mother that they would be right back. *Id.* After the samples were taken, the police took the boy to the highway-patrol office to be interrogated without notifying his mother. *Id.* The boy's waiver was upheld on appeal despite the deception and the fact that when the boy's mother was present he invoked his rights. *Id.* at 891.

145. See cases cited *supra* notes 134-38. In a California case, the court upheld the use at trial of a tape of a child's meeting with his mother at the police station after the *Miranda* rights had been read and before questioning began. *Ahmad A. v. Superior Court*, 263 Cal. Rptr. 747, 748-49 (Ct. App. 1989).

requirement the parent cannot gain the information necessary to guide the child, nor can the parent assist the child in understanding his or her rights or the consequences of waiver. As a result, parental presence provides little protection. Even when parents have the opportunity to consult privately with their child, they often lack the experience and understanding necessary to advise the child of the risks and benefits of waiving or asserting his or her rights. Many parents may feel that it is best for their child to talk to the police regardless of the risk and thereby be seen as cooperative. In some cases, it is the parent who turned the child in to police or provided information leading the police to interview the child.¹⁴⁶ In this circumstance, the child may not perceive an ally in the room, even if a parent is present. The parent's presence may have been unhelpful both in fact and in the child's perception.¹⁴⁷ Further, many parents are justifiably upset by, concerned for, or angry with their child when called to the police interrogation room for the child's questioning.¹⁴⁸ From their anger and justifiable need to understand what is going on, they may unwittingly encourage the child to answer questions, not anticipating how the child may incriminate him or herself. The parent may feel a sense of urgency or public duty to solve the crime and, believing that the child was not involved or not knowing if the child was involved, may join with the police in encouraging the child to tell the truth and answer questions.¹⁴⁹ While this may be good,

146. See, e.g., *In re Jonathan M.*, 700 A.2d 1370, 1373 (Conn. App. Ct. 1997) (observing that the child's mother, who was the daughter of the victim and who had voiced her suspicions of the child to the police, was present during his questioning); *J.P. v. State*, 895 So. 2d 1202, 1204 (Fla. Dist. Ct. App. 2005) (observing that after the mother called the police, the stepfather was present when the child made a statement); *J.D.L., Jr. v. State*, 782 P.2d 1387, 1389-90 (Okla. Crim. App. 1989) (observing that the fourteen-year-old's mother who called the police was present during his questioning).

147. See *Commonwealth v. Adams*, 617 N.E.2d 594, 597-98 (Mass. 2003) (holding that the trial court committed error in excluding expert testimony that the presence of the defendant's mother during interrogation was psychologically coercive).

148. See *J.E.W. v. State*, 349 S.E.2d 713, 713-14 (Ga. 1986) (observing that the mother of the fifteen-year-old who was a suspect in her sister's death just wanted answers).

149. See *Jonathan M.*, 700 A.2d at 1374 (observing that the mother told her son before he confessed that she knew he was lying and that she knew he killed his grandmother); *Marine v. State*, 607 A.2d 1185, 1189-91 (Del. 1992) (observing that the boy's mother, stepfather, and older brother all urged him to tell the truth and to give additional statements); *State v. Michael L.*, 441 A.2d 684, 687 (Me. 1982) (observing that the father asked a question leading to the inculpatory statement); *Commonwealth v. Philip S.*, 611 N.E.2d 226, 229 (Mass. 1993) (observing that the mother repeatedly urged the child to tell the truth, and that when the child ran, crying from the interview, the mother brought him back for more); *State ex rel. Q.N.*, 843 A.2d 1140, 1142-43 (N.J. 2004) (observing that the mother stated, "I can tell . . . you did this, answer the officer's questions" before the child made an admission).

developmentally sound parenting,¹⁵⁰ the good parent may be a lousy source of guidance for the protection of the child's constitutional rights.¹⁵¹

For these reasons, reliance on parental presence during a child's interrogation to protect the child from unknowing, unintelligent, or involuntary waivers of rights is fool's gold. Parents often simply do not provide adequate legal advice to their children.¹⁵² Moreover, as the cases cited above demonstrate, many parents actively encourage children to confess. This may stem from earnest attempts at teaching the child to be responsible; a belief that children should not have the right to remain silent;¹⁵³ or any number of other reasons, including that the parent's interests, in some manner, conflict with the child's.¹⁵⁴ Judicial policy

150. J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 340 (1977) (observing that a parent's advice to answer questions "is consistent with a respected child-rearing philosophy which emphasizes obedience to authority and responsibility to assume the consequences of one's actions").

