NOTE
MISSING THE MARK: HOW *MIRANDA* FAILS TO CONSIDER A MINOR'S MIND

I. INTRODUCTION

A teenage boy from Brooklyn was arrested and taken to an interrogation room.[1] There, with his mother present, a police officer read him his *Miranda* rights and asked him if he wanted to talk.[2] The boy very clearly answered: "No."[3] The officer then left the room briefly.[4] Upon returning, the officer asked the boy's mother if she wanted to ask the boy what had happened.[5] The boy, without a lawyer present, began talking to his mother about the incident.[6] The police officer, interjecting, began questioning the boy directly, invoking the mother's concern.[7] The officer then slid a piece of paper toward the boy, telling him it contained the questions he had just asked him, and told him to sign it.[8] Not only was the boy unaware that the statements he made to his mother could be used against him, he was also unaware that the paper the police officer had him sign effectuated a waiver of his *Miranda* rights.[9] The entire interaction was filmed.[10]

In *Miranda v. Arizona*,[11] the Supreme Court held that statements obtained during a custodial interrogation where the individual was not given a full warning of their constitutional rights are inadmissible based on a violation of the Fifth Amendment's privilege against

1. Eileen Grench, *A Brooklyn Teen Refused to Waive His Miranda Rights. But the NYPD's Questioning Didn't Stop There, Video Shows*, CITY (Oct. 12, 2023, 7:52 AM), https://www.thecity.nyc/2021/3/3/22312705/state-bill-to-give-new-york-kids-more-miranda-protection-nypd [https://perma.cc/TA4H-HMQ3].
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. 384 U.S. 436 (1966).

self-incrimination.[12] The Court defined "custodial interrogation" as questioning initiated by a law enforcement officer after an individual has been arrested or "otherwise deprived of his freedom of action in any significant way."[13] Yet, people may waive their *Miranda* rights if they do so "voluntarily, knowingly and intelligently."[14] Individuals under the age of eighteen are "uniquely vulnerable" to unknowingly or involuntarily waiving their *Miranda* rights during a custodial interrogation, and, to complicate matters further, police are allowed to use deceptive interrogation techniques.[15] For example, the Reid Technique is an interrogation method commonly used across jurisdictions in the United States.[16] Part of the Reid Technique involves completely isolating the suspect and conducting a Behavior Analysis Interview ("BAI") to determine whether the suspect is innocent or guilty.[17] The law enforcement officer will only proceed with the interrogation if he determines, based on the BAI, that the suspect is "guilty."[18] Therefore, the subsequent interrogation of the suspect in accordance with the Reid Technique is guilt-presumptive, and the interrogator attempts to convince the suspect that confessing is in the suspect's best interest.[19] Logically, minors are more susceptible than

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12. *Id.* at 444, 478-79, 492, 494, 498-99.

13. *Id.* at 444.

14. *Id.*; *see* Daniel P. Greenfield & Philip H. Witt, *Evaluating Adult* Miranda *Waiver Competency*, 33 J. PSYCHIATRY & L. 471, 474 (2005). The standard of a knowing, intelligent, and voluntary waiver is difficult to precisely define:

> Although the individual's competence, or capacity, to waive his [*Miranda*] rights is one element in determining whether a confession is valid (and may therefore be admitted into evidence), it is not the only element. The court must consider the procedures used by the police in apprehending, detaining, and questioning the individual. These factors focus most on the voluntariness of the confession. . . . The distinction between "intelligent" and "knowing" is a fine one. Historically, "knowing" refers to the more concrete, factual aspects of the individual's comprehension. That is[,] did the individual grasp the basic fact that he was entitled to remain silent and have the assistance of an attorney? "Intelligent" refers to understanding the implications of the decision to confess. Did the individual realize the adversarial nature of the proceedings or the implications of providing a statement to the police? However, the case law is still somewhat unsettled on these points, and although the distinction we make illustrates a general trend, there are contrary findings.

Id. (citations omitted).

15. N.Y.C. BAR ASS'N, JUV. JUST. COMM. & CHILD. & L. COMM., REPORT ON LEGISLATION A.1963 / S.1099 2 (May 2023) [hereinafter REPORT ON LEGISLATION A.1963 / S.1099], https://s3.amazonaws.com/documents.nycbar.org/files/2020904-CustodialInterrogationsJuveniles.pdf [https://perma.cc/84NQ-GMGD]; *see* Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1723 (2017).

16. Spierer, *supra* note 15, at 1725.

17. *Id.*

18. *Id.* at 1725-26.

19. *Id.* at 1732.

adults to the persuasive tactics of those in a position of authority, and the Reid Technique misleads minors, through subtle coercion, into believing a confession is in their best interest.[20]

In *Fare v. Michael C.*,[21] the Supreme Court held that a totality of the circumstances test shall be used to determine whether a minor validly waived their *Miranda* rights during a custodial interrogation.[22] The factors to consider under the test are the minor's age, education, life experience, intelligence, and background, as well as whether the minor has the capacity to understand the warnings given and the consequences of a waiver.[23] However, this test falls far short of providing the protection necessary to prevent involuntary statements by minors.[24]

Studies demonstrate that many children and adolescents will waive their *Miranda* rights when asked to do so by police or encouraged to do so by a well-intentioned but uninformed parent or guardian.[25] Inherent coercion is present when a person is in police custody and subjected to questioning in a police-dominated atmosphere, but young people have unique vulnerabilities due to their lack of knowledge regarding the legal system, difficulty managing emotions, and trouble assessing short- and long-term consequences.[26] Approximately ninety-four percent of young people between the ages of twelve and nineteen who have made contact with the criminal legal system do not fully understand how *Miranda* rights function.[27] Not surprisingly, studies have also shown that minors face a high risk of falsely confessing and consequently are at a higher risk of being wrongfully convicted.[28] Black and Latinx youth are particularly affected by police interrogation methods as they are disproportionately targeted by law enforcement officials[29] and face harsher penalties under the criminal legal system than minors from comparable groups.[30]

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20. *Id.* at 1732-33.
21. 442 U.S. 707 (1979).
22. *Id.* at 725.
23. *Id.*
24. *See* REPORT ON LEGISLATION A.1963 / S.1099, *supra* note 15, at 3.
25. *Id.* at 2-4.
26. *See id.* at 2-3.
27. *Id.* at 3.
28. Miriam Aroni Krinsky & Norman L. Reimer, *Children Deserve Protections That Too Many Aren't Getting in the US Justice System*, USA TODAY (Mar. 8, 2022, 6:02 AM), https://www.usatoday.com/story/opinion/policing/2022/03/08/police-tactics-kids-deception-threats/6895477001 [https://perma.cc/N7F2-99KR].
29. *See* REPORT ON LEGISLATION A.1963 / S.1099, *supra* note 15, at 1 ("The Committees recognize that youth affected by current police interrogation practices are overwhelmingly Black or Latinx. Black and Latinx youth comprise a substantially larger proportion of arrests than their proportion of the general population . . . ."); Claudio G. Vera Sanchez & Ericka B. Adams, *Sacrificed on the Altar of Public Safety: The Policing of Latino and African American Youth*, 27 J. CONTEMP.

Some states, including New York, have proposed legislation concerning minors and *Miranda* rights.[31] New York Senate Bill S2800C would amend the state's current required procedures for custodial interrogation of minors.[32] The proposed amendments mandate individuals under eighteen years of age to consult with an attorney before waiving their rights.[33] California has already passed a similar amendment.[34] While the amendment is fairly new, it was renewed in 2021 to include all individuals ages seventeen or younger; originally, it only applied to minors ages fifteen or younger.[35] Similarly, Illinois recently passed legislation stating that if law enforcement officers knowingly deceive a minor in order to procure a statement, that statement cannot be introduced as evidence against the minor in a criminal or juvenile legal

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CRIM. JUST. 322, 326 (2011). Vera Sanchez and Adams discuss their research findings concerning policing and Black and Latinx youth:

> Current researchers uncover a distinct style of policing that Latino and African American youth endure in high-crime neighborhoods, race operating as a common denominator. Brunson and Weitzer suggest that African American youth were convinced that they were routinely stopped unjustifiably in their neighborhoods by the police, searched intrusively, and that officers used more force than necessary to secure their legal objectives. Alternatively, Brunson and Weitzer also found that when White youth walked by themselves in African American neighborhoods, officers expressed a concern for their safety—when they walked with their African American companions, they were treated poorly—a temporary evaporation of racial privilege for White youth. African American women who reside in high-crime neighborhoods, alternatively, when accompanied by men, are also unable to escape unpleasant police encounters. The growing literature on race and neighborhood context reveals a vulnerability to policing for minority youth.

Vera Sanchez & Adams, *supra* (citations omitted); *see also New Data: Police Disproportionately Target Black and Latino Students in NYC Schools*, NYCLU (Apr. 30, 2018), https://www.nyclu.org/en/press-releases/new-data-police-disproportionately-target-black-and-latino-students-nyc-schools [https://perma.cc/VT4Q-99AD] ("Students of color are also more likely than [W]hite students to be handcuffed in school, even where there is no criminal activity. Black and Latino students accounted for [ninety-three] percent of juvenile reports and [ninety-four] percent of mitigated incidents where handcuffs were used, as well as [ninety-three] percent of child-in-crisis incidents where handcuffs were used.").

30. *See* REPORT ON LEGISLATION A.1963 / S.1099, *supra* note 15, at 1; Mikhayla Hughes-Shaw et al., *Youth of Color Disproportionately Represented in the Justice System*, NEWS21: KIDS IMPRISONED (Aug. 21, 2020), https://kidsimprisoned.news21.com/systemic-racial-disparities-juvenile-justice [https://perma.cc/9QVG-NFUY] ("Youth of color account[ed] for [twenty-eight percent] of the U.S. population in 2017, according to a study from the Pew Research Center. However, they represented [sixty-seven percent] of offenders in residential placement, according to [the] Office of Juvenile Justice and Delinquency Prevention. . . . Nationally, Black youth are five times more likely to be detained or confined than [W]hite youth, the Sentencing Project reported. Native American youth are three times more likely and Latino youth are roughly two times more likely than [W]hite youth.").

