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J.D.B. and the Maturing of Juvenile Confession Suppression Law

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The Supreme Court's decision in *J.D.B. v. North Carolina*¹ in 2011 marks a watershed moment in the jurisprudence of juvenile rights. Addressing a question left open in *Miranda v. Arizona*² more than four decades ago, the Court made clear in *J.D.B.* that a judicial determination of whether a minor suspect is "in custody" for *Miranda* purposes must take into account the age of the suspect because juveniles cannot be held to the same standard as adults.³ When one considers the broader context of the Court's criminal law jurisprudence of recent years, it is apparent that *J.D.B.* reflects the Court's willingness to extend, into new areas of criminal law, a recent line of cases that treats age eighteen as a central dividing line in how the Eighth Amendment regulates the sentences of capital punishment and life imprisonment without the possibility of parole.⁴ When one looks even further back into Supreme Court history, it is evident that *J.D.B.* marks a return to special protections for youth that characterized the Court's confession suppression caselaw more than half a century ago.⁵

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1. 131 S. Ct. 2394 (2011).

2. 384 U.S. 436 (1966).

3. *See J.D.B.*, 131 S. Ct. at 2402–08.

4. *See infra* notes 168–85 and accompanying text (discussing *Graham v. Florida*, 130 S. Ct. 2011 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005)).

5. *See infra* Part I.

We believe that *J.D.B.* could be a game changer in delinquency and criminal cases involving minor suspects, if the Supreme Court and the lower courts adhere and give appropriate weight to the legal principles and legislative facts that the Court ratified in *J.D.B.* If applied and extended in a logical and reasonable manner, the *J.D.B.* decision should transform police interrogations of juvenile suspects. At the very least, *J.D.B.* should require that all aspects of *Miranda* and other constitutional rules governing interrogations be reconceptualized in order to reflect fundamental differences between minors and adults. If the courts truly take to heart the lessons of *J.D.B.*, we believe that the result will be a rule that requires that juvenile suspects be afforded an attorney prior to and during a police interrogation.

This Article begins by looking back at juvenile confession suppression law in the half century preceding *J.D.B.* and examines the evolution of the doctrines applied in *J.D.B.* Part I demonstrates the special solicitude that the Court accorded juveniles half a century ago under the due process standard of voluntariness of statements and examines how and why this special protection was diluted in the ensuing decades.

Part II focuses on *J.D.B.* itself. This section examines the new direction the Court took, the various ways in which *J.D.B.* diverged from the confession suppression jurisprudence of preceding years, and how the decision built upon the reasoning of recent Eighth Amendment caselaw. We also take a close look at the legislative facts in the *J.D.B.* decision and consider the implications of the Court having taken judicial notice of these legislative facts.

Part III presents our views of the changes that *J.D.B.* demands of the criminal and juvenile justice systems. Part III.A shows that *J.D.B.*'s restructuring of the standard for one aspect of *Miranda* analysis requires commensurate changes in all other aspects of the *Miranda* doctrine and other constitutional rules governing police interrogations. Part III.B presents our view that *J.D.B.*, properly extended, requires that counsel be afforded to any minor suspect prior to and during any police interrogation.

I. THE ROAD TO *J.D.B.*: THE (MIS)EVOLUTION OF CONSTITUTIONAL PROTECTIONS FOR JUVENILES IN POLICE INTERROGATIONS IN CRIMINAL AND JUVENILE DELINQUENCY CASES

In *J.D.B.*, Justice Sonia Sotomayor, writing for the majority, demonstrated the lineage and self-evident nature of the majority's reasoning. Justice Sotomayor quoted from Supreme Court decisions in 1948 and 1962, respectively, *Haley v. Ohio*⁶ and *Gallegos v. Colorado*,⁷ that recognized the need for special protections for youth in the context of police interrogations.⁸ Justice Sotomayor quoted the plurality's statement in *Haley* that police interrogation conditions that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."⁹ She quoted the Court's statement in *Gallegos* that "[n]o matter how sophisticated, a juvenile subject of police interrogation 'cannot be compared' to an adult subject."¹⁰ "[T]hese observations," she said, "restate what 'any parent knows'—indeed, what any person knows—about children generally."¹¹ Addressing "social science and cognitive science authorities,"¹² which had been cited by petitioner *J.D.B.* and *amici* for the petitioner in their briefs,¹³ she noted that this "literature confirms what [such] experience bears out," and thus "citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions."¹⁴

In this way, Justice Sotomayor presented a compelling story of a longstanding, well-accepted view of the Court: Constitutional

6. 332 U.S. 596 (1948).

7. 370 U.S. 49 (1962).

8. See *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 (quoting *Gallegos v. Colorado*, 370 U.S. 49 (1962) and *Haley v. Ohio*, 322 U.S. 596 (1948)).

9. *Id.* (quoting *Haley v. Ohio*, 332 U.S. at 599 (plurality opinion)).

10. *Id.* (quoting *Gallegos v. Colorado*, 370 U.S. at 54).

11. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

12. *Id.* at 2403 n.5.

13. See Brief for Petitioner at 20, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121), 2010 WL 5168873, at *20; Brief of Juvenile Law Center et al. as Amici Curiae in Support of Petition for a Writ of Certiorari at 13–17, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121), 2010 WL 2813537, at *13–*17; Brief of the American Bar Association as Amicus Curiae in Support of Petitioner at 10–17, 19–20, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (No. 09-11121), 2010 WL 5385326, at *10–*17.

14. *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 n.5.

regulation of police interrogations of juveniles in criminal and delinquency cases must take into account certain irrefutable qualities of young people that are obvious to “any parent.” But the story is more complicated, as becomes immediately evident when one considers that the two Supreme Court decisions cited by Justice Sotomayor were decided so long ago. These are the last of the Court’s decisions prior to *J.D.B.* to recognize and enforce the principle in the context of police interrogation of juveniles. As Part I shows, the promise of *Haley* and *Gallegos* was not realized, and was actually diluted in important respects, in the half-century between *Gallegos* and *J.D.B.*

To understand the detours and dead-ends that took place during this past half-century, it is useful to divide this period into three segments: (A) the pre-*Miranda* era, when the central constitutional constraint on police interrogations of juveniles was the due process doctrine of involuntariness; (B) the period that began with the issuance of *Miranda* in 1966 and culminated with the Supreme Court’s issuance of a decision in 1979¹⁵ clarifying the operation of the *Miranda* rule in juvenile cases; and (C) the period from 1979 until the Court’s issuance of its two rulings on the subject of *Miranda* “custody” in juvenile cases—*Yarborough v. Alvarado*¹⁶ in 2004 and *J.D.B.* in 2011.

A. The Pre-Miranda Era of Due Process Regulation of Police Interrogations of Juveniles

1. *Haley* and *Gallegos*: The Supreme Court’s Laying of a Foundation for Robust Constitutional Protections of Youth in Police Interrogations

The 1948 decision in *Haley v. Ohio*¹⁷ is best understood as part of a series of cases in which the Court reacted to abusive practices in police interrogations by establishing protections for suspects under the Due Process Clause. This was an era before state criminal cases

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

16. 541 U.S. 652 (2004).

17. 332 U.S. 596 (1948).

were subject to the protections of the Bill of Rights—which would occur as a result of Supreme Court rulings of the 1960s that “incorporated” those rights into the Fourteenth Amendment and, by means of that mechanism, applied them to the States;¹⁸ thus, the Fourteenth Amendment’s Due Process Clause was the primary vehicle for affording constitutional protections against abuses by state police officers. The Court provided these protections in a series of cases in the mid-twentieth century by creating a vibrant jurisprudence on due process regulation of the voluntariness of a statement obtained from a suspect in interrogation by state police officers.

The earliest cases in this series typically dealt with the most extreme forms of police coercion: physical force; threats of force; denial of food and rest; and being held incommunicado by the police.¹⁹ In later cases, the Court extended the protections of the Due Process Clause to suppress confessions extracted by subtler forms of coercion. For example, in *Leyra v. Denno* (1954),²⁰ the Court held a confession involuntary under the Due Process Clause because it was extracted by a psychiatrist brought in by the police (in ostensible response to the suspect’s request for a physician to provide aid for a painful sinus attack) who used “subtle and suggestive questions” to “induce” the suspect to confess.²¹ In *Spano v. New York* (1959),²² the Court suppressed a confession obtained by a police officer who was a childhood friend of the suspect’s and who told the suspect that the officer’s failure to secure a confession would cause problems for him

18. A detailed history of the “incorporation” jurisprudence can be found in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3031–36 (2010). The Court held in *McDonald* that the Second Amendment right to keep and bear arms is incorporated in the Due Process Clause. *See id.* at 3050.

19. Thus, for example, the Court suppressed statements that were extracted by means of a brutal beating (*Brown v. Mississippi*, 297 U.S. 278, 281–85 (1936)); keeping the suspect incommunicado for a week after arrest while the police moved him from one jail to another, interrogating him around the clock with relay teams of four to ten officers (*Chambers v. Florida*, 309 U.S. 227, 229–35 (1940)); subjecting a suspect to thirty-six hours of continuous cross-examinations by prosecutors, working in relay teams as the suspect was denied sleep or rest of any sort (*Ashcraft v. Tennessee*, 322 U.S. 143, 148–54 (1944)); and stripping the suspect, keeping him in solitary confinement, and threatening physical violence (*Malinski v. New York*, 324 U.S. 401, 403–07 (1945)).

20. 347 U.S. 556, 559–61 (1954).

21. *Id.* at 559.

22. 360 U.S. 315 (1959).

with his superiors. In *Lynnum v. Illinois* (1963),²³ the Court found a statement to be involuntary largely because the police told the defendant that “state financial aid for her infant children would be cut off, and her children taken from her, if she did not ‘cooperate.’”²⁴

The later cases also deepened the quality of analysis by accounting for a variety of characteristics that can render a suspect particularly susceptible to police pressure and thus especially likely to make an involuntary statement. In addition to the Court’s recognition in *Haley v. Ohio* (1948) that the young age of a suspect is such a quality, the Court held that the voluntariness of a statement can be vitiated by a suspect’s mental retardation,²⁵ mental illness,²⁶ the effects of drugs,²⁷ a limited education,²⁸ and/or lack of prior experience with the criminal justice system.²⁹

In deciding whether to deem a confession involuntary under the Due Process Clause (and, as part of that determination, how much to weigh particular factors), the Court employed an amorphous standard that failed to provide the courts or the police with much guidance. The Court repeatedly stated that the question of whether the accused’s “will was overborne at the time he confessed”³⁰ was to be determined “on the ‘totality of the circumstances.’”³¹ In what appears to have been an effort to rationalize and guide applications of the involuntariness doctrine, Justice Felix Frankfurter issued a lengthy,

23. 372 U.S. 528 (1963).

24. *Id.* at 534.

25. *See* *Culombe v. Connecticut*, 367 U.S. 568 (1961) (I.Q. of sixty-four); *Reck v. Pate*, 367 U.S. 433 (1961) (mental retardation); *see also* *Sims v. Georgia*, 389 U.S. 404 (1967) (limited mental capacity); *Davis v. North Carolina*, 384 U.S. 737 (1966) (low level of intelligence).

26. *See* *Fikes v. Alabama*, 352 U.S. 191, 193, 196 (1957) (schizophrenia); *see also* *Spano v. New York*, 360 U.S. at 322 & n.3 (emotional instability).

27. *See* *Beecher v. Alabama*, 389 U.S. 35 (1967) (morphine); *Townsend v. Sain*, 372 U.S. 293 (1963) (scopolamine, a drug with “truth serum” properties).

28. *See* *Sims v. Georgia*, 389 U.S. 404 (1967) (third grade education and illiteracy); *Clewis v. Texas*, 386 U.S. 707 (1967) (fifth grade education); *Culombe v. Connecticut*, 367 U.S. at 609, 620 (illiteracy); *Fikes v. Alabama*, 352 U.S. at 196 (defendant was “uneducated”).

29. *See* *Reck v. Pate*, 367 U.S. at 442; *Clewis v. Texas*, 386 U.S. at 712; *Spano v. New York*, 360 U.S. at 321.

30. *Reck v. Pate*, 367 U.S. at 440.

31. *Boulden v. Holman*, 394 U.S. 478, 480 (1969) (quoting *Fikes*, 352 U.S. at 197); *see also, e.g., Gallegos v. Colorado*, 370 U.S. 49, 55 (1962).

encyclopedic opinion in the 1961 case, *Culombe v. Connecticut*.³² The opinion analyzed caselaw of preceding decades to extrapolate relevant considerations and laid out a test for assessing whether a confession in a particular case should be deemed involuntary.³³ Although five other Justices joined Frankfurter in reversing Culombe's conviction (based on the defendant's low I.Q., illiteracy, incommunicado detention, and prolonged interrogation), only one Justice (Potter Stewart) joined Frankfurter's opinion.³⁴ In a concurring opinion, Chief Justice Earl Warren explained that he "would prefer not to write on many of the difficult questions which the opinion [of Justice Frankfurter] discusses until the facts of a particular case make such writing necessary," and that he would rather continue "develop[ing] the law on a case-by-case approach."³⁵ The very next year, the Court decided *Gallegos*, which suppressed as involuntary the confession of a fourteen-year-old who was held incommunicado. Implicitly referencing the Court's rejection of Justice Frankfurter's effort the previous year, Justice William O. Douglas observed in his majority opinion in *Gallegos* that "[t]here is no guide to the decision of cases such as this, except the totality of circumstances."³⁶

Haley presented the type of brutal scenario typical of the early involuntariness cases. John Haley, a fifteen-year-old African American youth,³⁷ was arrested on capital murder charges for

32. 367 U.S. 568 (1961).

33. *See id.* at 571–635 (Frankfurter, J., majority opinion).

34. *See id.* at 568.

35. *Id.* at 636 (Warren, C.J., concurring). Justice Douglas issued a concurring opinion, joined by Justice Black, that began by announcing that he "find[s] this case a simple one" for reversal of the conviction, and then explained why in fairly short order. *Id.* at 637–41 (Douglas, J., concurring). Justice Brennan issued a paragraph-long opinion, joined by Chief Justice Warren and Justice Black, explaining his view that "under our cases none [of the confessions] is admissible in evidence against [Culombe]." *Id.* at 641–42 (Brennan, J., concurring in the result).

36. *Gallegos v. Colorado*, 370 U.S. at 55.

37. In his plurality opinion in *Haley*, Justice Douglas made specific reference to John Haley's race. *See Haley v. Ohio*, 332 U.S. 596, 597 (1948). The early involuntariness decisions of the Supreme Court often involved the most egregious forms of racial violence by white officers against African American suspects. For example, in *Brown v. Mississippi*, 297 U.S. 278 (1936), a deputy sheriff, together with a mob of "white men," hanged a suspect from a tree twice and, after cutting him down, tied him to a tree and whipped him; two other suspects were taken to the police station, where the deputy sheriff, again "accompanied by a number of white men," stripped the suspects and whipped them with leather straps with buckles. *Id.* at 281–82.

allegedly serving as a lookout as two slightly older youths robbed a store and killed the shop owner.³⁸ Haley testified that he was beaten by the police, and his mother gave confirmatory testimony that “when she first saw him five days after his arrest he was bruised and skinned,” and that “the clothes he wore when arrested, which were exchanged two days later for clean ones she brought to the jail, were torn and blood-stained.”³⁹ Justice Douglas, who authored a plurality opinion for the reversal of the conviction that was joined with respect to the judgment by Justice Frankfurter, excluded this testimony from the analysis because, as Justice Douglas explained, “[t]he police testified to the contrary on this entire line of testimony,” and it was possible to resolve the case based on “only the undisputed testimony.”⁴⁰ The undisputed testimony established that a fifteen-

In *Chambers v. Florida*, 309 U.S. 227 (1940), which involved a robbery-murder of an “elderly white man,” the police arrested “twenty-five to forty” African Americans without warrants, confined them in jail, and subjected them to constant interrogations for a week in a jail room, surrounded by “four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.” *Id.* at 229–32.

38. *Haley v. Ohio*, 332 U.S. at 597.

