No Match for the Police: An Analysis of *Miranda's* Problematic Application to Juvenile Defendants

by ZOË OVERBECK*

Introduction

The lives of juveniles are defined in many ways by legal prohibitions and directions from adults. Whether it is the ability to obtain a driver's license or the chance to participate in the democratic process by voting, the law treats juveniles and adults differently. Juveniles operate in a relatively restricted sphere, defined by legal prohibitions and cues from adults who direct them how to behave, where to be, and where not to go. Attending school, for instance, while understandably a worthwhile and noble pursuit, is mandatory, and absences are punishable with adult-imposed disciplinary measures, such as detention. While juveniles may emulate adult behavior, the level of personal freedom afforded to each group is vastly different. Yet, when the police investigate a juvenile in connection with a crime, that youth in many ways becomes an adult in the eyes of the law.

The legal protections that shelter and restrict juveniles in their daily lives fade away during a criminal investigation, and, suddenly, the law grants them an immense power—the ability to waive their constitutional right against self-incrimination—in the same way an adult can. Where the socialized restriction of juveniles is ingrained in almost every aspect of a youth's life, such as the expectation to attend school as told, suddenly, courts perceive youth as being able to move

---

* J.D. Candidate 2011, University of California, Hastings College of the Law; B.A., 2000, History and French, University of Wisconsin, Madison. I am grateful to Professor Hadar Aviram for her guidance and wisdom, the editorial staff of the *Hastings Constitutional Law Quarterly* for their hard work, and my family and Travis Gire for their constant support and encouragement.

freely and expect them to be able to exercise that option during police interrogation.

The landmark case of *Miranda v. Arizona* dramatically changed the landscape of police interrogation, and recitation of the four warnings beginning with, "You have the right to remain silent," is popular dialogue for suspenseful moments in TV dramas and legal thrillers. While most adults and older juveniles have heard the *Miranda* rights repeated in some form or another, not as many understand that those warnings are not merely a bureaucratic hoop for the police to jump through, but instead serve to safeguard a suspect's Fifth Amendment privilege against self-incrimination. Under *Miranda*, the police may not commence interrogating a suspect in custody until they advise her of her right to remain silent; that anything she says may be used against her in a court of law; of her right to counsel; and that if she can't afford an attorney, one will be appointed to her before any questioning begins if she wishes.[1]

In *Fare v. Michael C.* and *Yarborough v. Alvarado*, the Supreme Court affirmed the use of adult standards in determining whether a juvenile is under custodial interrogation and whether the juvenile has "knowingly and intelligently" waived her *Miranda* rights. Due to differences in juvenile cognition, young people's limited comprehension of the words and substance of the *Miranda* rights, and their vulnerability to police interrogation techniques, states should go beyond the baseline established by the Supreme Court, as some have already, to offer juvenile suspects the following protections: Age should *always* be taken into account when applying the *Miranda* custody test; and there should be a per se rule that law enforcement may not administer *Miranda* warnings to juvenile suspects in the absence of defense counsel.

I. The Supreme Court's Evolving Views on Juvenile Confessions

Under the common law, while there was no separate juvenile court, there was recognition that certain groups of juvenile offenders might be less culpable than their adult counterparts.[2] Children under the age of seven were viewed as not being responsible for their

1. Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

2. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509–10 (1984).

actions and thus were not subject to criminal adjudication under the "infancy defense;" juvenile offenders over the age of fourteen were tried as adults.[3] To prosecute youth between the ages of seven and fourteen, the state had to overcome a rebuttable presumption of incapacity by showing that the child knew his or her actions were wrong.[4] In the early 1800s, the Society for the Prevention of Pauperism in the City of New York began to campaign against the imprisonment of juvenile offenders with adult convicts and obtained a charter from the New York legislature to open the House of Refuge, a home for neglected and delinquent youth.[5] This sparked the first wave of juvenile justice reform in the United States, which worked to remove still "innocent" offenders and pre-delinquents from corruptive influences and place them in reformatory and industrial "schools."[6]

Illinois was the first state to create a special court for juveniles with the legislature's passage of the Juvenile Court Act in 1899.[7] Following the Illinois model, forty-six states, three territories, and the District of Columbia had adopted separate juvenile courts by 1925.[8] Under the early juvenile courts, the state was to serve as a benevolent parental figure for youthful offenders and help shape them into law-abiding adults.[9] The early juvenile courts were marked by informal proceedings intended to rehabilitate rather than punish children and a rejection of the adult criminal adjudicative model.[10] The notion that children comprised a vulnerable population deserving of extra protection was a notable shift from the era when only an infancy defense was available; yet, in practice, juvenile defendants were still being adjudicated and interrogated unfairly.

The Supreme Court first began to examine juvenile vulnerability and susceptibility in the context of police interrogations in *Haley v.*

3. *Id.* at 510–11.

4. *Id.* at 511.

5. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189–90 (1970).

6. *Id.* at 1190–91.

7. Robert E. Shepherd, Jr., *The Juvenile Court at 100: Birthday Cake or Funeral Pyre?*, 13 CRIM. JUST. 47, 47 (1999).

8. *Id.* at 48.

9. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

10. CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 28, 30 (1998).

Ohio.[11] The police interrogated the fifteen-year-old defendant in *Haley* from midnight to 5 a.m. in the absence of either his parents or defense counsel, until he confessed to acting as a lookout while two other juveniles robbed and murdered a store owner.[12] The *Haley* Court reversed the juvenile's conviction for murder and held that his confession was involuntary, explaining that a boy of fifteen "cannot be judged by the more exacting standards of maturity," and is no "match for the police in such a contest."[13] While *Haley* was decided before *Miranda* and the *Haley* Court was examining whether the defendant's statement had been coerced in violation of his Fourteenth Amendment due process rights, the Court stated in dicta that the fact that the police advised the defendant of his constitutional rights did not give credence to his confession; instead, the *Haley* Court noted that finding the boy's confession to be voluntary simply because he was advised of his rights would "assume . . . that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice."[14]

The Supreme Court echoed similar concerns regarding juvenile confessions through the lens of the Fourteenth Amendment in *Gallegos v. Colorado*.[15] The fourteen-year-old defendant in *Gallegos* was arrested on suspicion of robbing and assaulting an elderly man, who eventually died from his injuries.[16] The boy confessed after five days in a juvenile hall, where he never had access to an attorney, his parents, or any "other friendly adult."[17] The prosecution introduced the juvenile's signed confession at trial, and the jury convicted him of first-degree murder.[18] Citing to the *Haley* decision, the *Gallegos* Court considered the boy's youth to be a crucial factor in evaluating the voluntariness of his confession.[19] The prosecution stated that the boy had been advised of his right to counsel but that he had not asked

11. Haley v. Ohio, 332 U.S. 596, 599 (1948).
12. *Id.* at 597–98.
13. *Id.* at 599–600.
14. *Id.* at 599, 601.
15. Gallegos v. Colorado, 370 U.S. 49, 53 (1962).
16. *Id.* at 49–50.
17. *Id.* at 50.
18. *Id.*
19. *Id.* at 52–53.

to see his attorney or his parents.[20] Similar to the discussion in *Haley*, the *Gallegos* Court expressed concerns about the young defendant's ability to understand his rights, stating:

> [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 .... 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.[21]

The *Gallegos* Court reversed the defendant's conviction, holding that the police elicited the boy's confession in violation of his due process rights, taking into account the totality of the circumstances and focusing on the procedural unfairness and compulsive nature of the interrogation.[22]

Echoing similar concerns about the vulnerability of juvenile defendants expressed in the *Haley* and *Gallegos* decisions, the Court dramatically shifted the landscape of juvenile adjudication with its decision in *In re Gault*.[23] The fifteen-year-old defendant in *Gault* had been arrested and sentenced to a "State Industrial School" for up to six years for making "lewd" phone calls to a neighbor, an offense for which an adult would have been punished with a fine of up to $50 or jail time of no more than two months.[24] The events leading up to the boy's sentencing were flagrant in their lack of formality and structure: The police never notified his parents of his initial arrest; he was detained prior to his sentencing without his parents having any formal notice of the charges against him; the juvenile delinquency judge denied the defendant's mother's request to see the neighbor who allegedly complained of the calls; the boy's conviction was based on a confession given without any warning that he had the right not to do so; and his delinquency hearing proceeded without the boy or his

20. *Id.* at 54.