151. Empirical evidence suggests that parents typically encourage children to waive their rights and thereby contribute to the child's conviction. *See id.*; Grisso, *supra* note 8, at 1163.

152. Grisso, *supra* note 8, at 1153-54. In Grisso's study of juvenile understanding of *Miranda* warnings, he also studied two groups of adults as a comparison. *Id.* He found that only 42.3 percent of adults evidenced an adequate understanding of all of the *Miranda* warnings and that 23.1 percent of adults seriously misunderstood at least one of the warnings. *Id.* This suggests that the parents of the children who are being interrogated will themselves often labor under an inadequate understanding of *Miranda*'s protections.

153. Grisso, *supra* note 8, at 1163 (stating that nearly three-quarters of parents surveyed disagreed with "the premise that children should be allowed to withhold information from the police when suspected of a crime" and two-thirds of parents present when their child was advised of his or her rights offered no advice to the child).

154. *See* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1291-98 (2004). Farber analyzed the role of the parent during a child's custodial interrogation for possible third-party conflicts as defined by Rule 1.7 of the Model Rules of Professional Conduct. Farber concluded that the role of parent as advisor is rife with so many potential conflicts between the parent's and the child's interests as to disqualify a parent from acting in this role. *Id.* These conflicts range from the parent's relationship to a victim or another suspect, to the parent's personal and economic interests in the child's culpability, to the parent's need to know what happened in order to safeguard other family members or protect the family from the collateral consequences of the child's misconduct, such as eviction. *See* 42 U.S.C. § 1437d(1)(6) (2000) (stating that certain criminal activity "engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy"); *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 127 (2002) (holding that, under the Anti-Drug Abuse Act of 1988, a public housing tenant may be evicted "when a member of the tenant's household or a guest engages in drug-related criminal activity"); Public Housing Lease and Grievance Procedure, 24 C.F.R. § 966.4(f)(12)

simply should not require parents to make a choice between giving good developmental advice (for example, admit to your mistakes and learn from them) and providing good legal advice (remain silent until you talk to a lawyer).

3. NATURE AND DURATION OF THE QUESTIONING

Courts look at the nature and extent of the questioning solely to determine whether it was coercive.¹⁵⁵ That is, a statement is deemed to be voluntary¹⁵⁶ if the conduct of the police was not coercive as viewed by an adult, the impact of the police conduct on the child notwithstanding. This is a standard taken directly from adult *Miranda* jurisprudence and incorporated without modification into the analysis of juvenile *Miranda* waivers.¹⁵⁷ Following this line of reasoning, courts

(2005) (stating that tenant is “obligated” to “assure that no tenant, member of the household, or guest engages in” criminal activity threatening “the health, safety or right to peaceful enjoyment of the premises by other residents”).

155. See *Marine v. State*, 607 A.2d 1185, 1197 (Del. 1992) (stating that the question is whether the suspect’s “‘will was overborne’ by official coercion when a statement was made” (quoting *Baynard v. State*, 518 A.2d 682, 690 (Del. 1986)); *In re V.L.T.*, 686 N.E.2d 49, 54 (Ill. App. Ct. 1997) (holding that the test of voluntariness for a juvenile’s *Miranda* waiver is the same as the test for an adult—whether the suspect’s “will was overborne”); *In re Abraham*, 599 N.W.2d 736, 740 (Mich. Ct. App. 1999) (“[T]he voluntariness prong is determined solely by examining police conduct.” (alteration in original) (quoting *People v. Howard*, 575 N.W.2d 16, 24 (Mich. Ct. App. 1997))); *State v. Setser*, 1997-NMSC-004, ¶ 9, 122 N.M. 794, 932 P.2d 484 (stating that waivers are inadmissible if the confession was “elicited through intimidation, coercion, deception, assurances, or other police misconduct that constitutes overreaching”); *In re Goins*, 738 N.E.2d 385, 388 (Ohio Ct. App. 1999) (holding that coercive police activity is a “necessary predicate” to a finding that a *Miranda* waiver was not voluntary, and without police coercion the suspect’s circumstances such as “minority or low I.Q.” do not implicate voluntariness); *State ex rel. Juvenile Dep’t v. Deford*, 34 P.3d 673, 680 (Or. Ct. App. 2001) (“[P]olice overreaching or coercion is a necessary predicate to a claim that a statement is involuntary; the individual characteristics of a person questioned by police cannot, without more, ‘ever dispose of the inquiry into Constitutional “voluntariness.”” (quoting *Colorado v. Connelly*, 479 U.S. 157, 165 (1986)).

