THESE WORDS MAY NOT MEAN WHAT YOU THINK THEY MEAN: TOWARD A MODERN UNDERSTANDING OF CHILDREN AND MIRANDA WAIVERS

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I. INTRODUCTION

> "There's a growing recognition that our law has not caught up with science . . . . [Children] have less of a capacity than adults to peer into the future and understand the ramifications of an action, and adolescents are still learning how to make those calculations."[1]

The brutal stabbing of a young girl lured into the woods by her friends grabbed national headlines. The nation speculated as to who committed the crime and what motivated his or her savage behavior.[2] The police discovered that two twelve-year-old girls committed this heinous act in a grossly misguided attempt to appease a fictional character named "Slender Man."[3] What began as an invitation on an internet forum to "create paranormal images through Photoshop,"[4] eventually morphed into a collaborative effort

> by a community of anonymous contributors . . . much like a more organic urban legend would be. In some stories Slender Man has multiple arms, like tentacles, and in some he has no extra appendages, at all. Sometimes he seems to kill his victims themselves, in vague, mysterious ways that the faux news stories and police reports never seem to specify, before disemboweling them and bagging their organs. Other times, Slender Man somehow compels his victims to kill each other . . . .[5]

Despite this documented history of Slender Man's fictional origins, "the girls in Wisconsin, at least according to statements they made to police, truly believed Slender Man was real: He teleported and read their minds, they claimed. He watched them and threatened to kill their families."[6] By

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[1] Jeremy Loudenbeck, *California Bill Says a 10-Year-Old Cannot Waive Miranda Right,* CHRON. OF SOC. CHANGE (Aug. 2016), https://chronicleofsocialchange.org/juvenile-justice-2/california-bill-says-10-year-old-murderer-cannot-waive-miranda-rights.

[2] Lisa Miller, *Slender Man is Watching,* N.Y. MAG. (Aug, 24, 2015), http://nymag.com/daily/intelligencer/2015/08/slender-man-stabbing.html ("For all its fantastical elements, their plan had the outlines of a familiar mean-girls plot, in which two new friends conspire to discard a third wheel they've outgrown or come to resent.").

[3] *Id.*

[4] Caitlin Dewey, *The Complete History of "Slender Man," The Meme That Compelled Two Girls to Stab a Friend,* WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/?utm_term=.a1e892a3b0b8.

[5] *Id.*

[6] *Id.*

committing this murderous act, "[t]hey hoped [their friend] would die . . . and they would see Slender and know he existed."[7]

Morgan Geyser and Anissa Weier were eventually arrested for their roles in the attempted murder of Payton Leutner.[8] During their respective interrogations, both girls readily admitted participating in the crime and each carefully explained the motive.[9] According to the girls:

> The idea . . . was to become proxies, or puppets, of Slender Man through murder — an initiation ritual requiring a blood sacrifice. Anissa and Morgan told officers that, according to this logic, [Payton's] death would earn them Slender's protection. Afterward, they said, they would go to live with him in a mansion in the forest, morphing somehow into mini-monsters, not unlike the way humans who've been bitten by vampires are said to become vampires themselves.[10]

The results of the girls' interrogations, obtained without the presence of parents or legal counsel, were both thorough in detail and startling in content.[11] For example, during Anissa's interrogation:

> [s]he [wept] more or less continuously. But she [had] a grasp on things — on who Slender Man is . . .on the exact route she and Morgan took out of town, on the last names of her relevant friends. You [could] sense her relief. One of the things she [wanted] to make very clear is that Morgan did the stabbing, not her. She [was] "too squeamish." She [said] this over and over. She even [gave] the detectives a sort of redemption story: "Beforehand, I believed," she told them about Slender Man. "Now I know it's just teenagers who really like scaring people and making them believe false things."[12]

Morgan's confession was a bit more chilling:

> Once the cuffs [were] off and the questioning [began], Morgan [blamed] the whole thing on Anissa. Anissa told her to do it. Anissa made it seem necessary. She [could not] remember, exactly, who held the knife. Of the two, Morgan was much more in the grip of the mythical power of Slender Man . . . . Morgan [was] also hostile. "Stabby stab stab stab," probably the most-quoted phrase in the Slender Man canon, [was] prompted by her growing annoyance with the detective, who gently but firmly [kept] asking her to describe the

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[7] *Id.*

[8] Miller, *supra* note 2.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

> moment of violence again. "Are you trying to do this over and over again and see if I tell the story differently?" And then: "*I have the right not to go into detail about it if I don't want to.*"[13]

Morgan's last statement was an astute, albeit late, observation concerning her rights vis-à-vis her interlocutor. Indeed, in the wake of these highly incriminating interrogations of two young children, the overriding question became whether they knew they had the right to not speak to police at all. As expected, lawyers for both girls eventually challenged the admissibility of their respective confessions.[14] In Anissa's case, her attorneys argued that she "was too young at age 12 to understand and knowingly waive her rights to remain silent or have an attorney when she agreed to be interrogated."[15] Similarly, Morgan's attorney moved to suppress her statements to the police arguing, among other things, that due to her age she could not have knowingly, intelligently and voluntarily waived her Miranda rights.[16] The motion explained that from the outset, Morgan was groomed with "questions intended to make [her] feel more comfortable and open . . . then [the officer] continually minimize[d] the gravity and import of the conversation."[17]

Morgan Geyser eventually pleaded guilty to attempted first degree murder, but was found not guilty by reason of mental disease or defect and was committed to a mental institution.[18] Anissa Weier pleaded guilty to attempted second degree murder and was also found not guilty by reason of mental disease or defect.[19] She was committed to a mental institution for 25 years.[20] With the girls' pleas and sentences, the criminal justice portion of this tragic story is gradually coming to a close. However, the pop culture aspect will likely live on in Sony Pictures' *Slender Man,* a movie scheduled to be released in 2018.[21] It is unclear whether the movie will include

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[13] *Id.* (emphasis added).

[14] Bruce Vielmetti, *2nd Girl in Slender Man Case Challenges Confession,* MILWAUKEE J. SENTINEL (Dec. 22, 2016), http://www.jsonline.com/story/news/crime/2016/12/22/2nd-girl-slender-man-case-challenges-confession/95722702/.

[15] *Id.*

[16] *Id.*

[17] Bruce Vielmetti, *Slender Man Defense Seeks to Block Confession,* MILWAUKEE J. SENTINEL (Oct. 19, 2016), http://www.jsonline.com/story/news/crime/2016/10/19/slender-man-defense-seeks-block-confession/92359852/.

[18] Dakin Andone and Paige Levin, *Teen in "Slenderman" Stabbing Going to Mental Institution under Plea Deal,* CNN (Oct. 7, 2017), http://www.cnn.com/2017/10/07/us/slenderman-teen-guilty-plea/index.html.

[19] Steve Almasy, *Slender Man Stabbing: Teen Committed to Mental Institution,* CNN (Dec. 21, 2017), http://www.cnn.com/2017/12/21/us/slenderman-teen-sentence/index.html.

[20] *Id.*

[21] *Father of "Slender Man" Attacker Claims New Film is "Popularizing a Tragedy,*

aspects of the girls' crime.[22]

From a legal standpoint, the procedural component that resulted in the girls' detailed confessions will also continue to be examined. Wisconsin law does not currently require the presence of parents or an attorney when a minor is taken into a custodial interrogation.[23] While surprising, Wisconsin is certainly not alone in this practice, despite the fact that:

> [t]ime and again, researchers have concluded that most youth – even those who might be considered "street-smart" – simply do not understand their Miranda rights to counsel and to remain silent. Accordingly, these children do not exercise those essential rights and are thus left alone during police interrogation, without the assistance of counsel, a friendly adult, or their parents. Too often, the child's resulting statement is involuntary or unreliable.[24]

In Parts I and II, this article will discuss the history of the Miranda waiver standards and cases interpreting those standards as applied to children. In Part III, the article will explore efforts on the state level to establish more protective standards for minors facing police interrogations. Next, in Part IV, for comparative perspective, the article will survey what efforts are being made on the international stage to enhance children's rights during custodial interrogations. Finally, Part V of the article will offer some proposed best practices that acknowledge the vulnerable position of minors in custodial interrogations while also allowing law enforcement to pursue reliable evidence of guilt.