21. *Id.*

22. *Id.* at 54–55.

23. *See id.* at 49–50; Haley v. Ohio, 332 U.S. 596, 597–98 (1948).

24. *In re* Gault, 387 U.S. 1, 1–8, 29 (1967).

parents being advised of his right to counsel.[25] The *Gault* Court explained that the boy's juvenile status was no excuse for subjecting him to a "kangaroo court" devoid of both procedural regularity and respect for his constitutional rights.[26]

The *Gault* Court discussed the goals of the early social reformers who emphasized rehabilitative and clinical solutions for juvenile offenders over crime and punishment.[27] As juveniles were to be treated differently than adult defendants, "the rules of criminal procedure were therefore altogether inapplicable" to juvenile adjudication.[28] Among the litany of procedural irregularities suffered by the *Gault* defendant, the Court examined the validity of admitting the young defendant's confession, which the police elicited without advising the boy or his parents of his right to remain silent.[29] Building off of the foundation set in *Haley* and *Gallegos*, the *Gault* Court addressed juvenile defendants' unique susceptibility to coercive police interrogation techniques.[30] The *Gault* Court commented on the absurdity of adult defendants having the protection of the Fifth Amendment while their more vulnerable juvenile counterparts did not.[31] The *Gault* Court uprooted the prior informality of juvenile adjudication, holding that the right to notice of the charges, the right to confrontation and cross-examination, the right to counsel, and the privilege against self-incrimination applied in juvenile proceedings.[32]

Gault brought in a new era of due process for juveniles, yet the Court in *McKeiver v. Pennsylvania* made it clear that juveniles' constitutional rights extended only so far. The *McKeiver* Court held that juveniles do not have a constitutional right to a jury trial under the Fourteenth Amendment.[33] The Court recognized that the juvenile system was not living up to the idealistic goals behind its creation but explained that "the imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function," and "would tend once again to place the juvenile squarely

25. *Id.* at 4, 5, 43–44.
26. *Id.* at 28.
27. *Id.* at 15–16.
28. *Id.* at 15.
29. *Id.* at 43–44.
30. *Id.* at 44–48.
31. *Id.* at 47, 55.
32. *Id.* at 42, 55.
33. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

in the routine of the criminal process."[34] The *McKeiver* Court stated that the Court, in its prior juvenile due process cases, had "not yet said that all rights constitutionally assured to an adult accused of crime also are to be enforced or made available" in juvenile delinquency proceedings and that it "specifically has refrained from going that far."[35]

In its key juvenile due process decisions leading up to *McKeiver*, the Court acknowledged that juveniles are more vulnerable than adult criminal defendants. *Gault* accounted for this vulnerability by affording juveniles certain constitutional rights extended to adult criminal defendants. In contrast, the *McKeiver* Court reasoned that giving juveniles the right to a jury trial would implicitly close the gap between the adult and the juvenile adjudicative systems.[36] In its approach to *Miranda* warnings in a juvenile context following *Gault*, the Court has seemingly dispensed with the idea that juveniles are different from adults, stripping them of any special protections once the police begin to ask questions.

II. The Supreme Court's Views on Juvenile Confessions After *Gault*

Despite the concerns expressed by the Court in *Haley*, *Gallegos*, and *Gault* regarding juveniles' particular susceptibility to police pressure, the Court decided against providing juveniles with extra protection during police interrogation with its decisions in *Yarborough v. Alvarado* and *Fare v. Michael C.*[37] The police must advise a suspect of her *Miranda* rights when that person is subjected to custodial interrogation.[38] Interrogation occurs with "express questioning [by law enforcement] or its functional equivalent [meaning] . . . any words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[39] Routine booking questions, such as a police officer asking for a suspect's age or name, are not considered interrogation for

34. *Id.* at 547.

35. *Id.* at 531, 533.

36. *Id.* at 547.

37. *See* Yarborough v. Alvarado, 541 U.S. 652, 668 (2004); Fare v. Michael C., 442 U.S. 707, 725 (1979).

38. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

39. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

Miranda purposes.[40] Although the interrogation inquiry focuses on the perception of the suspect over the intent of the police, any information the officer has regarding the suspect's susceptibility to a particular form of persuasion is relevant to the analysis.[41] Thus, the interrogation test is objective on its surface, yet it also takes into account any particular vulnerabilities of the suspect, if known to the officer.[42]

In contrast, the custody analysis is purely objective. An individual is in custody when under formal arrest or when the police deprive her of her liberty to leave in a significant way, depending on "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action."[43] The Supreme Court held in *Yarborough v. Alvarado* that it was reasonable for a California Court of Appeal to apply the *Miranda* custody test to a juvenile defendant, Michael Alvarado, without taking his age and lack of prior experience with law enforcement into account.[44]

At the age of seventeen, Alvarado agreed to help a friend steal a truck while the driver was standing by the vehicle.[45] Alvarado's friend shot and killed the driver during the attempted robbery, and Alvarado helped him hide the gun.[46] After a month-long investigation of the murder, Los Angeles County Sheriff's Detective Cheryl Comstock left messages with Alvarado's parents about wanting to speak with him.[47] Alvarado's parents brought him to the station and waited in the lobby, while the detective took the boy into an interrogation room and questioned him for roughly two hours without giving him the *Miranda* warnings and while recording Alvarado without his knowledge.[48] Alvarado claimed to the trial court that the police denied his request to have his parents present during the interview.[49] After Comstock implored Alvarado to help

40. Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990).
41. *Innis*, 446 U.S. at 301, 302 n.8.
42. *Id.*
43. Stansbury v. California, 511 U.S. 318, 325 (1994).
44. Yarborough v. Alvarado, 541 U.S. 652, 659, 668–69 (2004).
45. *Id.* at 655–56.
46. *Id.* at 656.
47. *Id.*
48. *Id.*
49. *Id.*

bring his friend to justice for murdering the truck driver, Alvarado admitted to hiding the gun.[50]