156. Voluntariness analysis extends both to the *Miranda* waiver, that is, whether the waiver of *Miranda* rights was a free and voluntary act, as well as to any statements made during questioning, that is, whether the statement was a product of a free intellect and rational will. This Article refers solely to the *Miranda* waiver aspect of voluntariness.

157. See *Connelly*, 479 U.S. at 164-66. In *Connelly*, a mentally ill man approached a police officer on the street and confessed to murder. *Id.* at 160. The man’s confession and subsequent statements were the product of his mental illness. *Id.* at 161. The Court held that voluntariness for Fifth Amendment purposes was concerned solely with police overreaching, and not individual peculiarities that render the suspect more susceptible to suggestion or manipulation. *Id.* at 163-64. Though Connelly’s mental illness compelled him to confess, and hence the confession was not the product of his

reviewing juvenile *Miranda* waivers have held that a juvenile's individual character or maturity is irrelevant to the voluntariness analysis and that the use of psychological ploys, which play on a child's vulnerability and susceptibility to pressure, are unobjectionable.¹⁵⁸ The wholesale application of adult voluntariness analysis to the juvenile context is another way that courts have forgotten that children are different from adults and require extra protection.¹⁵⁹ Indeed, *Gault* speaks of ensuring that a child's waiver of Fifth Amendment rights is not the product of "adolescent fright, fantasy or despair."¹⁶⁰ The use of "adolescent" to modify "fright, fantasy or despair" clearly indicates that the Court recognized that an adolescent's perception of fright, fantasy, and despair may be different than an adult's. More importantly, however, *Gault* expressly acknowledges that one purpose of the privilege against self-incrimination in juvenile cases is to prevent the State, "whether by force or by *psychological domination*, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."¹⁶¹

The Supreme Court's recognition that adolescent fantasy and fright can contribute to adolescent decision-making in ways inapplicable in adult cases has been borne out by developments in neuroscience, as well as our growing understanding of adolescent psychosocial development. Yurgelun-Todd's work on how adolescents process the emotional stimuli of facial expressions suggests that a child who is subjected to

rational intellect and free will, in the absence of police overreaching, the statement was admissible. *Id.* at 167. All of the cases cited in note 131, save *V.L.T.*, 686 N.E.2d 49, cite *Connelly* as controlling authority.

158. See *Marine*, 607 A.2d at 1197; *Goins*, 738 N.E.2d at 390 ("The Fifth Amendment is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion.").

159. New Hampshire and Wisconsin are two states that do not follow the dominant trend. New Hampshire has interpreted the totality analysis to require that trial courts determine "not simply whether the minor's will was overborne, but also whether the juvenile's 'capacity for self-determination [was] critically impaired.'" *In re Wesley B.*, 764 A.2d 888, 891 (N.H. 2000) (alteration in original) (quoting *State v. Reynolds*, 471 A.2d 1172, 1175 (N.H. 1984)). In *Wesley B.*, the New Hampshire Supreme Court overturned a trial court's denial of the juvenile's motion to suppress where the evidence at the suppression hearing demonstrated that the eleven-year-old child was extremely distractible, "just" competent to stand trial, "very immature," read at about the second-grade level, wrote at about the first-grade level, and was interrogated for over two hours without a parent present. *Id.* at 890-92. Wisconsin requires an examination of "relevant personal characteristics" as part of the juvenile totality calculus. *In re Jerrell C.J.*, 2005 WI 105, ¶ 24, 283 Wis. 2d 145, ¶ 24, 699 N.W.2d 110, ¶ 24.