31. *See, e.g.*, S.B. 2800, 2022 Gen. Sess. (N.Y. 2022).

32. *See id.*

33. *Id.*

34. *See* CAL. WELF. & INST. CODE § 625.6 (West 2021).

35. *Id.*

proceeding.[36] The recognition by some states that current protections for minors during custodial interrogations are inadequate supports the argument that federal protections for minors should also be reexamined and rewritten.[37]

This Note analyzes the current standard of a knowing, intelligent, and voluntary waiver of *Miranda* rights and concludes that it is virtually impossible for people under the age of eighteen to meet this standard.[38] To compensate for minors' misunderstanding of their *Miranda* rights, 18 U.S.C. § 5033 should be amended to include a two-tiered approach to effectuate additional protections for minors subject to custodial interrogations.[39] First, the proposed 18 U.S.C. § 5033 protections would require minors (individuals under the age of eighteen) to consult with an attorney, either in person or over the phone, before waiving their *Miranda* rights.[40] This would allow the minor to gain a better understanding of the charges they potentially face, their rights under the law, and the process of the criminal system.[41] Second, the proposed 18 U.S.C. § 5033 protections would prohibit the use of deception by police officers when questioning minors.[42] Research shows that when police use interrogation techniques that are designed for adults, such as deception, on minors, minors are far more likely to falsely confess.[43]

Part II provides background information on *Miranda* rights in the adult context and an overview of the treatment of minors in areas of the law outside the criminal context.[44] It then explains the development of case law regarding minors and waivers of their *Miranda* rights and the current analytical framework for determining valid *Miranda* waivers by minors.[45] Part III assesses the shortcomings of that analytical framework and argues that such shortcomings result in false confessions and wrongful convictions of minors.[46] Part IV posits that the only way to

36. S.B. 2122, 102nd Gen. Assemb. (Ill. 2021).

37. *See* REPORT ON LEGISLATION A.1963 / S.1099, *supra* note 15, at 6-7.

38. Miranda v. Arizona, 384 U.S. 436, 444 (1966); *see infra* Part III.B.

39. 18 U.S.C. § 5033 (2018); *see infra* Part IV.B–C.

40. *See infra* Part IV.B.

41. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1163 (1980); *see also* Yekaterina Berkovich, Note, *Ensuring Protection of Juveniles' Rights: A Better Way of Obtaining a Voluntary* Miranda *Waiver*, 88 ST. JOHN'S L. REV. 561, 594 (2014).

42. *See infra* Part IV.C.

43. *See* Spierer, *supra* note 15, at 1731. *See generally* Nashiba F. Boyd, Comment, *"I Didn't Do It, I Was Forced to Say That I Did": The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 HOWARD L.J. 395 (2004) (explaining why minors are more susceptible to making false confessions than adults).

44. *See infra* Part II.A–B.

45. *See infra* Part II.C–D.

46. *See infra* Part III.

adequately address invalid *Miranda* waivers by minors and their consequences is to provide additional federal protections through an amendment to the United States Code.[47] The amendment would require a minor to consult with an attorney before waiving their *Miranda* rights and would prohibit the use of deceptive interrogation techniques by law enforcement officials conducting the interrogation.[48] Part V affirms that these federal amendments are necessary to protect minors from coerced confessions and combat the mistrust many young people feel toward the criminal legal system.[49]

II. DOES *MIRANDA* PROVIDE THE PROTECTIONS WE THINK IT DOES?

Since the landmark Supreme Court decision *Miranda v. Arizona* was rendered, researchers and lawyers alike have questioned whether individuals truly understand the protections afforded to them during custodial interrogations.[50] Subpart A discusses the difficulties that arise with understanding *Miranda* rights in general.[51] Subpart B provides an overview of how minors are treated in other areas of the law, particularly where minors are questioned as witnesses rather than suspects.[52] Subpart C discusses the treatment of minors and their waivers of *Miranda* rights by highlighting pertinent case law and U.S.C. provisions.[53] Lastly, Subpart D summarizes current federal protections for minors during custodial interrogations and outlines two different approaches courts have used to assess the voluntariness of a minor's *Miranda* waiver.[54]

A. The Complexity of Miranda *Warnings in Adult Contexts*

> You 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 an attorney. If you cannot afford an attorney, one will be provided for you. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?[55]

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47. *See infra* Part IV.

48. *See infra* Part IV.B–C.

49. *See infra* Part V.

50. *See, e.g.*, Richard Rogers et al., *"Everyone Knows Their* Miranda *Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCH., PUB. POL'Y, & L. 300, 315 (2010).

51. *See infra* Part II.A.

52. *See infra* Part II.B.

53. *See infra* Part II.C.

54. *See infra* Part II.D.

55. *What Are Your Miranda Rights?*, MIRANDAWARNING.ORG, http://www.mirandawarning.org/whatareyourmirandarights.html [https://perma.cc/R3EL-L3E8] (last visited Apr. 15, 2024).

Many people are familiar with this script because *Miranda* warnings are a unique legal concept ingrained in American culture, "becom[ing] an indelible part of our collective heritage and consciousness."[56] In fact, a study found that season five of the popular TV show *Law and Order: SVU* referenced *Miranda* warnings a total of twenty-seven times throughout twenty-five episodes.[57] But do people actually understand their *Miranda* rights outside of the character Olivia Benson's world?[58]

Following *Miranda v. Arizona*, researchers and advocates have studied the efficacy of *Miranda* warnings to determine whether most Americans even understand their *Miranda* rights in the first place.[59] A 2010 study developed a "*Miranda* Quiz" to assess issues related to *Miranda* comprehension and waivers.[60] The quiz was administered to two groups of pre-trial defendants: pre-trial defendants arrested within the two weeks prior to the study and pre-trial defendants arrested more than one month before the study.[61] The study found that criminal defendants had numerous misconceptions regarding their right to remain silent; approximately thirty percent of defendants viewed silence alone as incriminating evidence.[62] Many defendants did not understand that precise, affirmative language is required to invoke their right to counsel.[63] Further, a majority of those studied were not aware that police are legally allowed to deceive suspects, with about sixty-four percent believing that police cannot mislead defendants about eyewitness identifications and about fifty-five percent believing that the police cannot assert nonexistent charges.[64] This data was then compared to the understanding of *Miranda* by college students—"an educated segment of the public far removed from the stresses of arrest, detention, and pre-interrogation."[65] The study found that years of education had no correlation with

56. Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 672 (1996).

57. Ronald Steiner et al., *The Rise and Fall of the* Miranda *Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 233 (2011).

58. *See id.* at 223; Rogers et al., *supra* note 50, at 314 (suggesting that *Miranda* misconceptions are widespread and common).

59. *See* Meghan Finnerty, *Fight to Remain Silent: People Often Waive Miranda Rights, Experts Say*, CRONKITE NEWS (Aug. 9, 2016), https://cronkitenews.azpbs.org/2016/08/09/fight-remain-silent-people-often-waive-miranda-rights-experts-say [https://perma.cc/KMU4-2N6F].

60. Rogers et al., *supra* note 50, at 302-03.

61. *Id.*

62. *Id.* at 307 ("In general, these defendants are likely to believe there is nothing to lose—and possibly something to gain—by relinquishing their 'right' to silence.").

63. *Id.*

64. *Id.* at 311.

65. *Id.*

knowledge of *Miranda* protections.[66] For example, approximately thirty-six percent of college students also incorrectly believed that silence is likely to be considered incriminating.[67] These findings clearly illustrate that misconceptions about *Miranda* rights are widespread and common, regardless of one's level of education or connection to the criminal legal system.[68]

B. Treatment of Minors in Other Areas of the Law

There are numerous areas of the law that require children or adolescents to be treated differently than adults.[69] For example, minors often require an agent, like a parent or law guardian, to assert their legal rights; unlike adults, minors cannot be pro se[70] litigants.[71] Contract law also provides some insight into the differential treatment of minors and adults.[72] Under the law, minors are deemed not to have contractual capacity,[73] which is required to form a legally binding and enforceable agreement.[74] The idea that minors lack the capacity to contract is rooted in the notion that minors can be taken advantage of and are generally unable to understand the legal obligations and consequences that accompany a contract.[75] Therefore, "infants"—or individuals below the age of

66. *Id.* at 312.

67. *Id.* at 314.

68. *Id.* at 315.

69. *See* James G. Dwyer, *Equality Between Adults and Children: Its Meaning, Implications, and Opposition*, 2013 MICH. ST. L. REV. 1007, 1009 (2013).

70. *Pro Se*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/pro_se [https://perma.cc/3W6R-SXGT] (last visited Apr. 15, 2024) ("When a litigant proceeds without legal counsel, they are said to be proceeding 'pro se.'").

71. Dwyer, *supra* note 69, at 1009.

72. *See* 5 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS 35-37 (4th ed. 2009).

73. *See* RESTATEMENT (SECOND) OF CONTS. § 12 cmt. a (AM. L. INST. 1981) ("Capacity . . . means the legal power which a normal person would have under the same circumstances. . . . Incapacity may be total, as in cases where extreme physical or mental disability prevents manifestation of assent to the transaction, or in cases of mental illness after a guardian has been appointed. Often, however, lack of capacity merely renders contracts voidable."); EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS 539-41 (2d ed. 2019) ("Ordinarily, a party to a contract who is the victim of a mental disease or defect at the time of making a contract executes a voidable obligation. The common law defined mental capacity to contract as possession of sufficient reason to enable the party to understand the nature and effect of making a contract. Although many states have adopted verbal variations, in order to be deemed competent, a party to a contract must be able to understand the nature of the contract and the effect of making the contract.").

74. *See* WILLISTON & LORD, *supra* note 72, at 53-55.

75. Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquires*, 52 SANTA CLARA L. REV. 47, 50 (2012).

majority—can generally only agree to voidable[76] contractual obligations.[77]

In the 1980s, methods used to interview children during child abuse investigations in both criminal law and family law cases were criticized in part because improper interview procedures resulted in the interviewed child being inadvertently coerced.[78] Thus, forensic interview techniques were redesigned to ensure decreased use of suggestive questions which can lead to false charges against another individual based on a child's unreliable statement.[79] Forensic interviewing guides now encourage interviewers to keep in mind important considerations when questioning a child, such as a child's age and developmental level, the effect of trauma on memory, suggestibility, and the interviewer's own biases.[80] It is widely accepted that interviews are most effective when an interviewer "adapts the interview structure to the developmental, cultural, and emotional needs of the child . . . and avoids suggestive and coercive approaches."[81] Questioning tactics should also be structured to reduce the possibility of coerced confessions where the child is a suspect, particularly because individual liberty could be at stake.[82]

Since research recognizes that safeguards are needed to avoid false or inaccurate statements by children who are questioned as victims or witnesses, it follows that children in police custody, an environment of inherent coercion, are no less susceptible to making false or inaccurate statements and therefore require additional safeguards.[83] Consider the following hypothetical: John Doe, a child, was questioned on Monday as a witness and again on Wednesday as a suspect.[84] On Monday, the interviewers ensured that John Doe was comfortable.[85] They avoided asking John Doe leading questions or priming his answers in any way.[86] When

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76. RESTATEMENT (SECOND) OF CONTS. § 7 (AM. L. INST. 1981) ("A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.").

77. WILLISTON & LORD, *supra* note 72, at 53-55.

78. *See* CHILD WELFARE INFO. GATEWAY, FORENSIC INTERVIEWING: A PRIMER FOR CHILD WELFARE PROFESSIONALS 2 (2023), https://www.childwelfare.gov/resources/forensic-interviewing-primer-child-welfare-professionals [https://perma.cc/UV54-AB6F].

79. *See id.*

80. *Id.* at 5-6; *see also* CHRIS NEWLIN ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., CHILD FORENSIC INTERVIEWING: BEST PRACTICES 3-6 (Sept. 2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248749.pdf [https://perma.cc/2EGD-S8VU].

81. NEWLIN ET AL., *supra* note 80, at 11.

82. *See id.* at 7; CHILD WELFARE INFO. GATEWAY, *supra* note 78, at 2.

83. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 78, at 2.

84. *See id.* at 1-2.

85. *See* NEWLIN ET AL., *supra* note 80, at 6.

86. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 78, at 2, 4.

John Doe returned to the precinct on Wednesday, now suspected of a criminal act, the officers were able to question him entirely differently.[87] For example, the officers were free to ask leading questions.[88] They were also allowed to lie to John Doe.[89] What could have changed to make John Doe less susceptible to coercion on Wednesday?[90] Nothing at all.[91]

C. History of Federal Protections for Minors During Custodial Interrogations

The Supreme Court extended federal constitutional protections to juveniles in the 1967 case *In re Gault*.[92] There, a minor was taken into police custody after his neighbor complained about a call she received in which the caller made "indecent remarks."[93] However, the police never took any steps to notify the minor's parents that he had been arrested.[94] Prior to the case, juvenile proceedings were considered civil rather than criminal, which meant that minors did not have the due process rights that adult defendants had.[95] *In re Gault* extended the right to counsel and the privilege against self-incrimination to juveniles.[96] Importantly, it explicitly acknowledged the differences in the procedural rights accorded to adults and juveniles.[97] The Court noted that the lack of procedural

87. *See* Spierer, *supra* note 15, at 1721.

88. *See Analysis of Confessions in '89 NYC Rape*, ABC NEWS (Sept. 25, 2002, 7:04 PM), https://abcnews.go.com/Primetime/story?id=132077&page=1 [https://perma.cc/2UEM-AZWB] ("One method is by asking leading questions. The experts point to 16-year-old Kharey Wise's confession, in which Assistant District Attorney Elizabeth Lederer appeared to be guiding his answers. Wise initially said the boys only slapped and punched the jogger, but then Lederer showed him pictures of the victim's injuries and raised the possibility that someone hit her with a rock. She told him that slaps and punches are not enough to cause bleeding and a fractured skull. After more than an hour of questioning, Wise conceded, 'It looks like a rock wound.'"). This is an analysis of Wise's false confession; he was one of the exonerated Central Park Five defendants. *Id.*

89. Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 508 (2002).

90. *See* Boyd, *supra* note 43, at 402-03.

91. *See id.*

92. 387 U.S. 1 (1967).

93. *Id.* at 4.

94. *Id.* at 5.

95. Berkovich, *supra* note 41, at 567.

96. *In re Gault*, 387 U.S. at 41, 55.

97. *Id.* at 14. The Court stated that:

> From the inception of the juvenile court system, wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles. In practically all jurisdictions, there are rights granted to adults which are withheld from juveniles. In addition to the specific problems involved in the present case, for example, it has been held that the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury. It is frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles.

rules for minors "based upon constitutional principle has not always produced fair, efficient, and effective procedures."[98] In fact, the Court went so far as to say that:

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child—essentially good, as they saw it—was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.[99]

Following *In re Gault*, courts began to handle cases involving minors subject to custodial interrogation differently.[100] For example, in *Haley v. Ohio*,[101] the Court recognized that minors are "easy victim[s] of the law."[102] The Court explained that the young defendant in that case could not be expected to adequately protect himself against police questioning without "counsel and support."[103] In *Gallegos v. Colorado*,[104] the Court affirmed its decision in *Haley* to treat minors with special care when ensuring their due process rights by establishing a totality of the circumstances test.[105] The Court recognized that the age of the minor, the length of detention, the failure to notify the minor's parents, and

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Id.

98. *Id.* at 18.

99. *Id.* at 15-16 (quoting Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

100. Berkovich, *supra* note 41, at 567.

101. 332 U.S. 596 (1948).

102. *Id.* at 599 (stating that the fifteen-year-old defendant "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. . . . A [fifteen]-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition").

103. *Id.* at 600.

104. 370 U.S. 49 (1962).

105. *Id.* at 55.

the failure to ensure the minor's access to a lawyer were all important factors to be considered when questioning minors in a custodial setting.[106] The Court also stressed that the presence of an adult—such as a lawyer or a relative of the minor—plays an important role in effectuating the minor's due process rights.[107]

However, the Court did not seem to later adhere to its recognition of a minor's unique vulnerabilities during custodial interrogations.[108] The Court backpedaled from its decisions in *In re Gault*, *Haley*, and *Gallegos* when it held in *Fare v. Michael C.* that the same totality of the circumstances test used to determine the voluntariness of an adult waiver should be used to determine whether there was a valid waiver by a minor.[109] While the test takes into consideration "the juvenile's age, experience, education, background, and intelligence,"[110] the Court provided no guidance regarding how heavily each of these factors should be weighed.[111] This intentional lack of clarity has resulted in differing outcomes across jurisdictions and counterintuitive decisions, such as the upholding of waivers despite a minor's immaturity or low IQ.[112]

Here, a brief history of the Juvenile Justice and Delinquency Prevention Act ("JJDPA") is required to understand the evolution of protections afforded to minors in our criminal legal system, particularly because the 1974 Act was enacted in response to the Court's *In re Gault* decision.[113] Prior to 1974, the protections afforded to minors suspected of a crime were pronounced in the Federal Juvenile Delinquency Act of 1938;[114] prior to 1938, there was no such federal legislation.[115] The goal of the 1938 Act was to ensure that minors were treated differently than

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106. *Id.*

107. *See id.* at 54. The Court stated that the fourteen-year-old defendant

> 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.

Id.

108. *See* Berkovich, *supra* note 41, at 577; Fare v. Michael C., 442 U.S. 707, 725 (1979).

109. *See Fare*, 442 U.S. at 725; Berkovich, *supra* note 41, at 577.

110. *Fare*, 442 U.S. at 725.

111. *See id.* at 725-26; Berkovich, *supra* note 41, at 577-78.

112. Berkovich, *supra* note 41, at 578.

113. *Id.* at 572.

114. Federal Juvenile Delinquency Act of 1938, 18 U.S.C. §§ 921–929; U.S. DEP'T OF JUST., *Juvenile Delinquency Prosecution—Introduction*, U.S. DEP'T OF JUST. ARCHIVES [hereinafter U.S. DEP'T OF JUST., *Juvenile Delinquency Prosecution*], https://www.justice.gov/archives/jm/criminal-resource-manual-116-juvenile-delinquency-prosecution-introduction [https://perma.cc/PM53-AM4L] (last visited Apr. 15, 2024).

115. U.S. DEP'T OF JUST., *Juvenile Delinquency Prosecution*, *supra* note 114.

adult suspects.[116] In 1948, the Act was amended, but with limited substantive changes.[117] Eventually, in 1974, Congress passed the JJDPA, which required immediate parental notification upon a minor's arrest and parental notification of the minor's rights.[118] A Senate Report explained that the JJDPA was meant "to provide basic procedural rights for juveniles who come under Federal jurisdiction and to bring Federal procedures up to the standards set by various model acts, many state codes and court decisions."[119]

D. Current Federal Protections for Minors During Custodial Interrogations

As a result of the vagueness of the totality of the circumstances test set forth in *Fare v. Michael C.*, which followed amendments to the JJDPA, federal courts have applied the test differently to determine whether a minor's waiver of *Miranda* rights is voluntary and therefore admissible at trial.[120] The circuit courts have taken two different approaches.[121] A majority have applied the totality of the circumstances test, even where there has been a violation of the JJDPA.[122] Violation of the JJDPA is but a mere factor to be considered as part of the totality of the circumstances test.[123] The Ninth Circuit provides a different standard for evaluating the voluntariness and consequent admissibility of a minor's statement taken in violation of the JJDPA.[124] Where there has been a violation of the Act, the Ninth Circuit has held that a court must first determine "whether the government's conduct was so egregious as to deprive" the minor of due process.[125] If the court finds the government's conduct was not egregious enough to violate the minor's due process rights, it still must determine whether the violation of the JJDPA prejudiced the defendant.[126] The standard of review is the same as that for a