Alvarado filed a motion to suppress the statements he made during his interview with Comstock, which the trial court denied.[51] He was convicted of second-degree murder with a sentence of fifteen years to life.[52] After losing on direct appeal, Alvarado filed a petition for a writ of habeas corpus with the U.S. District Court for the Central District of California, which agreed that Alvarado had not been in custody when he confessed as "a reasonable person would have felt at liberty to leave" in that situation.[53] The Court of Appeals for the Ninth Circuit found differently and reversed, holding that a juvenile's age and experience must be considered when evaluating whether a defendant is in custody under *Miranda*, and that based on Alvarado's age and lack of criminal record, he had been under custodial interrogation when he made the incriminating statements.[54]

The Ninth Circuit held that Alvarado was entitled to relief even under the deferential standard of habeas review that federal courts are required to use when evaluating state court decisions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[55] Under the AEDPA, federal courts are only to grant applications for writs of habeas corpus if the state court's decision was "contrary to" or involved an "unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States."[56] The Ninth Circuit held that "it was unreasonable [for the California Court of Appeal] to conclude that a reasonable 17-year-old, with no prior history of arrest or police interviews, would have felt that he was at liberty to terminate the interrogation and leave."[57] The *Alvarado* Court reversed the Ninth Circuit's decision, holding that the California Court of Appeal's decision had been reasonable.[58]

50. *Id.* at 657–58.
51. *Id.* at 658.
52. *Id.* at 659.
53. *Id.*
54. *Id.* at 660.
55. *Id.*
56. *Id.* at 655.
57. *Id.* at 660 (citing Alvarado v. Hickman, 316 F.3d 841, 854–55 (9th Cir. 2002)).
58. *Id.* at 664.

Writing the *Alvarado* majority opinion, Justice Kennedy explained that the "custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age could be viewed as creating a subjective inquiry."[59] The *Alvarado* Court stated that taking a suspect's previous experience with law enforcement into account in the custody analysis could easily cross the line into speculation, given that a criminal record could either give the defendant a greater understanding of her rights or alternately create more fear of re-arrest and the police.[60] The *Alvarado* Court emphasized that the police should not bear the task of evaluating a suspect's subjective state when deciding whether or not to administer the *Miranda* warnings.[61]

The *Alvarado* Court distinguished the objective *Miranda* custody test from other doctrinal tests that take a suspect's age and experience into account, such as when evaluating the voluntariness of a *Miranda* waiver or a confession.[62] However, in her concurring opinion, Justice O'Connor stated that "[t]here may be cases in which a suspect's age will be relevant" in the *Miranda* custody analysis, but that in Alvarado's case, it would have been difficult for the police to "recognize that a suspect is a juvenile when he is so close to the age of majority."[63] The Court also refrained from adopting a special protective standard for juveniles when looking at the waiver of *Miranda* rights.

For the police to use statements obtained during a custodial interrogation, they must first advise the suspect of her *Miranda* rights.[64] If the interrogation continues after administration of the *Miranda* warnings in the absence of the suspect's attorney, the government has the burden of showing that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel" to use statements made during the interrogation.[65] If the suspect *clearly* and *unambiguously* requests counsel at any point during the

59. *Id.* at 668.
60. *Id.*
61. *Id.* at 668–69.
62. *Id.* at 667–68.
63. *Id.* at 669 (O'Connor, J., concurring).
64. Miranda v. Arizona, 384 U.S. 436, 477 (1966).
65. *Id.* at 475.

interrogation, the police must cease all questions.[66] In *Fare v. Michael C.*, the Supreme Court upheld the use of a totality of the circumstances test for determining when juveniles have "knowingly and intelligently" waived their rights—the same standard that the Court applies with adult suspects.[67]

The police arrested the juvenile defendant in *Fare*, a sixteen-and-a-half-year-old boy who had a history of prior offenses and had been on probation since the age of twelve, on suspicion of murder and advised him of his *Miranda* rights prior to interrogation.[68] When the police asked the young defendant if he "want[ed] to give up [his] right to have an attorney present" in the interrogation room, in which only the juvenile and two officers were present, the youth asked if he could have his probation officer in the room.[69] The officer replied that he could call the probation officer later but that he would not do it at that point, thereafter explaining to the juvenile twice that he could speak without an attorney present but that he did not have to.[70] The *Fare* defendant confirmed that he understood his rights and proceeded to implicate himself in the murder.[71]

After holding that a juvenile's request to speak to his probation officer was not a per se invocation of his Fifth Amendment right against self-incrimination, the *Fare* Court went on to explain that a "totality of the circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved," taking into account the youth's "age, experience, education, background, and intelligence, and . . . whether [the juvenile] has the capacity to understand the warnings given him."[72] The *Fare* Court explained that "[t]here is no reason to assume that . . . juvenile courts, with their special expertise in this area . . . will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns."[73]

In a strong dissent, Justice Marshall, joined by Justices Brennan and Stevens, addressed juveniles' susceptibility to police coercion and

66. Davis v. United States, 512 U.S. 452, 461–62 (1994).
67. Fare v. Michael C., 442 U.S. 707, 725–26 (1979).
68. *Id.* at 709–10.
69. *Id.* at 710.
70. *Id.* at 711.
71. *Id.*
72. *Id.* at 725.
73. *Id.*

argued that "*Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests."[74] The *Fare* dissent argued that a juvenile would be less trusting of the police to obtain an attorney for him than he would be of his parents or another adult accountable for his welfare.[75] As an example, Justice Marshall cited to a moment of confusion when the police were interrogating the *Fare* defendant, which the majority overlooked, when the youth asked, "How I know you guys won't pull no police officer in and tell me he's an attorney?"[76]

III. Juvenile Cognition and the Application of *Miranda*

In its decision to use adult standards when undertaking the *Miranda* custody test or evaluating whether a juvenile suspect has "knowingly and intelligently" waived her *Miranda* rights, the Court has not taken into account the following key differences distinguishing juveniles from adults and how these discrepancies are particularly worrisome in the context of police interrogation: variations between juvenile and adult cognition; juveniles' relatively limited understanding of the meaning and substance behind the *Miranda* warnings; and juveniles' unique vulnerability to police interrogation techniques.

A. Differences between Juvenile and Adult Cognition

The "teenage brain" has become an increasingly prevalent topic of discussion in the popular media, with technological advances in neuroscience enabling more illuminating studies of brain processes. In 2005, the Supreme Court formally acknowledged the differences between adult and juvenile cognition with its decision in *Roper v. Simmons*, wherein the Court held that that imposing the death penalty on individuals for capital crimes committed under the age of eighteen is an excessive punishment under the Eighth and Fourteenth Amendments.[77] While the *Roper* Court discussed how the particularities of juvenile cognition relate to the culpability of youthful offenders, the Court's discussion is also relevant to the vulnerability of juvenile suspects in police interrogations.

74. *Id.* at 729 (Marshall, J., dissenting).

75. *Id.* at 730.

76. *Id.* at 730 n.1.

77. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

Justice Kennedy, writing for the *Roper* majority, explained that there are three reasons why juveniles cannot be classified as the most heinous offenders, for which the death penalty is reserved: First, juveniles are comparatively less mature and more likely to engage in reckless behavior than are adults; second, juveniles are more susceptible to negative external pressures and have less control over their environment than do adults; and third, juveniles' personalities are still in transition and are less static than those of adults.[78] As the *Roper* Court observed, the social consensus that juveniles are cognitively different than adults shows in the many laws restricting juveniles from participating in certain activities engaged in by adults.[79]

Laws and restrictions targeting youth stem from both paternalistic notions and concerns about juvenile capacity. In prohibiting those under eighteen from voting or serving on juries, state legislatures are expressing a concern about juvenile maturity and cognitive development.[80] These laws are also rooted in a desire to protect juveniles from certain behaviors, as with prohibitions against underage drinking.[81] The same considerations relevant in the *Roper* Court's holding regarding differences between adult and juvenile cognition also apply in determining how to best preserve juveniles' right against self-incrimination in an interrogation setting.[82]

As the *Roper* Court observed, juveniles' personalities are more dynamic than those of adults, shifting and making dramatic leaps as the youths mature.[83] While there may be overall trends in juvenile cognitive development, youth develop at different rates, as they react to the forces of their external environment and heredity. Thus, a random selection of sixteen-year-olds would reveal a full spectrum of maturity levels, social skills, and developmental abilities. The differences in cognitive levels among youth of the same age would make it difficult for a court to fairly determine whether or not that child had "knowingly and intelligently" waived her *Miranda* rights without undertaking cumbersome, timely, and costly in-depth

78. *Id.* at 568–70.

79. *Id.* at 569.

80. *Id.*

81. *See* NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEPT. OF HEALTH & HUMAN SERVS., NO. 67, ALCOHOL ALERT (2006), *available at* http://pubs.niaaa.nih.gov/publications/aa67/AA67.pdf.

82. *Roper*, 543 U.S. at 578.

83. *Id.* at 570.

individualized analysis of each juvenile defendant's cognitive state. A per se approach to *Miranda* waivers would alleviate courts of this burden and ensure that youth are properly protected, especially those who may appear deceptively mature due to the seriousness of their crimes or their adult-like appearance.

Also relevant in the context of police interrogation is the tendency for young people to be more impulsive than adults and more driven by the short-term consequences of their actions.[84] In an interrogation setting, when presented with the opportunity to waive her rights or remain silent, a juvenile's method of processing information may negatively impact her ability to fully weigh both options and the long-term consequences thereof.[85] Richard Leo and Steven Drizin argue that juvenile defendants resemble the developmentally disabled in "their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making," and that both groups deserve special protections during the interrogation process due to these vulnerabilities.[86]

B. Juvenile Comprehension of the *Miranda* Warnings

Thomas Grisso has extensively researched and studied the ways juvenile cognitive development and maturity affect the capacities of youthful offenders at various stages of the adjudicative process, from the initial police interrogation to competency to stand trial.[87] In the late 1970s, Grisso conducted a series of studies to contrast juveniles' understanding of *Miranda* warnings with that of adults, examining both groups' ability to comprehend the words of the warnings and the significance and purpose of those words.[88] He compared the results

84. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 62 (2007).

85. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY, 137, 171 (1997).

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

87. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006).

88. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1143 (1980).

obtained from three groups of juveniles, each in some form of detention, and two samples of adults, both offenders and non-offenders, to look for differences between juvenile and adult comprehension of the *Miranda* warnings.[89] Grisso's studies used three different measures in evaluating the participant's level of understanding, two of which asked for verbal responses and one that required "true" or "false" answers.[90]

In the "Rights" component of Grisso's test, examiners asked juveniles to paraphrase each sentence of the *Miranda* warning in their own words.[91] In the "Vocab" measure of the study, examiners asked juveniles to define six key words in the *Miranda* warnings: "consult, attorney, interrogation, appoint, entitled, and right."[92] With the third measure, examiners showed juveniles twelve reworded versions of the *Miranda* warnings, which other youth had provided in a pilot study, and asked them to answer in "true or false" format whether the reworded phrase had the same meaning as the original *Miranda* statement.[93] Grisso found that juveniles displayed a significantly lower comprehension rate of the *Miranda* warnings in contrast with the study's adult participants.[94]

Grisso found that over half of the juveniles tested demonstrated an "inadequate" understanding of at least one of the four *Miranda* warnings in contrast with 23.1% of the adults.[95] Of the four *Miranda* warnings, the phrase most commonly misunderstood by juveniles was their right to have an attorney present before and during interrogation, with 44.8% of the juveniles and 14.6% of the adults giving "inadequate" responses on this issue.[96] In addition, 63.3% of the juveniles misunderstood at least one of the six crucial words in the

89. *Id.* at 1149–50.

90. *Id.* at 1144.

91. *Id.* at 1146. The study used the *Miranda* warning form used by the St. Louis County Police Department's Juvenile Division: "You do not have to make a statement and have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to consult an attorney before interrogation and to have an attorney present at the time of the interrogation. If you cannot afford an attorney, one will be appointed for you." *Id.* at 1144.

92. *Id.* at 1146.

93. *Id.* at 1147.

94. *Id.* at 1152.

95. *Id.* at 1153–54.

96. *Id.* at 1154.

Miranda warnings compared with 37.3% of the adults.[97] The study found that 27.6% of the juveniles obtained the highest score on the true or false "Rights" component of the test compared with 62.7% of the adult subjects.[98] Grisso's study also measured juveniles' comprehension of the legal significance and protective function of the *Miranda* warnings.[99]

In conjunction with a panel of lawyers and psychologists, Grisso argued that in order to "knowingly and intelligently" waive one's *Miranda* rights, a suspect must (1) understand the nature of interrogation and the police's role as an information-seeking adversary; (2) understand that she has a right to counsel who will work as an advocate bound by confidentiality rules; and (3) understand that the "right to remain silent" means there is an absolute right against self-incrimination extending throughout the adjudicative process.[100] To compare juvenile and adult comprehension and knowledge of these areas, the interviewers asked study participants a series of questions relating to a cartoon of an interrogation scene, in which no emotions were visible on the characters in the scenario.[101]

Grisso found that the juveniles in the study displayed several key differences in their understanding of the purpose and legal significance behind the *Miranda* warnings.[102] First, 61.8% of the juveniles in the study believed that a judge could penalize them for invoking their right to remain silent, in contrast with 21.7% of the adults tested.[103] Additionally, 55.3% of the youth tested thought that they would have to explain their criminal activity in court if asked by a judge, as did 42.9% of the ex-offenders surveyed.[104] Grisso concluded that juveniles under fifteen years of age and juveniles ages fifteen and sixteen with IQ scores below eighty had significantly worse comprehension of both the *Miranda* warnings and their function compared with adults.[105] The sixteen-year-old juvenile

97. *Id.*
98. *Id.*
99. *Id.* at 1148.
100. *Id.* at 1147.
101. *Id.* at 1148–50.
102. *Id.* at 1158.
103. *Id.*
104. *Id.* at 1158–59.
105. *Id.* at 1160.

participants in the study had the same level of comprehension regarding their rights as those individuals ages seventeen to twenty-one.[106]

In a later article, Grisso explained that while there are not significant differences between an adult's understanding of the words in *Miranda* warnings and that of most juveniles once they reach fifteen or sixteen, youth of that age are less clear than their adult counterparts on the significance of the warnings and the nature of their rights.[107] For example, Grisso explained that juveniles have only a superficial understanding of their attorney's role as advocate and that they believe that the attorney serves as less of an advocate for youth who had actually committed offenses.[108] Other research has shown that juveniles tend to think of legal rights as conditional, which "adults can grant, and then take away, especially if they do not say what they believe adults want them to say."[109]

A more recent study using modified versions of Grisso's measurement instruments from the 1970s found similar trends in juveniles' comprehension of the *Miranda* warnings.[110] Researchers wanted to replicate Grisso's studies to assess the effectiveness of the simplified *Miranda* warnings now used in most jurisdictions and to evaluate whether today's juvenile population, which has greater exposure to the police through media, is savvier than the youth participants from Grisso's study.[111] The results of the more recent study showed that the juvenile participants, particularly younger juveniles and those with lower IQs, had comprehension problems similar to those from Grisso's study, even with the more simplified warnings of today.[112] Grisso's original studies and the more recent version modeled after his indicate that juveniles might be more vulnerable in an interrogation setting than their adult counterparts

106. *Id.*

107. Grisso, *supra* note 88, at 10–11.

108. *Id.*

109. Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 164–65 (2007).

110. Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 360, 368 (2003), *available at* http://www.wisspd.org/html/training/ProgMaterials/Conf2007/WEfr/JOMR.pdf.

111. *Id.* at 366.

112. *Id.*

and more at risk of waiving their rights without a full understanding of the nature of those rights. In addition to comprehension problems, juveniles' tendency to be more suggestible than adults renders them more vulnerable to police interrogation techniques.

C. Juveniles' Unique Susceptibility to Police Interrogation Techniques

The *Miranda* Court expressed concern about "the interrogation atmosphere and the evils it can bring."[113] Delivering the *Miranda* Court's opinion, Chief Justice Warren cited certain police practices intended to elicit confessions from suspects, such as isolating the individual to be interrogated and keeping him away from familiar faces, insisting on the suspect's guilt, questioning with dogged perseverance for lengthy bouts of time, and, in the event that a suspect refuses to talk or asks for a relative, to acknowledge the suspect's right to remain silent while "point[ing] out the incriminating significance of the suspect's refusal to talk."[114] The Fifth Amendment privilege against self-incrimination, a principle stemming back to English common law, lies at the heart of the adversarial system, in which the government bears the burden of independently proving the charges against a suspect.[115] The procedural safeguards set forth in *Miranda* serve to counter the inherently coercive nature of police interrogation. However, police departments have adapted to *Miranda* and have developed interrogation techniques intended to elicit waivers from suspects and obtain admissible incriminating statements in spite of the *Miranda* warnings.[116] A juvenile who does not understand her rights in the first place may be particularly vulnerable to such manipulation during an interrogation.

Barry C. Feld studied the interrogation records for sixteen- and seventeen-year-old juveniles who had been charged with felony-level offenses in the Twin Cities area of Minnesota.[117] Feld noted in his study that of the sixty-six juvenile records he reviewed, in 56% of the interrogations, the police had not given the *Miranda* warnings

113. Miranda v. Arizona, 384 U.S. 436, 456 (1966).

114. *Id.* at 450–51, 453–54.

115. *Id.* at 458–60.

116. Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 412–13 (1999).

117. Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 61–62 (2006).

immediately, instead using casual conversation and "booking questions" to establish rapport with the young suspects and "subtly . . . predispose the suspect to waive her rights and talk with the police."[118] Although the police must advise a suspect of her *Miranda* rights prior to interrogation, routine "booking questions" are exempt from the *Miranda* requirement.[119]

Feld also found that police officers delivered the *Miranda* warnings in ways intended to elicit waivers from juvenile suspects, such as suggesting that the youth "tell the truth" prior to giving the *Miranda* warning and presenting the warnings as a mere formality, emphasizing "the routine nature of the . . . warnings by referring to a suspect's familiarity with it from seeing it on television and in movies" or using the form itself as "an opportunity to convert the waiver process into an exercise in bureaucratic paper-pushing."[120] Feld noted that 15% of the juveniles he studied invoked their *Miranda* rights immediately and that 5% invoked them when the police began asking more challenging questions, with 80% of the youth waiving their rights.[121] This waiver rate is comparable to what Richard Leo observed in his 1996 study of police interrogation of adult defendants.[122]

Feld interpreted that the sixteen- and seventeen-year-olds he studied exhibited an adult-like understanding of the substance of the *Miranda* warnings, noting that most of the juveniles read along with and initialed each warning and that the majority of the youth read aloud the final paragraph of the warning and signed the statement that they understood their rights.[123] While Feld acknowledged that such gestures might indicate compliance rather than understanding, he stated that because judges do not have the time to conduct individualized assessments of each offender's cognition, the signing, initialing, and reading aloud could serve as "the types of objective evidence upon which trial judges and appellate courts necessarily rely" to determine whether the youth knowingly and intelligently

118. *Id.* at 73–74.

119. Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990).

120. Feld, *supra* note 117, at 74–76.

121. *Id.* at 84, 90.

122. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

123. Feld, *supra* note 117117, at 90–91.

waived his or her rights.[124] Based on his research, Feld suggested that the current protections surrounding juvenile interrogation are adequate for juveniles sixteen years and older.[125] Feld also noted that in only looking at the interrogation records for juveniles charged with felony-level offenses, 42% of whom had one or more prior felony arrests at the time they were interrogated, his study might not address how "police obtain waivers from and interrogate . . . less sophisticated juveniles who may be more vulnerable."[126]

Although Feld distinguished juveniles over fifteen as exhibiting a similar level of comprehension of their *Miranda* rights as adults, there is research suggesting that juvenile offenders have other cognitive issues that might affect their perception of the police and custodial interrogation. For instance, researchers studying the prevalence of mental health issues in juvenile offenders found that 20% of youth entering the juvenile justice system have "serious mental health disorders," with 70% to 90% "meet[ing] official criteria for at least one psychiatric diagnosis."[127] A 2006 study conducted by the National Center for Mental Health and Juvenile Justice found that of those youth involved in the juvenile justice system with mental health problems, nearly 61% were also struggling with substance abuse issues.[128] More striking, particularly for those who might suspect the over-diagnosis of troubled youth with psychiatric conditions, is the assessment by Howard Snyder of the National Center for Juvenile Justice that "58% of committed youth ages 15 to 17 had not completed eighth grade compared with 24% in the U.S. population."[129] While adult criminal defendants also exhibit higher-than-average rates of learning disorders, mental health problems, and substance abuse issues than the nonoffender population, juveniles facing those obstacles have the added age and power differential with

124. *Id.*

125. *Id.* at 100–01.

126. *Id.* at 64.

127. David R. Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems*, 32 AM. J.L. & MED. 503, 509 (2006).

128. *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study*, RESEARCH & PROGRAM BRIEF (Nat'l Ctr. for Mental Health & Juvenile Justice, Delmar, N.Y.), June 2006, *available at* http://ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf.

129. Katner, *supra* note 127, at 509–10.

adults that leave them particularly vulnerable during an interrogation.[130]

D. Juveniles' Relations with Authority Figures

While the Court has clearly held that the police must read a defendant his or her *Miranda* rights when a person "in custody is subjected to either express questioning or its functional equivalent," the Court's guidelines on what specific conditions constitute custodial interrogation are less clear.[131] The *Miranda* Court stated that a defendant is in custody when the police deprive an individual's "freedom of action in any significant way."[132] The police interrogate a suspect if they act or speak in a way they should know are reasonably likely to elicit an incriminating response.[133] Juveniles are not on equal legal footing with adults and do not have the same room to move around freely in the world as they might wish. Juveniles operate in many ways as a subjugated group of individuals, expected to submit to the authority of adults around them everywhere. This relates to their perception of being free to leave when subjected to questioning by the police and to their susceptibility to persuasive interrogation techniques.