39. *Id.*

40. *Id.* at 597–98. Perhaps for this same reason, Justice Douglas also did not advert to the racial dimensions of the case beyond identifying the race of the accused and observing that “[a]ge 15 is a tender and difficult age for a boy of any race.” *See id.* at 597, 599; *see also supra* note 37 and accompanying text. The dissenting Justices declared that “[t]here is no suggestion that racial discrimination or prejudice existed in the attitude of any of the witnesses, or of the courts or of the community of Canton.” *Haley*, 332 U.S. at 615 (Burton, J., dissenting). Given that neither the plurality nor the concurring opinion of Justice Frankfurter even suggested that race *had* played a factor, the fact that the dissenters felt the need to proclaim the absence of racial bias implicitly supports an obvious inference: that, in a capital murder case in 1948, in which the accused was an African American youth, racial bias surely played a role in numerous aspects of the case; at the very least, an African American youth, held incommunicado by the police, would have had good reason to fear grave injury at the hands of the police.

The dissenting Justices’ failure to appreciate (or perhaps simply to acknowledge) the racial overtones helps to explain their inability to perceive a central flaw in a dichotomy they presented. After stating that the Supreme Court, “[a]s a reviewing court,” has “a major obligation to guard against reading into the printed record purely conjectural concepts,” the dissenters stated: “To conjecture from the printed record of this case that the accused, because of his known proximity to the scene of the crime and his known association that night with the boys, one of whom did the actual shooting, must have been a hardened, smart boy, whose conduct and falsehoods necessarily made all of his testimony worthless per se, is as unjustifiable as it would be to assume, without seeing him or his mother as witnesses, that he was an impressionable, innocent lad, likely to be panicstricken by police surroundings and that all his testimony must be accepted as true except where expressly admitted by him to have been false.” *Id.* at 618–19. It would appear that this passage is essentially a use of the rhetorical device of *paraleipsis* to portray John Haley as “a hardened, smart” youth while ostensibly

year-old youth had been arrested in his home, taken to a police station at midnight, and interrogated by relays of police officers for five hours until he confessed at 5:00 a.m.⁴¹ The plurality concluded that these facts were sufficient to find the statement to be coerced in violation of the Due Process Clause. Emphasizing the young age of the accused, the plurality stated in a passage that has come to epitomize the central principle of *Haley*:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.⁴²

What has received little attention, but will play a substantial role in our efforts later to pull together the lessons of *Haley* and other cases, is that a significant part of the plurality's analysis of the involuntariness of John Haley's confession was that he was denied the opportunity to confer with a lawyer. Immediately after the above-quoted passage, the plurality stated:

disclaiming that any such assertion is being made. In any event, a feeling of "panic" would not have been limited to "an impressionable, innocent lad." Any African American youth of that era, arrested for a capital crime and held incommunicado at the police station, would have had reason to feel "panic-stricken" about what the police might do to him.

41. *See id.* at 597–98 (Douglas, J., plurality opinion).

42. *Id.* at 599–600. This passage was later quoted, in full or part, in, e.g., *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011); *In re Gault*, 387 U.S. 1, 45–46 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53 (1962); *Doody v. Ryan*, 649 F.3d 986, 1008–09 (9th Cir. 2011) (en banc); *United States ex rel. Riley v. Franzen*, 653 F.2d 1153, 1163 (7th Cir.), *cert. denied*, 454 U.S. 1067 (1981) (per curiam).

He [the youth in police custody] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him. No friend stood at the side of this 15-year old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.⁴³

In summing up the factors that called for deeming the statement unconstitutionally involuntary, the plurality listed: “The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, [and] the callous attitude of the police towards his rights.”⁴⁴ Then, in response to the argument that Haley had been “advised of his constitutional rights before he signed the confession and that, knowing them, he nevertheless confessed,”⁴⁵ the plurality explained, “[t]hat assumes, however, that a boy of fifteen, without aid of counsel, would have a full appreciation of that advice and that on the facts of this record he had a freedom of choice. We cannot indulge those assumptions.”⁴⁶ Justice Frankfurter, in a separate opinion, emphasized the young age of the accused, the incommunicado detention, and the “protracted questioning carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado,” and also listed the denial of “aid of counsel” as among the factors that rendered the confession involuntary.⁴⁷ In describing the *Haley* holding in a later opinion, Justice Frankfurter stressed that Haley

43. *Haley*, 332 U.S. at 600.

44. *Id.* at 600–01.

45. *Id.* at 601.

46. *Id.*

47. *Id.* at 605, 607 (Frankfurter, J., concurring).

“had seen no friend or legal counsel” during the time he was held incommunicado by the police.⁴⁸

The Court’s 1962 decision in *Gallegos v. Colorado*,⁴⁹ the other case (along with *Haley*) cited by the majority in *J.D.B. v. North Carolina* to document the lineage of the Supreme Court’s particularly protective treatment of juveniles in confession suppression cases, reiterated and reinforced *Haley*’s recognition that the analysis of a statement’s involuntariness should take into account a suspect’s young age as well as the denial of counsel. Writing for a majority of the Court this time, Justice Douglas held in *Gallegos* that a statement taken from a fourteen-year-old after five days of incommunicado detention must be deemed involuntary. “The fact that petitioner was only 14 years old,” wrote Justice Douglas, “puts this case on the same footing as *Haley v. Ohio*.”⁵⁰ The five-day period of incommunicado detention, Justice Douglas wrote, was a period during which Robert Gallegos “saw no lawyer, parent or other friendly adult.”⁵¹ Explaining the importance of access to counsel when a suspect is a minor, Justice Douglas stated:

[T]he five-day detention—during which time the boy’s mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor—gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

48. *Culombe v. Connecticut*, 367 U.S. 568, 624 (1961).

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

50. *Id.* at 53.

51. *Id.* at 50.

. . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.⁵²

Employing the “totality of the circumstances” standard, the Court held that the statement must be found involuntary because of the following factors: “[t]he youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, [and] the failure to see to it that he had the advice of a lawyer or a friend.”⁵³

Four years after *Gallegos*, the Court announced its decision in *Miranda v. Arizona*,⁵⁴ which drastically changed the landscape of confession suppression jurisprudence and shifted much of the courts’, litigants’, and commentators’ attention from the due process issue of involuntariness to issues concerning the application and waiver of *Miranda* rights. The effect of this transformation is the focus of Part I.B. But before taking up that part of the story, it is useful to understand how the lower courts applied *Haley* and *Gallegos* to juvenile confession suppression cases during the pre-*Miranda* era.

52. *Id.* at 54.

53. *Id.* at 55.

54. 384 U.S. 436 (1966).

2. The Lower Courts' Applications of the Due Process Doctrine of Involuntariness in Juvenile Confession Cases in the Pre-*Miranda* Era

A review of criminal and delinquency caselaw in the pre-*Miranda* era yields relatively few published lower court decisions addressing a claim that a juvenile's confession was involuntary in violation of the Due Process Clause.⁵⁵ The relative paucity of such claims may be, at least in part, a function of the nature of the juvenile court system in that era. Until the Supreme Court issued the 1967 seminal decision of *In re Gault*⁵⁶ (one year after *Miranda*), it was widely believed by judges and lawyers that juvenile delinquency proceedings should be informal, with "[t]he rules of criminal procedure . . . altogether inapplicable" and the juvenile deprived of "the procedural rights available to his elders."⁵⁷ Until *Gault* made clear that juveniles have a constitutional right to counsel,⁵⁸ many States denied counsel in delinquency proceedings; thus there would have been no defenders to file confession suppression motions in many cases. Moreover, even

55. To find such cases, we conducted a Westlaw search in the ALLSTATES and ALLFEDS databases for all cases before 6-13-1966 (the date of the *Miranda* decision) that contained the search terms "confession & involuntar! & (juvenile [or] minor [or] child) & (Haley [or] Gallegos)." We reasoned that any decision concerning the application of the involuntariness doctrine to a juvenile's confession would likely contain a citation to either *Haley* or *Gallegos* or both in the majority opinion or at least in a concurrence or dissenting opinion. This search produced sixteen juvenile confession suppression cases in the ALLSTATES database and two juvenile confession suppression cases in the ALLFEDS database that were decided by federal courts other than the U.S. Supreme Court. (Three of the decisions we found relate to the same case: a New Jersey first-degree murder case in which the New Jersey Supreme Court rejected the involuntariness claims of the two defendants (*State v. Smith*, 161 A.2d 520 (N.J. 1960)), and thereafter a federal district court denied federal habeas corpus relief (*United States ex rel. Smith v. New Jersey*, 194 F. Supp. 691 (D.N.J. 1961)), and the district court's ruling was subsequently affirmed by the *en banc* Third Circuit Court of Appeals (*United States ex rel. Smith v. New Jersey*, 323 F.2d 146 (3d Cir. 1963), *cert. denied*, 377 U.S. 1000 (1964)). This case is discussed *infra* notes 62–64 and accompanying text. We recognize that there were surely some juvenile confession suppression decisions in this era that would not have cited either *Haley* or *Gallegos*, but we are inclined to think that our search parameters probably generated most of the relevant cases.

56. 387 U.S. 1 (1967).

57. *Id.* at 15, 17.

58. At the time of the *Gault* decision, only one-third of the States had adopted legislation requiring provision of counsel in delinquency proceedings. *See id.* at 37–38. For *Gault*'s discussion of the right to counsel, and its holding that juveniles have a due process right to counsel in delinquency proceedings, *see id.* at 35–42.

in those States that *did* provide counsel, there was confusion in the pre-*Gault* era about whether a lawyer for a juvenile in a delinquency case should function like a defender in an adult criminal case. Many commentators took the position that defenders should refrain from an adversarial stance on behalf of their juvenile clients and should instead work with the Family Court to obtain rehabilitative services for the client.⁵⁹ As an early treatise on juvenile court work observed, “this cooperative, nonadvocate model often mandates encouraging an admission by the juvenile and avoiding the presentation of an available defense in order not to obstruct the rehabilitative goals of the juvenile court.”⁶⁰ Lawyers who were doing all they could to induce a client to confess were unlikely to file and aggressively litigate a motion to suppress a confession that the client had made to the police. Nonetheless, as is evident in the small body of reported cases on juvenile confession suppression in the pre-*Miranda*/post-*Gault* era, there were at least some court-appointed and retained lawyers for minors in delinquency cases who filed confession suppression motions. Moreover, as in *Haley v. Ohio* and *Gallegos v. Colorado*, there were challenges to minors’ confessions in cases in which a minor was prosecuted in adult court.⁶¹

An examination of the published lower court opinions of this era illuminates an important point about the involuntariness doctrine, at least as it was applied by the lower courts at that time. As is readily apparent when one considers the wide-open nature of the Court’s “totality of the circumstances” standard, the lower courts had a free

59. See, e.g., Jacob L. Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 BUFF. L. REV. 501, 507 (1963); Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1410 (1973).

60. PAUL PIERSMA, JEANETTE GANOUSIS, ADRIENNE E. VOLENIK, HARRY F. SWANGER & PATRICIA CONNELL, *LAW AND TACTICS IN JUVENILE CASES* 47 (3d ed. 1977).

61. A minor may be prosecuted in adult court for a crime because the youth exceeds the maximum jurisdictional age for prosecution in Family Court (in those jurisdictions that set the cut-off below age eighteen) or because the youth is waived or transferred to adult court or, in some States, is automatically subject to adult court prosecution for an enumerated crime unless transferred down to Family Court. See generally RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, *TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT* 237–59 (2d ed. 2008 & Supp. 2009); see also *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

hand to denominate a confession as voluntary or involuntary. In cases involving the most serious types of crimes, the courts were likely to employ their discretion to reject involuntariness claims, using some fact or factor to distinguish the case from *Haley* and *Gallegos*. For example, in a federal habeas corpus proceeding stemming from a New Jersey first-degree murder conviction, the en banc Third Circuit Court of Appeals rejected involuntariness claims by habeas corpus petitioners who were seventeen years old at the time of the crime and who were held incommunicado for at least nine-and-a-half hours and interrogated over the course of that period.⁶² To distinguish *Haley* and *Gallegos*, the majority stated that these “defendants though young in years were seasoned in crime . . . [and] cannot be cloaked with the tender immaturity protection of *Haley* and *Gallegos*,” that “[t]hey were never expressly or impliedly threatened with continued incommunicado detentions,” and that “[t]here is no evidence that the necessary interrogation was at all exhausting” (in that one defendant confessed after five hours of interrogation while the other confessed after one to three hours of interrogation).⁶³ In a passage that reveals much about the court’s motivations, the majority concluded by stating that “reversal of these convictions would be a signal to the vicious elements rampant in our cities that the chances are excellent for eventually slipping out from under responsibility lawfully established for crimes which stagger belief.”⁶⁴ State court rejections of juvenile involuntariness claims during this era reflect a similar pattern of an extremely serious crime, circumstances that appear equivalent to those in *Haley* and *Gallegos*, and judicial straining to find some fact or factor that can be used to distinguish the case from those U.S. Supreme Court cases.⁶⁵

62. United States *ex rel.* Smith v. New Jersey, 323 F.2d 146, 148–51 (3d Cir. 1963) (en banc), *cert. denied*, 377 U.S. 1000 (1964).

63. *Id.* at 150.

64. *Id.* at 151.

65. *See, e.g.*, Bean v. State, 199 A.2d 773, 776–78 (Md. Ct. App. 1964) (rejecting involuntariness claim by fifteen-year-old in rape case even though youth had I.Q. of seventy-four and was questioned late at night after having been in police custody for roughly ten hours, and had had little food or water; majority stresses that youth “never asked for either food or water” and that the youth “had sufficient reasoning ability to give the sheriff an alibi when he was first accosted, and was self-assertive enough to curse the sheriff”); State v. Carder, 210 N.E.2d 714, 718–19 (Ohio Ct. App. 1965) (rejecting involuntariness claim by sixteen-year-old

The federal and state cases in which an involuntariness claim prevailed typically involved a far less serious type of crime (for example, theft or breaking and entering).⁶⁶ In the only case we could find in which a confession was suppressed as involuntary even though the crime was very serious, the grounds for suppression were unusually compelling: a thirteen-year-old child, charged in Family Court with a fatal stabbing, had been interrogated continuously for seven hours, while being held incommunicado and denied “any food during the seven hours of interrogation.”⁶⁷

3. The Status of Juvenile Confession Suppression Law at the End of the Pre-*Miranda* Period

The Supreme Court’s decisions in *Haley v. Ohio* (1948) and *Gallegos v. Colorado* (1962) offered great promise for a jurisprudence recognizing the special characteristics of youth in assessing the constitutional validity of a confession. But, as the foregoing review has shown, the Supreme Court’s eschewal of standards and principles to guide the due process analysis of the voluntariness of a confession left the lower courts with too little guidance and too free a hand, and the lower courts were able to apply or distinguish the decisions in order to reach whatever result the lower court might wish.

who was convicted of first-degree murder; court distinguishes *Haley* and *Gallegos* by stating that “it is apparent that the accused was treated with unusual fairness and consideration by the officers” and that, although the police told the youth’s parents and a lawyer they brought with them that the interrogation had to finish before they could see the youth, “there is evidence that the accused did not wish to see his parents or the attorney”).

66. See, e.g., *United States v. Morales*, 233 F. Supp. 160, 162, 169–70 (D. Mont. 1964) (sixteen-year-old was convicted of breaking and entering a post office with intent to commit larceny; confession was deemed involuntary because of defendant’s age, overnight confinement; and denial of access to “any relative, friend or lawyer”); *State ex rel. Garland*, 160 So.2d 340, 341, 343 (La. Ct. App. 1964) (fifteen-year-old was convicted of multiple burglaries; confession was suppressed because of defendant’s age, prolonged interrogation, and denial of access to “friends, parents or persons standing in loco parentis or attorneys”); *In re Williams*, 267 N.Y.S.2d 91, 96, 106 (N.Y. Fam. Ct. 1966) (fifteen-year-old was convicted of breaking and entering; confession was found involuntary because of “the boy’s age, the unlawfulness of his arrest by the security guard, the lateness of the hour, the duration of the detention and the absence of his parents, a lawyer or a friend”).