116. *See id.*
117. *Id.*; 18 U.S.C. § 5033 (1946).
118. 18 U.S.C. § 5033 (1970); Berkovich, *supra* note 41, at 572.
119. S. REP. NO. 93-1011, at 19 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 5283, 5284; Berkovich, *supra* note 41, at 572.
120. Berkovich, *supra* note 41, at 564-65, 573.
121. *Id.* at 573.
122. *Id.* at 565, 577-78.
123. *Id.* at 577-78.
124. *See id.* at 565.
125. *Id.* at 565 (quoting United States v. Juvenile Male, 595 F.3d 885, 902 (9th Cir. 2010)).
126. *Id.* at 565, 581.

criminal case: "beyond a reasonable doubt."[127] If the court finds that the defendant was so prejudiced, it has the discretion to issue a remedy.[128]

The United States District Court for the Southern District of New York has held that a juvenile's statements can be suppressed based on a violation of the JJDPA.[129] This is true even where a juvenile has had prior encounters with the criminal legal system.[130] Therefore, even if a juvenile appears knowledgeable about their constitutional rights based on prior contact with the criminal legal system, this factor is not necessarily dispositive on the issue of a valid waiver.[131]

III. CONTRADICTORY COURTS AND CONFUSED CHILDREN

The different ways courts assess the voluntariness of a minor's *Miranda* waiver—and particularly how violations of the codification of the JJDPA, 18 U.S.C. § 5033, are weighed in the analysis—present a fairness issue for minors.[132] This is further complicated by research that demonstrates minors' general lack of understanding when it comes to *Miranda* rights.[133] Subpart A discusses how the current protections in section 5033 are inadequate because courts assess violations of the statute differently in relation to their analysis of the voluntariness of the waiver.[134] Subpart B presents statistics regarding minors' inability to comprehend *Miranda* rights and what it means to waive them.[135] Subpart C assesses the long-term consequences of involuntary waivers by minors.[136]

A. 18 U.S.C. § 5033

Section 5033 provides that when a minor is taken into custody for an alleged act of juvenile delinquency, the arresting officer must

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127. *Id.* at 581.

128. *Id.*

129. United States v. Nash, 620 F. Supp. 1439, 1444 (S.D.N.Y. 1985); *see* Berkovich, *supra* note 41, at 580.

130. *See Nash*, 620 F. Supp. at 1444 ("Finally, the Government asserts that Nash and Negron were not strangers to the criminal justice system, both having been previously convicted of violent crimes and having served time on those charges. This experience, it submits, made the defendants fully aware of their rights and consequences of waiving those rights and making a statement. . . . We are not persuaded by the Government's arguments.").

131. *See id.*

132. *See* Berkovich, *supra* note 41, at 580; Sara Cressey, Comment, *Overawed and Overwhelmed: Juvenile* Miranda *Incomprehension*, 70 ME. L. REV. 87, 90 (2017).

133. *See* Cressey, *supra* note 132, at 89.

134. *See infra* Part III.A.

135. *See infra* Part III.B.

136. *See infra* Part III.C.

immediately read the minor his rights and notify the Attorney General and the minor's parents or guardian of the arrest.[137] The arresting officer must also inform the parents or guardian of the minor's rights and the nature of the arrest.[138] There is, however, no requirement that the arresting officer ensure the minor genuinely appreciates and understands these rights before choosing to waive them.[139] It is also unclear whether a violation of section 5033—or a failure by police to notify a parent or guardian of the minor's arrest—requires application of the exclusionary rule.[140]

A per se application of the exclusionary rule would automatically suppress any statements made by a minor which were obtained without parental notification and thus in violation of section 5033.[141] This approach, however, has been rejected by federal courts.[142] Instead, courts have utilized two different methods to determine whether a minor executed a valid waiver of their rights: the totality of the circumstances approach and the Ninth Circuit approach.[143] The totality of the circumstances approach has been adopted by the Second,[144] Sixth,[145] Tenth,[146]

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137. 18 U.S.C. § 5033.

138. *Id.*

139. *See id.*

140. Berkovich, *supra* note 41, at 573; United States v. Guzman, 879 F. Supp. 2d 312, 324-25 (E.D.N.Y. 2012) (declining to apply the exclusionary rule notwithstanding the violation of the parental notification requirement of section 5033 and explaining that a "*per se* suppression rule for violations of the parental notification requirement has no support in the plain text of the law or logic, and this Court declines to adopt it"). The Court used the same standard for evaluating voluntariness as it would with an adult:

> *Per se* suppression of Guzman's post-statements under these circumstances would provide a judicial windfall to Guzman, even though no such remedy is dictated by the plain language of the statute, or the United States Constitution. Thus, this Court declines to impose such a *per se* suppression remedy for a violation of this statutory (rather than constitutional) rule. Instead, the Court adopts the approach of the Sixth Circuit and holds that, under these circumstances, the test remains the same as utilized for analyzing post-arrest statements generally—that is, whether the *Miranda* waiver was knowingly, voluntarily, and intelligently made under the totality of the circumstances. Under that test, the lack of parental notification is simply one factor, among many—including the juvenile's experience and background, the conditions of the interrogation, and the conduct of the law enforcement officials—that the Court must consider under the totality of the circumstances.

Guzman, 879 F. Supp. 2d at 316.

141. Berkovich, *supra* note 41, at 573.

142. *Id.* at 573, 583.

143. *Id.* at 573. For an in-depth discussion of the two approaches and their differences, see *id.* at 573-83.

144. United States v. Burrous, 147 F.3d 111, 116 (2d Cir. 1998) ("In the case of interrogation of a juvenile, we examine the totality of the circumstances culminating in the waiver. . . . Based upon a review of the record, this court holds that the district court did not err in finding that Burrous knowingly and voluntarily waived his Fifth Amendment rights."); Lauren Gottesman, Note, *Protecting Juveniles' Right to Remain Silent: Dangers of the* Thompkins *Rule and Recommendations*

and Eleventh Circuits.[147] The Ninth Circuit approach, adopted by its namesake, first asks whether the government's conduct was egregious enough to violate the defendant's due process rights.[148] The court applies a totality of the circumstances standard to evaluate a minor's waiver in order to determine whether there has been a denial of due process.[149] If the court finds no such denial, it then assesses whether the violation caused harm to the minor, which must be proved beyond a reasonable doubt.[150] The violation is considered to have harmed the minor where the violation itself caused him to confess and the confession then prejudiced the minor.[151] If the violation of section 5033 prejudices the minor beyond a reasonable doubt, the court has discretion to order certain remedies.[152] For example, the Ninth Circuit has described prejudice on one occasion as "the juvenile los[ing] the opportunity, envisioned by the statute, for parental advice about his rights prior to interrogation."[153] The Ninth Circuit has explained that this is to ensure that the minor's "rights are safeguarded and the will of Congress is not thwarted."[154]

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for Reform, 34 CARDOZO L. REV. 2031, 2040 (2013) ("[T]he Second Circuit held that a juvenile's incriminating statements were admissible into evidence after an officer made several, unsuccessful attempts to locate the juvenile's parents and the juvenile knowingly and voluntarily signed a waiver-of-rights form.") (citing *Burrous*, 147 F.3d at 116); Berkovich, *supra* note 41, at 573-74.

145. *See* United States v. Doe, 226 F.3d 672, 680 (6th Cir. 2000) ("[W]e unequivocally conclude that Doe's confession was knowingly made of his own free will, even assuming (without deciding) that a violation of § 5033 occurred when the authorities failed to contact Doe's mother after learning that he was a juvenile."); Berkovich, *supra* note 41, at 573-74 & n.89.

146. *See* United States v. Watts, 513 F.2d 5, 9 (10th Cir. 1975) ("Under the total circumstances of this case, we agree with the conclusion of the trial court and hold that Watts was not denied the fundamental 'fair treatment' mandated by *In [r]e Gault*."); United States v. Palmer, 604 F.2d 64, 67 (10th Cir. 1979) ("The instant case must be decided 'on the totality of the circumstances surrounding the interrogation.'"); Berkovich, *supra* note 41, at 573-74 & n.90.

147. United States v. Kerr, 120 F.3d 239, 241-42 (11th Cir. 1997) (per curiam) ("While § 5033 requires urgency in the notification of a parent or guardian, there is no requirement that a parent be present in order for a juvenile's statement to be admissible. . . . Under these circumstances, it is apparent that defendant's statements were freely and voluntarily given."); Berkovich, *supra* note 41, at 573-74 & n.91.

148. Berkovich, *supra* note 41, at 575.

149. *Id.*; United States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999) ("As to voluntariness, we consider the totality of the circumstances to determine whether the government obtained the confession by overriding Doe's will with physical or psychological coercion or with improper inducements. . . . We hold that Doe's waiver was knowing, intelligent and voluntary.").

150. Berkovich, *supra* note 41, at 575; *Doe*, 170 F.3d at 1168-69 ("Although the § 5033 violation is not a due process violation, it may serve as an independent basis for suppression. . . . Initially, we inquire whether the violation caused the juvenile to confess. . . . The failure to notify Doe's mother of his *Miranda* rights was harmless.").

151. Berkovich, *supra* note 41, at 575.

152. *Id.* at 565.

153. United States v. Doe, 219 F.3d 1009, 1012 (9th Cir. 2000).

154. *Id.* at 1017 (quoting United States v. Doe, 862 F.2d 776, 780-81 (9th Cir. 1988)); Berkovich, *supra* note 41, at 581.

The application of two federally employed standards for determining whether a minor has effectuated a valid waiver of rights and, therefore, whether a suppression remedy applies, has caused diverging results.[155] The totality of the circumstances approach has numerous issues, including a lack of guidance on how a court should weigh the factors of the test.[156] Furthermore, the totality of the circumstances approach does not produce the safeguards that Congress intended to provide to minors in enacting the JJDPA.[157] Additionally, since jurisdictions treat a violation of section 5033 differently depending on how it is balanced against other factors of the test, there are disparate outcomes for minors across jurisdictions.[158] For example, in *United States v. Guzman*,[159] the District Court for the Eastern District of New York denied a minor's motion to suppress his statements after applying the totality of the circumstances test, notwithstanding the police officer's failure to notify the minor's mother of his arrest.[160] In contrast, in *United States v. Nash*,[161] the neighboring District Court for the Southern District of New York suppressed the statements of two minors under the totality of the circumstances test, even though their mother and relatives, respectively, were notified of the arrests.[162] The court found the statements to be inadmissible because of a seven- to nine-hour delay in bringing the minors before a magistrate,[163] which is also a violation of section 5033.[164] Disparate outcomes present a fairness issue for minors because it becomes impossible to predict whether violations of procedural safeguards will result in a suppression remedy.[165] The totality of the circumstances test allows courts to make personal judgments regarding how much weight a particular violation should have in determining if suppression is warranted.[166]

The Ninth Circuit approach incorporates the totality of the circumstances test to determine the voluntariness of a minor's waiver; thus, the

155. Berkovich, *supra* note 41, at 576.

156. *Id.* at 577.