From teachers to parents to coaches, juveniles constantly receive orders directing them where to be and how to behave, and "socialization presents considerable pressure for children to acquiesce to adult's wishes."[134] The fact that juveniles are already restricted in their freedom to move about in their daily lives creates a complex relationship with adult authority figures, particularly if these adults are the police. The level of personal freedom that courts ascribe to juvenile defendants seems particularly curious when applied to the cases of young defendants questioned at school. Few adults would feel comfortable refusing to answer the police's questions, let alone a fifteen-year-old taken out of her school classroom by school security personnel or the police.

---

130. Sharon Dolovich, Foreword, *Incarceration American Style*, 3 HARV. L. & POL'Y REV. 237, 245 (2009).

131. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980); *see also* Miranda v. Arizona, 384 U.S. 436, 467 (1966).

132. *Id.*

133. *Innis*, 446 U.S. at 301.

134. Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992).

IV. Where the States Stand Following *Fare* and *Alvarado*

A. State Approaches to Juvenile Custodial Interrogation

In line with the *Alvarado* Court, most states evaluate a series of objective factors when applying the *Miranda* custody test for juvenile defendants and do not take the suspect's age into account. As Justice O'Connor acknowledged in her *Alvarado* concurrence, age may be a factor in the custody determination for certain defendants, yet some lower courts are granting more weight to objective factors, such as whether or not the police told the suspect she was free to leave the "interview" site.[135] The interrogation analysis theoretically leaves more room for courts to consider a suspect's young age. The following cases highlight the two contrasting approaches to the custody analysis as applied to juvenile defendants, and the interplay between the custody test and the interrogation inquiry.

1. States That Consider a Suspect's Age in the Custody Analysis

In line with the concerns expressed in *Haley*, *Gallegos*, and *Gault* that juveniles are more vulnerable than adults during interrogation, certain state courts look at the defendant's age when applying the *Miranda* custody test despite the *Alvarado* Court's holding that this consideration is not necessary. The Ohio Ninth District Court of Appeals examined the *Alvarado* decision in *In re A.A.*, in which the police questioned a high school student at school in a closed office regarding his involvement in a breaking and entering.[136] In discussing the *Alvarado* decision, the *A.A.* court noted that the Supreme Court had not rejected age as a factor to consider in the *Miranda* custody analysis, but held that it was reasonable for a state court not to take this into account.[137] Thus, the *A.A.* court held that because "a person in [the defendant's] situation would have known that, if he left before the assistant principals were finished with him, he could face adverse consequences, such as detention," he had been in custody during the interview at school.[138] The fact that the three authority figures questioning the boy did not tell him he was free to leave was a factor

135. Yarborough v. Alvarado, 541 U.S. 652, 669 (2004) (O'Connor, J., concurring); *see also* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH & LEE L. REV. 385, 437–43 (2008).

136. *In re* A.A., No. 08CA009512, 2009 WL 2488010, at *1 (Ohio Ct. App. Aug. 17, 2009).

137. *Id.* at *3.

138. *Id.*

in the court's analysis, yet the court also considered the unique restrictions on liberty facing a school-age child.[139]

Certain state courts have discussed the young age of a defendant when applying the *Miranda* custody test, yet have grappled with how an individual's youth impacts her perception of being free to leave, ultimately finding that the suspect's age did not tip the scale towards custodial interrogation.[140] In the custody analysis, these courts primarily rely on the police's behavior, such as whether the officer explicitly told the suspect she was free to leave and whether the suspect was actually placed under arrest.[141] For example, the Supreme Court of Nebraska held in *In re Interest of Tyler F.* that a fourteen-year-old male was not in custody when security guards at the boy's school escorted him from class to a windowless room, where the police questioned him for twenty minutes without advising him of his *Miranda* rights.[142] The *Tyler F.* court acknowledged that "there is no easy answer to the issue of whether a suspect's age should factor into the custody assessment," yet the court declined to provide a solution to the conundrum, after assessing case law from other jurisdictions and the fact that the defense counsel had not addressed this issue for the court.[143]

2. States that Do Not Consider a Suspect's Age in the Custody Analysis

In contrast, various state courts have explicitly rejected taking a suspect's age into account when determining whether the youth was subjected to custodial interrogation, often involving questioning that took place at the juvenile's school. For example, in 2009, the North Carolina Supreme Court in *In re J.D.B.* looked at whether or not a thirteen-year-old boy had been under custodial interrogation when he gave incriminating statements to the police without being advised of his *Miranda* rights.[144]

139. *Id.*

140. *See* CSC v. State, 118 P.3d 970, 973, 977 (Wyo. 2005) (holding that a sixteen-year-old male had not been in custody when questioned at school without being advised of his *Miranda* rights by two Sheriff's investigators, a police officer, and two school employees in a conference room yet addressing Justice O'Connor's concurrence in *Alvarado*, stating that in certain instances age should be taken into account).

141. *See* In re Tyler F., 755 N.W.2d 360, 367 (Neb. 2008).

142. *Id.* at 371.

143. *Id.*

144. *In re* J.D.B., 686 S.E.2d 135, 136 (N.C. 2009).

The police suspected the *J.D.B.* defendant, a seventh grade special education student, of breaking into several homes after receiving a report that he was in possession of a stolen camera and speaking with him near one of the residences on the same day as the robbery.[145] Two police investigators went to the boy's school and pulled him into a conference room, where they questioned the youth in front of a school resource officer, the assistant principal, and an intern.[146] The door of the conference room where the questioning took place was closed but not locked.[147] The investigators did not advise the boy's parents before questioning him, nor did they read the youth his *Miranda* rights.[148] The boy asked whether he would still be in trouble if he gave the stolen items back, and the investigator "responded that it would be helpful, but that the matter was still going to court and that [the police] may have to seek a secure custody order."[149] When the investigator asked the child if he understood that he was free to leave and did not have to speak with the police, the youth nodded "yes" in response and proceeded to incriminate himself, including in a written statement.[150] The entire "interview" lasted for thirty to forty-five minutes, and the boy was allowed to leave when the bell rang indicating the end of the school day.[151]

The *J.D.B.* court emphasized that the custody analysis involves an objective standard and that while "subjective mental characteristics" are to be considered in evaluating whether a waiver of rights is "knowing and intelligent," these factors are not relevant in looking to see whether a reasonable person would have felt at liberty to leave or that he was "under the equivalent of formal arrest."[152] Further, the *J.D.B.* court stated that a police interview in the inherently restrictive school environment would only become custodial if "law enforcement . . . subject[ed] the student to 'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general."[153]

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 137.
150. *Id.*
151. *Id.*
152. *Id.* at 140.
153. *Id.* at 138.