67. *In re Rutane*, 234 N.Y.S.2d 777, 778–80 (N.Y. Fam. Ct. 1962).

In the latter half of the 1960s, the Supreme Court issued two decisions that had great implications for juvenile confession suppression law. The 1967 *Gault* decision created opportunities for clarifying the import of *Haley* and *Gallegos* and using these decisions to build a viable jurisprudence of juvenile confession suppression law. Instead of facilitating that development, *Miranda* led to the sidelining of the involuntariness doctrine in juvenile cases.

B. From Miranda (1966) to Fare v. Michael C. (1979)

1. *Miranda*: The Rule and Its Reasoning

By the early 1960s, the Supreme Court was acutely aware—from the involuntariness cases that the Court had decided and from the many other cases that came before the Court in certiorari petitions—of the manifold types of abuses that took place at the police stationhouse in interrogations of suspects. As Justice Frankfurter wrote in his 1961 *Culombe* opinion, the Court had come to understand that the police were adept at coercing confessions through devices “subtler” than “ropes and a rubber hose”: police officers regularly extracted confessions by means of “[k]indness, cajolery, entreaty, [and] deception.”⁶⁸ Until the mid-1960s, the central constitutional check on such actions by state and local police officers was, as Justice Frankfurter put it, “what due process of law requires by way of restricting the state courts in their use of the products of police interrogation.”⁶⁹ This was the backdrop for the Court’s decision in *Miranda v. Arizona*⁷⁰ in 1966.

The rule adopted in *Miranda* is, of course, well known to every lawyer who ever took a criminal procedure course in law school—or even a bar review course—as well as to anyone who has ever read or watched a crime drama. But this basic rule, stated succinctly and with impressive clarity in an early passage of Chief Justice Warren’s opinion for the Court in *Miranda*,⁷¹ has been elaborated, extended,

68. *Culombe v. Connecticut*, 367 U.S. 568, 571–72 (1961) (Frankfurter, J., announcing the judgment of the Court).

69. *Id.* at 587.

70. 384 U.S. 436 (1966).

71. *See id.* at 444–45. It was not until 2000, in *Dickerson v. United States*, 530 U.S. 428

and often limited in the almost half-century of subsequent decisions. Under *Miranda* jurisprudence, “custodial interrogation”⁷² triggers an obligation on the part of the police to give the well-known warnings,⁷³ and a failure to do so, or to convey a “fully effective equivalent,”⁷⁴ will ordinarily⁷⁵ result in suppression unless the accused makes a voluntary, knowing, and intelligent waiver⁷⁶ of their

(2000), that the Court clarified that “*Miranda* announced a constitutional rule,” notwithstanding the Court’s previous references to the “*Miranda* warnings as ‘prophylactic.’” *See id.* at 437, 444.

72. “Custodial interrogation” is, in this context, a term of art, limiting the police obligation to administer *Miranda* warnings to situations in which a suspect (1) is in “custody” or “otherwise deprived of his [or her] freedom of action in any significant way,” *Miranda*, 384 U.S. at 444; *see also id.* at 477, 478, and (2) is subjected to “interrogation,” which has been defined as “express questioning” or “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

73. The warnings, as set forth in the *Miranda* opinion, are that the suspect (1) has a right to remain silent, *Miranda v. Arizona*, 384 U.S. at 467–68; (2) that any statement he or she makes can and will be used in court as evidence against him or her, *id.* at 469; (3) that the suspect has a right “to consult with a lawyer and to have the lawyer with him [or her] during interrogation,” *id.* at 471; and (4) that if the suspect cannot afford a lawyer, he or she has a right to have a lawyer appointed without cost to represent him or her “prior to any interrogation,” *id.* at 474.

74. *See Duckworth v. Eagan*, 492 U.S. 195, 202–03 (1989) (warnings must be “‘a fully effective equivalent’” of the *Miranda* language, and “reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*’”) (emphasis in original) (alterations in original); *see also Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010).

75. The Court has recognized two general exceptions to the requirement to administer *Miranda* warnings in situations of “custodial interrogations”: (1) Under the “booking exception,” the police need not administer warnings in order to elicit the “biographical data necessary to complete booking or pretrial services,” *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990), such as “name, address, height, weight, eye color, date of birth, and current age,” *id.*, as long as the questions asked are “reasonably related to the police’s administrative concerns,” *id.* at 601–02, and are not “‘designed to elicit incriminatory admissions,’” *id.* at 602 n.14; and (2) under the “public safety” exception of *New York v. Quarles*, 467 U.S. 649 (1984), “when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him [or her] of [the *Miranda*] . . . rights ask questions essential to elicit information necessary to neutralize the threat to the public.” *Berkemer v. McCarty*, 468 U.S. 420, 429 n.10 (1984) (describing *Quarles* rule).

76. There is, first of all, the question of whether a waiver took place at all. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–63 (2010). If there was a waiver, then (1) “‘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,’” *Colorado v. Spring*, 479 U.S. 564, 573 (1987); and (2) the waiver “must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Miranda rights. In the event of a suspect's assertion of either the "right to silence" or the "right to counsel," the police are foreclosed from further questioning unless certain protections are afforded.⁷⁷

Reflecting the lessons that the Court learned about the nature of police interrogations in the voluntariness cases—and indeed, directly referencing some of those cases—the *Miranda* opinion explained that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."⁷⁸ The *Miranda* opinion drew on "police manuals and texts" to document the practices and ploys commonly used by police,⁷⁹ and thereby laid the foundation for the Court's ultimate conclusion that adequate advisement of one's rights by means of the warnings is necessary "to permit [a suspect] a full opportunity to exercise the privilege against self-incrimination" in the face of "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."⁸⁰ The *Miranda* decision could be founded on the Fifth Amendment privilege against self-incrimination, even though the case involved a state court prosecution, because, as Chief Justice Warren explained, the Court had, two years earlier, employed the incorporation doctrine to hold that "the substantive standards underlying the privilege appl[y] with full force to state court proceedings."⁸¹

77. If the suspect asserts the right to silence, then "the interrogation must cease," *Miranda*, 384 U.S. at 473–74, but the police may resume questioning if the circumstances of the case show that the officers "scrupulously honored" the suspect's assertion of the right to silence. See *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). If the suspect asserts the right to counsel, "all questioning must cease," *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam), until and unless "counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

78. *Miranda*, 384 U.S. at 448.

79. See *id.* at 448–59.

80. *Id.* at 467.

81. *Id.* at 463–64 (discussing *Malloy v. Hogan*, 378 U.S. 1 (1964)). See also *Malloy*, 378 U.S. at 6 ("We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."). For discussion of the "incorporation" doctrine, the mechanism by which the Supreme Court found much of the Bill of Rights to apply to the states, see *supra* note 18 and accompanying text.

2. *Miranda*, *Gault*, and a Lost Opportunity to Refine the Due Process Involuntariness Doctrine in Juvenile Cases

As Part I.A.2 explained, the development of a vibrant juvenile confession suppression jurisprudence was impeded in the pre-*Miranda* era at least in part by the nature of juvenile court practice at that time: the informality of the proceedings and the absence of the procedural safeguards of adult criminal court; the denial of counsel for an accused juvenile in many States; and the view of many lawyers that a juvenile defender should not litigate in an aggressive manner.⁸² *In re Gault*,⁸³ issued the year after *Miranda*, removed these obstructions and held that juvenile delinquency proceedings “must measure up to the essentials of due process and fair treatment”; that the accused in a delinquency case is entitled to representation; and, although this was implicit in the opinion rather than explicit, that a lawyer for an accused child must zealously defend against the charges in the well-established manner of a defender in a criminal case.⁸⁴

Gault also furnished a prime opportunity for a newly-minted corps of juvenile defenders to build upon *Haley* and *Gallegos* to shape a vibrant set of due process regulations of police interrogations of youth. Although *Gault* took pains to explain that the primary focus of the decision was on the charging and fact-finding stages of a delinquency case—and not the “pre-judicial stage[] of the juvenile process”⁸⁵—several passages of the opinion provided the makings of arguments for amplifying and refining the *Haley-Gallegos* doctrine. In the course of explaining that delinquency proceedings are necessarily subject to the regulations of the Due Process Clause, the Court approvingly cited its previous applications of the Due Process

82. See *supra* notes 56–60 and accompanying text.

83. 387 U.S. 1 (1967).

84. *Id.* at 30, 35–42. See also HERTZ ET AL., *supra* note 61, at 7–9.

85. *Gault*, 387 U.S. at 13. The Court also explicitly excluded the subject of “the post-adjudicative or dispositional process.” *Id.* See also *id.* at 27 (“nor do we here rule upon the question whether ordinary due process requirements must be observed with respect to hearings to determine the disposition of the delinquent child”).

Clause to “prohibit the use of [a] . . . coerced confession” in *Haley v. Ohio* (1948) and *Gallegos v. Colorado* (1962).⁸⁶

More importantly, the Court expressly ruled that juveniles enjoy the privilege against self-incrimination.⁸⁷ In holding that juveniles have the right to remain silent, Justice Abe Fortas made clear that this right applies throughout the entire criminal process, beginning at the investigative phase. As he explained, “[t]he privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable extensions of the truth.”⁸⁸ Emphasizing that the roots of this privilege go “far deeper” than protecting against unreliable confessions, he stressed that the privilege’s roots

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.⁸⁹

86. *Id.* at 12–13 & nn.9–10.

87. *Id.* at 55.

88. *Id.* at 47.

89. *Id.* (footnote omitted). In a recently published history of the *Gault* case, which draws on Justice Fortas’ papers (along with a large number of other written sources and interviews), David Tanenhaus reveals that Fortas, in an effort to persuade Chief Justice Warren and Justice Brennan to join an opinion holding that juveniles deserve the constitutional protection of the Fifth Amendment (which they ultimately did join), circulated two recently issued decisions by prominent juvenile court judges (which are cited *infra* note 96) that stressed “that young people were more susceptible than adults to confessing guilt to police officers.” DAVID S. TANENHAUS, *THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE* 84 (2011). For discussion of the sources that Tanenhaus consulted, see *id.* at 137–41.

The Court definitively rejected the view that “the juvenile and presumably his parents should not be advised of the juvenile’s right to silence because confession is good for the child.”⁹⁰ Recognizing that “special problems may arise with respect to waiver of the privilege by or on behalf of children,”⁹¹ the Court held unequivocally that “the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.”⁹²

In doing so, the Court recognized that juveniles deserve heightened protection, which the Court termed “differences in technique—but not in principle,” in “administering the privilege.”⁹³ Such “differences in technique,” the Court explained, should account for “the age of the child and the presence and competence of parents,” and whether there was “participation of counsel.”⁹⁴ The Court quoted extensively from *Haley* to make the point that “[t]his Court has emphasized that admissions and confessions of juveniles require special caution.”⁹⁵ It also approvingly referenced decisions of the New York Court of Appeals and New Jersey Supreme Court that reversed delinquency findings that were based on “confessions obtained in circumstances comparable to those in *Haley*.”⁹⁶ The Court declared that it is essential to ensure that a juvenile’s statements are neither “the product of . . . adolescent fantasy, fright or despair” nor “the product of ignorance of rights.”⁹⁷

With *Miranda*’s establishment in 1966 of important new constraints upon police interrogation to safeguard the Fifth

90. *Gault*, 387 U.S. at 51.

91. *Id.* at 55.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 45.

96. *Id.* at 46 (discussing *In re Gregory W. & Gerald S.*, 224 N.E.2d 102 (N.Y. 1966), and *In re State ex rel. Carlo & Stasilowicz*, 225 A.2d 110 (N.J. 1966)); *see also id.* at 52–54 (further discussing these lower court rulings).

97. *Gault*, 387 U.S. at 55. In an earlier passage of the opinion, in which the Court held that juveniles have a constitutional right to counsel in a delinquency case, the Court similarly emphasized the crucial role that counsel plays in ensuring that juveniles can exercise their constitutional rights: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’” *Id.* at 36 (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (footnote omitted)).

Amendment privilege against self-incrimination, *Gault*'s clarification in 1967 that the privilege applies to juveniles in delinquency cases, and *Gault*'s bolstering of the due process doctrine of *Haley* and *Gallegos*, one would expect that the new national corps of juvenile defenders would have embarked upon a course that actively challenged juvenile confessions on both *Miranda* and due process involuntariness grounds. A review of the reported decisions of the first decade after *Gault* shows that this was indeed the case with regard to *Miranda* claims, but that involuntariness claims were raised only rarely.⁹⁸

A particularly revealing gauge of the state of juvenile confession suppression practice a decade after *Miranda*'s issuance can be found

98. Given the large number of cases that can be found throughout the United States during this period, the textual point is best illustrated by focusing on a single State and a discrete body of cases that will permit a viable survey of confession suppression motion practices. For this purpose, we used New York State because this State had a fully functional defense bar in juvenile court even before the Supreme Court's recognition of a right to counsel in 1967 in *In re Gault*, 387 U.S. 1 (1967). *See id.* at 40–41 (discussing New York State's statutory right to counsel in Family Court). We focused exclusively on New York Family Court practice during this period because there was an active corps of lawyers specializing in Family Court juvenile delinquency proceedings in New York City at this time. *See generally* PETER S. PRESCOTT, THE CHILD SAVERS (1981) (presenting history of New York Legal Aid Society's Juvenile Rights Division)). Also, New York Family Court lawyers had good reason to appreciate the vitality of an involuntariness claim given that such a claim had resulted in suppression of a confession in a homicide case in *In re Rutane*, 234 N.Y.S.2d 777 (N.Y. Fam. Ct. 1962) (discussed *supra* note 67 and accompanying text).

For our search, we focused on the roughly ten-year period commencing with the announcement of the *Miranda* decision on June 13, 1966, and ending with the announcement on June 20, 1979, of the U.S. Supreme Court's decision in *Fare v. Michael C.*, 442 U.S. 707 (1979), which (as discussed *infra* notes 111–19 and accompanying text), set limits upon the ways in which *Miranda* applies to juvenile cases. To limit our search to New York Family Court cases, we defined the Westlaw search to focus on cases within the New York database that have the words "In the Matter of" or "In re" in the caption of the case. We then conducted searches with the following search patterns: "confession & suppress! & Miranda"; "confession & suppress! & Miranda & involuntar!"; "confession & suppress! & involuntar! % Miranda."

This search produced fifteen cases in which defense counsel raised a *Miranda* claim. In one of these, defense counsel also raised an involuntariness claim. In a single case, defense counsel raised an involuntariness claim without also raising a *Miranda* claim.

Of course, the reported decisions, which are almost exclusively appellate, do not necessarily present an accurate picture of what confession suppression claims were raised at the trial court level by trial counsel. Issues raised below may not have been deemed by appellate counsel as sufficiently compelling to be presented on appeal. But the factors that we describe in the above text as creating a favorable climate for raising both *Miranda* and Due Process challenges to a juvenile confession at the trial level also would have provided reasons for raising these claims on appeal.

in a practice manual for juvenile defenders, published in 1977 by the National Juvenile Law Center and the American Law Institute-American Bar Association Committee on Continuing Professional Education. The manual, entitled *Law and Tactics in Juvenile Cases*, was written by experts on juvenile law with practice experience in four States.⁹⁹ The manual covers each stage of a delinquency case, provides caselaw and practice pointers for juvenile defenders, and devotes an entire chapter to confessions.¹⁰⁰ As one would expect, that chapter contained a lengthy section on *Miranda* rights and waiver.¹⁰¹ There was also a section on statutory grounds for excluding a juvenile's confession.¹⁰² Surprisingly, there was no section or even subsection on suppressing a juvenile's confession as involuntary under the Due Process Clause. The seminal decisions on involuntariness of a minor's statement, *Haley v. Ohio* and *Gallegos v. Colorado*, appeared only briefly and tangentially in the manual's discussion of *Miranda* requirements.¹⁰³

What accounts for the manual's odd omission of an important, long-established constitutional basis for suppressing the confession of a juvenile? Based on our recollections of criminal and juvenile court practice of the era, refreshed and reinforced by our review of caselaw of that period, we believe that the drafting choice reflects a widely-shared view of juvenile defenders at the time: *Miranda* was not only the better constitutional basis for seeking to suppress a confession, but essentially the *only* constitutional claim worth raising in most

99. See PIERSMA ET AL., *supra* note 60. The manual was first published in 1971 and thereafter expanded and re-issued in a second edition in 1974 and a third edition in 1977. See *id.* at ix. As the title page of the third edition shows, the book was the result of a collaboration between the National Juvenile Law Center and the ALI-ABA Committee on Continuing Professional Education. The title page also identified the practice sites of the authors: Piersma, Ganousis, Volenik, and Connell were identified as members of the Missouri Bar; Piersma as also a member of the Michigan Bar; Volenik as also a member of the Maryland Bar; and Swanger and Connell as members of the Pennsylvania Bar.