157. *Id.* at 577-78.

158. *Id.* at 578; *see* Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile* Miranda *Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1376 (2000) ("Case law illustrates that the totality test can yield different results for similarly situated juveniles, which makes the admissibility of confessions—and possibly the prospect of life imprisonment—turn on where a juvenile committed the crime.").

159. 879 F. Supp. 2d 312 (E.D.N.Y. 2012).

160. *Id.* at 327; Berkovich, *supra* note 41, at 579.

161. 620 F. Supp. 1439 (S.D.N.Y. 1985).

162. *Id.* at 1440, 1443-44; Berkovich, *supra* note 41, at 580.

163. *Nash*, 620 F. Supp. at 1444.

164. 18 U.S.C. § 5033 (1982) (providing that a juvenile in custody shall not "be detained for longer than a reasonable period of time before being brought before a magistrate").

165. *See* Berkovich, *supra* note 41, at 583.

166. *See id.* at 582.

same issues inherent to the totality of the circumstances approach also exist within the Ninth Circuit approach.[167] However, there are further issues with the Ninth Circuit approach beyond those associated with the totality of the circumstances test.[168] For example, there are no clear criteria under the Ninth Circuit approach for determining whether a violation of section 5033 caused the minor's confession and, therefore, whether the violation was prejudicial.[169] This lack of clarity and direction allow too much judicial discretion, which once again results in disparate outcomes across jurisdictions.[170]

Even in a single case, judges' opinions can drastically vary since the Ninth Circuit approach leaves too much room for discretion.[171] Section 5033 complicates the picture because it does not clearly state how a statutory violation should be remedied.[172] The Ninth Circuit approach is unpredictable and results in a lack of uniformity in the weight courts give to violations of the procedural safeguards set forth in section 5033 when applying the totality of the circumstances test to determine the prejudicial effect of the violation.[173] The lack of a definitive standard for determining the validity of a minor's *Miranda* waiver and whether a suppression remedy is necessary translates to minors not being afforded the protections Congress meant to create for them through the JJDPA.[174] This is especially troubling in light of the fact that minors typically misunderstand their *Miranda* rights and waivers, even more so than adults.[175]

B. Statistical Analysis of Minors' Understanding of Miranda *Rights*

Various studies illuminate the issue of the inability of minors to understand their *Miranda* rights.[176] Studies show that minors waive their *Miranda* rights at "extremely high rates"—up to about ninety percent, by

167. *See id.* at 581-82.
168. *Id.* at 582.
169. *Id.*
170. *See id.*
171. *See, e.g.*, *id.* (explaining that in one Ninth Circuit case where section 5033 was violated, the court remanded the case to determine whether the violations were prejudicial; one concurring judge argued that the violations were clearly prejudicial and remand was therefore unnecessary; and another judge, both concurring and dissenting, argued that the record could not support a finding of prejudice).
172. *Id.* at 564.
173. *Id.* at 583.
174. *See id.* at 572, 583.
175. Cressey, *supra* note 132, at 89.
176. *Id.*

some estimates.[177] A study by Richard Rogers of the University of North Texas and Eric Drogin of Harvard Medical School found that fifty-two percent of juvenile *Miranda* warnings required minors to have an eighth-grade reading level.[178] This problem is further complicated by the prevalence of mental health issues among juvenile offenders; one study found that seventy percent of juvenile offenders had a diagnosable mental health disorder.[179]

Over the course of time, psychology has developed to inform our understanding of the adolescent[180] mind.[181] For instance, it is now widely recognized that minors are more impulsive than adults, are more vulnerable to pressure from peers, and cannot assess risk in the same manner as adults can.[182] It is also accepted that the frontal lobes, parietal lobes, and temporal lobes are the last regions of the brain to fully develop.[183]

A significant difference between an adult and a minor's cognition is the ability to engage in counterfactual thinking, which Abigail A. Baird and Jonathan A. Fugelsang define as "[o]ne's ability to imagine alternative outcomes and understand the consequences of those outcomes . . . ."[184] Oftentimes, counterfactual thinking consists of imagining a potential set of circumstances and the likely outcome, coupled with the recognition that those circumstances could have produced a different outcome if a certain event did not happen.[185] Counterfactual thinking

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177. Lorelei Laird, *Police Routinely Read Juveniles Their Miranda Rights, but Do Kids Really Understand Them?*, A.B.A. (Aug. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/august-2016/police-routinely-read-juveniles-their-miranda-rights--but-do-kid [https://perma.cc/W8FU-KVMR].

178. *Id.*

179. *Id.*

180. Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence from Neuroscience*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCIS. 1797, 1800 (2004) (defining adolescence as "the period of life between puberty and adulthood").

181. *See* Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 434-35 (2006).

182. *Id.* at 435-36.

183. *Id.* at 439 ("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. 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.").

184. Baird & Fugelsang, *supra* note 180, at 1797.

185. *Id.* ("For example, consider the case in which an individual runs over a pedestrian while taking an alternative route home to drop off a coworker. Had the coworker not requested a ride home, the driver might not have taken the alternative route, and thus not struck the pedestrian. Given this set of circumstances, an individual can mutate the events preceding the outcome and judge

occurs for many actors within the criminal legal system, such as judges and jurors;[186] it also includes criminal defendants, and, therefore, minors accused of criminal acts.[187] Neither a minor's brain or counterfactual thinking ability are fully developed.[188] Therefore, a minor's inability to assess and mitigate risk, which results in participation in chancier behavior, may stem from the difficulty a minor experiences when thinking through the consequences of their behavior or coming up with an alternative course of action.[189] Deficiencies in a minor's thought process were taken into consideration by the Supreme Court when it ruled on the unconstitutionality of the death penalty as applied to juvenile offenders.[190] Justice Stevens, in the majority opinion of *Thompson v. Oklahoma*,[191] stated:

> Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[192]

Developmental neuroscience has not yet determined an exact age where a person's brain structure becomes fully mature.[193]

In a study by Dr. Deborah Yurgelun-Todd of Harvard Medical School, it was determined that the adult brain is able to reflect when

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the degree to which certain mutations could change the outcome (e.g. the consequences of their behaviour).").

186. *Id.*

187. *See id.* at 1797, 1801-03.

188. *Id.* at 1801-02.

189. *Id.* at 1801.

190. *Id.* at 1802 ("Both the American Medical Association and the American Psychological Association have submitted briefs to the United States Supreme Court, reviewing deficiencies in brain structure, function and concomitant behaviour in adolescents relative to adults. Accordingly, these deficiencies warrant exclusion from the death penalty and violate the Eighth Amendment of the United States Constitution, which states that 'excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.'] The spirit of this logic is captured in the case of [*Thompson v. Oklahoma*], where the Supreme Court prohibited the execution of juveniles whose crimes were committed prior to their sixteenth birthday.").

191. 487 U.S. 815 (1988).

192. *Id.* at 835; Baird & Fugelsang, *supra* note 180, at 1802.

193. Baird & Fugelsang, *supra* note 180, at 1803.

confronted with emotional stimuli whereas a minor's brain is structured to be more reactive.[194] Dr. Yurgelun-Todd also found that minors misinterpret emotional stimuli.[195] It is important to note that these findings apply to "healthy" children, or children who do not suffer from a mental illness.[196] However, many minors who come into contact with the criminal legal system suffer from mental illness, learning disabilities, and substance abuse issues.[197] These minors are therefore particularly vulnerable to the inherent coercion of a custodial interrogation.[198]

Another study articulated the differences between the ability to understand the actual language of *Miranda* warnings and the ability to appreciate the consequences that follow a waiver of those *Miranda* rights.[199] Even if a minor is able to understand the basic meaning of the language in *Miranda* warnings, that does not mean that they are capable of reasoning through the abstract consequences of waiving these rights.[200] Research suggests the inability of minors to consider and appreciate the consequences of waiving their *Miranda* rights has to do with misconceptions about those rights.[201] These misconceptions include a misunderstanding of the role of law enforcement in a custodial interrogation as helpful rather than adversarial and a belief that court-appointed defense counsel must disclose information that the minor shared with them to a judge.[202]

C. Long-Term Consequences of Involuntary Waivers by Minors

The long-term consequences of minors not understanding *Miranda* warnings and the constitutional rights implicated include involuntary

194. King, *supra* note 181, at 442 ("A child is more likely to react than to try to think through his or her options in an emotionally charged situation.").

195. *Id.* at 442-43 ("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.").

196. *Id.* at 443.

197. *Id.* at 443-44 ("These children, laboring under the burdens of 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.' These children are not protected by the totality test as it has been developed in state courts.") (citing Fare v. Michael C., 442 U.S. 707, 724 (1979)).

198. *See id.* at 444.

199. Cressey, *supra* note 132, at 99.

200. *Id.* ("Even if a juvenile understands the meaning of the *Miranda* warnings, he may nevertheless be unable to understand the benefits conferred by those rights and the consequences of foregoing them.").