160. *In re Gault*, 387 U.S. 1, 55 (1966) (emphasis added).

161. *Id.* at 47 (emphasis added).

interrogation in tense, serious circumstances may well misinterpret the stimuli and will not process them in the same way an adult would. Thus, the child may see an angry and threatening face where the adult would recognize the face as determined or stern, but not as angry or threatening. That the adult interrogator did not intend to look angry or threatening or intend his or her words to threaten is largely irrelevant to whether the child perceived a threat. A view of the law that focuses solely on whether adults see police conduct as objectively threatening denies the differences associated with youth by ignoring that children perceive conduct differently. An adolescent may quickly determine that the safest way out of a situation perceived as threatening—the interrogation room—is to tell the police what the child understands they want to hear.¹⁶² By doing so, the child can bring the interrogation to a quick and safe end. The long-term consequences of this strategy do not enter into the child's mental calculus. In a similar vein, 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."

The child's short-term focus and misperception of the emotional content of the officer's facial expressions may combine to induce a child to give a statement, true or false, based solely on the short-term gain of ending the interrogation, without regard to long-term consequences. These features of adolescence leave children particularly vulnerable to being coerced by interrogation tactics that would leave an adult unmoved. Despite the substantial differences in how children and adults perceive and understand situations, the current law leaves children wholly unprotected from interrogations that they experience as coercive.

162. Though courts have almost uniformly refused to find that an officer's, or a parent's, exhortations to "tell the truth" amount to coercion, for the child who only wants the questioning to end and believes that by telling the police what they want to hear, he or she may go home, repeated exhortations to "tell the truth" can be coercive. *See* Commonwealth v. Philip S., 611 N.E.2d 226, 230 (Mass. 1993); *Marine v. State*, 607 A.2d 1185, 1189-91 (Del. 1992) (noting that the officer and family repeatedly urged the child to tell the truth, and the interrogating officer told the child he was the child's "friend"); *In re Jonathan M.*, 700 A.2d 1370, 1374 (Conn. App. Ct. 1997) (noting that the mother and police told the child he was lying); *Conner v. State*, 982 S.W.2d 655, 660-61 (Ark. 1998) (stating that the "good cop," "bad cop" routine did not lead to an involuntary statement by a seventeen-year-old juvenile); *In re SLL*, 631 N.W.2d 775, 777 (Mich. Ct. App. 2001) (noting that, before the admission was made, the officers repeatedly asked the thirteen-year-old who was interviewed alone why the victims would lie).

4. PRIOR COURT EXPERIENCE—AWARENESS OF THE CONSEQUENCES
OF WAIVER

Michael C. makes a child's understanding of the consequences of waiver an express part of the totality analysis.¹⁶³ Most courts hold that this showing is satisfied by proof that the child understood no more than that her statement could be used in a court proceeding.¹⁶⁴ Again, this is consonant with the adult view of *Miranda*: an intelligent waiver is made when the suspect knows that the statement could be evidence in a court proceeding.¹⁶⁵ While this may be all an adult needs to know to appreciate the gravity of the situation, one must question whether the same holds true for a child. Many of the children who find themselves in the juvenile court delinquency sessions have first been in the court's child welfare sessions. Regardless of whether they have prior experience on the child welfare side of the court, many children perceive the court as a "toothless tiger" or even as a largely benevolent, protective institution and are unaware of the increasingly punitive aspects of delinquency law. Such a child's understanding of the consequences of the waiver may be very different from that of an adult who knows that punishment is likely to follow an admission of criminality. Nonetheless, no state appears to require that a child clearly articulate his or her understanding that a statement can lead to punishment and incarceration, rather than treatment and rehabilitation, as a proof that the child understood the consequences of the waiver.¹⁶⁶

163. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979).

164. *See Marine*, 607 A.2d at 1196-97; *Conner*, 982 S.W.2d at 659.