100. See *id.* at 69–101.

101. See *id.* at 70–86.

102. See *id.* at 86–90.

103. See *id.* at 80 (citing *Gallegos* to support the point that the age of the suspect is a factor to consider in evaluating the validity of a *Miranda* waiver); *id.* at 92 (citing *Gallegos* and *Haley* to argue for *Miranda* warnings at a probation intake interview of a juvenile at the initial stage of a delinquency case); *cf. id.* at 117–18 (citing *Gallegos* and *Haley* to argue for a more protective Fourth Amendment standard for assessing the validity of a juvenile's consent to a search).

cases.¹⁰⁴ The involuntariness route had appeared to become a dead end because the amorphous nature of the involuntariness standard gave the lower courts free rein and these courts generally used their discretion to uphold confessions, particularly when the crime charged was a serious one. *Miranda*'s issuance in 1966 seemed to open the door to substantial, realistic new opportunities for suppressing a juvenile's confession. In sharp contrast to the involuntariness doctrine's "totality of the circumstances" standard, the *Miranda* doctrine created a set of sequential issues that lawyers and judges could employ as a concrete checklist:

- (1) Was there "custodial interrogation"?¹⁰⁵ If so, *Miranda* applied. If not, it did not.
- (2) If *Miranda* applied, was the need to administer warnings nullified by either the "booking exception" or the "public safety exception"?¹⁰⁶
- (3) If *Miranda* warnings were required, were they administered in their proper form?¹⁰⁷
- (4) If yes, did the suspect waive his or her rights, and, if there was a waiver, was it voluntary, knowing, and intelligent?¹⁰⁸
- (5) If the suspect asserted the right to silence or the right to counsel, did the police respond in the manner required by such an assertion?¹⁰⁹

Moreover, as *Law and Tactics in Juvenile Cases* points out, these issues were conducive to an argument that a particularly stringent standard should be applied in juvenile cases.¹¹⁰

104. That pattern is evident in the sample of cases of the period that is described *supra* note 98. Here, we address only the federal constitutional bases for seeking suppression of a juvenile's statement. Suppression may also be available by means of various state constitutional and state statutory claims. See HERTZ ET AL., *supra* note 61, at 514–29.

105. See *supra* note 72 and accompanying text.

106. See *supra* note 75.

107. See *supra* note 74 and accompanying text.

108. See *supra* note 76 and accompanying text.

109. See *supra* note 77 and accompanying text.

110. See PIERSMA ET AL. *supra* note 60, at 74 (arguing that young age should be factored into analysis of "custody" for *Miranda* purposes); *id.* at 79–80 (explaining that the age of a

The juvenile defenders of the 1970s who were pinning their hopes on the emergence of highly protective *Miranda* standards for juveniles were surely disappointed when the Supreme Court issued its first juvenile *Miranda* decision in 1979, *Fare v. Michael C.*¹¹¹ The Court overturned a lower court's ruling that "a juvenile's request, made while undergoing custodial interrogation, to see his *probation officer* is *per se* an invocation of the juvenile's Fifth Amendment rights as pronounced in *Miranda*."¹¹² A suspect's request to see a probation officer, the Court held, cannot be equated with a request for counsel (with the attendant protections that assertion of the right to counsel entails¹¹³), "[w]hether it is a minor or an adult who stands accused."¹¹⁴ Addressing the broader question of how to administer the *Miranda* waiver rule in juvenile cases,¹¹⁵ the Court held that the customary adult court "totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved."¹¹⁶ The Court suggested the need for a more exacting analysis in juvenile cases, stating that the "circumstances" to be considered in this "totality" analysis should "include[] evaluation of the juvenile's age, experience, education,

suspect is generally treated as a factor in assessing the validity of waiver of *Miranda* rights); *id.* at 82–85 (discussing argument that "absence of a juvenile's parents . . . or the ineffective or imprudent advice of a youth's parents" should be factored into the assessment of validity of *Miranda* waiver).

111. 442 U.S. 707 (1979).

112. *Id.* at 709.

113. As explained *supra* note 77 and accompanying text, a suspect's request for counsel during custodial interrogation requires that interrogation cease. *See also Fare*, 442 U.S. at 717–18.

114. *Fare*, 442 U.S. at 719.

115. A subsidiary, threshold question in *Fare v. Michael C.* was whether the *Miranda* rule applies at all in juvenile delinquency cases. *Id.* at 717 n.4 ("this Court has not yet held that *Miranda* applies with full force to exclude evidence obtained in violation of its proscriptions from consideration in juvenile proceedings. . . . We do not decide that issue today. In view of our disposition of this case, we assume without deciding that the *Miranda* principles were fully applicable to the present proceedings."). Notwithstanding this footnote, the lower courts have uniformly applied *Miranda* to juvenile delinquency cases. For representative citations, see *HERTZ ET AL.*, *supra* note 61, at 487–88. To the extent that there has been any question, any such doubts have been laid to rest by the Court's recent decision in *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), which treats *Miranda* as so self-evidently applicable to delinquency cases that nothing even need be said about the matter.

116. *Fare*, 442 U.S. at 725 ("We 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.").

background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.”¹¹⁷ The way the Court applied this standard to the facts of the case before it, however, was unlikely to encourage lower courts to conclude that a suspect’s young age should sway the analysis in run-of-the-mill cases. Explaining that “no special factors” indicate that sixteen-and-a-half-year-old Michael C. was “unable to understand the nature of his actions,” the Court concluded that it is “clear that respondent voluntarily and knowingly waived” his *Miranda* rights.¹¹⁸ The Court emphasized that Michael C. had “considerable experience with the police,” “had a record of several arrests,” “had served time in a youth camp,” “had been on probation for several years,” was “under the full-time supervision of probation authorities,” “[t]here is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be,” and “[h]e was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.”¹¹⁹

C. Juvenile Confession Suppression Law and Practice in the 1980s, 1990s, and the First Half-Decade of the Twenty-First Century

After issuing *Fare v. Michael C.* in 1979, the Supreme Court did not return to the subject of juvenile confession suppression until 2004 in *Yarborough v. Alvarado*¹²⁰ and then in 2011 in *J.D.B. v. North Carolina*.¹²¹ We discuss *Yarborough* and *J.D.B.* in Part II. But, before doing so, it is useful to discuss the evolution of juvenile confession suppression law and practice in the lower courts in the 1980s, 1990s, and the initial years of the twenty-first century leading up to *Yarborough*.

117. *Id.*

118. *Id.* at 726–27.

119. *Id.* Michael C. argued that “any statements he made during interrogation were coerced” by police “threats and promises” and that “he repeatedly told the officers during his interrogation that he wished to stop answering their questions,” but the Court rejected these arguments, stating that “[r]eview of the entire transcript reveals that respondent’s claims of coercion are without merit.” *Id.* at 727.

120. 541 U.S. 652 (2004).

121. 131 S. Ct. 2394 (2011).

With the Court's adoption in *Fare* of a totality-of-the-circumstances standard for assessing juvenile waivers of *Miranda* rights, the analytic constructs for assessing voluntariness of a *Miranda* waiver and due process voluntariness of a statement became essentially identical. This point was explicitly ratified by the Supreme Court in two adult criminal decisions in the 1986–87 Term.¹²² Under this uniform standard, the central question of whether the accused's will was "overborne" by law enforcement officials or other governmental agents is to be determined by considering a variety of relevant factors, including, in juvenile cases, the age of the suspect.¹²³ Although there is reason to use the same general standard to assess voluntariness in both contexts, the result has been to subject *Miranda* to the same lack of standards that has long hampered the lower courts' applications of the due process involuntariness doctrine. In

122. See *Colorado v. Spring*, 479 U.S. 564, 574 (1987) (explaining that a central issue in assessing voluntariness of a *Miranda* waiver is whether the accused's "will [was] overborne and his capacity for self-determination critically impaired' because of coercive police conduct" and identifying relevant factors by quoting Justice Frankfurter's opinion in *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)); *Colorado v. Connelly*, 479 U.S. 157, 169–70 (1986) ("There is obviously no reason to require more in the way of a 'voluntariness' inquiry in the *Miranda* waiver context than in the Fourteenth Amendment confession context."). *Connelly* also clarified an aspect of the involuntariness doctrine that may have been apparent all along but had never been explicitly stated by the Court: that a confession can be found to be involuntary under the Due Process Clause only if there was *some* coercive conduct on the part of government agents, and it cannot be based *exclusively* on a suspect's mental illness or other personal characteristics. See *Connelly*, 479 U.S. at 165–67 (adopting this holding and characterizing it as inherent in the Court's "'involuntary confession' jurisprudence"). *But see id.* at 177–78 (Brennan, J., dissenting) ("While it is true that police overreaching has been an element of every confession case to date, . . . [t]he fact that involuntary confessions have always been excluded in part because of police overreaching signifies only that this is a case of first impression.").

123. In the 1986 *Connelly* decision (see *supra* note 122 and accompanying text), the Court made clear that even though a personal quality like mental illness cannot, by itself, render a statement involuntary, it is "relevant to an individual's susceptibility to police coercion." *Connelly*, 479 U.S. at 165. This point was underscored several years later, with specific regard to the factor of young age, by the Court in *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (discussed *infra* Part II.A). In *Yarborough*, the Court declared that "we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "the defendant's will was overborne," . . . a question that logically can depend on "the characteristics of the accused." *Id.* at 667–68 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)) (majority opinion); see also *id.* at 668 (the "characteristics of the accused" that are relevant to this assessment "can include the suspect's age, education, and intelligence, as well as a suspect's prior experience with law enforcement").

applying this standard (which might be better termed a “standardless rule”), the lower courts have occasionally suppressed a juvenile’s statement as involuntary under the Due Process Clause¹²⁴ or as a product of an involuntary waiver of *Miranda* rights.¹²⁵ But such rulings have generally been limited to cases with extremely compelling showings of involuntariness.¹²⁶

In the 1980s, the juvenile defense bar turned its attention to using social scientific data about adolescence to try to establish special protections for juveniles with respect to *Miranda*’s requirement that a

124. See, e.g., *Doody v. Ryan*, 649 F.3d 986, 990, 1023 (9th Cir. 2011) (en banc) (seventeen-year-old was “sleep-deprived” and interrogated by “tag team of detectives” in “relentless, nearly thirteen-hour interrogation”); *A.M. v. Butler*, 360 F.3d 787, 800–01 (7th Cir. 2004) (eleven-year-old with no prior court experience “sat, alone, in the police interrogation room,” with “[n]o friendly adult . . . present during the questioning,” and was “continually challenged” by a detective who “accused him of lying, a technique which could easily lead a young boy to ‘confess’ to anything,” as a state-provided youth officer did nothing “to protect Morgan’s rights”); *Woods v. Clusen*, 794 F.2d 293, 297–98 (7th Cir. 1986) (sixteen-and-a-half-year-old with no prior court experience was “awakened early one morning by police officers hovering in his bedroom, handcuffed and led away from home and family in a matter of moments,” and then taken to stationhouse interrogation room and “confronted with graphic (if not gruesome) pictures of the . . . murder scene,” by “two experienced (adult) police officers” who “intentionally made misrepresentations to Woods about the sufficiency of the evidence against him”); *Thomas v. North Carolina*, 447 F.2d 1320, 1321–23 (4th Cir. 1971) (fifteen-year-old with I.Q. of seventy-two and limited education was questioned throughout the night, off and on, for “some 17 hours after he was arrested”); *Ex rel. Thompson*, 241 N.W.2d 2, 3–4, 7 (Iowa 1976) (seventeen-year-old with I.Q. of seventy-one and fourth-grade reading level was questioned off and on throughout the night, without “any consultation with a parent, guardian, custodian, adult friend or lawyer”); *State ex rel. Holifield*, 319 So. 2d 471, 472–73 (La. Ct. App. 1975) (mentally retarded fourteen-year-old with I.Q. of sixty-seven, who “functions on a third grade level and is unable to read,” “was not permitted to call his parent or to talk to an attorney prior to signing either the waiver or the inculpatory statement”); *In re Jerrell C.J.*, 2005 WI 105, ¶¶ 26–28, 31, 33–34, 283 Wis. 2d 145, 159–64, 699 N.W.2d 110, 117–19 (fourteen-year-old with an I.Q. of eighty-four and limited prior involvement with the juvenile justice system was interrogated for five-and-a-half hours by officers who used “psychological techniques” to induce him to confess and who “specifically denied Jerrell’s requests to call his parents”).

125. See, e.g., *Doody*, 649 F.3d at 990, 1023; *Woods*, 794 F.2d at 297–98; *In re Roderick P.*, 500 P.2d 1, 2–4, 7 (Cal. 1972) (mentally retarded fourteen-year-old with no prior arrests was awakened late at night at home, taken to police station, and interrogated, and, according to psychiatrist, “became confused easily, was passive, [and] susceptible to suggestion”); *Ex rel. Thompson*, 241 N.W.2d at 7–8; *State ex rel. Holifield*, 319 So. 2d at 472–73; *Commonwealth v. Cain*, 279 N.E.2d 706, 709–10 (Mass. 1972) (fifteen-year-old with “no prior experience with police practices” was “in an agitated state” and was denied access to his father).

126. See *supra* notes 124–25 (describing factors that caused courts to suppress a confession as either involuntary under the Due Process Clause or under *Miranda* on grounds of involuntariness of the accused’s waiver of *Miranda* rights or both).

waiver of rights be “knowing and intelligent.” This may have been partly a reaction to *Fare*, with its relegation of the voluntariness prong of juvenile *Miranda* waivers to a totality-of-the-circumstances standard. It is surely attributable in very large part to the publication of a 1981 book, *Juveniles’ Waiver of Rights: Legal and Psychological Competence*, by psychologist Thomas Grisso.¹²⁷ The book, which was a follow-up to articles that Grisso published in 1977¹²⁸ and 1980,¹²⁹ reported the findings of a three-year series of empirical studies of delinquent youth and adult criminal offenders that examined their ability to comprehend the words and phrases used in customary *Miranda* warnings and to grasp the nature and significance of the rights set forth in the warnings.¹³⁰ These studies found the following:

- “As a class, juveniles of ages 14 and below demonstrate incompetence to waive their rights to silence and legal counsel. This conclusion is generally supported across measures of both understanding and perception in our studies, and in relation to both absolute and relative (adult norm) standards.”
- “As a class, juveniles of ages 15 and 16 who have IQ scores of 80 or below lack the requisite competence to waive their rights to silence and counsel.”
- “About one-third to one-half of juveniles 15 and 16 years of age with IQ scores above 80 lack the requisite competence to waive their rights when competence is defined by absolute standards (that is, the satisfaction of scoring criteria for adequate understanding). As a class, however, this group demonstrates a level of understanding and

127. THOMAS GRISSO, *JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* (1981).

128. J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321 (1977).

129. Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980).