201. *Id.*

202. *Id.* at 99-100.

waivers, false confessions, and wrongful convictions.[203] False confessions are a particularly troubling issue; research has shown that among individuals exonerated for crimes that they were accused of as teenagers, thirty-six percent of those who were under eighteen falsely confessed.[204] That number rises to an astounding eighty-six percent for teens under the age of fourteen.[205]

Many studies have documented the reality that a defendant's confession significantly increases the likelihood of a conviction.[206] Mock jurors have also tended to vote guilty even after being instructed to disregard a coerced confession.[207] A study by Richard A. Leo and Richard J. Ofshe emphasized that none of the disputed confessions they researched were corroborated by any reliable evidence, and many of those cases contained compelling evidence supporting the defendant's innocence.[208] This is likely due to the fact that jurors may find it difficult to believe that a defendant would confess to something they are not guilty of—after all, why would someone say they committed a crime when they never did?[209] The answer may be police inducement, whether that inducement is caused by poor police practice or law enforcement's eagerness to close a case.[210] This inducement may be malicious, but oftentimes it is not and is instead inherent in the procedures used to elicit the statement.[211] In fact, police officers are not typically instructed on

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203. *See* Krinsky & Reimer, *supra* note 28.

204. *Id.*

205. *Id.*

206. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 142 (2003).

207. *Id.*

208. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 494 (1998) [hereinafter Leo & Ofshe, *The Consequences of False Confessions*].

209. Redlich & Goodman, *supra* note 206, at 142.

210. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 208, at 440.

211. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 983 (1997). As Leo and Ofshe explained:

> No one suggests police set out to extract false confessions or prosecutors intentionally seek to convict the innocent. There is little evidence that such intentional abuses of power happen with significant frequency. While some miscarriages of justice are caused by malicious intent, it appears that poor training and negligence are the principal reasons that false confessions occur. Police are not trained to avoid eliciting them, to recognize their variety and distinguishing characteristics, or to understand how interrogation tactics can cause the innocent to falsely confess. Instead, interrogation manual writers and trainers persist in the self-serving and misguided belief that contemporary psychological methods are not apt to cause an innocent suspect to confess—a fiction that is flatly contradicted by all of the scientific research on interrogation and confession.

Id.

how to avoid eliciting false confessions or how to recognize them when they occur.[212] Research shows that laypeople and police officers' accuracy rates for determining false confessions range from forty-two percent to sixty-four percent.[213]

A 2003 study researched factors that may affect an individual's likelihood to take responsibility for a non-criminal act they did not actually commit and which carried the potential for negative, but not particularly harsh, consequences.[214] This study built on research gleaned from a 1996 study in which college students were led to believe that they were participating in a "computer-based reaction time experiment" and were responsible for causing the computer to crash and lose data.[215] The computer crash was the "crime" for the purpose of the study.[216] The study was manipulated by the pace of the mock experiment and whether the student participants were presented with false incriminating evidence.[217] A false confession was classified as a signed statement by the student stating that they caused the computer crash.[218] Only thirty-five percent of participants who experienced the slow-paced experiment and were not presented with false incriminating evidence falsely confessed, whereas 100 percent of the participants who experienced the fast-paced/false incriminating evidence conditions falsely confessed.[219] Even more shocking were the findings that the participants in the fast-paced/false incriminating evidence group faced an increased likelihood of internalized guilt, or actually believing they committed the mock crime, and created false details about the crime.[220]

A later study conducted by Allison D. Redlich and Gail S. Goodman used the same framework as the 1996 study but used three age groups: twelve- and thirteen-year-olds, fifteen- and sixteen-year-olds, and college students.[221] Instead of manipulating the pace of the mock experiment to influence vulnerability, the age of the participant became the variable.[222] The false incriminating evidence presented was also

212. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 208, at 443.

213. *See* Laurel LaMontagne, Student Article, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 33 (2013).

214. Redlich & Goodman, *supra* note 206, at 142 (explaining that the study does not examine false confessions per se because it is difficult to conduct ethical research on false confessions to actual criminal acts).

215. *Id.* at 143.

216. *Id.*

217. *Id.*

218. *Id.* at 143-44.

219. *Id.*

220. *Id.* at 144.

221. *Id.* at 143-44.

222. *Id.* at 144.

different than the 1996 study.[223] The results of the study indicated that under the same circumstances, minor children are more likely to falsely confess than adults, particularly when presented with false incriminating evidence.[224]

False confessions threaten the quality, efficacy, and public perception of the American legal system, particularly because false confessions place heavy costs on the defendant.[225] A study found that at the very least, defendants who falsely confess suffer pre-trial deprivations of liberty such as pre-trial incarceration, litigation costs, and reputation or career damage.[226] Involuntary waivers of *Miranda* rights can lead to false confessions, particularly during custodial interrogations of minors.[227] One study demonstrated that nearly twelve minors in the United States confessed to murder during a two-year period, only for subsequent evidence to later prove their innocence.[228] Additional procedural safeguards to ensure that a minor does not involuntarily waive his rights, such as mandatory attorney consultation and a prohibition on deceptive police interrogation tactics, may help combat the issue and consequences of false confessions.[229]

IV. REINFORCING RIGHTS: DEMANDING COUNSEL AND DITCHING DECEPTION

Because minors misunderstand their *Miranda* rights and the consequences of waiving them,[230] the U.S.C. should be amended to require attorney consultation, either in person or over the phone, before a minor can waive their *Miranda* rights, and to prohibit deceptive police

223. *Id.* ("In [the 1996] study, an adult confederate falsely claimed to have seen the participant hit the wrong key. In the present research . . . participants in the false-evidence condition were shown a computer printout supposedly proving they committed the mock crime.").

224. *Id.* at 152 ("Our findings suggest that when false evidence is presented to teens, the potential for false responsibility-taking is magnified. Also, the [fifteen]- and [sixteen]-year-olds who were shown false evidence were significantly more likely to falsely confess than the [fifteen]- and [sixteen]-year-olds who were not shown false evidence. The presence of false evidence did not seemingly affect the [twelve]- and [thirteen]-year-olds who had high compliance rates notwithstanding experimental condition ([eighty-one percent] and [seventy-three percent], for the no-false-evidence and false-evidence conditions, respectively).").

225. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 208, at 493.

226. *Id.*

227. *See* LaMontagne, *supra* note 213, at 39.

228. Walters, *supra* note 89, at 489.

229. *See* LaMontagne, *supra* note 213, at 53; *see also* Hana M. Sahdev, Student Article, *Juvenile* Miranda *Waivers and Wrongful Convictions*, 20 U. PA. J. CONST. L. 1211, 1233-34, 1236 (2018); *False Testimony/Confessions*, CAL. INNOCENCE PROJECT, https://perma.cc/27VW-8RVJ (last visited Apr. 15, 2024).

230. Cressey, *supra* note 132, at 99.

interrogation techniques should the minor choose to waive.[231] Subpart A discuses state legislation that has been passed or proposed that would afford greater protections for minors during custodial interrogations.[232] Subpart B argues that minors should have an unwaivable right to counsel before signing away their *Miranda* rights.[233] Subpart C argues that officers should be prohibited from using deceptive interrogation techniques, such as the Reid Technique, when questioning minors.[234]

A. Current State Statutes and Proposed Bills on Minors and Miranda

Some states have passed or introduced legislation affording increased protections for minors subject to custodial interrogation, such as videotaping confessions.[235] The Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, Firearms and Explosives; and United States Marshals Service operate under a presumption that these agencies have electronically recorded interviews since 2014.[236] Former U.S. Attorney General Eric Holder stated in a video message regarding the policy that, "Creating an electronic record will ensure that [the Department of Justice has] an objective account of key investigations and interactions with people who are in federal custody. It will allow us to document that detained individuals are afforded their constitutionally protected rights."[237] However, do these videos actually help juries in determining whether a confession was coerced?[238]

Research conducted by G. Daniel Lassiter of Ohio University showed mock juries the same interrogation but through different camera

231. *See infra* Part IV.B–C.

232. *See infra* Part IV.A.

233. *See infra* Part IV.B.

234. *See infra* Part IV.C.

235. *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, https://perma.cc/6B87-HDPS (last visited Apr. 15, 2024) ("The states that require recording of certain custodial interrogations are: Alaska, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.").

236. Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Attorney General Holder Announces Significant Policy Shift Concerning Electronic Recording of Statements (May 22, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-significant-policy-shift-concerning-electronic-recording [https://perma.cc/XKS6-C5RL].

237. *Id.*

238. Jennifer L. Mnookin, *Can a Jury Believe What It Sees?*, N.Y. TIMES (July 13, 2014), https://www.nytimes.com/2014/07/14/opinion/videotaped-confessions-can-be-misleading.html [https://perma.cc/98KM-BD5W] (explaining that research indicates the angle of the camera and other factors can negatively influence how juries, judges, and police interrogators interpret a defendant's statement).

angles.[239] Some jurors were only able to see the defendant on camera while other jurors were able to see both the defendant and the interrogator through a wide-angle view.[240] Even though the jurors were hearing the exact same statements, the jurors who could not see the interrogator were substantially less likely to conclude that the interrogation was coercive.[241] This was the case even where the interrogator "explicitly threaten[ed]" the defendant.[242] Lassiter and other psychologists have studied this "camera perspective bias" in a number of different experiments and have found that even judges and police interrogators are influenced by the differing camera angles.[243] Although recordings are useful, "[t]he emotional impact of a suspect declaring his guilt out loud, on video, is powerful and hard to dislodge, even if the defense attorney points out reasons to doubt its accuracy."[244] Therefore, additional procedural safeguards are needed at the federal level to decrease the likelihood of involuntary *Miranda* waivers and false confessions, especially in the context of minors in custody.[245]

Some states have offered procedural safeguards other than videotaping confessions.[246] New York State has proposed a bill that would require minors to consult with an attorney before waiving their rights.[247] In California, a similar bill already passed and was renewed in 2021.[248] Also in 2021, Illinois passed legislation prohibiting law enforcement officers from using deception when interrogating minors.[249] Other states, such as Vermont and Indiana, have established procedural safeguards for minors through case law.[250] Although state legislation and state court