165. *Colorado v. Spring*, 479 U.S. 564, 574 (1987).

166. An overwhelming minority of the states require that a child be warned that statements could be used against him or her in a criminal prosecution as an adult as a condition to finding any waiver to be intelligently made. *Missouri, State v. Simon*, 680 S.W.2d 346, 353 (Mo. Ct. App. 1984), *New Hampshire, State v. Benoit*, 490 A.2d 295, 303 (N.H. 1985), and *South Dakota, State v. Lohnes*, 324 N.W.2d 409, 414 (S.D. 1982), appear to be the only three states that expressly require that a child be warned that his or her statement may be used against him or her in an adult prosecution. In Minnesota, this practice is strongly encouraged, but not required. *State v. Ouk*, 516 N.W.2d 180, 185 (Minn. 1994). Some states require that the child be aware of the possibility of trial as an adult, but hold that the child can infer this from the nature of the offense and the questioning. *See, e.g., Quiriconi v. State*, 616 P.2d 1111, 1114 (Nev. 1980); *State v. Luoma*, 558 P.2d 756, 761 (Wash. 1977); *State v. Gullings*, 416 P.2d 311, 313 (Or. 1966). States that have expressly held that a child need not be warned of adult prosecution to make a valid waiver include: Alaska, *Watkinson v. State*, 980 P.2d 469, 472 (Alaska Ct. App. 1999) (identifying New Hampshire and South Dakota as the only two states to impose this requirement); Connecticut, *State v. Perez*, 591 A.2d 119, 123-24 (Conn. 1991); Delaware, *Marine*, 607 A.2d at 1197; North Carolina, *State v. Taylor*, 496 S.E.2d 811, 816 (N.C. Ct. App. 1998); Oklahoma, *J.D.L., Jr. v. State*, 782 P.2d 1387,

Two courts have expressly recognized that a child's experiences on the child-welfare side of the court are relevant to an analysis of the child's *Miranda* waiver.¹⁶⁷ In *Benoit*, the court overturned the trial court's ruling upholding the waiver based in part on evidence that established that the fifteen-year-old juvenile, who had a long history of neglectful caretaking, had spent much of his life in foster, group, and residential homes.¹⁶⁸ Due to the child's experience, the court concluded that he had little reason to appreciate that his statement could result in incarceration.¹⁶⁹ The children who are products of the child welfare system may see court intervention as limited to foster homes, group homes, or other facilities that are staff-secure. These children may not know that locked youth prisons or adult incarceration lies ahead. Further, though most states have raised the stakes in juvenile proceedings in recent years, most also still claim a rehabilitative treatment purpose for their juvenile courts. Inasmuch as an adult does not need to know every consequence of his or her statement for a waiver to be intelligently made, it may also be true that a child need not know all the criminal ramifications of his or her statement. But, at the least, a child who confesses should know that imprisonment and punishment, well into adulthood, not the beneficial rehabilitative treatment of the traditional juvenile court, may follow.

Courts often look to a child's prior experience with the courts or police as evidence supporting the finding that the child understood the consequences of waiver. In these cases, relevant court experience appears to include virtually any court involvement.¹⁷⁰ Despite courts'

1390 (Okla. Crim. App. 1989); Rhode Island, *State v. Campbell*, 691 A.2d 564, 567 (R.I. 1997); and Tennessee, *State v. Callahan*, 979 S.W.2d 577, 582 (Tenn. 1998).

167. *State v. Burrell*, 697 N.W.2d 579, 592 (Minn. 2005); *Benoit*, 490 A.2d at 303.

168. *Benoit*, 490 A.2d at 297-98. Even in *Benoit*, the reversal was based on the failure to warn of criminal consequences only, and not the failure to warn of punitive delinquency consequences. *Id.* at 303.

169. *Id.* at 298.