130. For a description of the composition of Grisso’s samples, see GRISSO, *supra* note 127, at 139–40; see also Grisso, *supra* note 129, at 1149–50. The testing instruments and study protocols are described in Grisso, *supra* note 129, at 1144–51.

perception similar to that of 17–21-year-old adults for whom the competence to waive rights is presumed in law.”¹³¹

This empirical data corroborated the findings of an earlier, more rudimentary study of juveniles’ ability to comprehend *Miranda* warnings,¹³² and was supported by a later empirical study by Professor Barry Feld.¹³³

This data had a significant impact on at least some courts. The New Hampshire Supreme Court cited Grisso’s data in holding on state constitutional grounds that “before a juvenile can be deemed to have voluntarily, knowingly and intelligently waived” *Miranda* rights, “he or she must be informed, in language understandable to a child, of his or her rights.”¹³⁴ The Massachusetts Supreme Judicial Court and the Kansas Supreme Court referenced Grisso’s data when these courts adopted a state common law rule that a parent or other concerned adult must be present during police interrogation of a juvenile, and that the juvenile must be permitted to consult with the adult.¹³⁵ Other courts cited Grisso’s data in granting suppression of an

131. GRISSEO, *supra* note 127, at 193–94; *see also* THOMAS GRISSEO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS 113–55 (1986); Thomas Grisso, *Adolescents’ Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 10–12 (2006); Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37, 74–77 (2011).

132. *See* A. Bruce Ferguson & Alan C. Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53–54 (1970) (reporting on study of sample populations of delinquent and non-delinquent youths that found that more than 90 percent of the juveniles failed to fully comprehend *Miranda* warnings, and that even a simplified version of the warnings did not remedy the comprehension problems).

133. *See* Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 28, 99 (2006) (reporting on examination of “quantitative and qualitative data—interrogation tapes and transcripts, police reports, juvenile court filings, and probation and sentencing reports—of the routine police interrogation of sixty-six juveniles sixteen years of age or older whom prosecutors charged with a felony offense,” which produced findings that are “very consistent with laboratory research . . . [and] tend[] to bolster the validity of developmental psychologists’ experimental findings that younger juveniles do not understand their *Miranda* rights, lack adjudicative competence, and remain at greater risk to give false confessions”).

134. *State v. Benoit*, 490 A.2d 295, 300–01, 304 (N.H. 1985). The court set forth a simplified juvenile rights form in an appendix to its opinion. *See id.* at 306–07.

135. *In re B.M.B.*, 955 P.2d 1302, 1310–13 (Kan. 1998); *Commonwealth v. A Juvenile*

individual juvenile's confession in the case before the court.¹³⁶ But some courts rejected the data and/or excluded expert testimony based on the data.¹³⁷

Thus, by the middle of the first decade of the twenty-first century, there was a well-established (albeit largely undefined) jurisprudential basis for treating young age as a significant factor in assessing voluntariness for due process and *Miranda* purposes, and an empirical—and, in some jurisdictions, an accepted doctrinal—basis for finding that youth below a certain age are unable to make a “knowing and intelligent” waiver of *Miranda* rights, at least when the youth is advised with the customary *Miranda* warnings. The evolution of juvenile confession suppression law and practice continued with the Supreme Court's 2004 decision, *Yarborough v.*

(No. 1), 449 N.E.2d 654, 656–57 (Mass. 1983).

136. See, e.g., *A.M. v. Butler*, 360 F.3d 787, 801 n.11 (7th Cir. 2004). See also *In re Jerrell C.J.*, 2005 WI 105, 699 N.W.2d 110, 117 (referring generally to “[s]cholarly research” as supporting the proposition that “children are less likely to understand their *Miranda* rights” “[b]ecause their intellectual capacity is not fully developed”).

137. See, e.g., *State v. Griffin*, 869 A.2d 640, 652 (Conn. 2005) (upholding trial court's exclusion of testimony of defense expert who used Grisso protocol to evaluate fourteen-year-old defendant's competency to understand *Miranda* warnings: “On the basis of the evidence presented at the suppression hearing, we simply cannot say that the trial court abused its discretion in ruling that the Grisso test [i.e., Grisso's protocol for evaluating competency] did not satisfy the [state law standard for admissibility of expert testimony]. . . . Of course, we do not foreclose the possibility that, in a future case, sufficient evidence regarding the reliability of the Grisso test will be presented such that it may be found to pass muster. . . .”); *People v. Hernandez*, 846 N.Y.S.2d 371, 372 (N.Y. App. Div. 2007) (“County Court did not err in precluding expert testimony proffered by the defendant concerning his performance on a battery of tests, known as the ‘Grisso instrument,’ which is intended to assess a person's ability to knowingly and intelligently waive *Miranda* rights. The tests have not been generally accepted by New York courts and, assuming that their general acceptance among forensic psychologists has been established for purposes of *Frye v. United States*, the defense failed to establish a foundation for admissibility by demonstrating the ‘specific reliability of the procedures followed to generate the evidence proffered’ by the proposed expert.”) (citation omitted); *People v. Cole*, 807 N.Y.S.2d 166, 170 (N.Y. App. Div. 2005) (trial court did not abuse its discretion in ruling, at the conclusion of *Frye* hearing, that defense would not be permitted to present expert testimony at trial from “a forensic psychologist regarding the administration and results of a ‘Grisso test’ upon defendant—a device used to measure an accused's ability to comprehend *Miranda* warnings,” based upon trial court record “that the tests had not gained sufficient acceptance for reliability and relevance in the scientific community, and the vocabulary used to gauge defendant's understanding of the *Miranda* warnings differed substantially from the warnings defendant received”).

Alvarado.¹³⁸ Because *Yarborough* is so inextricably intertwined with *J.D.B. v. North Carolina*, it is best to discuss these decisions together.

II. J.D.B. v. NORTH CAROLINA: FACTS, HOLDING, BACKSTORY, AND ANALYSIS

A. Prelude: *Yarborough v. Alvarado* (2004)

To examine what the Supreme Court held (and did not hold) in *Yarborough v. Alvarado*, and why the holding was far more limited than it otherwise might have been, it is crucial to recognize that *Yarborough* was a federal habeas corpus proceeding. As a result, the Supreme Court's and the lower federal courts' analyses of the factual and legal issues in the case were subject to the specialized rules of federal habeas corpus, including the limitations set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹³⁹

On direct appeal of Michael Alvarado's conviction, a California appellate court rejected his *Miranda* claim, ruling that the seventeen-and-a-half year old had not been in "custody" at the time he was questioned by the police at the stationhouse, and therefore *Miranda* did not apply.¹⁴⁰ On federal habeas corpus review of this state court ruling, the Ninth Circuit Court of Appeals concluded that the state court's ruling was wrong on the merits. But, under AEDPA, a federal court cannot grant federal habeas corpus relief "merely" because the state court improperly applied federal constitutional law; a grant of the writ requires that the federal court also find that the state court's ruling on the merits was either "contrary to" or an "unreasonable application" of "clearly established" Supreme Court law, or was based on "an unreasonable determination of the facts."¹⁴¹ The Ninth

138. 541 U.S. 652 (2004).

139. Pub. L. No. 104-132, 110 Stat. 1214 (1996). For a general description of AEDPA and how it changed federal habeas corpus practice, see 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 3.1–3.5, at 117–232 (6th ed. 2011 & Supp. 2012).

140. *Yarborough*, 541 U.S. at 659. As explained *supra* note 72 and accompanying text, the *Miranda* rule applies only in situations of "custodial interrogation." Thus, even if there was "interrogation," as there was in the *Yarborough* case, *Miranda* would not apply unless the individual who was questioned was in "custody" at the time.

141. 28 U.S.C. § 2254(d)(2) (2006). This AEDPA-created limitation on federal habeas

Circuit granted the writ by ruling that the state court had “unreasonably” failed to apply clearly established Supreme Court law requiring that a minor suspect’s age be factored into the analysis of *Miranda* “custody.”¹⁴² Readily acknowledging that the Supreme Court had never explicitly adopted such a rule, the Ninth Circuit found the rule to be implicit in the Court’s holdings regarding juvenile confessions and a necessary “extension” of that caselaw.¹⁴³

The Supreme Court reversed the Ninth Circuit and denied habeas corpus relief in a 5–4 decision authored by Justice Anthony Kennedy. After explaining that there is some question about the propriety of the Ninth Circuit’s approach of finding “clearly established” Supreme Court law in an “extension” of existing Supreme Court decisions,¹⁴⁴ Justice Kennedy rejected the Ninth Circuit’s conclusion that the Court’s prior caselaw can be read as calling for consideration of a minor suspect’s age when analyzing “custody” for *Miranda* purposes:

Our opinions applying the *Miranda* custody test have not mentioned the suspect’s age, much less mandated its consideration. The only indications in the Court’s opinions relevant to a suspect’s experience with law enforcement have rejected reliance on such factors. See [*California v. Beheler*, 463 U.S. [1121], at 1125 [(1983) (*per curiam*)] (rejecting a lower court’s view that the defendant’s prior interview with the

corpus relief, which is established by 28 U.S.C. § 2254(d) and applies to state prisoner petitions filed pursuant to § 2254—but not to habeas corpus petitions filed pursuant to 28 U.S.C. § 2241 or to federal-prisoner motions for relief pursuant to 28 U.S.C. § 2255—is explained in detail in 2 HERTZ & LIEBMAN, *supra* note 139, §§ 32.1–32.5, at 1745–1898.

142. See *Alvarado v. Hickman*, 316 F.3d 841, 852–55 (9th Cir. 2002), *rev’d sub nom.* *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

143. See *id.* at 852–54.

144. *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004) (“The petitioner [state of California] contends that if a habeas court must extend a rationale before it can apply to the facts at hand then the rationale cannot be clearly established at the time of the state-court decision. There is force to this argument. Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.”) (citations omitted). For further discussion of the question of when a prior Supreme Court holding can be deemed broad enough to justify treating apparent “extensions” of that holding as “clearly established” for purposes of section 2254(d), see HERTZ & LIEBMAN, *supra* note 139, § 32.3 n.7, at 1771–75.

police was relevant to the custody inquiry); *Berkemer* [*v. McCarty*], 468 U.S. [420], at 442, n.35 [1984] (citing *People v. P.*, 21 N.Y.2d [1], at 9–10, 286 N.Y.S.2d 225, [232,] 233 N.E.2d [255], at 260 [1967], which noted the difficulties of a subjective test that would require police to “anticipat[e] the frailties or idiosyncrasies of every person whom they question”); 468 U.S., at 430–432 (describing a suspect’s criminal past and police record as a circumstance “unknowable to the police”).¹⁴⁵

Addressing the due process involuntariness caselaw that *does* classify age of a minor as a relevant factor,¹⁴⁶ which the Ninth Circuit viewed as necessarily “extend[ing]” to the issue of *Miranda* “custody,”¹⁴⁷ Justice Kennedy stated:

There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test. . . . To be sure, the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases. It is possible to subsume a subjective factor into an objective test by making the latter more specific in its formulation. Thus the Court of Appeals styled its inquiry as an objective test by considering what a “reasonable 17-year-old, with no prior history of arrest or police interviews,” would perceive.

At the same time, the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect’s age and experience. For example, the voluntariness of a statement is often said to depend on whether “the defendant’s will was overborne,” a question that logically can depend on “the characteristics of the accused[.]” The characteristics of the accused can include the

145. *Yarborough*, 541 U.S. at 666–67.

146. For discussion of this caselaw, see *supra* Part I.A.1.

147. See *Alvarado v. Hickman*, 316 F.3d at 850, 852.

suspect's age, education, and intelligence, as well as a suspect's prior experience with law enforcement. In concluding that there was "no principled reason" why such factors should not also apply to the *Miranda* custody inquiry, the Court of Appeals ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry. For these reasons, the state court's failure to consider Alvarado's age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law [under section 2254(d)(1) of AEDPA].¹⁴⁸

The specific phrasing of the above passage gives the impression that Justice Kennedy was signaling his view of the issue on the merits—whether the *Miranda* "custody" determination should take a minor suspect's age into account—and not merely resolving the habeas corpus issue of whether the state court's failure to do so constituted an "unreasonable application" of "clearly established" Supreme Court law. But Justice Kennedy was careful to frame the passage in the terminology and concepts of habeas corpus analysis. Thus, in a key portion of the above passage, he wrote that "the objective *Miranda* custody inquiry could *reasonably be viewed* as different" from the due process involuntariness doctrine when it comes to factoring in age of a minor suspect.¹⁴⁹

Even if Justice Kennedy's language may have suggested his own view of the underlying merits issue, and perhaps also that of other members of the *Yarborough* majority, it was apparent that such a position did not command a majority of the Court on the merits issue. In a separate concurring opinion, Justice Sandra Day O'Connor—siding with the majority—explained her view that "[t]here may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda v. Arizona*," but this was not such a case because "Alvarado was almost 18 years old at the time of his

148. *Yarborough*, 541 U.S. at 667–68 (citations omitted).

149. *Id.* at 667 (emphasis added).

interview” and because it is “difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority.”¹⁵⁰ It appeared, therefore, that Justice O’Connor took the view—as did the four dissenting Justices (Breyer, Stevens, Souter, and Ginsburg)¹⁵¹—that the *Miranda* “custody” inquiry can take the age of a minor suspect into account in appropriate cases, even though she agreed with Justice Kennedy and the rest of the majority (Chief Justice Rehnquist and Justices Scalia and Thomas) that existing Supreme Court law did not “clearly establish” such a rule.

Thus, the stage was set for the Court’s next step of resolving the issue on the merits in a direct appeal case. That is precisely what happened seven years later in *J.D.B. v. North Carolina*. By then, as the next section relates, the composition of the Court had changed, and the Court had wrestled in other cases with the question of whether the age of a defendant should matter in the application of criminal law and procedure.

B. J.D.B.: Facts, Holding, and Backstory

J.D.B., a thirteen-year-old, seventh-grade student, was questioned at his school by two police officers for thirty to forty-five minutes in a “closed-door conference room.”¹⁵² Two school administrators were present but J.D.B. was not given the opportunity to speak to his legal guardian (his grandmother) or to have her or another family member present.¹⁵³ Nor was he administered his *Miranda* warnings or “informed that he was free to leave the room.”¹⁵⁴ In response to this police questioning, J.D.B. made inculpatory statements.¹⁵⁵ When J.D.B. was subsequently charged in juvenile court with one count of breaking and entering and one count of larceny, his court-appointed public defender moved to suppress the statements on both *Miranda*

150. *Id.* at 669 (O’Connor, J., concurring).

151. *See id.* at 676 (Breyer, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) (“Common sense, and an understanding of the law’s basic purpose in this area, are enough to make clear that Alvarado’s age—an objective, widely shared characteristic about which the police plainly knew—is also relevant to the inquiry.”).

152. *J.D.B. v. North Carolina*, 131 S. Ct. at 2399–2400.

153. *Id.*

154. *Id.*

155. *Id.*

and due process involuntariness grounds.¹⁵⁶ The trial court denied the motion on both grounds, ruling that J.D.B. was not in “custody” at the time of the questioning and accordingly *Miranda* did not apply, and that the statement was voluntary.¹⁵⁷ The North Carolina Supreme Court affirmed the trial court’s denial of the suppression motion, expressly rejecting J.D.B.’s argument that his age should be factored into the analysis of *Miranda* “custody,” and left the due process involuntariness issue entirely unaddressed.¹⁵⁸ The Supreme Court granted J.D.B.’s petition for a writ of certiorari on the question of “whether the *Miranda* custody analysis includes consideration of a juvenile suspect’s age.”¹⁵⁹

The Supreme Court’s holding in *J.D.B.* can be stated quite succinctly, although we have much to say in the remainder of this Article about how the Court reached this result and the implications of the holding and its underlying reasoning. The holding was stated, in a straightforward manner, by Justice Sotomayor in the opening paragraph of her opinion for the majority in a 5–4 ruling:

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*, 384 U.S. 436 (1966). It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.¹⁶⁰

156. *Id.* at 2400.

157. *Id.*

158. *See id.* (describing North Carolina Supreme Court’s ruling in *In re J.D.B.*, 686 S.E.2d 135, 140 (2009)). The North Carolina Supreme Court’s ruling was an affirmance of an intermediate state appellate court ruling affirming the trial court. *See id.* (describing decision of North Carolina Court of Appeals in *In re J.D.B.*, 674 S.E.2d 795 (N.C. Ct. App. 2009)).