Emphasizing the importance of having a clear guideline for the police to follow, the *J.D.B.* court "decline[d] to extend the test for custody to include consideration of the age and academic standing of an individual subjected to questioning by police." The *J.D.B.* court noted that *Alvarado* was persuasive but not binding, as that decision involved only an analysis of whether the state court's decision had been reasonable under the AEDPA.[154] Because the young defendant in *J.D.B.* had not been in custody, he was not entitled to the protections of *Miranda.*[155]

3. State Approaches to the Interrogation Analysis

Under *Rhode Island v. Innis*, interrogation occurs when law enforcement uses words or actions they should have known would elicit an incriminating response from a suspect.[156] The inquiry emphasizes the perception of the suspect over the intentions of the police.[157] In practice, certain state courts have considered a suspect's age when evaluating whether or not interrogation occurred. For example, the Massachusetts Appeals Court determined in *Commonwealth v. Clark C.* that a police lieutenant had interrogated a juvenile suspect for *Miranda* purposes, taking the suspect's young age into account.[158] The lieutenant in *Clark C.* spoke with the boy's grandmother regarding his involvement in a home invasion, and the youth called the police station five days later.[159] During the phone call, the juvenile told the lieutenant he would make arrangements to be picked up or go on his own to the assessment center the following day.[160] When the boy did not show up the next day, the lieutenant arrived at his home with an arrest warrant and, after being let in to the home, proceeded to the suspect's room where he was still sleeping.[161] The lieutenant woke the boy up and told him he had an arrest warrant, to which the boy responded, "[D]id my grandmother turn me in?"[162] The lieutenant answered in the negative, but then

154. *Id.* at 140 n.1.
155. *Id.* at 140.
156. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
157. *Id.*
158. Commonwealth v. Clark C., 797 N.E.2d 5, 9 (Mass. App. Ct. 2003).
159. *Id.* at 7.
160. *Id.*
161. *Id.* at 8.
162. *Id.*

proceeded to tell the boy that he had said he would turn himself in when they spoke on the phone.[163]

Clark C. agreed with the lower court's finding that the lieutenant's reference to the phone call was the functional equivalent of interrogation, after taking into account all the circumstances, "including the fact that Clark C. was a juvenile."[164] Thus, the *Clark C.* court excluded the boy's response, which the lieutenant elicited before administering the *Miranda* warnings.[165] However, a review of state case law has shown that following *Alvarado*, juvenile defendants remain vulnerable during police interrogation as courts frequently overlook their young age in the initial custody determination, thus depriving the youth of their *Miranda* rights regardless of whether express questioning or its functional equivalent occurred.

As an example, the District of Columbia Court of Appeals found in *In re J.H.* that the responses a twelve-year-old boy gave to a police officer regarding the youth's alleged sexual abuse of his sister were admissible in the absence of *Miranda* warnings.[166] The officer in *J.H.* went to the boy's school in plain clothes with a gun holstered to his hip, which he testified the boy could not see because of the officer's overcoat.[167] The officer questioned the juvenile in a large room at the boy's school, and asked him about the incident with his sister, following a ten- or fifteen-minute discussion about sports and the pictures in the room.[168] The officer never told the boy whether he was free to leave the room, instead explaining that the suspect never asked about leaving.[169] The court noted in its analysis that the officer never made any threats or promises, but that he did ask the boy if he knew the difference between lying and telling the truth, and then told the child more than once that he should be honest with the officer.[170] The boy ultimately confessed to abusing his sister in writing without having been advised of his *Miranda* rights.[171]

163. *Id.* at 8–9.
164. *Id.* at 9.
165. *Id.*
166. *In re* J.H., 928 A.2d 643, 645–46 (D.C. 2007).
167. *Id.* at 646.
168. *Id.* at 647.
169. *Id.*
170. *Id.*
171. *Id.*

Despite the fact that the officer was clearly asking questions to elicit an incriminating response, the *J.H.* court held that the boy's confession was admissible after determining that he had not been in custody.[172] While noting that it did not have to consider the boy's young age due to *Alvarado*, the *J.H.* court discussed the defendant's young age anyway and affirmed the lower court's ruling that the interview was about "as non-custodial as one could imagine of an interview of a juvenile in school by a law enforcement officer."[173] In finding that the boy had not been in custody, the *J.H.* court noted that the officer did not restrain the child in any way, "nor was he overbearing or dominating."[174] In the same way that state courts are grappling with how to factor a suspect's young age into the custodial analysis, courts have adopted a number of approaches to evaluating whether or not a juvenile has waived her *Miranda* rights "knowingly and intelligently."

B. State Approaches to Juvenile *Miranda* Waivers

1. The Per Se Presence of Counsel Rule

New Jersey's approach to juvenile *Miranda* waivers addresses the concerns of the *Haley, Gallegos,* and *Gault* Courts. In 2009, the New Jersey Supreme Court held in *State ex rel. P.M.P.* that a juvenile may not waive his right to counsel without an attorney present.[175] In *P.M.P.* the Prosecutor's Office filed a complaint against a twenty-year-old male for a sexual assault he allegedly committed at the age of thirteen or fourteen and arrested the suspect at his home pursuant to a warrant.[176] During its investigation of the reported crime, a detective at the prosecutor's office had phoned the defendant, posing as the assault victim.[177] The arresting detectives reported that upon their arrival at his home, the defendant stated that he knew why the detectives were there and that "[s]he, [the alleged victim], called [him] last night."[178] The detectives brought the suspect to the prosecutor's office and advised him of his *Miranda* rights; after

172. *Id.* at 651.
173. *Id.* at 650.
174. *Id.* at 651.
175. State ex rel. P.M.P., 975 A.2d 441, 442–43 (N.J. 2009).
176. *Id.* at 442–44.
177. *Id.* at 443.
178. *Id.* at 444.

waiving his rights, the defendant admitted to engaging in sexual activity with the victim.[179] Looking in large part to state statutory law, the New Jersey Supreme Court held in *P.M.P.* that the trial court was correct in suppressing the defendant's statements to the detectives.[180]

The New Jersey Supreme Court had previously held in *State v. Sanchez* that, following indictment, adult defendants may not waive their *Miranda* rights absent defense counsel.[181] Further, following *Gault*, the New Jersey legislature codified protections for juvenile defendants in the state's Code of Juvenile Justice, under which a juvenile defendant has the right "to be represented by counsel at every critical stage in the proceeding" and may only waive her *Miranda* rights at these critical stages after consultation with counsel.[182] In *P.M.P.*, the New Jersey Supreme Court held that a prosecutor is acting in an accusatory not an investigatory role when it files a juvenile delinquency complaint, qualifying it as a "critical stage" in the proceedings.[183] Thus, the juvenile defendant's waiver of his *Miranda* rights in *P.M.P.* was invalid as it had been obtained prior to any consultation with defense counsel.[184] In contrast, California has adopted a pure totality of the circumstances approach in evaluating whether a juvenile *Miranda* waiver is "knowing and intelligent."

2. *The Totality of the Circumstances Rule*

In *People v. Burton*, the California Supreme Court extended the scope of *Miranda* protections for juveniles, holding that when "a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege."[185] In *People v. Lessie*, the California Supreme Court reviewed the validity of this holding, based on the U.S. Supreme Court's decision in *Fare v. Michael C.* to uphold the "totality

179. *Id.*

180. *Id.* at 448.

181. *Id.* at 446; State v. Sanchez, 609 A.2d 400, 409 (N.J. 1992).

182. *P.M.P.*, 975 A.2d at 447.

183. *Id.* at 448.