170. See *Matthews v. State*, 991 S.W.2d 639, 643 (Ark. Ct. App. 1999) (noting that the fact that the child had one prior charge of "fleeing" supported finding that she understood the situation when interrogated on murder and attempted murder charges); *People v. Hall*, 643 N.W.2d 253, 255 (Mich. Ct. App. 2002) (noting that the fifteen-year-old child, though never in custody before, "apparently had had more than de minimis prior contact with the police"); *State v. Gray*, 100 S.W.3d 881, 887 (Mo. Ct. App. 2003) (noting that prior relevant experience consisted of school resource officers intervening when the child became disruptive in school on numerous occasions, although only two interventions resulted in his being placed in "custody" while he was taken to speak with his mother, and that the child had been interrogated on one prior occasion a little over a year earlier); *State ex rel. Juvenile Dep't v. Deford*, 34 P.3d 673, 676, 685 (Or. Ct. App. 2001) (explaining that some of the relevant "experience" that supported a finding that an

common consideration of this factor, there is little empirical support for the proposition that prior contact with courts or law enforcement significantly increases a child's understanding of legal rights.¹⁷¹ Moreover, only a few courts explicitly limit consideration of prior experience to prior interrogation experience or prior invocation of one's rights.¹⁷² Certainly, when a child has invoked *Miranda* rights, or consulted with counsel on a prior occasion and chose to give a statement, the child's experience is relevant to his or her ability to make a valid waiver on the later date. Nonetheless, absent persuasive evidence that the child did understand the *Miranda* rights at the time of the previous waiver, little weight should be placed on this experience. More importantly, reliance on any prior court experience, however attenuated from interrogation, to support a finding that the child understood his or her rights renders this totality factor virtually meaningless.

V. CONCLUSION: IF WE ARE SERIOUS ABOUT PROTECTING CHILDREN,
WE MUST PROVIDE THEM WITH COUNSEL DURING CUSTODIAL
INTERROGATION

Michael C. and *Gault* recognize that attorneys play unique roles in the American adversarial judicial process.¹⁷³ If as a society we mean it when we say that children require an extra measure of protection, then we must provide children with counsel in the police interrogation room. Too many children lack the psychosocial and cognitive maturity to consider the consequences of a waiver of rights or to reason how to make this decision. Parents are simply not up to this task. Further, parents not only lack the legal knowledge necessary to give good advice they also

eleven-year-old understood the consequences of the waiver was that he watched *Cops* on television and "kind of figured out I was going to get arrested. The cops don't read you your rights for no reasons [sic]").

171. Grisso et al., *supra* note 5, at 347; Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in *YOUTH ON TRIAL*, *supra* note 49, at 139, 151.

172. See, e.g., *Commonwealth v. Guyton*, 541 N.E.2d 1006, 1010 (Mass. 1989) ("Extensive contact with the police and other authorities by itself does not demonstrate unusual sophistication or knowledge about the *Miranda* rights."); *Commonwealth v. King*, 460 N.E.2d 1299, 1305 (Mass. App. Ct. 1984) (noting that two weeks prior to the interrogation in question, the defendant had invoked his rights to counsel and to remain silent during custodial interrogation).

173. *Fare v. Michael C.*, 442 U.S. 707, 719-21 (1979); *In re Gault*, 387 U.S. 1, 36-42 (1967).

often add to the coercive pressure of the interrogation room—pressure that *Miranda* was designed to lessen.¹⁷⁴

Many commentators have called for the provision of counsel to children prior to interrogation.¹⁷⁵ The chief objection to such a requirement seems to be the concern that insertion of lawyers into the interrogation room will be a net loss for public safety. Critics suggest that lawyers will advise children to remain silent and police will thereby be deprived of an important crime-fighting tool. If this is the cost of protecting children, so be it; there is always a cost to protecting the rights of the accused. This concern, however, is likely overblown as it is based on two dubious assumptions. The first is that children will follow the advice of their counsel. The second is that a child's confessions yield reliable evidence.