239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* ("But we need to recognize that by itself, video recording cannot stop all the problems with interrogations, prevent false confessions or guarantee that we will spot them when they do occur.").
246. *See, e.g.*, Steve Lash, *Md. Legislature Enacts Counsel Requirement at Child Interrogations Over Hogan's Veto*, DAILY REC. (Apr. 11, 2022), https://thedailyrecord.com/2022/04/11/md-legislature-enacts-counsel-requirement-at-child-interrogations-over-hogans-veto [https://perma.cc/JE76-MVTH] (stating that in Maryland, "[t]he Child Interrogation Protection Act will permit police officers to interrogate a child without counsel only when they reasonably believe the answer will be necessary to prevent a threat to public safety").
247. S.B. 2800, 2022 Gen. Sess. (N.Y. 2022).
248. CAL. WELF. & INST. CODE § 625.6 (West 2021).
249. S.B. 2122, 102nd Gen. Assemb. (Ill. 2021).
250. Thomas J. Von Wald, Student Article, *No Questions Asked!* State v. Horse*: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S.D. L. REV. 143, 165-66 (2003).

decisions can usher in much-needed reform, they are not without weaknesses.[251]

B. Minors Should Have an Unwaivable Right to Counsel Before Signing Away Their Miranda *Rights*

An unwaivable right to counsel is a solution that has been supported by numerous state legislators.[252] There are also prosecutors who have approved of this solution.[253] An unwaivable right to counsel for all individuals under the age of eighteen would reduce involuntary waivers (and subsequent false confessions and wrongful convictions).[254] As the Supreme Court itself has recognized:

> The rule in *Miranda*, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence.[255]

Amending the U.S.C. to include a per se rule requiring minors to consult with an attorney (whether in person or over the phone) before speaking with law enforcement in order for the minor's statements to be admissible would more adequately ensure that a minor does not waive his *Miranda* rights due to a lack of knowledge regarding the law or police coercion and intimidation compared to the current totality of the

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251. *See, e.g.*, Walters, *supra* note 89, at 490, 515 (arguing that an Illinois law which requires children under age thirteen who are suspected of committing murder or sexual assault to be represented by a lawyer during the entire police interrogation is "an inadequate attempt to prevent false confessions").

252. *See, e.g.*, Karen Savage, *New York Youth Need Attorney Before Interrogation, Coalition Tells State Lawmakers*, JUV. JUST. INFO. EXCH. (Mar. 5, 2021), https://jjie.org/2021/03/05/new-york-youth-need-attorney-before-interrogation-coalition-tells-state-lawmakers [https://perma.cc/YF4D-5N2V] (demonstrating support among New York legislators for an unwaivable right to counsel).

253. Sarah Martinson, *Prosecutors Push for National Reform on Youth Interrogation*, LAW360 (Feb. 6, 2022, 8:02 PM), https://www.law360.com/articles/1461825/prosecutors-push-for-national-reform-on-youth-interrogation [https://perma.cc/5P98-YS6J].

254. *See* Berkovich, *supra* note 41, at 594; Boyd, *supra* note 43, at 417.

255. Fare v. Michael C., 442 U.S. 707, 719 (1979) (quoting Miranda v. Arizona, 384 U.S. 436, 469 (1966)).

circumstances test.[256] While a federal amendment would not require the states to adopt this rule, states will often follow the lead of the federal system.[257] Therefore, an amendment to the U.S.C. would afford more protections under federal law and hopefully start a trend among states to adopt a per se rule for minors' attorney consultations.[258]

While some opponents suggest that the issue of underfunded public defenders complicates the picture,[259] this is a weak argument because a custodial interrogation which leads to criminal charges would require a public defender to be appointed anyway, assuming the defendant met the criteria for court-appointed counsel.[260] Mandating a consultation with an attorney prior to a custodial interrogation lowers the chances of criminal charges being brought, thereby preventing an influx of cases that would further tax the efforts of public defenders.[261] A more salient objection to requiring counsel prior to *Miranda* waivers is the traditional law enforcement objection to an expansion of due process rights: attorneys would shut down interrogations before they even start, thereby impeding law enforcement from fettering out crime.[262]

Former Maryland Governor Larry Hogan vetoed the state's proposed legislation for the "unwaivable right to consult counsel" for minors,[263] arguing that such a rule would "hamper criminal investigations and, in turn, potentially jeopardize public safety."[264] However, a per se rule mandating that a minor consult with an attorney before waiving their *Miranda* rights adequately strikes a balance between law

256. Von Wald, *supra* note 250, at 164-65.

257. *See* Mnookin, *supra* note 238 ("Last week . . . federal law enforcement agencies instituted a policy of recording interrogations of criminal suspects held in custody. Only a minority of states and local governments have a similar requirement, but the new rule . . . will most likely spur more jurisdictions to follow suit.").

258. *See id.*

259. Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS, https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/LFZ6-B2CD] (Dec. 11, 2017, 5:55 AM).

260. *Right to Counsel*, LEGAL INFO. INST. AT CORNELL L. SCH., https://www.law.cornell.edu/wex/right_to_counsel [https://perma.cc/RPG8-5UXZ] (last visited Apr. 15, 2024).

261. *See id.*; Berkovich, *supra* note 41, at 594-95; Boyd, *supra* note 43, at 417.

262. *See* Walters, *supra* note 89, at 513-14; McGuire, *supra* note 158, at 1381 ("The challenge in offering a new model for the protection of a juvenile's Fifth Amendment rights in the context of custodial interrogations lies in addressing two major concerns. The first concern is that the system must adequately protect the rights of the juveniles in custody because of the danger of coerced confessions. The second concern is that police must be free to investigate criminal activity and not be 'handcuffed' by an overbroad application of *Miranda* and *Gault*.").

263. Lash, *supra* note 246. Governor Hogan's veto was overridden by the Maryland Senate. *Id.*

264. *Id.*

enforcement interests and a minor's rights.[265] If a minor, after consulting with an attorney, chooses to voluntarily speak with police, there is nothing stopping law enforcement from proceeding with an interrogation.[266] Rather, this per se rule merely increases the likelihood that the minor's decision to waive his rights and speak with police is in fact voluntary, since an attorney is best equipped to ensure that a minor actually understands his rights and appreciates the consequences of relinquishing them.[267] Further, a bright-line rule such as this would eliminate the need for law enforcement to make case-by-case determinations regarding the minor's understanding of his rights and ability to validly waive them before proceeding with an interrogation.[268]

However, some opponents of this per se rule argue that the presence of a parent or guardian, rather than an attorney, is adequate to protect the interests of a minor subject to custodial interrogation.[269] This is not the case.[270] A study of 400 police interrogations of minors was aimed at assessing the effect of parental involvement during custodial interrogations.[271] The findings are illuminating: about two-thirds of parents did not offer any advice to the minor, and the parents who did offer advice

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265. *See* Gottesman, *supra* note 144, at 2063-64; *see also* Nicole J. Ettlinger, Note, *You Have the Right to Remain Thirteen: Considering Age in Juvenile Interrogations in* J.D.B. v. North Carolina, 60 BUFF. L. REV. 559, 597-98 (2012) ("Proponents of such arguments insist that providing non-custodial interrogations with additional safeguards will inhibit confessions, 'cause police officers to second-guess the legal future of a case,' and otherwise prevent law enforcement from convicting the proper wrongdoer. Whether there is truth to this argument for adult convictions is a separate question; however, the rationale of this argument for minors is moot. *Miranda* itself held that the potential for lost confessions and convictions is a smaller price for society to pay than for a person to be deprived of his constitutional rights.").

266. Gottesman, *supra* note 144, at 2063-64.

267. Sandra Eismann-Harpen, Note, *Kentucky Should Mandate Attorney Consultation Before Juveniles Can Effectively Waive Their* Miranda *Rights*, 40 N. KY. L. REV. 201, 212-13 (2013); Gottesman, *supra* note 144, at 2064 ("An attorney can ensure, in a way that police or a parent cannot, that the youth fully appreciates the meaning and legal consequences of an express waiver form, thereby increasing the likelihood that only truly knowing, voluntary, and intelligent waivers will be realized. Without this additional safeguard in place, a juvenile's constitutional right to remain silent can be violated by a youth's simple compliance with a request by an authoritative figure to sign his name to a form—a form with potentially onerous lifelong consequences that the juvenile is unlikely to fully comprehend without proper legal guidance.").

268. Eismann-Harpen, *supra* note 267, at 214-15.

269. Chris Gelardi, *Retired Judges and Advocates: Don't Let Cops Interrogate Kids Without a Lawyer*, N.Y. FOCUS (May 6, 2022), https://www.nysfocus.com/2022/05/06/police-interrogation-of-minors [https://perma.cc/L8XX-QLQT] (quoting a New York City Police Department statement asserting that "[p]arents and guardians are in the best position to make decisions for their children, and this [New York State bill], while well-intentioned, supplants the judgement of parents and guardians with an attorney who may never have met the individual").

270. *See* Gottesman, *supra* note 144, at 2062-63; *see also* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 313 (2007).

271. Gottesman, *supra* note 144, at 2062.

typically encouraged the minor to waive his rights.[272] According to the study, parents often pressure the child to "tell the truth," which the child "interpret[s] as a command to comply with the officers and tell them what they want to hear, regardless of the factual truth."[273] In fact, police are often trained to encourage a parent to pressure a minor into "telling the truth," which increases the coercive nature of the interrogation.[274] The negative effect that parental presence can have on a minor's interrogation is evidenced by one court's finding of a valid *Miranda* waiver by a minor whose "mother threatened to 'clobber him' unless he talked to the police officers and told them the truth . . . ."[275] Furthermore, research shows that sometimes parents do not understand *Miranda* rights any better than their child.[276] All of these considerations support the position that a minor should be required to consult with an attorney, as opposed to a parent, before waiving his rights.[277]

C. Law Enforcement Officers Should Be Prohibited from Using Deception When Questioning Minors

Law enforcement officials are permitted to use the same deceptive interrogation techniques on minors as they do on adults.[278] Research shows that minors are even more susceptible to false confessions when

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272. *Id.*

273. *Id.*

274. *See id.* at 2063; *see also* Drizin & Luloff, *supra* note 270, at 313 ("First, police are instructed on how to marginalize parents during an interrogation if they are required to be present. As Inbau's manual states, a parent who is present during the interrogation should be advised to refrain from believing they are acting in their child's best interest, encourage children to waive their rights and speak to the police. The Central Park Jogger case was a potent example of how parental presence actually encouraged the children to cede to the police authority, the result of which was a series of false confessions.").