159. *Id.*; *see also* *J.D.B. v. North Carolina*, 131 S. Ct. 502 (2010) (granting petition for writ of certiorari). As the Court noted in its opinion in *J.D.B.*, the voluntariness issue was not before the Court because the North Carolina Supreme Court did not rule on this issue. *J.D.B.*, 131 S. Ct. at 2400 n.3.

160. *J.D.B.*, 131 S. Ct. at 2398–99; *see also id.* at 2401–06.

Far less straightforward, and requiring much more discussion, is how this position ended up commanding a majority of the Court.

As Part II.A's discussion of *Yarborough v. Alvarado* explained, the majority's opinion there appeared to signal that the Court was leaning towards the view that the *Miranda* custody determination should not take account of a minor suspect's age.¹⁶¹ The fifth member of the *Yarborough* majority, Justice O'Connor, seemed to lean in the opposite direction,¹⁶² and the four dissenters in that case (Justices Breyer, Stevens, Souter, and Ginsburg) explicitly announced their view that age of a minor suspect is relevant to the *Miranda* custody determination.¹⁶³

In the seven years between *Yarborough*'s issuance and the ruling in *J.D.B.*, there were significant changes in the composition of the Court. Two members of the *Yarborough* majority were replaced by new members of the Court: Chief Justice John Roberts succeeded Chief Justice William Rehnquist, and Justice Samuel Alito was appointed to Justice O'Connor's seat. Two of the *Yarborough* dissenters had also stepped down from the Court: Justice David Souter, succeeded by Justice Sotomayor, and Justice John Paul Stevens by Justice Elena Kagan.

Based on the line-up of Justices in *Yarborough* and the voting patterns of the Justices who had joined the Court since *Yarborough*, it seemed likely that *J.D.B.* would hold the exact opposite of what Justice Sotomayor announced in the opening paragraph of *J.D.B.* Given their votes in *Yarborough*, Justices Kennedy, Scalia, and Thomas seemed likely to vote for a ruling that a suspect's age does not matter. Chief Justice Roberts and Justice Alito had shown in previous cases that they favored a narrow view of *Miranda* and were likely to vote for the State in cases presenting novel questions about how to define and apply *Miranda* rules.¹⁶⁴ Thus, even if both Justices Sotomayor and Kagan supported Justices Stephen Breyer's and Ruth Bader Ginsburg's already-announced view that age *does* matter, it

161. See *supra* notes 144–49 and accompanying text.

162. See *supra* notes 150–51 and accompanying text.

163. See *supra* note 151 and accompanying text.

164. See, e.g., *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010); *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010); *Florida v. Powell*, 130 S. Ct. 1195 (2010).

appeared that there was at least a five-Justice majority that would rule against *J.D.B.*

The wild card turned out to be Justice Kennedy. Although his majority opinion in *Yarborough* appeared to be a strong sign of how he would vote in *J.D.B.*, he joined the two *Yarborough* dissenters and Justices Sotomayor and Kagan in holding that the *Miranda* “custody” determination should account for a minor suspect’s age. The dissenters in *J.D.B.*, Justices Scalia and Thomas, held fast to what appeared to be their position in *Yarborough*, and Chief Justice Roberts and Justice Alito voted as predicted based on their positions in prior *Miranda* cases.

If Justice Kennedy’s majority opinion in *Yarborough* was indeed a barometer of his view on the merits in 2004, what accounts for his remarkable shift of position in *J.D.B.*? In posing this question, it is important to underscore that, of course, Justice Kennedy’s opinion in *Yarborough* was *not* a ruling on the merits, but merely a habeas corpus decision on whether a lower court’s view of the merits was “reasonable.”¹⁶⁵ This very point was made by Justice Sotomayor in her majority opinion in *J.D.B.*, explaining that the Court’s prior ruling in *Yarborough* posed no impediment to a ruling in favor of *J.D.B.*¹⁶⁶ Yet, as explained earlier, Justice Kennedy’s language in *Yarborough* certainly seemed to signal how he felt about the merits at that point in time.¹⁶⁷ If we are correct, then what might account for his reaching precisely the opposite conclusion when it came time to rule on the merits in *J.D.B.*?

165. See *supra* notes 144–49 and accompanying text.

166. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2405 (2011) (“Our prior decision in *Alvarado* in no way undermines these conclusions [about the propriety of factoring a minor suspect’s age into the assessment of *Miranda* “custody”]. In that case, we held that a state-court decision that failed to mention a 17-year-old’s age as part of the *Miranda* custody analysis was not objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. Like the North Carolina Supreme Court here, we observed that accounting for a juvenile’s age in the *Miranda* custody analysis ‘could be viewed as creating a subjective inquiry,’ *Yarborough*, 541 U.S. at 668. We said nothing, however, of whether such a view would be correct under the law. Cf. *Renico v. Lett*, 130 S. Ct. 1855, 1865 n.3 (2010) (‘[W]hether the [state court] was right or wrong is not the pertinent question under AEDPA’). To the contrary, Justice O’Connor’s concurring opinion explained that a suspect’s age may indeed ‘be relevant to the ‘custody’ inquiry.’ *Alvarado*, 541 U.S., at 669.”) (citations omitted).

167. See *supra* notes 144–49 and accompanying text.

*C. The Fifth Vote: Justice Kennedy's Evolving Conception of the
Relevance of Youth in Criminal Law and Procedure*

During the period between *Yarborough* and *J.D.B.*, Justice Kennedy authored two seminal decisions for the Court on the relevance of youth in criminal sentencing. In 2005, the year following *Yarborough*, Justice Kennedy wrote for the 5–4 Court in *Roper v. Simmons*¹⁶⁸ that the Eighth and Fourteenth Amendment bar on capital punishment for defendants below the age of sixteen—established in *Thompson v. Oklahoma*¹⁶⁹ (1988)—should be extended to all defendants below the age of eighteen at the time of the crime.¹⁷⁰ Justice Kennedy's position in *Roper* was a dramatic shift. In 1989, Justice Kennedy joined with four other Justices in rejecting precisely this argument in *Stanford v. Kentucky*.¹⁷¹ Moreover, it was the first of a series of dramatic shifts he made in cases involving juveniles. In *Roper*, in which he led a majority of the Court to abrogate *Stanford v. Kentucky*, Justice Kennedy appeared to signal that *Roper*'s ruling was necessarily limited to the context of capital punishment. In a passage explaining why the penological principle of deterrence does not call for the use of capital punishment for defendants below the age of eighteen at the time of the crime, he observed that the “punishment of life imprisonment without the possibility of parole” is available to provide whatever deterrent is necessary in the case of “a young person.”¹⁷² Yet, five years later, Justice Kennedy authored a majority opinion in *Graham v. Florida*,¹⁷³ extending *Roper*'s reasoning to hold that the Eighth and Fourteenth Amendments also prohibit a sentence of life without the possibility of parole in a non-homicide case in

168. 543 U.S. 551 (2005).

169. 487 U.S. 815 (1988).

170. See *Roper*, 543 U.S. at 578.

171. 492 U.S. 361 (1989). The ruling in *Stanford* was the product of a plurality opinion by Justice Scalia, which was joined in full by Chief Justice Rehnquist and Justices White and Kennedy, and which was joined in part by Justice O'Connor, who wrote separately to explain her divergences.

172. *Roper v. Simmons*, 543 U.S. at 572 (“To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.”).

173. 130 S. Ct. 2011 (2010).

which the defendant was under eighteen at the time they committed the crime.¹⁷⁴

Justice Kennedy's voting pattern, along with the language that he used in his opinions for the majority in *Roper* and *Graham*, suggests an evolving understanding of the nature of adolescence and its relevance to constitutional regulation in criminal cases. In *Roper*, after explaining that legislative enactments and other indicia suggest an emerging national consensus condemning the use of the death penalty for juveniles,¹⁷⁵ Justice Kennedy wrote extensively and eloquently about the developmental factors that justify treating the age of majority (18) as the dividing line:

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. . . .”

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . .

174. *Id.* at 2034.

175. In accordance with the Court's established approach to Eighth Amendment proportionality analysis, Justice Kennedy began by examining “objective indicia of consensus” with regard to the use of the death penalty for juveniles, “as expressed in particular by the enactments of legislatures that have addressed the question.” *Roper*, 543 U.S. at 564. This review yielded evidence of a “trend toward abolition of the juvenile death penalty,” *id.* at 566, along with a “rejection of the juvenile death penalty in the majority of States” and “infrequency of its use even where it remains on the books,” *id.* at 567. Justice Kennedy then moved on to the equally essential Eighth Amendment step of “exercis[ing] . . . [the Court's] own independent judgment” on the issue. *Id.* at 564. The latter stage of the analysis contained Justice Kennedy's examination of the developmental factors that distinguish childhood from adulthood. *Id.* at 568–75.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.¹⁷⁶

In identifying these inherent characteristics of youth, Justice Kennedy cited to social scientific studies¹⁷⁷ (including Erik Erikson's classic work on youth development¹⁷⁸) and to prior Court decisions that recognized some of these qualities.¹⁷⁹ He acknowledged that "[d]rawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules," especially given that the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18," but he explained that "a line must be drawn" and that it is appropriate to draw it at age eighteen, "the point where society draws the line for many purposes between childhood and adulthood."¹⁸⁰

Notably, the four dissenting Justices in *Stanford v. Kentucky* made precisely the same points about the nature of adolescence and the reasons for designating age eighteen as the minimum age for eligibility for the death penalty¹⁸¹ but failed to win Justice Kennedy's vote at that time. Justice Kennedy's subsequent opinion in *Roper* suggests that he did not feel able to rely on such considerations in Eighth Amendment analysis until there had been a pronounced shift in the national consensus against using the death penalty for juveniles.¹⁸² Upon doing so in *Roper*, he delved deeply into the social scientific literature and found reason to view juveniles as categorically different from adults.

Having drawn this chronological line and having vested it with great constitutional significance, Justice Kennedy embraced the full

176. *Id.* at 569 (alteration in original) (citations omitted).

177. *See id.* (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

178. *See id.* at 570 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)).

179. *See id.* at 569–70 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

180. *Id.* at 574.

181. *See Stanford*, 492 U.S. at 393–99 (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.).

182. *See supra* note 175 and accompanying text.

implications of this conclusion when it came time, five years later in *Graham v. Florida*, to consider the constitutionality of a sentence of life imprisonment without parole for a defendant under the age of eighteen in a nonhomicide case. Quoting his earlier statements in *Roper*, Justice Kennedy explained that, as “*Roper* established,” “juveniles have lessened culpability” and “are less deserving of the most severe punishments” because “[a]s compared to adults, juveniles have a “‘lack of maturity and an underdeveloped sense of responsibility’”; they ‘are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure’; and their characters are ‘not as well formed.’”¹⁸³

Justice Kennedy elaborated on his *Roper* statements by drawing on more recent social scientific literature, specifically the briefs of amici curiae in the *Graham* case, and other literature:

No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles. As petitioner’s amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as Amici Curiae 16–24; Brief for American Psychological Association et al. as Amici Curiae 22–27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of “irretrievably depraved character” than are the actions of adults. *Roper*, 543 U.S., at 570. . . . It remains true that “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Ibid.* . . .

. . . As some amici note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. . . . Difficulty in weighing long-term consequences; a corresponding

183. *Graham v. Florida*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569–70).

impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.¹⁸⁴

Relying on these and other factors, the Court in *Graham* again used age eighteen as the dividing line, this time for the constitutional point of eligibility for a sentence of life imprisonment with parole in a non-homicide case.¹⁸⁵

Although the Court in *Roper* and *Graham* had no reason to comment on the implications of the foregoing qualities of youth for the validity of a confession taken from a juvenile suspect by the police, those implications were readily apparent. In *J.D.B.*, the Court made the connection explicit, drawing directly on *Roper* and *Graham* and linking these decisions to the Court's equivalent statements about youth many decades earlier in *Haley* and *Gallegos*:

Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion); see also *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (“[N]o matter how sophisticated,” a juvenile subject of police interrogation “cannot be compared” to an adult subject). Describing no one child in particular, these observations restate what “any parent knows”—indeed, what any person knows—about children generally. *Roper*, 543 U.S., at 569. . . .

Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”).¹⁸⁶

184. *Id.* at 2026–27, 2032.

185. *See id.* at 2034.

186. *J.D.B.*, 131 S. Ct. at 2403 & n.5; *see also id.* at 2403 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), for proposition that “[a] child’s age is far ‘more than a chronological

When one appreciates the extent to which Justice Kennedy's post-*Yarborough* analysis in *Roper* (regarding the inherent qualities of youth) led inexorably to *Graham* and then to *J.D.B.*, it is not at all surprising that Justice Kennedy joined the majority in *J.D.B.* notwithstanding whatever he may have said and felt at the time of *Yarborough*. Indeed, this would be just a single—and, actually a relatively small—part of a pattern he has exhibited of opening his mind to social scientific evidence about adolescence and, where appropriate, open-mindedly reconsidering his previously-held positions to fit what he has learned from that scientific evidence.

D. J.D.B.'s Use of Legislative Fact

The *Roper*, *Graham*, and *J.D.B.* passages quoted in the immediately preceding section reflect a significant difference between Justice Kennedy's use of social scientific data about youth in *Roper* and *Graham* and Justice Sotomayor's approach in *J.D.B.* Whereas Justice Kennedy extensively cited and relied on the social scientific literature, Justice Sotomayor shifted the focus from the realm of social science to what she termed "commonsense propositions" about the nature of adolescence, for which "citation to social science and cognitive science authorities is unnecessary."¹⁸⁷ In doing so, she returned to the Court's approach in *Haley v. Ohio* and *Gallegos v. Colorado*—both of which she quoted in this passage of *J.D.B.*—of relying on general, widely-held knowledge about the nature of youth.¹⁸⁸ This is knowledge, she stressed, that "'any parent knows'—indeed what any person knows—about children generally."¹⁸⁹

By shifting from a reliance on social scientific studies to what amounts to judicial notice of generally known facts, Justice Sotomayor probably has made it easier for the lower courts to apply the standard that emerges from *J.D.B.* in assessing *Miranda*

fact'" and citing *Roper*, 543 U.S. at 569 for proposition that children "'are more vulnerable or susceptible to . . . outside pressures' than adults").

187. *Id.* at 2403 n.5.

188. *See id.* at 2403 & n.5.

189. *Id.* at 2403 (quoting *Roper*, 543 U.S. at 569).

“custody” in juvenile cases. As commentators have observed,¹⁹⁰ the lower courts may experience difficulties in employing “legislative facts”—social scientific and other facts that “inform[] a court’s legislative judgment on questions of law and policy.”¹⁹¹ In many of the instances in which the Supreme Court or a lower appellate court relies on legislative facts to shape a new standard, there is no need for the lower courts to deal with the underlying legislative facts. A prime example is *Roper*: In applying the rule that persons under eighteen are categorically ineligible to be sentenced to death, the lower courts have no need to address the social scientific data on which the Court relied to develop the rule¹⁹²; the lower courts need only resolve the ordinarily simple and straightforward adjudicative fact question of whether the defendant was or was not eighteen at the time of the crime.¹⁹³ As the next subsection points out, however, the standard that emerges from *J.D.B.* often requires lower court application of general facts about the nature of youth, including facts of this sort that the Supreme Court used as “legislative facts” in *Roper*, *Graham*, and *J.D.B.* If Justice Sotomayor had tracked *Roper* and *Graham* by presenting these facts as ones that emerge from the social scientific literature, this could have led to disagreements in the lower courts about what role such social scientific facts can play in an individual

190. See, e.g., Peggy C. Davis, “*There is a Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1540–41, 1595, 1599–1602 (1987); Kenneth Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75–76, 91–92, 98; Arthur Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices*, 61 VA. L. REV. 1187, 1211, 1228–30 (1975).

191. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404 (1942). As Professor Davis explained in his classic article about legislative facts, such facts are to be distinguished from “adjudicative facts,” which are facts about “what the parties did, what the circumstances were, what the background conditions were.” *Id.* at 402.