II. HISTORY OF VOLUNTARINESS AND THE MIRANDA WAIVER STANDARD

A. *Miranda*

1. The Voluntariness Doctrine

Today, providing a Miranda warning and securing a waiver are often the yardsticks by which the voluntariness of a confession is measured.

HOLLYWOOD REP. (Jan. 3, 2018), https://www.hollywoodreporter.com/news/father-slender-man-attacker-claims-new-film-is-popularizing-a-tragedy-1071421.

[22] *Id.* (according to Mr. Weier: "All [the movie is] doing is extending the pain all three of these families have gone through").

[23] *See, e.g.*, Theriault v. State, 223 N.W.2d 850, 852 (Wisc. 1974) ("Thus, the current state of the law in Wisconsin is that the validity of juvenile confessions is determined based upon the totality of the circumstances in the case, and that presence of parents, guardian, or attorney is not an absolute requirement for the minor to validly waive his right to remain silent.").

[24] Bluhm Legal Clinic, *Wrongful Convictions of Youth*, NORTHWESTERN.EDU, http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem/.

However, on the road to *Miranda*, the United States Supreme Court, articulated a voluntariness test designed to evaluate the validity of confessions using the Due Process Clause of the Fourteenth Amendment.[25] The "Voluntariness Doctrine," as the test came to be known, examined the totality of the circumstances to determine if a suspect's will had been overborne by police conduct.[26] This test focused less on the outcomes and more on shining a critical light on the means used to achieve those outcomes. For example, in *Brown v. Mississippi*, the Court reversed the defendants' convictions because "state authorities . . . contrived a conviction resting solely upon confessions obtained by violence."[27] Applying the Due Process Clause of the Fourteenth Amendment, the Court observed that "'state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[28] In light of the utter failure of state officials in this regard, the Court declared that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[29]

Having established that "[c]oercing the supposed state's criminals into confessions and using such confessions so coerced from them against them

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[25] U.S. CONST. amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").

[26] *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) ("[P]etitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused, his confession was not voluntary, and its admission in evidence violated the Due Process Clause of the Fourteenth Amendment."); Payne v. Arkansas, 356 U.S. 560, 567 (1958) (arresting the petitioner without a warrant, depriving him of food and holding him incommunicado "deprived him of 'that fundamental fairness essential to the very concept of justice' . . . and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment."); Leyra v. Denno, 347 U.S. 556, 556 (1954) (police violated due process of law when, instead of a doctor to treat petitioner's painful sinus condition, they used a psychiatrist who employed "skillful and suggestive questioning, threats and promises" to obtain a confession).

[27] Brown v. Mississippi 297 U.S. 278, 286 (1936). In Brown, the defendants, all black men, were accused of murder. When the defendants denied their involvement in the crime, a lynch mob that included law enforcement officers inflicted various forms of torture upon them. As an example of the egregious law enforcement behavior, when one of the defendants initially denied his involvement in the murder of the victim, a deputy sheriff and others "seized him and, with the participation of the deputy, they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony." *Id.* at 281.

[28] *Brown*, 297 U.S. at 286 (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

[29] *Id.* at 286.

in trials has been the curse of all countries,"[30] the Court, in subsequent cases, set about giving more definition to the due process based analysis established in *Brown*. In *Lynumn v. Illinois*, for example, the petitioner was arrested outside of her apartment for selling marijuana.[31] When confronted by police officers, she initially denied that she had participated in a drug transaction, which prompted the officers to surround her and badger her about her guilt.[32] According to the petitioner, one officer:

> started telling me I could get [ten] years and the children could be taken away, and after I got out they would be taken away and strangers would have them, and if I could cooperate, he would see they weren't; and he would recommend leniency, and I had better do what they told me if I wanted to see my kids again. The two children are three and four years old. Their father is dead; they live with me. I love my children very much. I have never been arrested for anything in my whole life before. I did not know how much power a policeman had in a recommendation to the State's Attorney or to the Court. I did not know that a Court and a State's Attorney are not bound by a police officer's recommendations. I did not know anything about it. All the officers talked to me about my children and the time I could get for not cooperating. All three officers did. After that conversation I believed that if I cooperated with them and answered the questions the way they wanted me to answer, I believed that I would not be prosecuted. They had said I had better say what they wanted me to, or I would lose the kids. I said I would say anything they wanted me to say. I asked what I was to say. I was told to say 'You must admit you gave Zeno the package' so I said, 'Yes, I gave it to him.'[33]

Reviewing the facts of this case, the Court concluded that:

> It is . . . abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice-convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.[34]

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[30] *Id.* at 287 (quoting Fisher v. State, 110 So. 361, 365 (Miss. 1926)).

[31] Lynumn v. Illinois, 372 U.S. 528, 529 (1963).

[32] *Id.* at 530.

[33] *Id.* at 531.

[34] *Id.* at 534.

According to the Court, the key question in such cases is whether the suspect's will was overborne at the time she confessed.[35] If so, then "the confession cannot be deemed 'the product of a rational intellect and a free will.'"[36] Applying this analysis to the facts of *Lynumn*, the Court concluded that, under the totality of the circumstances, the officers' behavior operated to produce a coerced confession that violated the Due Process Clause of the Fourteenth Amendment.[37] Salient factors in the Court's determination of coercion included the fact that the petitioner was threatened with the loss of her children, she was physically surrounded by officers, she had no previous experience in the criminal justice system, and she did not have anyone in the room to represent her interests.[38]

Similarly, in *Haynes v. Washington,* after officers extracted a confession from the petitioner through a series of threats and promises during a 16-hour incommunicado interrogation, the Court determined that the resulting confession violated the Fourteenth Amendment.[39] According to the petitioner:

> [H]e several times asked police to allow him to call an attorney and to call his wife. He said that such requests were uniformly refused, and that he was repeatedly told that he would not be allowed to call unless and until he "cooperated" with police and gave them a written and signed confession admitting participation in the robbery. He was not permitted to phone his wife, or, for that matter, anyone, either on the night of his arrest or the next day. The police persisted in their refusals to allow him contact with the outside world, he said, even after he signed one written confession and after a preliminary hearing before a magistrate, late on the day following his arrest.[40]

Although some of the facts surrounding the petitioner's interrogation were in dispute, the Court summarized the evidence and reiterated the standard for assessing the voluntariness of confessions as follows:

> [T]he petitioner's written confession was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities. We have only recently held again that a confession obtained by police through the use of threats is violative of due process, and that "the question in each case is whether the

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[35] *Id.*

[36] *Id.* (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960)).

[37] *Id.* at 537.

[38] *Id.* at 534.

[39] Haynes v. Washington, 373 U.S. 503 (1963).

[40] *Id.* at 504.

defendant's will was overborne at the time he confessed . . . ."[41]

The Court further observed that "the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort."[42]

After its development in *Brown*, the Due Process voluntariness test was used in "some [thirty] different cases from 1936-1964," as the Court endeavored to ensure the reliability of confessions by carefully scrutinizing the means used to achieve such outcomes.[43] However, with the shift toward the Fifth Amendment, mainly Miranda and the notion of inherent compulsion in the interrogation context, the Court moved away from the fact specific case-by-case voluntariness analysis.[44] Yet, as the Court explained in *Dickerson*, "[w]e have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."[45]

2. The *Miranda* Presumption

On the heels of the voluntariness cases and in an attempt to address more subtle forms of coercion, the Court decided *Miranda v. Arizona,* which set forth baseline standards for police warnings during custodial interrogations.[46] The Court also carefully delineated the circumstances under which the Miranda protections might be cast aside: "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently."[47] With respect to those who invoke rights under *Miranda*, the Court explained that if a person requests an attorney and the interrogation nevertheless continues, then "a heavy

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[41] *Id.* at 513 (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)).

[42] *Id.* at 513 (quoting Wilson v. United States, 162 U.S. 613, 623 (1896)).