The concern that significantly more children will remain silent if provided with a lawyer is likely exaggerated. Not all of the children who are advised to remain silent will take this advice. Armed with pad and pen, the lawyer may not seem to be a particularly formidable ally next to the officer strapped with a semi-automatic handgun and handcuffs. The child will understand that the keys to the cell door are in the officer's hands. Counsel's advice notwithstanding,¹⁷⁶ children may believe that their silence will be used against them and that their interests are best served by speaking.¹⁷⁷ Many children will decide to answer the officer's inquiries with the hope that cell door will open. This possibility aside, counsel in the room will ensure that the child has access to good advice, deter police excesses, and provide the child an ongoing opportunity to re-think the decision to speak as a clearer understanding of his or her circumstances emerges. Moreover, this is the only way to provide real protection for the child's right to terminate the questioning.

174. An additional concern is that unless state law creates a parent-child privilege that permits the parent to maintain the confidences of a child, the child confides in the parent at his or her peril.

175. Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, in *YOUTH ON TRIAL*, *supra* note 49, at 105, 118-20 (listing some of the organizations that have called for the appointment of counsel for a child before the child is allowed to waive any rights).

176. Too many of my and my colleagues' child clients, clients with whom we have worked to establish trusting, respectful relationships, have refused sound legal advice in pursuit of a short-term goal (to go to trial rather than plead out and receive probation, for example) for me to believe that all, or even most, will follow my advice when at the station house.

177. Grisso, *supra* note 171, at 149 (reporting findings that one-half to two-thirds of adolescents did not understand the *Miranda* warnings to mean that a court should not penalize a defendant who invoked the right to remain silent).

The assumption that a child's confession is reliable has been shown to be highly dubious.¹⁷⁸ Children are vulnerable to police interrogation techniques and can easily be led to make false confessions. Public safety is not advanced by leaving children in situations where they give false statements and the real criminals go free.

In *Michael C.*, the due process analysis that the Court had designed to protect children was hijacked by adult *Miranda* jurisprudence.¹⁷⁹ Last year, the Court decided that children under the age of eighteen at the time of their offense cannot be subject to the death penalty.¹⁸⁰ The Court reached this decision based on the simple proposition that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”¹⁸¹ The Court's analysis was based on the premise that the death penalty, at least in theory, is reserved for those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them “deserving” of execution.¹⁸² The majority posited that the death penalty is to be reserved for the worst of the worst—those who are the most culpable and whose crimes are the most serious.¹⁸³ The Court concluded that juveniles, as a group, cannot be considered to be among the worst offenders because their characters are not fully formed, they lack maturity, have an undeveloped sense of responsibility, are more susceptible to peer pressure, and make hasty, ill-considered decisions.¹⁸⁴ Therefore, the Court held that they cannot constitutionally be subject to the death penalty.¹⁸⁵ Significantly, it did not determine that no juvenile could ever be so “psychological[ly] matur[e], and . . . demonstrate[] sufficient depravity, to merit a sentence of death;” in fact, it acknowledged that such children may exist.¹⁸⁶ Instead, the Court reasoned that, given what we know about the course of adolescent development, “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments . . . even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less

178. See Drizin & Leo, *supra* note 10, at 963.

179. *Michael C.*, 442 U.S. at 727-28.

180. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005).

181. *Id.* at 1197.

182. *Id.* at 1194-95.

183. *Id.*

184. *Id.* at 1195.

185. *Id.*

186. *Id.* at 1197.

severe than death.”¹⁸⁷ The Court thereby rejected arguments that jurors could determine on a case-by-case basis which juveniles should be allowed to live and which should be sentenced to death.¹⁸⁸

The same principles of adolescent development that the *Simmons* Court relied on to determine that juvenile offenders are less culpable than adults, and therefore cannot be put to death, supports a per se rule prohibiting a juvenile from waiving *Miranda* rights during custodial interrogation without first consulting an attorney. Given what we know about adolescent cognitive and psychosocial development, when we allow judges to indulge in a case-by-case totality analysis and assign whatever weight they see fit to their chosen totality factors, we create an unacceptable risk that a child who does not understand his or her *Miranda* rights or the relevant circumstances will be found to have made a knowing, intelligent, and voluntary waiver nonetheless. The *Simmons* decision supports a return to a due process analysis that requires bright, age-based lines for the protection of juveniles in the nation’s delinquency and criminal courts. The differences between juveniles and adults are too marked and too well understood to continue treating children as adults.

187. *Id.*

188. *Id.*