192. For discussion of this social scientific data, see *supra* notes 175–80 and accompanying text.

193. In some cases, this question will not be simple and straightforward because of discrepancies in a defendant’s birth records or the absence of such birth records altogether. But, for the most part, the administration of the *Roper* standard is simple and straightforward. This can be contrasted with a parallel rule that bars the use of capital punishment if the defendant was mentally retarded. The latter rule, adopted by the Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), often may require adjudicative factfinding as to whether a defendant is “mentally retarded.” See, e.g., *Wiley v. Epps*, 625 F.3d 199, 222 (5th Cir. 2010); *Thomas v. Allen*, 607 F.3d 749, 760 (11th Cir. 2010).

case and whether such facts are subject to the specialized processes for adjudicating expert opinions. As we saw earlier,¹⁹⁴ some lower courts rejected psychologist Thomas Grisso's empirical data on juveniles' ability to comprehend *Miranda* warnings, even as other lower courts relied on this same data to shape special constitutional rules and/or to suppress confessions in individual juvenile cases.¹⁹⁵ Indeed, even *Roper* and *Graham* set off debates about how social scientific data about juvenile capacity can and should be used by the courts.¹⁹⁶ In *Graham*, Justice Kennedy largely avoided such questions about what has come to be known as "adolescent brain science" by citing this social scientific data as illustrative and supportive of the Court's previous "observations in *Roper* about the nature of juveniles."¹⁹⁷ Justice Sotomayor took the next step of entirely reframing the facts about adolescent capacity as generally known "commonsense propositions," which "the literature confirms" but for which "citation to social science and cognitive science authorities is unnecessary."¹⁹⁸

194. See *supra* note 137 and accompanying text.

195. See *supra* notes 134–36 and accompanying text.

196. See, e.g., Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 15 (2009); Terry A. Maroney, *Adolescent Brain Science After Graham v. Florida*, 86 NOTRE DAME L. REV. 765, 766–67 (2011); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 94 (2009); Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1 (2009); see also ELIZABETH SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008).

Much of the recent social scientific data on adolescent decisionmaking, adjudicative competence, and criminal culpability stems from studies sponsored by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. See, e.g., NORMAN G. POYTHRESS ET AL., *ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES* (2002); *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* (Thomas Grisso & Robert G. Schwartz eds., 2000); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents Might Be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 744–45 (2000); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 251–52 (1996); see also *About the Network: Our Purpose*, MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, http://www.adjj.org/content/about_us.php (last visited Oct. 28, 2011), for an explanation of its mission.

197. *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (quoting *supra* text accompanying note 184).

198. *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 n.5.

This discussion highlights the long competing strains in confession suppression caselaw on how to deal with generally known facts about adolescent qualities that are relevant to confession suppression standards. The Supreme Court's decisions in *Haley v. Ohio* and *Gallegos v. Colorado* treated, as self-evident, the propositions that police officers' actions that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens,"¹⁹⁹ and that a juvenile, "no matter how sophisticated," "cannot be compared with an adult."²⁰⁰ Although these statements were presented in the course of what reads like a legal analysis, it is readily apparent that they encompass factual judgments about the inherent qualities of juveniles. In the decades after *Haley* and *Gallegos*, litigants and lower court judges often turned to social scientific studies as bases for such factual judgments.²⁰¹ *Roper* and *Graham* could be read as favoring this approach although, and as we explained above, they are best understood as fitting the specialized rubric of use of "legislative fact" to support a new constitutional rule. *J.D.B.* revived the approach of *Haley* and *Gallegos*, a point that Justice Sotomayor made starkly plain, not only by her express reliance on these cases, but also by her relegation of the social science data to a footnote observing that "citation to social science cognitive science authorities is unnecessary."²⁰²

199. *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (quoted at greater length *supra* text accompanying note 42).

200. *Gallegos v. Colorado*, 370 U.S. at 54 (quoted at greater length *supra* text accompanying note 52).

201. See *supra* notes 127–36 and accompanying text. Of course, this was not true across the board. In some instances, the lower courts presented such facts as general knowledge about the nature of adolescence. See, e.g., *People v. Mitchell*, 810 N.E.2d 879, 881–82, (N.Y. 2004) (establishing a more protective rule for the invocation of the state constitutional right to counsel in juvenile delinquency and juvenile offender cases because "[c]hildren of tender years lack an adult's knowledge of the probable cause of their acts or omissions and are least likely to understand the scope of their rights and how to protect their own interests . . . [and they] may not appreciate the ramifications of their decisions or realize all the implications of the importance of counsel").

202. *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 n.5.

E. The Nature of the Standard that Emerges from J.D.B.

An issue that divided the Court in *J.D.B.* was whether integrating the age of a suspect into the *Miranda* “custody” assessment would convert what should be an “objective” inquiry into a “subjective” one. This issue first surfaced in the earlier case of *Yarborough v. Alvarado*,²⁰³ when Justice Kennedy wrote for a majority that habeas corpus relief was unwarranted because a state court could “reasonably” believe that factoring in the age of a juvenile suspect would be inconsistent with “the objective [nature of the] *Miranda* custody inquiry.”²⁰⁴

In *J.D.B.*, Justice Alito, in a dissenting opinion joined by three other Justices, took the position that the *Miranda* custody determination has been, and should remain, a “one-size-fits-all reasonable-person standard.”²⁰⁵ He argued that “incorporating age into . . . [the Court’s] analysis” is fundamentally inconsistent with a standard that “[u]ntil today . . . [has] focused solely on the ‘objective circumstances’ of the interrogation, . . . not the personal characteristics of the interrogated.”²⁰⁶ Justice Sotomayor, writing for the majority, responded that “inclusion [of age] in the custody analysis” (assuming that the “child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer”) is “consistent with the objective nature of th[e] *Miranda* test” and is, more profoundly, “a reality that courts cannot simply ignore.”²⁰⁷

In our view, Justice Sotomayor had the better argument. As Justice Sotomayor observed, “in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age.”²⁰⁸ To support this point, she used the facts of the *J.D.B.* case itself, pointing out that the instant scenario—a seventh-grader’s removal from a social studies class and

203. 541 U.S. 652 (2004).

204. *Id.* at 667–68; *see supra* text accompanying note 148 for full quote.

205. *See J.D.B.*, 131 S. Ct. at 2410–18 (Alito, J., dissenting, joined by Roberts C.J., Scalia & Thomas JJ.).

206. *Id.* at 2412.

207. *Id.* at 2406 (majority opinion).

208. *Id.* at 2405.

subsequent interrogation by a “uniformed school resource officer,” with an “assistant principal” present—is necessarily “specific to children” and cannot logically be viewed through a lens that is uniformly calibrated for individuals of all ages.²⁰⁹ This example prompted Justice Alito to respond that *Miranda* can be adjusted to accommodate a schoolhouse setting.²¹⁰ In turn, Justice Sotomayor replied that “the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned.”²¹¹

We believe that a different type of example may more forcefully illustrate the above-quoted statement of Justice Sotomayor’s, that “in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age.” Imagine, for a moment, the case of a ten-year-old—or for that matter, a seven-year-old—who is interrogated by the police.²¹² Merely invoking this scenario is sufficient to demonstrate that it is “nonsensical” (to use Justice Sotomayor’s apt term) to apply an adult standard when assessing whether a reasonable child of that age would have felt free to terminate police questioning and depart.²¹³ And, once that proposition has been accepted, then, as Justice Kennedy put it in

209. *Id.*

210. *Id.* at 2417–18 (Alito, J., dissenting).

211. *Id.* at 2405 (majority opinion).

212. Some states set a minimum age of ten for prosecution for a delinquency offense, *see, e.g.*, COLO. REV. STAT. ANN. § 19-2-104(1)(a) (West 1999); MISS. CODE ANN. § 43-21-105(i) (West 2011); TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2011); VT. STAT. ANN. tit. 33, § 5102(2)(c) (West 2011), but others permit prosecution starting at age seven, *see, e.g.*, MASS. GEN. LAWS ANN. ch.119, § 52 (West 2008); N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008). For examples of cases involving police interrogations of such young children, *see In re S.H.*, 293 A.2d 181, 182–83 (N.J. 1972) (ten-year-old); *In re Julian B.*, 125 A.D.2d 666, 667–68 (N.Y. App. Div. 1986) (seven-year-old).

213. *See, e.g., In re S.H.*, 293 A.2d at 184–85 (treating, as axiomatic, that “[r]ecitation of the *Miranda* warnings to a boy of 10 even when they are explained is undoubtedly meaningless”). As this example illustrates, the need for a special juvenile standard will often become apparent if, instead of considering the application of a “one-size-fits-all” standard to a seventeen-year-old, one considers instead its application to a ten-year-old. *Compare, e.g., Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004) (O’Connor, J., concurring) (“17 1/2-year-olds vary widely in their reactions to police questioning, and many can be expected to behave as adults.”), *with Thompson v. Oklahoma*, 487 U.S. 815, 827–28 (1988) (plurality opinion) (“One might argue . . . that there is no chronological age at which the imposition of the death penalty is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable” (footnote omitted)).

Roper, the only question that remains is where to draw the dividing line between childhood and adulthood, and the most logical place is “the point where society draws th[at] line.”²¹⁴

III. THE IMPLICATIONS OF *J.D.B.* FOR OTHER ASPECTS OF CONFESSION SUPPRESSION LAW

Although *J.D.B.* addressed only the single dimension of confession suppression law that was before the Court—the assessment of “custody” for purposes of *Miranda*—we believe that the reasoning of Justice Sotomayor’s majority opinion sweeps broadly. Part III.A examines the many other aspects of confession suppression law that should be reconsidered in light of *J.D.B.* Part III.B then proposes an even more extensive reconceptualization of all of juvenile confession suppression law that we regard as the best way to implement the teachings of *J.D.B.*

A. *Reshaping Juvenile Confession Suppression Law to Reflect the Lessons of J.D.B.*

1. Due Process Doctrine of Involuntariness

As the Supreme Court recognized, the due process standard for assessing whether a statement was unconstitutionally involuntary is designed to be a “subjective inquiry,” in which the question of whether the accused’s “will was overborne” turns upon “the actual mindset of a particular suspect,” and must account for all relevant “characteristics of the accused,” including “age, education, and intelligence, as well as a suspect’s prior experience with law enforcement.”²¹⁵ But, as Part I’s review of the lower courts’

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

215. *Yarborough v. Alvarado*, 541 U.S. 652, 667–68 (2004) (citations omitted); *see also id.* at 667–68 (“we do consider a suspect’s age and [extent of prior] experience [with the criminal justice system]” when assessing the “voluntariness of a statement”); *accord J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2408 (2011) (“[T]he due process voluntariness test . . . permits consideration of a child’s age”); *id.* at 2418 (Alito, J., dissenting) (“[T]he Court’s precedents already make clear that ‘special care’ must be exercised in applying the voluntariness test where the confession of a ‘mere child’ is at issue.”) (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion)).

applications of this standard showed, the standard has been too “subjective” in a different sort of way: Because the Supreme Court has announced no criteria other than the very broad rule that the determination should be based upon the “totality of the circumstances,”²¹⁶ the lower courts have applied the doctrine in a haphazard manner, usually rejecting involuntariness claims in all but the most extreme sets of circumstances.²¹⁷ The lower courts have tended to treat the Supreme Court’s findings of involuntariness in *Haley v. Ohio*²¹⁸ and *Gallegos v. Colorado*²¹⁹ as prototypes for when a statement can be found to be involuntary (i.e., as the minimum preconditions for such a finding) rather than what these cases really were: fact patterns that were so extreme²²⁰ that the U.S. Supreme Court intervened by granting certiorari and then invalidating state court convictions in an era in which confession suppression was extremely rare.

What is needed now is a set of “objective” criteria for the “totality of circumstances” test to guide the lower courts in evaluating the various circumstances that may be present. *J.D.B.* provides some guidance for applying the involuntariness standard to a juvenile suspect. As Justice Sotomayor demonstrated in her use of *Haley* and *Gallegos*, these cases should be treated as recognizing the “commonsense propositions” that “events that ‘would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens,’” and that “a juvenile subject of police interrogation,” “no matter how sophisticated,” “‘cannot be compared’ to an adult subject.”²²¹ *J.D.B.* shows further that *Roper v. Simmons*²²² should be read as establishing that it is the “common ‘nature of juveniles’” that “‘they ‘are more vulnerable or susceptible to . . . outside pressures’

216. See *supra* notes 30–36 and accompanying text.

217. See *supra* notes 62–67 and accompanying text.

218. 332 U.S. 596 (1948).

219. 370 U.S. 49 (1962).

220. For descriptions of the facts of *Haley* and *Gallegos* see respectively notes 37–48 and accompanying text (discussing *Haley*) and notes 49–53 and accompanying text (discussing *Gallegos*).

221. *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 & n.5 (quoting *Haley v. Ohio*, 332 U.S. at 599, and *Gallegos*, 370 U.S. at 54).

222. 543 U.S. 551 (2005). For discussion of *Roper*, see *supra* notes 168–80 and accompanying text.

than adults.” As discussed earlier, *Roper* relied on social scientific data to establish these propositions,²²³ but the Court concluded in *J.D.B.* that these are “commonsense propositions” for which “citation to social science and cognitive authorities is unnecessary.”²²⁴ “Such conclusions,” *J.D.B.* teaches, “apply broadly to children as a class.”²²⁵

Moreover, as the Court’s opinion in *J.D.B.* shows, an assessment of the likely effects of the “pressure of custodial interrogation” on juveniles must take into account the empirical finding that the risk of a false confession has been shown to be particularly “acute . . . when the subject of custodial interrogation is a juvenile.”²²⁶ Although *J.D.B.* did not cite *In re Gault*,²²⁷ *Gault* recognized as early as 1967 that there is a high risk in any juvenile case that a confession may be “the product of . . . adolescent fantasy, fright or despair.”²²⁸ The

223. See *supra* notes 187–202 and accompanying text. For full quotation of the relevant passage of *Roper*, see *supra* text accompanying note 176.

224. *J.D.B. v. North Carolina*, 131 S. Ct. at 2403 n.5.

225. *Id.* at 2403.

226. *Id.* at 2401 (citing *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) and Brief for Center on Wrongful Convictions of Youth et al. as amici curiae); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941–43 (2004) (presenting data on disproportionately high percentage of documented instances of false confessions involving juvenile suspects); In the Matter of Jimmy D., 938 N.E.2d 970, 979 (N.Y. 2010) (Lippman, C.J., dissenting) (“So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room.”; “Children do resort to falsehood to alleviate discomfort and satisfy the expectations of those in authority, and, in so doing, often neglect to consider the serious and lasting consequences of their election. There are developmental reasons for this behavior which we ignore at the peril of the truth-seeking process.”); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007); Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States, 1989 Through 2003*, 95(2) J. CRIM. L. & CRIMINOLOGY 523, 523–53 (2005); Saul M. Kassir, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8–9, 19, 30–31 (2010); Saul M. Kassir & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature & Issues*, 5 PSYCHOL. SCI. IN PUB. INT. 33, 52–53 (Nov. 2004); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2010).

227. 387 U.S. 1 (1967).

228. *Id.* at 55. For a discussion of the Court’s rationale on this point, see *supra* notes 95–97 and accompanying text.

empirical data on false confessions by juveniles, as referenced in *J.D.B.*, provides empirical confirmation for something that the Court in *Gault* knew as (to use Justice Sotomayor's term in *J.D.B.*) a "commonsense proposition."

How are these broad, categorical observations about the inherent nature of youth to be applied in an individual case in which a trial court must assess the voluntariness of a youth's confession? In answering this question, it is useful to consider the burden of persuasion on the issue of involuntariness.

Federal constitutional law places the burden on the prosecution to show voluntariness of a statement by at least "a preponderance of the evidence"²²⁹; in some States, state law goes beyond this constitutional minimum by requiring that the prosecution prove the voluntariness of a statement "beyond a reasonable doubt."²³⁰ When assessing whether the prosecution has proven that the individual juvenile freely and voluntarily confessed, a trial court should begin by applying the "general presumptions"²³¹ that "children as a class" are "more vulnerable or susceptible to . . . outside pressures' than adults"²³² and that they are likely to succumb to police interrogation by giving statements that are "the product of . . . adolescent fantasy, fright or despair."²³³ The question in each case becomes whether, in light of

229. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *accord Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (plurality opinion); *see also United States v. Raddatz*, 447 U.S. 667, 678 (1980).