[43] Dickerson v. United States, 530 U.S. 428, 434 (2000)

[44] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964). In Malloy, the Court determined "that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." *Id.* at 6. The Court also acknowledged that since the inception of the voluntariness doctrine, there had been a "marked shift" on the state level toward the Fifth Amendment standard developed in Bram v. United States. *Id.* at 7. "Under [the Bram test], the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . .'" *Id.* (quoting Bram v. United States, 168 U.S. 532, 542-543 (1897)).

[45] *Dickerson*, 530 U.S., at 434.

[46] Miranda v. Arizona, 384 U.S. 436, 444 (1966). The now famous warnings include the right to silence and the right to counsel in the interrogation room. *Id.*

[47] *Id.*

burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[48] By articulating this waiver standard, the Court made clear that it was reaffirming the lofty standards established in *Johnson v. Zerbst*, to wit:

> An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained. A statement we made in Carnley v. Cochran . . . is applicable here:
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> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but *intelligently and understandingly* rejected the offer. Anything less is not waiver."[49]

Despite its enduring (although somewhat hobbled) status today, *Miranda* was a controversial and closely decided opinion. Not every Justice agreed with the warnings or the high bar set for waiver. In his dissent, Justice Harlan viewed the explicit waiver as an almost certain hindrance to obtaining confessions:

> To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy.[50]

Of course, predicting such dire consequences and depicting *Miranda* as a stranglehold on legitimate law enforcement efforts did little to aid its popularity with police officers.[51] Nevertheless, as with many of the precedent-setting cases from the Warren Court that contributed to a criminal procedure revolution, *Miranda* tasked lower courts with interpreting, defining, and applying Miranda warnings and waiver standards. These definitional challenges naturally played out against the backdrop of balancing the competing interests of due process and fairness to suspects

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[48] *Id.* at 475.

[49] *Id.* (quoting Carnley v. Cochran, 369 U. S. 506, 516 (1962)) (emphasis added).

[50] *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).

[51] *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY, 621, 634-645 (1996) (discussing, among other things, law enforcement's initial resistance to the Court's required warnings in Miranda).

with the needs of a proactive law enforcement community.

B. *Defining the Miranda Waiver Standard: Burbine, Butler & Berghuis*

As expected, over the years, the Court further examined and refined what it means to knowingly, intelligently and voluntarily waive rights under *Miranda*. For instance, in *Moran v. Burbine*, after the defendant was arrested in connection with a burglary, police discovered evidence of his possible involvement in a murder.[52] Unbeknownst to the respondent, his sister secured an attorney to represent him during questioning, a fact that was conveyed to the police station where he was being held.[53] Despite knowledge that counsel was prepared to assist him, the police brought Burbine in for questioning and neglected to tell him of the arrangements made by his sister.[54] After reading Miranda warnings and securing a waiver, the police questioned Burbine about the murder to which he eventually confessed in three signed statements.[55]

Burbine was subsequently convicted of the murder and appealed his conviction arguing, among other things, that he could not have validly waived his rights under *Miranda* because he did not know that an attorney had been secured to represent him.[56] Therefore, he did not have sufficient information to make an informed decision about waiver.[57] In other words, he could not "knowingly and intelligently" waive his rights if he did not have critical information related to his exercise of those rights at his disposal at the time he made the waiver decision.[58]

The Court initially explained that *Miranda* allows for waiver of "rights conveyed in the warnings 'provided the waiver is made voluntarily, knowingly and intelligently.'"[59] Next, the Court expounded on the waiver analysis and its two distinct dimensions. According to the Court:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. Second, *the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.* Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level

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[52] Moran v. Burbine, 475 U.S. 412, 416 (1986).

[53] *Id.* at 417.

[54] *Id.*

[55] *Id.* at 418.

[56] *Id.* at 419–20.

[57] *Id.* at 420.

[58] *Id.* at 419.

[59] *Id.* at 421 (quoting Miranda v. Arizona, 384 U.S. 436, 475 (1966)).

> of comprehension may a court properly conclude that the Miranda rights have been waived.[60]

Applying this construct to the facts in *Burbine*, the Court reasoned that the narrow purpose of *Miranda* is to limit the inherently coercive environment in the interrogation room.[61] The specific Miranda warnings conveying those rights are designed to effectuate that purpose. Therefore, the inquiry into whether a waiver is made knowingly, intelligently, and voluntarily must begin and end with those expressly stated rights, and the Court declined to "upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement."[62] In weighing the costs and benefits of advising suspects about information beyond those rights, the Court reasoned that "a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt."[63] As a result, the Court in *Burbine* provided a more comprehensive definition of waiver while simultaneously limiting the scope of its coverage.

After prescribing what a suspect has to "know" in order to make an intelligent decision regarding waiver, the Court next delved into what precise language (if any) is necessary to effectively waive Miranda rights. In *North Carolina v. Butler*, the Court addressed the question of whether a *per se* rule requiring an explicit statement of waiver was required to establish a valid waiver of Miranda rights.[64] In *Butler*, after being advised of his Miranda rights and requested to sign a waiver form, the defendant stated "I will talk to you, but I am not signing any form."[65]

Later, seeking to suppress the inculpatory statements that led to his conviction, Butler argued that "he had not waived his right to the assistance of counsel at the time the statements were made."[66] The Court, examining the question of whether an express waiver is a critical prerequisite to a valid confession, acknowledged that an express written or oral statement is

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[60] Moran v. Burbine, 475 U.S. 412, 421 (1986) (emphasis added).

[61] *Id.* at 428.

[62] *Id.* at 427. According to the Court, Miranda addressed the competing concerns of legitimate law enforcement and constitutionally impermissible compulsion by ensuring that a suspect has *knowledge* that he is permitted to have the advice of counsel and not by the "more extreme position that the actual presence of a lawyer was necessary." *Id.* (emphasis added).

[63] *Id.*

[64] North Carolina v. Butler, 441 U.S. 369 (1979).

[65] *Id.* at 371.

[66] *Id.*

"usually strong proof of the validity of that waiver," however, such a waiver is "not inevitably either necessary or sufficient to establish waiver."[67] According to the Court, "[t]he question is not one of form, but rather whether the defendant, in fact, knowingly and voluntarily waived the rights delineated in the Miranda case."[68] Therefore, while silence on the part of the defendant cannot be enough to infer waiver, silence "coupled with an understanding of his rights and a course of conduct indicating waiver" could lead to an inference that a defendant had waived his rights.[69] In its analysis, the Court once again went back to the precise language of *Miranda* and its requirement that suspects simply be apprised of their rights and given an opportunity to exercise those rights. As long as those conditions have been met, then "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[70]

More recently, in *Berghuis v. Thompkins*, the Court again addressed the "course of conduct" waiver as well as the timing of a waiver during a custodial interrogation.[71] In *Berghuis*, the defendant, Thompkins, was taken into custody in Ohio and interrogated about a murder that occurred a year earlier in Michigan.[72] Prior to questioning, Thompkins was given Miranda warnings. After officers determined that Thompkins could read and understand English, they asked him to sign a waiver.[73] He declined.[74] Thompkins was largely silent during the ensuing three-hour interrogation, occasionally interjecting minimal verbal responses and/or nodding his head.[75] However, after a period of more than two-and-a-half hours, one officer asked Thompkins if he "pray[ed] to God to forgive [him] for shooting that boy down?"[76] Thompkins offered a tearful "Yes," but later refused to provide a written confession.[77]

Thompkins moved to suppress his confession on the basis that he did not expressly waive his rights under *Miranda* and, even if he did, the police failed to obtain said waiver *prior* to questioning him.[78] The Court

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[67] *Id.* at 373.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 374–75 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[71] Berghuis v. Thompkins, 560 U.S. 370 (2010).

[72] *Id.* at 374.

[73] *Id.* at 375.

[74] *Id.*

[75] *Id.* at 375–76. Additionally, Thompkins never invoked his right to silence nor did he request the assistance of counsel. *Id.*

[76] *Id.* at 376.