184. *Id.*

185. People v. Burton, 491 P.2d 793, 798–99 (Cal. 1971).

of the circumstances" test for assessing whether a juvenile *Miranda* waiver is "knowing and intelligent."[186]

The police arrested the sixteen-year-old *Lessie* defendant on suspicion of murder during a street fight based on "information identifying [the] defendant as the shooter."[187] At the police station, the officers asked the defendant if he wanted anyone else to know that he had been arrested, to which he responded that he wanted to call his father.[188] The juvenile did not have his father's phone number, and the police said they would have him fill out paperwork "in the meantime."[189] After several routine booking questions, the police advised the boy of his *Miranda* rights and began questioning the youth, at one point telling him that members of his own family had identified him as the shooter.[190] The juvenile, who was tried as an adult, claimed that he had been forced into committing the murder as a gang initiation and would have been beaten or killed had he not complied; he was convicted of second degree murder.[191]

The *Lessie* court held that the boy's request for his probation officer was not an invocation of his *Miranda* rights and overturned the *Burton* rule in light of the holding in *Fare*.[192] A key factor in the *Lessie* court's analysis was the Truth-in-Evidence provision of the California Constitution, passed by voters in 1982 as part of the Victim's Bill of Rights, under which relevant evidence can only be excluded under compulsion of the Federal Constitution rather than state constitutional rules.[193] Because the *Burton* rule provided an added level of protection for defendants beyond the totality of the circumstances test required in *Fare*, the *Lessie* court overruled *Burton*.[194] The *Lessie* defendant argued that his request for a probation officer should still qualify as invoking his *Miranda* rights, as *Burton* had involved the defendant's request to speak with his parents.[195] However, the *Lessie* court rejected this argument, stating

186. People v. Lessie, 223 P.3d 3, 4–5 (Cal. 2010).
187. *Id.* at 5.
188. *Id.* at 6.
189. *Id.*
190. *Id.*
191. *Id.* at 5, 7–8.
192. *Id.* at 14.
193. *Id.* at 9–10; *see also* CAL. CONST. art. I, § 28(f)(2).
194. *Lessie*, 223 P.3d at 13.
195. *Id.* at 10–11.

that the *Fare* Court emphasized that "only a request for *an attorney* constitutes a per se invocation of a suspect's Fifth Amendment privilege."[196]

With juvenile defendants in particular, using a totality of the circumstances approach to assess the voluntariness of a *Miranda* waiver is a complex and ambitious undertaking for the court to assume. Given the variations in juvenile cognition from one youth to the next, looking back at an interrogation to assess whether a waiver was truly "knowing and intelligent" is a seemingly impossible task. Further, there is a tendency to mistake the severity of a crime conducted by a youth with cognitive sophistication.

3. The Parental Presence/Interested Guardian Rule

Despite the Court's holding in *Fare*, numerous state courts and legislatures apply a rule similar to that in *Burton* and require that a parent or an "interested adult" be present before the police advise juvenile defendants of their *Miranda* rights, often only as a per se requirement for juveniles under fourteen.[197] While certain parents may provide their children with emotional support during the interrogation, some end up actually encouraging a waiver by advising their children to "tell the truth" and to "talk" to the authorities out of confusion, morality, or even a misunderstanding of the *Miranda* rights themselves.[198] Parents may also have conflicts of interest, such as a relationship with another suspect or one of the victims in the investigation, or a personal desire to find out if the juvenile actually committed the crime in question.[199]

196. *Id.* at 11.

197. *See, e.g.*, VT. CONST. ch. 1, art. 10 (stating that "for a juvenile to voluntarily and intelligently waive his right must be given opportunity to consult with an adult, the adult must be one who is not only genuinely interested in welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile and the independent interested adult must be informed and be aware of the rights"); COLO. REV. STAT. § 19-2-511(1) (1996). *See also* Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983).

198. *See* Barbara Kaban & Ann E. Tobey, *When Police Question Children, Are Protections Adequate?*, 1 J. CENTER FOR CHILD. & CTS. 151, 154 (1999).

199. *See* Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1295 (2004).

4. Additional Procedural Safeguards

Some states require that all custodial interrogation of juveniles be electronically recorded so that courts can better assess whether or not that juvenile voluntarily waived her *Miranda* rights.[200] For example, in 2004 the Supreme Court of Wisconsin affirmed the totality of the circumstances test over a per se parental or guardian presence rule for assessing whether or not a juvenile had waived her rights.[201] However, the court held that "all custodial interrogation of juveniles . . . be electronically recorded where feasible, and without exception when questioning occurs at a place of detention."[202] The court noted that in addition to protecting juveniles, the electronic recording rule would protect police officers accused of coercive interrogation techniques.[203] Recognizing the benefit for its own officers, certain police departments have adopted a policy to routinely record custodial interrogations.[204]

Conclusion

The *Alvarado* Court upheld the use of an objective standard in determining whether a juvenile is in custody largely out of fear that holding otherwise would overburden the police, by asking them to consider a defendant's subjective mental state before administering the *Miranda* warnings. In contrast, factors that most courts consider in the *Miranda* custody test, such as the duration of questioning and the interrogation site, are easy for the police to control. While it is true that the police have a sometimes thankless, difficult and dangerous job, the issue on the other side of the balance is the risk that juvenile suspects have less protection under the current custodial interrogation test.

As discussed above, certain courts consider a suspect's age in the *Miranda* custody test yet seem reluctant to part ways with *Alvarado*, except for extremely young defendants. In line with the underlying rehabilitative intent behind juvenile adjudication, research on juvenile cognition, and the inherent power differential between the police and juvenile defendants, when a suspect under eighteen years

200. *See, e.g.*, Stephen v. State, 711 P.2d 1156, 1159–60 (Alaska 1985).

201. In re Jerrell C.J., 699 N.W.2d 110, 121 (Wis. 2005).

202. *Id.* at 113.

203. *Id.* at 122.

204. *See* Feld, *supra* note 117, at 60.

of age is questioned by the police, there should be a rebuttable presumption that the youth is under custodial interrogation. Given the challenges facing juvenile offenders in terms of mental health and substance abuse issues, in conjunction with comparably low levels of education, giving protections for just those youth ages fifteen and under leaves older juveniles still vulnerable. The *Alvarado* Court's concerns about the various ways that a defendant's prior experience with law enforcement would affect his or her perception of being free to leave are legitimate. Yet, asking a defendant's age before questioning and then proceeding accordingly is a finite and simple procedure for the police to incorporate in the interrogation process.

Further, as some state courts and legislatures have already adopted, there should be a per se requirement that the police not advise suspects under eighteen of their *Miranda* rights in the absence of counsel. Drawing the line at eighteen parallels the Court's decision in *Roper v. Simmons*, yet this may still leave those with developmental delays without adequate protection during interrogation.[205] In light of Grisso and Feld's research on juveniles' relatively poor comprehension of both the words and substance of the warnings and broader findings regarding juvenile cognition, the attorney can provide a neutral buffer zone between the police and the suspect, a role that not every parent or interested adult can fill. A per se approach will both save courts of the burdens and inaccuracies of the totality of the circumstances approach, which for juveniles would involve in-depth analysis of each defendant's particular cognitive abilities, and provide police with a clear rule to follow when interrogating young suspects. Lastly, as an added protection, state courts should adopt a rule similar to the one implemented in Wisconsin requiring that all custodial interrogation of juveniles be recorded.

205. Roper v. Simmons, 543 U.S. 551, 574 (2005).