275. Ann Leslie Bailey, Note, *Waiver of* Miranda *Rights by Juveniles: Is Parental Presence a Necessary Safeguard?*, 21 J. FAM. L. 725, 737 (1982-83).

276. Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH & ADOLESCENCE 685, 694 (2008) ("However, parents and adolescents sometimes do have severe fundamental misconceptions about the parameters of legal police interrogation procedures. Virtually all parents and adolescents expect that police will notify them if the adolescent is considered a witness or suspect. About half believe that the police must tell the truth during interrogation and up to two thirds believe that police must wait for parents before questioning an adolescent. Regardless of family impairment levels, a majority of parents and adolescents anticipate parental and individual protections during the interrogation process that simply are not constitutionally required and do not (necessarily) exist. It appears that parents and adolescents across the board expect police behavior to be governed by consideration for suspects and especially parents in concert with the search for the truth.").

277. *See* Gottesman, *supra* note 144, at 2062-63.

278. *See* Boyd, *supra* note 43, at 401-02.

police use adult interrogation techniques on them.[279] For example, as discussed earlier, the most common interrogation technique is the Reid Technique.[280] This method of interrogation was coined by John E. Reid & Associates, the largest provider of interrogation training in the United States, with reach in Canada as well.[281]

The nine steps of the technique focus on isolation, confrontation, and minimization, which influences how a suspect perceives the scenario and rationalizes his options, particularly if the suspect is a minor.[282] It is also relevant to note that these investigation tactics begin before the suspect is even read his *Miranda* warnings.[283] A reviewer of the technique summarized, and opined on, John E. Reid and his colleague Fred E. Inbau's recommendations for police interrogators as follows:

> [S]it in a chair immediately opposite the suspect, with nothing in between. While the chairs may be separated by 2 or 3 feet in the beginning, once the interrogation is under way "the interrogator should move his chair in closer, so that, ultimately, one of the subject's knees is just about in between the interrogator's two knees." It is at this point, [Reid and Inbau] imply, that the *Miranda* warnings should be given. It is this reviewer's opinion, however, that under these circumstances the *Miranda* warnings might even be dispensed with because they will have little or no effect, at least upon the suspect who is unfamiliar with police procedures and his own constitutional rights! Once the suspect has been brought into the little, windowless room and sat in a chair immediately facing the interrogator, and possibly already in the vise created by the interrogator's two knees, the import of the *Miranda* warnings would be lost.[284]

It is clear that sanctioned police interrogation techniques are tailored toward creating a coercive environment and circumventing *Miranda* warnings.[285]

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279. *Id.* at 403; Abigail Kay Kohlman, Note, *Kids Waive the Darndest Constitutional Rights: The Impact of* J.D.B. v. North Carolina *on Juvenile Interrogation*, 49 AM. CRIM. L. REV. 1623, 1633 (2012); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 411, 455-56 (2013).

280. Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 536 (2010); *see supra* Part I.

281. Buffie Brooke Merryman, *Arguments Against Use of the Reid Technique for Juvenile Interrogations*, 10 COMMC'N L. REV. 16, 21 (2010).

282. *Id.* at 24-25.

283. *Id.* at 24.

284. Lewis R. Katz, *Criminal Interrogation and Confession, by Fred E. Inbau & John E. Reid*, 19 CASE W. RSRV. L. REV. 188, 191 (1967) (book review).

285. *See id.*

The cognitive research that exists regarding minors emphasizes that traits like a minor's "desire to please authority" make them uniquely vulnerable to false confessions, particularly when coupled with coercive interrogation techniques such as the Reid Technique.[286] For example, one of the primary deceptive techniques that police officers employ through the Reid Technique is lying about what evidence law enforcement has already obtained.[287] Police can tell a minor that they have a lot of physical evidence implicating the minor in the crime, which leads the minor to believe that he will be in trouble even if he does not confess.[288] Police also target a minor's immaturity through these techniques by making promises, such as a promise that a minor can see his parent only if he confesses to the crime.[289] Law enforcement might also withhold food or bathroom usage, which is coercive for an adult, let alone a minor.[290] The power dynamic between a police officer and a minor subject to a custodial interrogation is undoubtedly skewed, especially since minors are taught as they grow up that police officers are there to protect them and would not lie.[291] Asking leading and repetitive questions, a common interrogation technique, can also increase the likelihood that a minor makes false or inaccurate statements,[292] especially considering the typical minor's desire to please authority.[293] When these tactics are paired with the reality that many minors do not fully understand the

286. Merryman, *supra* note 281, at 25.

287. Walters, *supra* note 89, at 508; LaMontagne, *supra* note 213, at 46; Gottesman, *supra* note 144, at 2055; *see* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSYCH. REV. 53, 68-69 (2007).

288. Walters, *supra* note 89, at 508.

289. *Id.* at 508-09.

290. *Id.* at 509.

291. *Id.*; Scott-Hayward, *supra* note 287, at 67-68 ("There are numerous examples of juveniles succumbing to the pressures of an interrogation that involved a police officer using deception. For example, Michael Crowe was interrogated three times beginning the day that his sister was murdered. During these sessions, police told Crowe that they had found hair in his sister's hand and that this, along with other physical evidence, would prove that he was the killer. Furthermore he was given a voice stress analysis test, which he was incorrectly told was an infallible lie-detector. Detectives then presented him with false test results that purported to show that he was lying. Crowe succumbed to the pressures of being faced with evidence of his guilt and eventually falsely confessed. Says Crowe of his interrogation: 'Nobody told me that police are legally allowed to lie during interrogations. Instead, I started believing maybe I'd blocked the whole thing out.' Like Crowe, Allen Chesnet also falsely confessed soon after being presented with false evidence of his guilt. In Chesnet's case, the interrogating officer falsely told Chesnet that his DNA matched that found at the crime scene.").

292. *See* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM L. & CRIMINOLOGY 219, 260 (2006) [hereinafter Feld, *Police Interrogation of Juveniles*].

293. Walters, *supra* note 89, at 509; *see* Feld, *Police Interrogation of Juveniles*, *supra* note 292, at 230.

consequences of waiving their *Miranda* rights, they can lead to involuntary waivers and subsequent false confessions.[294] Some argue that the coercive effects of these techniques can be mitigated by limiting the length of interrogations for minors or videotaping all interrogations.[295] For the reasons stated previously in this Note, videotaping confessions will not alleviate this issue.[296]

Oftentimes, police officers are not instructed on how to avoid and recognize false confessions by minors.[297] Therefore, balancing law enforcement interests in solving crime and securing convictions with society's interest in protecting and preserving the rights of minors under the law supports an amendment to the U.S.C. prohibiting law enforcement from using deception when interrogating minors.[298] Police officers would still be free to ask leading questions and encourage a minor to tell the truth, thereby still allowing some traditional interrogation techniques, but they would not be able to engage in deception by misrepresenting evidence or making false promises to minors.[299] Therefore, there would still be avenues for law enforcement to secure confessions without taking advantage of the unique vulnerabilities of a minor's mind.[300]

V. CONCLUSION

Certain members of society are more vulnerable and require more protection than others; minors are but one example.[301] Society recognizes the unique position of children and adolescents in other areas of law

294. Walters, *supra* note 89, at 509; Feld, *Police Interrogation of Juveniles*, *supra* note 292, at 245-46; Scott-Hayward, *supra* note 287, at 62-63 ("These developmental differences between adults and adolescents are particularly important when we consider juvenile interrogation. Adolescents' psychological development can affect how a juvenile responds to interrogation in two ways. First, it can impact their ability to understand and waive their *Miranda* rights (this waiver is important because all false confessions involve a waiver of the right to remain silent). Second, it can impact how adolescents respond to the techniques used by police during an interrogation, which may ultimately result in false confessions.").

295. Merryman, *supra* note 281, at 26.

296. *See supra* Part IV.A; *see also* Merryman, *supra* note 281, at 28 ("[B]ecause the Reid Method is sanctioned by the Supreme Court, videotaping the use of the technique does not decrease or eliminate the psychologically coercive effects on juveniles. It just documents them.").

297. Boyd, *supra* note 43, at 400.

298. *See* Scott-Hayward, *supra* note 287, at 72; Feld, *Police Interrogation of Juveniles*, *supra* note 292, at 313 ("Good police investigation should precede every interrogation, and officers should possess enough true evidence with which to confront a suspect that they should not need to resort to false evidence. If they do not have substantial evidence of guilt, then they increase the likelihood that they are questioning an innocent person from whom false evidence may elicit a false confession.").

299. *See* Scott-Hayward, *supra* note 287, at 72.

300. *See id.*

301. *See* REPORT ON LEGISLATION A.1963 / S.1099, *supra* note 15, at 2.

and investigatory procedures.[302] That same recognition should be extended to custodial interrogations of minors charged with acts of juvenile delinquency so that appropriate protections may be implemented.[303] A two-tiered solution can adequately safeguard the rights of minors: amend 18 U.S.C. § 5033 to require minors to consult with an attorney before waiving their *Miranda* rights and prohibit the use of deception by law enforcement when interrogating minors.[304]

While it is ultimately true that this two-tiered solution would inhibit law enforcement from obtaining confessions in some cases, and therefore potentially forgo some convictions, that is not a reason to continue to allow minors' constitutional rights to fall by the wayside.[305] As Nelson Mandela once said: "There can be no keener revelation of a society's soul than the way in which it treats its children."[306] By allowing law enforcement to elude constitutional mandates like ensuring the voluntariness of a minor's waiver, the government has signaled to society that protecting the rights of minors are not a priority.[307]

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302. *See, e.g.*, WILLISTON & LORD, *supra* note 72, at 53-55; CHILD WELFARE INFO. GATEWAY, *supra* note 78, at 2; *see also supra* Part II.B.

303. *See* Berkovich, *supra* note 41, at 594.

304. *See supra* Part IV.

305. Gottesman, *supra* note 144, at 2066.

306. Nelson Mandela, President, S. Afr., Speech at the Launch of the Nelson Mandela Children's Fund (May 8, 1995) (transcript available at the Nelson Mandela Foundation).

307. *See* Gottesman, *supra* note 144, at 2066.

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