[77] *Id.*

[78] *Id.* at 382, 387

reiterated the "course of conduct" test articulated in *Butler* and reaffirmed that *Miranda* waivers can occur by "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver."[79] Consequently, "[i]f the State establishes that a Miranda warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate 'a valid waiver' of Miranda rights. *The prosecution must make the additional showing that the accused understood these rights.*"[80] The Court concluded that "Miranda rights can therefore be waived through means less formal than a typical waiver on the record in a courtroom . . . given the practical constraints and necessities of interrogation and the fact that Miranda's main protection lies in advising defendants of their rights . . . ."[81]

The Court next addressed Thompkins' claim that a waiver must be secured prior to any interrogation. According to the Court, the "course of conduct" standard developed in *Butler* foreclosed any requirement that officers secure an explicit waiver prior to questioning.[82] The Court once again reiterated the principle that the Miranda warnings are designed as a mechanism to advise suspects of their rights and to ensure that a suspect understands those rights.[83] The Miranda warnings do not impose any further affirmative obligations on law enforcement.[84] Indeed, by omitting a formal waiver and proceeding straight to the interrogation when a suspect has not invoked the right to silence or the right to counsel, the Court observed that the suspect may actually be in a more beneficial position:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own

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[79] *Id.* at 384.

[80] *Id.* (emphasis added).

[81] *Id.* at 385.

[82] *Id.* at 387.

[83] *Id.*

[84] *Id.* The Court added: "This holding also makes sense given that 'the primary protection afforded suspects subject[ed] to custodial interrogation is the Miranda warnings themselves.'" *Id.* (quoting Davis, 512 U. S. 452, 460 (1994)).

return to the law and the social order it seeks to protect.[85]

While it may strain credulity to accept that an adult in the midst of an ongoing police interrogation can think rationally about his immediate and long-term interests and continually reassess whether to invoke or waive Miranda rights, such rational thought processes are almost unimaginable when considering juveniles alone in interrogation rooms with police officers. This article will now turn to cases addressing juveniles undergoing police interrogation to examine whether the Miranda warnings and waiver standards are indeed a good fit when children find themselves face-to-face with police officers seeking evidence of their guilt.

III. CHILDREN AND WAIVER

A. *In re Gault*

In re Gault, a 1967 Supreme Court decision that followed on the heels of *Miranda*, considered whether the Fifth Amendment privilege against compelled self-incrimination was fully applicable during proceedings involving juveniles.[86] In *Gault*, a 15-year-old minor, Gerald Gault, was charged with making lewd phone calls to a neighbor.[87] Prior to interrogating Gault, the police never advised him of his right to remain silent or his right to counsel. Eventually, the Court determined that Gault was a "delinquent child" during a proceeding in which the judge did most of the questioning and the complaining witness was absent.[88]

The Court framed the question in *Gault* as a determination of the "precise impact of the due process requirement upon [juvenile] proceedings."[89] Examining the history of the development of the juvenile court system, the Court observed that a *parens patriae* approach that denied children basic procedural rights in juvenile courts may have been motivated by the "highest motives and most enlightened impulses . . . ."[90] Nonetheless, "Juvenile Court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[91] In response to claims that juveniles benefit from special procedures that vary from the typical criminal process, the Court explained "the observance of due process standards, intelligently and

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[85] *Id.* at 388.

[86] *In re* Gault, 387 U.S. 1 (1967).

[87] *Id.* at 4.

[88] *Id.* at 4–8. Gault was ordered committed until he was 21 "unless sooner discharged by due process of law." No appeal was permitted in juvenile cases in Arizona. *Id.* at 7–8.

[89] *Id.* at 14.

[90] *Id.* at 17.

[91] *Id.* at 18.

not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."[92]

Given this history and the compelling need for more protection in juvenile courts, the Court concluded that juvenile hearings must "measure up to the essentials of due process and fair treatment . . . [as] part of the Due Process Clause of the Fourteenth Amendment."[93] Accordingly, the Court determined that the constitutional privilege against self-incrimination is fully applicable to juvenile proceedings to "assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."[94]

The Court noted that "[s]pecial problems may arise with respect to waiver of the privilege by or on behalf of children," which may lead to differences in techniques for questioning.[95] However, the principle remains the same: "[i]f counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was *voluntary in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.*"[96]

Finally, reflecting on the history of the Fifth Amendment privilege and its necessity when a juvenile is forced to run the gauntlet of a police interrogation, the Court observed:

> The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle, because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state. In other words, the privilege has a broader and deeper thrust than the rule which prevents the use of confessions which are the product of coercion because coercion is thought to carry with it the danger of unreliability. One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.
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> It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children. The language of the Fifth Amendment, applicable to the States by operation of the Fourteenth Amendment, is unequivocal and without

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[92] *Id.* at 21.

[93] *Id.* at 30–31.

[94] *Id.* at 47.

[95] *Id.* at 55.

[96] *Id.* (emphasis added).

exception. And the scope of the privilege is comprehensive.[97]

B. *Fare v. Michael C.*

In *Fare v. Michael C.*, the Court concluded that the Miranda "knowingly, intelligently and voluntary" waiver standard applied equally to juveniles in the interrogation room.[98] Michael C. was sixteen and a half years old at the time he was interrogated about his involvement in a murder.[99] Upon being read his Miranda rights, he asked if he could speak with his probation officer before talking with police.[100] When officers declined Michael's request to contact his probation officer that evening, he agreed to speak with officers without the presence of counsel.[101] His subsequent statements and drawings implicated him in the murder.[102]

In a motion to suppress the incriminating statements and sketches, Michael C., the respondent, argued that his request to speak to his probation officer was the functional equivalent of requesting the assistance of counsel during his interrogation.[103] Thus, the respondent contended that he had invoked his right to counsel and any subsequent questioning was improper.[104] As such, any evidence gleaned therefrom should be suppressed as a violation of the Fifth Amendment.[105]

The Court, reflecting on the core principles of *Miranda*, observed that once a suspect requests an attorney, the interrogation must cease. To wit:

> If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise . . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before

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[97] *Id.* at 47.

[98] Fare v. Michael C., 442 U.S. 707, 724–25 (1979).

[99] *Id.* at 710.

[100] *Id.*

[101] *Id.* at 710–11.

[102] *Id.* at 711.

[103] *Id.* at 711–12.

[104] *Id.* at 712.

[105] *Id.*

speaking to police, they must respect his decision to remain silent.[106]

The Court characterized these standards as rigid and clear in terms of informing officers and courts about police procedure in the interrogation room.[107]

Having articulated these guidelines, the Court determined that Michael's request to speak with his probation officer was not tantamount to requesting the advice of counsel.[108] The Court explained that an attorney's role is to advocate on behalf of his client while a probation officer might, in some instances, have a conflict of interest with his probationer due to the probation officer's duty to "police" the behavior of the probationer.[109] Therefore, by asking to speak with his probation officer, Michael did not request the kind of protection from the adversarial process that triggers Miranda's rigid *per se* rules to cease interrogation. In reaching this conclusion, the Court gave short shrift to the fact that a juvenile under pressure in an interrogation room could not have made such fine distinctions, and, therefore, was likely attempting to reach out to a person of trust regardless of that person's official status.

The determination that respondent did not invoke his right to silence or counsel under *Miranda* did not, however, end the inquiry. The Court still had to analyze the voluntariness of Michael's confession. Specifically:

> [T]he question whether the accused waived his rights "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case." Thus, the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel.[110]

According to the Court, such a determination should be made based upon a totality of the circumstances even in cases in which juveniles were alone in the interrogation room with police officers.[111] Indeed, the Court could

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[106] *Id.* at 717–18 (quoting Miranda v. Arizona, 384 U.S. 436, 473–74 (1966)).

[107] *Id.* at 718.

[108] *Id.* at 719.

[109] *Id.* at 720—1. Moreover, "[t]he fact that a relationship of trust and cooperation between a probation officer and a juvenile might exist. . .does not indicate that the probation officer is capable of rendering effective legal advice sufficient to protect the juvenile's rights during interrogation by the police, or of providing the other services rendered by a lawyer." *Id.* at 722.

[110] *Id.* at 724–25.

[111] *Id.* at 725.

"discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so."[112] Thus, rather than developing a different Miranda waiver standard when juveniles are involved, the Court instead reasoned that the totality of the circumstances test should simply take the suspect's age into account as one of the factors to assess voluntariness.[113] As a result, the totality of the circumstances test would be re-formulated to include the "juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[114] The Court expressed confidence that juvenile courts would be able to take age and experience into account when the circumstances warranted such an analysis.[115]

Curiously, however, the Court seemed to acknowledge that not all juveniles are on equal footing when confronted with Miranda warnings.[116] To account for these possible differences, the Court observed that:

> Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation.[117]

The adoption of this flexible totality of the circumstances approach ensured that juveniles were not to be left to the mercy of a Miranda waiver standard measured against adult experiences in the interrogation room. Yet, this approach seemingly left such juveniles trapped in the vagaries of a totality of the circumstances test that could use age and experience as generic proxies for understanding Miranda rights and the consequences of waiving those rights.

C. *Joseph H.*

In 2011, Joseph was one of 613 children under the age of [twelve]

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*

> arrested for a felony in California. This case raises an important legal issue that likely affects hundreds of children each year: whether and, if so, how the concept of a voluntary, knowing, and intelligent Miranda waiver can be meaningfully applied to a child as young as [ten] years old.[118]

During a custodial interrogation, Joseph H., age ten, confessed to shooting and killing his father.[119] "[D]espite his young age, his ADHD . . . and low-average intelligence," a California appellate court determined that Joseph nevertheless understood and validly waived his Miranda rights.[120] On its face, this holding on these facts would likely be surprising to many and cause outrage for some. However, what is perhaps most striking about the Joseph H. case is the dissenting statement written by California Supreme Court Justice Goodwin Liu in response to the denial of certiorari by the California Supreme Court.

Writing for the dissent, Justice Liu methodically discussed both the increasing trend of juveniles finding themselves in interrogation rooms and the corresponding need for greater protections to ensure the voluntariness of their confessions.[121] Explaining why the California Supreme Court should have taken the case, Justice Liu relied upon "social science and cognitive science as well as what any parent knows – indeed, what any person knows – about children generally" to conclude that "it is doubtful that Joseph understood or was capable of understanding the nature of Miranda rights and the consequences of waiving those rights."[122]

Justice Liu explained that the validity of Joseph's confessions (and, indeed, any minor's confession) "subsumed several questions worthy of the court's review."[123] Specifically:

> (1) Whether there is an age below which the concept of a voluntary, knowing, and intelligent waiver has no meaningful application, (2) whether and, if so, how the Miranda warnings and waiver decision can realistically be made intelligible to very young children, and (3) what role parents, guardians, or counsel should play in aiding a valid waiver by such children, and under what conditions a parent or guardian

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[118] *In re* Joseph H., 367 P.3d 1 (Cal. 2015) (Liu, J., dissenting statement).

[119] *In re* Joseph H., 188 Cal. Rptr. 3d 171, 178 (Cal. Ct. App. 2015).

[120] *Id.* at 187. The case was appealed and eventually both the California Supreme Court and the United States Supreme Court denied certiorari.

[121] *Joseph H.*, 367 P.3d at 1.

[122] *Id.* at 3. The dissent dismissed the fact that Joseph's stepmother was present during the interrogation because she had a conflict of interest and didn't actually do anything to assist Joseph during the interrogation. *Id.*

[123] *Id.* at 3–4.

would be unable to play that role.[124]

Finally, Justice Liu noted that other state high courts and legislatures have proactively adopted specific standards and procedures for minors in an interrogation setting.[125] Considering alternative solutions for this pressing yet unresolved issue, Justice Liu concluded his opinion by suggesting that "[the California] Legislature may wish to take up this issue in light of this court's decision not to do so here."[126]

D. *Dassey v. Dittmann*

The story of Brendan Dassey and his path through the criminal justice system was the focus of a widely viewed and analyzed Netflix program, *Making a Murderer*.[127] During the program, viewers witnessed Dassey "go it alone" during police interrogations, appearing nonchalant, confused and defeated. How is it possible, many viewers wondered, that a sixteen-year-old with apparently limited mental capacity could be left alone with experienced police interrogators? Notwithstanding Dassey's Miranda waiver and his mother's consent to his questioning, the visual of young Dassey sitting in that room spinning conflicting stories with police prompting seemed contrary to any system of justice that purports to protect its most vulnerable individuals. At minimum, isn't this what Miranda was supposed to protect against? And, perhaps most importantly, isn't Brendan Dassey a person who is most in need of that protection?

Since his conviction in 2007, Dassey has filed several appeals. His most recent appeal focused on the voluntariness of his confession. On December 8, 2017, an *en banc* panel of the Seventh Circuit Court of Appeals used the traditional totality of the circumstances analysis to determine that, while the Wisconsin state courts' determination that Dassey's confession was voluntary is not "beyond . . . debate," it was nevertheless reasonable.[128] More specifically, the court determined that:

> Some factors would tend to support a finding that Dassey's confession was not voluntary: his youth, his limited intellectual ability, some suggestions by the interrogators, their broad assurances to a vulnerable suspect that honesty would produce leniency, and inconsistencies in Dassey's confession.[129]

However:

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[124] *Id.* at 4.

[125] *Id.* at 5.

[126] *Id.* at 5. *See also infra* notes 142-151 and accompanying text.

[127] *Making a Murderer* (Netflix 2015).

[128] Dassey v. Dittmann, 877 F.3d 297, 301 (7th Cir. 2017) (en banc).

[129] *Id.*

> Many other factors . . . point toward a finding that it was voluntary. Dassey spoke with the interrogators freely, after receiving and understanding Miranda warnings, and with his mother's consent. The interrogation took place in a comfortable setting, without any physical coercion or intimidation, without even raised voices, and over a relatively brief time. Dassey provided many of the most damning details himself in response to open-ended questions. On a number of occasions he resisted the interrogators' strong suggestions on particular details. Also, the investigators made no specific promises of leniency.[130]

Although the majority acknowledged that the law demands that juveniles receive special care during custodial interrogations, the court determined that state courts had, indeed, taken his age and intellectual disability into account, weighing those concerns against the fact that he was read his Miranda rights and chose to speak with officers anyway.[131] In sum, after considering relevant U.S. Supreme Court precedent and concluding that the "[U.S.] Supreme Court has considered and rejected claims similar to Dassey's," the Seventh Circuit held that "[t]he Wisconsin courts did not apply the law unreasonably in finding that Dassey's confession was voluntary."[132]

The voluntariness of a confessions is, of course, a matter separate and apart from whether the confession might be false due to police interrogation tactics that prey upon a juvenile's age, inexperience, and pliable nature. On the matter of whether a confession extracted from a vulnerable juvenile might nevertheless be false and therefore unreliable, the Seventh Circuit observed that "whether a confession is reliable, as distinct from voluntary, 'is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment.'"[133]

By contrast, the dissenting opinions in *Dassey* criticized the Wisconsin state courts for failing to perform a meaningful analysis of the special care standard that is implicated when juveniles undergo interrogation. According to the dissent, "even though the Wisconsin Court of Appeals gave a nod to the totality test, it made no mention of the special- care standard for juvenile confessions beyond a brief mention of Dassey's age

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[130] *Id.*

[131] *Id* at 314. The majority did not provide any detail as to how the Wisconsin courts took Dassey's age and intellectual disability into account beyond noting that officers used normal speaking tones with Dassey, made no threats or promises of leniency and offered Dassey food and restroom breaks. *Id.*

[132] *Id.* at 315.

[133] *Id.* at 317 (quoting Colorado v. Connelly, 497 U.S. 157, 167 (1986)).

and intellectual disability in the state court's opinion."[134]

In a separate dissenting opinion, Judge Rovner described "the chasm between how courts have historically understood the nature of coercion and confessions and what we now know about coercion with the advent of DNA profiling and current social science research."[135] Explaining that current thinking on false confessions is based on the outdated notion that innocent people do not confess to crimes they did not commit, Judge Rovner observed that "our case law developed in a factual framework in which we presumed that the trickery and deceit used by police officers would have little effect on the innocent."[136] That proposition has been proven erroneous because "[w]e know now that in approximately 25% of homicide cases in which convicted persons have later been unequivocally exonerated by DNA evidence, the suspect falsely confessed to committing the crime."[137] Moreover:

> Studies have demonstrated that personal characteristics such as youth, mental illness, cognitive disability, suggestibility, and a desire to please others may induce false confessions. A survey of false confession cases from 1989–2012 found that although only 8% of adult exonerees with no known mental disabilities falsely confessed to crimes, in the population of exonerees who were younger than 18 at the time of the crime, 42% of exonerated defendants confessed to crimes they had not committed . . . .[138]

Applying this framework to Dassey's circumstances, Judge Rovner reasoned that "Dassey's interrogation combined a perfect storm of internal and external elements. He was young, of low intellect, manipulable, [and] without a friendly adult . . . ."[139] He was forced to go it alone against "repeated accusations, deception, fabricated evidence, implicit and explicit promises of leniency, police officers disingenuously assuming the role of father figure . . . ."[140] Against those odds, Brendan Dassey did not stand a chance. Accordingly, Judge Rovner concluded that no reasonable court "knowing what we now know about coercive interrogation techniques and viewing Dassey's interrogation in light of his age, intellectual deficits, and manipulability" could have concluded that Dassey's confession was voluntary.[141]

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[134] *Id.* at 320 (Wood, C.J., dissenting).

[135] *Id.* at 331 (Rovner, J., dissenting).

[136] *Id.* at 332.

[137] *Id.* at 333.

[138] *Id.* at 334.

[139] *Id.* at 335.

[140] *Id.*

[141] *Id.* at 336.

IV. STATE LAW APPROACHES

A. *California*

> When a police detective asked Joseph if he understood his right to remain silent, the [ten]-year-old replied that he did.
>
> "Yes, that means I have the right to remain calm," Joseph said.[142]

In the wake of the denial of certiorari by the California Supreme Court in the *Joseph H.* case, the California Legislature took up the task suggested by Justice Liu in his dissenting statement–drafting legislation designed to protect minors in the interrogation room.[143] California Senate Bill 1052 was the first attempt and would have required, among other things:

> [T]hat a youth under [eighteen] years of age consult with legal counsel in person, by telephone, or by video conference prior to a custodial interrogation and before waiving [Miranda] rights. The bill would provide that consultation with legal counsel cannot be waived. The bill would require the court to consider the effect of the failure to comply with the above-specified requirement in adjudicating the admissibility of statements of a youth under [eighteen] years of age made during or after a custodial interrogation.[144]

Although the bill passed the California Senate, Governor Edmund G. Brown, Jr. exercised his veto authority to defeat the bill's passage into law.[145] While recognizing that juveniles faced greater hurdles in the interrogation room that might lead them to "easily succumb to police pressure to talk instead of remaining silent," the Governor contrasted that fact against the competing reality that "police investigators solve very serious crimes through questioning and the resulting admissions or statements that follow."[146] Accordingly, the Governor vowed to work with all of the impacted constituents to find a more workable solution in the coming year and to gain a "much fuller understanding of the ramifications of [the] measure."[147]

In early 2017, California Senate Bill 395 was introduced. Like SB 1052, the new bill sought to protect minors in the interrogation room. However,

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[142] *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015).

[143] *See supra* notes 121–126 and accompanying text.

[144] S.B. 1052, 2015-16 Reg. Sess. (Cal. 2016)). The bill had a "public safety" exception of sorts, waiving the right to counsel requirement when the officer's questions were reasonably necessary to protect life or property from a substantial threat. *Id.*

[145] Governor Edmund G. Brown, Jr., Veto of S.B. 1052 (Sept. 30, 2016), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1051-1100/sb_1052_vt_20160930.html.

[146] *Id.*

[147] *Id.*

the new bill contained several key differences. First, the age for youth to be protected by the absolute non-waivable right to counsel before an interrogation was lowered from age eighteen to age fifteen.[148] Second, by January 1, 2023, the bill required that a panel be convened to examine the effects of the implementation of the new youth interrogation standards.[149] Finally, the bill contained a provision that would repeal its requirements on January 1, 2025.[150] The bill was signed into law by Governor Brown on October 11, 2017 and it took effect on January 1, 2018.[151]

B. *Illinois*

Taking a somewhat different approach, in January 2017, the Illinois General Assembly adopted a modified Miranda warning for juveniles under the age of eighteen.[152] Whenever a juvenile is in custodial interrogation, the following Miranda warning must be read:

> You have the right to remain silent. That means you do not have to say anything. Anything you do say can be used against you in court. You have the right to get help from a lawyer. If you cannot pay for a lawyer, the court will get you one for free. You can ask for a lawyer at any time. You have the right to stop this interview at any time.[153]

After reading that statement in its entirety without stopping to verify the juvenile's comprehension, then the following questions must be asked and the juvenile must be allowed to respond:

> (1) Do you want to have a lawyer?
> (2) Do you want to talk to me?[154]

The bill also raised the age from thirteen to fifteen for a requirement that the minor have non-waivable legal representation during custodial interrogations and expanded the videotaping requirements for all felonies and sex offenses involving minors under the age of eighteen.[155] According to the Juvenile Justice Initiative, these statutory changes were necessary because false confessions by children are especially common and juveniles

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[148] S.B. 395, 2017-18 Reg. Sess. (Cal. 2017).

[149] *Id.*

[150] *Id.*

[151] *See* CAL. WELF. & INST. CODE § 625.6 (West 2018).

[152] *See* 705 ILL. COMP. STAT. § 405/5-401.5 (a-5) (2017).

[153] *See id.*

[154] *See id.*

[155] *See id.* § 405/5-170. (2017); Juvenile Justice Initiative, SB 2370 Fact Sheet (May 19, 2011), available at http://jjustice.org/wordpress/wp-content/uploads/May-19-SB2370-Fact-Sheet.pdf.

are less capable of clearly understanding their rights.[156] In fact, a scant 20.9% of minors understand the Miranda warnings and 62% believe that a judge can penalize them for exercising their right to remain silent.[157]

C. *New York & Other States*

In early 2016, New York State Senator Michael Gianaris introduced Senate Bill S6754 that mandated simpler language for Miranda warnings.[158] The simpler language was deemed necessary because minors, who have been shown to waive their Miranda rights at a 90% rate, could not understand the typical language in Miranda warnings, and the added stress of being arrested and questioned by police could further reduce the level of comprehension.[159] An additional justification for the bill was to reduce the number of false confessions "by ensuring that youth understand their constitutional rights commonly known as 'Miranda Rights'".[160] Unfortunately, the bill stalled in Committee and the law in New York remains unchanged as of this date.

At the time New York set out to change its law, no other state had adopted the simpler language approach to Miranda.[161] But, other states were using different means to accomplish the same end of protecting minors in the interrogation room so as to avoid false confessions. For example, in New Mexico, confessions by minors under the age of thirteen are not admissible for any purpose.[162] By contrast, in New Mexico, "[a]t ages [thirteen] and [fourteen], confessions are presumed inadmissible, but prosecutors may rebut that. For ages [fifteen] and up, courts must consider age, custody status, how the rights were read, circumstances of questioning, and whether a parent or attorney was present" in the admissibility determination.[163]

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[156] Juvenile Justice Initiative, *supra* note 155.

[157] *Id.*

[158] *Police Routinely Read Juveniles Their Miranda Rights, but Do Kids Really Understand Them?*, NYSENATE.GOV (June 1, 2016), https://www.nysenate.gov/newsroom/in-the-news/michael-gianaris/police-routinely-read-juveniles-their-miranda-rights-do-kids [hereinafter *Police Routinely Read Juveniles Their Miranda Rights*]. The "language was adapted from a set of model warnings in a 2008 paper co-authored by [Richard Rogers]." *Id.* The Illinois General Assembly used very similar language to update its statute and likely used the same model warnings as a template. *See supra* notes 152–54 and accompanying text.

[159] *Police Routinely Read Juveniles Their Miranda Rights*, *supra* note 158.

[160] S.B. S6754, 201516 Leg. Sess. (N.Y. 2016).

[161] However, as mentioned above, Illinois later incorporated the language into its statutes. *See supra* notes 152–54 and accompanying text.

[162] *See* N.M. Stat. Ann. § 32A-2-14(F) (2009).

[163] *See* N.M. Stat. Ann. § 32A-2-14(E) and (F) (2009); *Police Routinely Read Juveniles*

In Seattle, Washington, the King County Sheriff's office recently took steps to make the Miranda warnings simpler.[164] "For example, instead of saying, 'You have the right to remain silent' and 'Anything you say can and will be used against you in a court of law,' deputies will tell them, 'You have the right to remain silent, which means that you don't have to say anything,' and 'It's OK if you don't want to talk to me.'"[165] The Washington approach is one example of a non-legislative solution. The Sheriff's office worked in partnership with a non-profit organization to formulate the warnings to help teens "recognize and avoid choices that could be detrimental to them."[166]

V. COMPARATIVE APPROACHES

A. *England*

The Police and Criminal Evidence Act of 1984, Code of Practice C (hereinafter "PACE Code C") provides:

> A juvenile or person who is mentally disordered or otherwise mentally vulnerable must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult . . . .[167]

Their Miranda Rights, *supra* note 158.

[164] *King County Deputies to Give Kids Simplified Miranda Warnings*, US NEWS (Sept. 27, 2017), https://www.usnews.com/news/best-states/washington/articles/2017-09-27/king-county-deputies-to-give-kids-simplified-miranda-warning .

[165] *Id.*

[166] *Id.*

[167] The Police and Criminal Evidence Act 1984, Revised Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, § 11.15 (Eng.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592547/pace-code-c-2017.pdf. As far as who is defined as a juvenile, Section 1.5 of Pace Code C provides: "Anyone who appears to be under 18, shall, in the absence of clear evidence that they are older. . .be treated as a juvenile for the purposes of this Code and any other Code." Additionally:

"The appropriate adult" means, in the case of a:

(a) juvenile:

(i) the parent, guardian or, if the juvenile is in the care of a local authority or voluntary organisation, a person representing that authority or organization. . .;

(ii) a social worker of a local authority. . .;

(iii) failing these, some other responsible adult aged 18 or over who is *not*:

~ a police officer;

~ employed by the police;

~ under the direction or control of the chief officer of a police force; or

If an appropriate adult is present during the police interview, that person is advised that he or she has an express role during the interview process. Specifically:

> If an appropriate adult is present at an interview, they shall be informed:
> - that they are not expected to act simply as an observer; and
> - that the purpose of their presence is to:
>   (1) advise the person being interviewed;
>   (2) observe whether the interview is being conducted properly and fairly; and
>   (3) facilitate communication with the person being interviewed.[168]

If at any time it is determined that the appropriate adult is acting in a manner that unreasonably obstructs questioning of the juvenile, then the adult will be reminded of his or her role and, if the behavior continues, the adult must be replaced by another appropriate adult before the interview resumes.[169]

To further manage the roles of appropriate adults during police interviews, the U.K. government provided specific guidance for those who act in this capacity.[170] Importantly, the appropriate adult is not present to act as a solicitor, but to ensure that the juvenile understands the proceedings and to help the juvenile communicate effectively with the police.[171] Any conversations between the juvenile and the appropriate adult are not covered by legal privilege, although they are permitted to speak in private.[172] During police questioning of the juvenile, the main role of the appropriate adult is:

> [T]o ensure that in any interview. . .the person detained understands the questions which are being asked and that the police do not ask questions in a way which is confusing, repetitive or oppressive.

~ a person who provides services under contractual arrangements (but without being employed by the chief officer of a police force), to assist that force in relation to the discharge of its chief officer's functions,

whether or not they are on duty at the time. *Id.* at § 1.7 (emphasis added).

[168] *Id.* at § 11.17.

[169] *Id.* at § 11.17A.

[170] HOME OFFICE, GUIDANCE FOR APPROPRIATE ADULTS, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117625/guidanceappadultscustody.pdf.

[171] *Id.* The Guidance does advise, however, that the appropriate adult shall "consider whether legal advice from a solicitor is required." The appropriate adult is not entitled to be present during consultations between the detained person and his or her solicitor. *Id.*

[172] *Id.*

> Almost all interviews are audio tape recorded, but more and more interviews are video recorded. There is a procedure for recording. In an interview [the appropriate adult] should not feel that [he or she has] to remain silent. [Appropriate adults] are entitled to intervene at any stage.
>
> [Appropriate adults] should always make sure that when questions are asked the person detained understands them and that the police understand the reply.
>
> If [appropriate adults] are unhappy about the way in which the interview is being conducted then [he or she is] entitled to ask them to stop the interview so that legal advice can be taken from a solicitor.[173]

The appropriate adult is also entitled to be present during procedures in which the police take photographs, DNA samples and/or conduct identification parades or confrontations.[174] In sum, as the Guidance explains at the outset, "[a]ppropriate adults have an important role to play in the custody environment . . . ."[175]

B. *Netherlands*

The Netherlands has adopted a "youth-specific" approach to juveniles in the interrogation context.[176] In 2009, based upon case law from the European Court of Human Rights ("ECHR"), the Netherlands modified its approach to the police interrogation of minors. Specifically, the Dutch Supreme Court "ruled that [minors] . . . have an additional right to assistance by a lawyer or another 'person of trust' *during* the police interrogations."[177] This change in Dutch Law was prompted by a judgment from the ECHR that "[underscored] the particular capacities and vulnerability of minors in the context of police interrogations [and determined] that minors are entitled to legal or other assistance during police interrogations in order to enable them to participate effectively in the proceedings, which is an important part of the right to a fair trial."[178] After the ruling, a Dutch Policy Directive provided more specific detail to the

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[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Ton Liefaard & Yannick van den Brink, *Juveniles' Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands,* 4 Eramus L. Rev. 206, 206 (2014). Among other things, the "youth-specific" approach meant that "juveniles were entitled to higher level of protection at the stage of police interrogations." *Id.*

[177] *Id.* (emphasis in original).

[178] *Id.* at 208.

rights and waiver capabilities of minors when the right to counsel becomes available. As the Directive outlined:

> [M]inors accused of an offence have the right to legal counsel prior to police interrogation and the right to assistance by a lawyer or another representative during police interrogation. With regard to the right to waive legal or other appropriate assistance, the Directive distinguishes between different groups of minors according to age and seriousness of the offence. When it comes to [twelve]- to [fifteen]-year-olds, there is no possibility to waive the right to prior consultation of a lawyer in case the accusation concerns a felony for which the use of pre-trial detention is allowed by law (i.e. a severer offence); yet in case of specific minor offences or misdemeanours, this group of minors can waive their right to counsel. As far as [sixteen]- and [seventeen]-year-olds are concerned, the right to prior consultation cannot be waived in case of the most serious felonies (i.e. a violent or sexual assault such as murder, homicide/manslaughter, rape, etc.); however, it can be done if the charge concerns a less serious offence or a misdemeanour.[179]

The right to consult with counsel prior to an interrogation and to have counsel present during the interrogation are considered two separate rights. If the minor waives the right to consult with counsel, then he or she has automatically waived the right to have counsel present during the interrogation.[180] The minor may nevertheless have a "person of trust," such as a parent or guardian, present during the interrogation, but this person does not stand in the shoes of an attorney.[181]

Early in 2017, the Netherlands implemented many of the standards from this Directive and other European Union Directives into its Code of Criminal Procedure. Pursuant to the current law, "[m]inors above the age of twelve are appointed to and assisted by a lawyer before and during police hearings."[182] This right can no longer be waived.[183] As to the lawyer's

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[179] *Id.* at 208.

[180] *Id.*

[181] *Id.*

[182] Defense for Children International, *The Role of the Youth Lawyer in the Juvenile Justice System in the Netherlands* 17 (Sept. 2016-Feb. 2017). "During the first consultation the lawyer and the minor suspect speak about the necessity of the presence and participation of the lawyer during police interrogation. The lawyer informs the assistant prosecutor of the outcome. Upon request of the suspect or parents or guardian a lawyer will provide legal aid during the interrogation." *Id.*

[183] *Id.* Presumably, this non-waiver applies only to the first consultation since representation during the interrogation appears to depend upon the outcome of the first consultation.

responsibilities, she can:

> [Sit] next to the suspect and can make comments and ask questions immediately at the start and just before the end of police hearings. The police interrogator will give the lawyer the chance to make comments at the beginning and at the end. Lawyers can furthermore ask for a time out to have a personal conversation with their client. The lawyer can bring to the attention of the interrogator that:
>
> - the young suspect does not understand the question;
> - the interrogator should [take measures to prevent obtaining] a statement of the suspect under pressure;
> - the physical or mental state of the suspect obstructs the [continuation] of the interrogation.
>
> The lawyer is allowed to make notes and bring writing equipment such as a [laptop] or mobile phone, but is not allowed to make recordings. Lawyers who act against these rules can be removed by the Assistant Prosecutor.[184]

By contrast, if a person of trust is invited into the interrogation context, then he or she is there to provide emotional support for the minor.[185] In that capacity, the person of trust may not interrupt the interrogation proceeding and may not make contact with the minor.[186] Ignoring these rules can lead to removal from the proceeding by the Assistant Prosecutor.[187]

VI. BEST PRACTICES

A. Adult Advisers

Miranda created a one-size-fits-all approach to the explanation of Fifth Amendment rights and waiver. At the same time, the juvenile system was grappling with whether a *parens patriae* model, in which children were denied basic procedural rights, was the best approach to juvenile justice. Since that time, several developments have occurred that suggest some combination of simplified Miranda warnings and a modified *parens patriae* model might be best suited for juveniles who find themselves in a custodial interrogation. These developments include a considerable body of social science research that "underscores the importance of making a distinction between a juvenile's cognitive ability (capacity to understand) and maturity of judgment (capability to make grown-up decisions) when it comes to

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[184] *Id.* at 26–27.

[185] *Id.* at 27

[186] *Id.*

[187] *Id.*

determining his ability to effectively exercise Miranda rights during police interrogations."[188]

Further, as the dissenting opinion noted in *Dassey,* studies have demonstrated that people who do not understand their rights are among the most vulnerable in an interrogation context, and, therefore, are more likely to be led or badgered into making false confessions.[189] Specifically, the court observed:

> A survey of false confession cases from 1989–2012 found that . . . only 8% of adult exonerees with no known mental disabilities falsely confessed to crimes, [but] in the population of exonerees who were younger than [eighteen] at the time of the crime, 42% of exonerated defendants confessed to crimes they had not committed, as did 75% of exonerees who were mentally ill or mentally disabled. Overall, one sixth of the exonerees were juveniles, mentally disabled, or both, but they accounted for 59% of false confessions. Indeed, youth and intellectual disability are the two most commonly cited characteristics of suspects who confess falsely.[190]

Finally, on the international stage, numerous countries and international organizations have adopted "youth-specific" criteria that recognize the protection of children in the criminal justice system as a means of effectuating basic human rights.[191] A number of international organizations and documents confirm this critical understanding, including the United Nations Convention on the Rights of the Child, the Council of Europe Guidelines and the European Court of Human Rights.[192]

The Miranda warnings were designed to be a simple straightforward explication of rights to put *adult* suspects on an equal footing with police in the interrogation context. Advising suspects of the rights and providing an opportunity for waiver (even by a "course of conduct") was thought to meet the twin goals of protecting the suspect while not unduly hindering legitimate law enforcement investigations. Yet, *Miranda* has limitations. If one were to use the analogy of a restaurant, *Miranda* provides a "menu of

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[188] Liefaard & van den Brink, *supra* note 176, at 213.

[189] Dassey v. Dittmann, 877 F.3d 297, 334 (7th Cir. 2017) (Rovner, J., dissenting).

[190] *Id.*

[191] "Effective human rights protection is fundamental to any concept of fairness in the criminal justice system. Fairness, however, is relative: it may require different levels of protection in different circumstances. Children require special measures of protection to take account of their particular vulnerability and need False" Debbie Sayers, *Standing up for Children? The Directive on Procedural Safeguards for Children Suspected or Accused in Criminal Proceedings*, EU LAW ANALYSIS (Dec. 22, 2015), http://eulawanalysis.blogspot.com/2015/12/standing-up-for-children-directive-on.html.

[192] *Id.*

rights," but the police interrogator (as "waiter") is not required to share anything about the choices beyond the barebones language on the "menu." Imagine the confusion of one who is being asked to choose from the "menu," while lacking basic understanding of the words or their meaning in the context presented. Moreover, without this essential foundation of knowledge, one cannot accurately assess the consequences of choosing or not choosing. Should you just pick one? Or none? Should you trust what the police interrogator is telling you about the choices?[193]

Additionally, the dynamics in the interrogation room between police officers and children cannot be discounted. The age and authority status discrepancies likely intimidate and exploit the weaknesses of an overwhelming majority of minors well before any words are exchanged. Not only does this level of stress further hinder comprehension, it also probably renders minors highly susceptible to the "good cop" routine. The friendly officer becomes an oasis amidst the uncertainty, thereby obtaining the minor's trust and her confession of guilt.

An after the fact examination of what occurred in the interrogation room that takes into account the juvenile "special care" factors of age and intellectual ability can never fully recreate the mood and atmosphere in the room.[194] A look in the eye, a shift in the seat, a reaffirming pat on the back, a clenching of the fist – all of these convey messages that can rarely be captured in a totality of the circumstances test that merely examines age and intellectual ability.

Accordingly, jurisdictions that have moved toward a model that mandates placing counsel or another trusted adult in the interrogation room with a juvenile at the earliest opportunity are ensuring that the will of the minor isn't overborne through lack of understanding combined with subtle intimidation. These jurisdictions are also holding sacred the constitutional right to a fair trial that can be severely undermined in the time it takes an officer to say, "Just tell me the truth son and you can go home."

B. *Waiver Standards*

Simplifying the language of Miranda warnings is a good first step toward enhancing children's understanding of the complex of rights afforded them in custodial interrogations. However, the real consequence in the

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[193] Researchers examined the wording of 371 juvenile Miranda warning across the country and found that "52 percent required at least an eighth-grade reading level." *Police Routinely Read Juveniles Their Miranda Rights*, *supra* note 158. However, a 2006 study of Texas offenders found that "average reading levels were four years below expectations for their ages." *Id.*

[194] For a discussion of the "special care" factors, *see*, *supra* notes 128–34 and accompanying text.

interrogation room arises from *waiving* those rights without understanding the long-term ramifications of talking to the police and, perhaps more importantly, not understanding the significant downside to making up stories to placate an intimidating and persistent adult.

The implied "course of conduct" waiver standard endorsed by the Court in *Butler*[195] and *Berghuis*[196] examines knowledge and understanding of one's rights and conduct and takes into account that knowledge and understanding. However, the "course of conduct" waiver assumes a thought process that is keenly aware of the surroundings, understands the significance of the interaction, and is constantly making adjustments in verbal and non-verbal communication to account for the dynamics of the interaction. Quite simply, children lack such sophisticated thought processes. Many of them naturally fiddle, shift in their seats, stammer, tell tall tales, nod as if they understand even when they don't and laugh or cry unexpectedly. These "courses of conduct" are usually not intended to convey agreement or disagreement. They are just the typical behavior traits of many children. Therefore, the "course of conduct" waiver standard is ill-suited to juvenile interrogations and should never be used.

Because explicit waivers are intricately bound to understanding words, meanings and consequences, and such understanding cannot be gained without an advocate or other trusted adult, no waiver should be permitted until such time as a child has had the opportunity to speak with someone whom she trusts to look out for her best interests.

VII. CONCLUSION

This article has explored the Miranda waiver standards and the harmful and unreliable results that can occur when juveniles lack sufficient understanding of the criminal process to calibrate their self-interest. Without a doubt, obtaining confessions is a noteworthy goal in the criminal justice system. But, securing *reliable* confessions and protecting the right to a fair trial for our most vulnerable populations is a greater constitutional good. Our system can accommodate both and the jurisdictions that have moved in the direction of finding such a compromise are to be applauded. Their efforts and those on the international stage should serve as a call to action for those states that have not yet addressed the issue. Our children are watching.

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[195] *See supra* notes 64–70 and accompanying text.

[196] *See supra* notes 71–81 and accompanying text.