230. *See, e.g., People v. Jimenez*, 580 P.2d 672 (Cal. 1978); *State v. Carter*, 412 A.2d 56, 60 (Me. 1980); *Lowe v. State*, 800 So.2d 552, 554–55 (Miss. App. 2001); *People v. Anderson*, 364 N.E.2d 1318 (N.Y. 1977).

231. The term comes from Chief Justice Roberts' concurring opinion in *Graham v. Florida*, 130 S. Ct. 2011 (2010), in which he explained that he "agree[s] with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment[]" but he reaches this conclusion by an approach that differs from the majority's adoption of a categorical rule barring such a sentence for all offenders who were below age eighteen in a nonhomicide case. *Id.* at 2036. Chief Justice Roberts explained that he would begin in each individual case by applying a "general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders" and would then consider whether there is "reason to believe that [the offender in a particular case] . . . should be denied th[at] general presumption." *Id.* at 2040. The approach we propose in the above text essentially implements a model of this sort in the confession suppression context with regard to the "general presumptions" about youth that were recognized in *J.D.B.* as relevant to juvenile confessions.

232. *J.D.B.*, 131 S. Ct. at 2403 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

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

the testimony adduced by the prosecution and defense, the prosecution has overcome these “general presumptions” and has proven (by the requisite burden of proof) that the accused freely and voluntarily confessed.

2. Miranda

Although it has taken until now for *J.D.B.* to resolve the question whether the young age of a minor suspect should be factored into the “custody” prong of the *Miranda* threshold determination of “custodial interrogation,”²³⁴ the Supreme Court indicated three decades ago that the “interrogation” prong should account for the age of a minor suspect. In *Rhode Island v. Innis*,²³⁵ the 1980 decision that defined the standard for assessing whether an “interrogation” took place,²³⁶ the Court explained that the applicable test—an objective assessment of whether the police used “words or actions . . . that they *should have known* were reasonably likely to elicit an incriminating response”²³⁷—should factor in, among other things, the “unusual susceptibility of a defendant to a particular form of persuasion.”²³⁸ Thus, as the lower courts recognized, *Innis* called for consideration of a minor suspect’s age in assessing whether “interrogation” took place.²³⁹ The Supreme Court had not previously explained how to integrate this factor into the inquiry, but *J.D.B.* supplied the requisite guidance.

234. As explained *supra* note 72, the *Miranda* doctrine applies only in situations of “custodial interrogation,” and the threshold inquiry in any *Miranda* case is whether the accused was in “custody” and subjected to “interrogation.”

235. 446 U.S. 291 (1980).

236. *See id.* at 300–01. For the definition adopted in *Innis*, see *supra* note 72.

237. 446 U.S. at 302.

238. *Id.* at 302 n.8.

239. *See, e.g., In re Ronald C.*, 107 A.D.2d 1053 (N.Y. App. Div. 1985) (finding “interrogation” under *Innis* because police should have known that placing alleged burglar’s tools in front of thirteen-year-old suspect was likely to elicit incriminating response); *In re Julian M.*, 2006 WL 3782989, at *5 (Wis. Ct. App. Dec. 27, 2006) (finding “interrogation” under *Innis* because police officer knew that suspects “were juveniles” and thus reasonably should have known that “by agreeing with Phaheem that she, too, would be upset if wrongly accused or by directly asking Julian why he did not think he belonged in custody,” juveniles would “likely . . . interpret[] [these words as prompts for their further responses]”).

Like the conjoined assessment of “custody,” the “interrogation” inquiry in a juvenile case should take into account the specific age of the accused, assessing whether the words or actions of the police were “reasonably likely to elicit an incriminating response” from a reasonable juvenile of the accused’s age. In doing so, the trial court should keep in mind the “commonsense conclusions,” ratified by the Court in *J.D.B.*, that “children ‘generally are less mature and responsible than adults,’” that “they ‘often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,’” and that “they ‘are more vulnerable or susceptible to . . . outside pressures’ than adults.”²⁴⁰

If a reviewing court in a juvenile case finds that a statement *was* elicited by means of “custodial interrogation,” thereby triggering *Miranda*’s requirements, then most of the follow-up stages of a *Miranda* analysis will require juvenile-specific assessments akin to *J.D.B.*’s. If *Miranda* warnings were given in a form that diverged from the wording approved in *Miranda* itself, then there will be a question of whether “the warnings reasonably ‘conve[yed] to [a suspect] his rights as required by *Miranda*.’”²⁴¹ This objective inquiry, like the one in *J.D.B.*, must take into account the suspect’s age in a juvenile case as well as *J.D.B.*’s lesson that children “possess only an incomplete ability to understand the world around them”²⁴² and *Roper*’s teaching that juveniles “have limited understandings of the criminal justice system and the roles of the institutional actors within it.”²⁴³

If the prosecution asserts that the accused implicitly waived his or her *Miranda* rights, then the prosecution must show both “‘a course of conduct indicating waiver’” and that “‘the accused understood these rights.’”²⁴⁴ If there was a waiver, whether explicit or implicit, the

240. *J.D.B.*, 131 S. Ct. at 2403 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion); *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

241. *Florida v. Powell*, 130 S. Ct. 1195, 1204 (2010) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)) (alteration in original).

242. *J.D.B.*, 131 S. Ct. at 2403.

243. *Graham*, 130 S. Ct. at 2032.

244. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2261 (2010) (quoting *North Carolina v. Butler*, 441 U.S. 369, 373 (1979)); see *supra* note 76 and accompanying text.

prosecution must prove by at least a preponderance of the evidence²⁴⁵ (although state law may impose a higher standard²⁴⁶) that the waiver was “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,” and “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”²⁴⁷

If the lower courts apply *J.D.B.*’s “general presumptions” about the nature of youth fully and faithfully, surely most juvenile waivers of *Miranda* rights will not withstand constitutional scrutiny. *J.D.B.* warns that children must be assumed to “lack the capacity to exercise mature judgment” and too “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”²⁴⁸ *Gault* recognizes the grave risk that juvenile confessions may be “the product of ignorance of rights.”²⁴⁹ Social scientific data documents juveniles’ inability to comprehend *Miranda* warnings.²⁵⁰ Accordingly, and especially given that a high percentage of the juveniles charged in criminal and delinquency cases come from backgrounds of limited and inadequate education,²⁵¹ it seems difficult to imagine that many juveniles adequately comprehend their rights, let alone that they waive those rights with an adequate understanding of the potential consequences. Moreover, given *J.D.B.*’s recognition

245. *Berghuis*, 130 S. Ct. at 2261 (citing *Colorado v. Connelly*, 479 U.S. 157, 168 (1986)).

246. See, e.g., *In re Jimmy D.*, 938 N.E.2d 970, 975 (N.Y. 2010) (prosecution bears burden of proving “beyond a reasonable doubt” that police complied with *Miranda* and all other constitutional and statutory requirements that are encompassed within state law concept of “voluntariness” of a confession).

247. *Berghuis*, 130 S. Ct. at 2260 (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)).

248. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)).

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

250. See *supra* notes 127–33 and accompanying text.

251. See, e.g., Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 3-4 (2003); Joseph B. Tulman & Douglas M. Weck, *Shutting Off the School-to-Prison Pipeline for Status Offenders with Education-Related Disabilities*, 54 N.Y.L. SCH. L. REV. 875, 882 (2009–10); see also *In re Benjamin L.*, 708 N.E.2d 156, 161 (N.Y. 1999) (observing, in decision establishing more protective, youth-specific, speedy trial rule under state constitution, that “many youths in juvenile proceedings suffer from educational handicaps and mental health problems, which undermine their capacity to anticipate a future presentment and to appreciate the need to take self-protective measures”).

that juveniles “are more vulnerable or susceptible to . . . outside pressures’ than adults,”²⁵² it seems difficult to credit a juvenile’s waiver as voluntary when it is made (as it usually is) in a police interrogation room by a child, confronted by one or more police officers and denied the support of a parent or other concerned adult.

B. Learning from Past Mistakes and Old Wisdom

If the lower courts take to heart the lessons of *J.D.B.* and revise *Miranda* standards for interrogation of juveniles in all of the ways proposed in Part III.A.2, then there is reason to hope that, as the Court put it in *J.D.B.*, children will be able to enjoy the “full scope of the procedural safeguards that *Miranda* guarantees to adults.”²⁵³ So too, the modifications of the voluntariness standard proposed in Part III.A.1 should help to ameliorate what the *J.D.B.* Court termed the voluntariness test’s inadequacy as a “barrier when custodial interrogation is at stake.”²⁵⁴

Although we hope this will come to pass, we are not sanguine about the likelihood. The history of the lower courts’ applications of the involuntariness and *Miranda* standards in juvenile cases²⁵⁵ gives us reason to worry that the lower courts will limit *J.D.B.* to its specific context, treating it as nothing more than a requirement that a minor suspect’s age be factored into the assessment of *Miranda* custody. And if that is what becomes of *J.D.B.*, then it will accomplish little indeed. Even if lower courts apply *J.D.B.* to invalidate un-*Mirandized* juvenile confessions on the ground that the juvenile suspects must be deemed to have been in custody although that would have not been the case for an adult, and even if (as we assume) police departments respond by routinely giving *Miranda* warnings to juveniles in settings that the police might not otherwise regard as “custodial,” this will not result in a constitutionally adequate *Miranda* procedure for juveniles. As the immediately preceding section discussed, a high percentage of juveniles are

252. *J.D.B.*, 131 S. Ct. at 2403 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

253. *Id.* at 2408.

254. *Id.*

255. See *supra* notes 55–67, 137 and accompanying text.

incapable of making truly knowing and voluntary waivers of their *Miranda* rights. So, even if more juveniles are warned of their rights as a result of *J.D.B.*, this will accomplish little if the lower courts continue to uphold waivers of rights by juveniles who have been *Mirandized*.

The rule adopted in *Miranda* (and now adapted to juveniles in *J.D.B.*) is, and always has been, a means to an end. The end is to ensure that suspects are advised of their rights so that a suspect can make a truly knowing and voluntary decision whether to waive those rights. If, as we believe, the vast majority of juveniles are incapable of making a truly knowing and voluntary waiver, then the *Miranda* rule cannot function in juvenile cases in the way that it was intended.

For this reason, we believe that the system of constitutional regulation of juvenile interrogation needs to be completely overhauled and replaced with a more protective standard that ensures lower court compliance. Moreover, even if lower courts could be counted on to apply *J.D.B.* rigorously in all of the ways proposed in Part III.A, we still worry that the police could easily do an end run around these protections. Our fear is based on the pattern of police behavior in the years before and after the *Miranda* decision. Although the *Miranda* rule was specifically designed by the Court to counter the interrogation techniques that the police had developed to bypass the involuntariness doctrine,²⁵⁶ the decades since *Miranda*'s issuance have produced numerous examples of state and federal police departments adapting to *Miranda* by employing a variety of ploys and devices that sidestep *Miranda*'s protections.²⁵⁷

256. See *Miranda v. Arizona*, 384 U.S. 436, 457–58 (1966) (explaining that the Court was supplementing the longstanding due process protections against involuntary statements with the now-familiar warnings and waiver rules because the police had developed new, sophisticated interrogation devices to extract statements that “we might not find . . . to have been involuntary in traditional terms” but that nonetheless are not “truly the product of free choice.”).

257. See, e.g., Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 633, 640–41 (1996); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009–10 (2001). For example, in a well-known ploy that eventually became the subject of a Supreme Court ruling in *Missouri v. Seibert*, 542 U.S. 600 (2004), police officers regularly interrogated suspects with the following “two-stage interrogation,” *id.* at 617, procedure: first, the police would elicit a confession without *Mirandizing* the suspect, knowing full well that the statement would be unavailable for use in court because of the omission of *Miranda* warnings; then, after having obtained a confession, the police would administer *Miranda* warnings and question the suspect again,

Two juvenile confession decisions recently issued by New York State's highest court, the New York Court of Appeals, provide vivid examples of the ease with which the police can work around constitutional regulations of the interrogation of juveniles. In one of these cases, the police used a variant on a "two-stage interrogation procedure" condemned by the Supreme Court in 2004,²⁵⁸ obtaining an un-*Mirandized* statement from a fifteen-year-old youth at school, and then taking the youth to the precinct, placing him in an adult holding cell, and thereafter questioning him again after administering *Miranda* warnings.²⁵⁹ The lower courts upheld the confession on the ground that the taint of the earlier *Miranda* violation had been attenuated by the time of the re-initiated interrogation at the police station, and the Court of Appeals denied review.²⁶⁰ Yet, as two members of the Court of Appeals pointed out in dissenting from the denial of review, only an hour elapsed between the interrogations, and moreover a "juvenile suspect is less likely [than an adult] to comprehend the meaning of *Miranda* warnings read shortly following a confession and understand that he can remain silent."²⁶¹ In the other case, in which the Court of Appeals affirmed the denial of suppression of a thirteen-year-old's confession, the police officer complied with all federal and state constitutional and state statutory preconditions for the interrogation of a juvenile: using a "juvenile interview room"; reading the *Miranda* warnings to the youth with a variant "designed for use with juveniles . . . [that] explains each of

invariably obtaining yet another confession (now ostensibly in compliance with *Miranda*, and available for use in court) because the suspect would feel that it was futile to assert his or her rights and remain silent after having already confessed, *id.* at 604–05, 609–11. The Supreme Court outlawed this particular practice in *Seibert*. *See id.* at 617. In a graphic demonstration of the persistence of even those police practices that have been expressly condemned by the courts, the Sixth Circuit Court of Appeals recently granted habeas corpus relief because the police obtained a confession by using one of the interrogation techniques disapproved of in the *Miranda* opinion itself. *See Simpson v. Jackson*, 615 F.3d 421, 438–42, 448 (6th Cir. 2010) (granting writ of habeas corpus because one statement of accused was elicited by means of interrogation technique disapproved in *Miranda* opinion itself, "in which the interrogator tries to dissuade a suspect from speaking with an attorney," and two other statements were taken without prefatory *Miranda* warnings even though they were obtained by custodial interrogation).

258. *See supra* note 257 (discussing *Missouri v. Seibert*).

259. *In re Daniel H.*, 938 N.E.2d 966, 967, 969 (N.Y. 2010).

260. *See id.* at 967–68.

261. *See id.* at 968–70 (Ciparick, J., dissenting, joined by Lippman, C.J.).

the rights in simple language”); obtaining written waivers from the youth while his mother was present; advising the youth’s mother of his *Miranda* rights (as the state statute requires); obtaining the mother’s signature in addition to the youth’s on a *Miranda* waiver card; and securing the mother’s permission to speak with the youth alone.²⁶² Once the child was alone, however, the officer induced the youth to confess by using the ploy of repeatedly offering to “help” the child if he gave a written confession.²⁶³ In affirming the denial of suppression, the court’s majority summarily rejected—as a “novel theory”—Chief Judge Jonathan Lippman’s argument in his dissent that the police officer’s misconduct vitiated the validity of the child’s previously-given waivers.²⁶⁴ Whether one agrees with the majority or dissent, we imagine that all would agree that the cases demonstrate the ease with which police officers can work around *Miranda* and other protections in order to extract a confession from a child.

The only way to ensure adequate enforcement of children’s due process and Fifth Amendment rights during police interrogation is a remedy proposed a long time ago but never adopted: establish a bright-line rule that a child under the age of eighteen must be afforded an opportunity to confer with counsel before police interrogation. In 1977, in a comprehensive set of *Juvenile Justice Standards* drafted by a joint commission of the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) and thereafter approved by the ABA House of Delegates,²⁶⁵ the IJA and

262. *In re Jimmy D.*, 938 N.E.2d 970, 971–74 (N.Y. 2010); *see also id.* at 975–80 (Lippman, C.J., dissenting).

263. *See id.* at 971–72 (majority opinion); *id.* at 975–76 (Lippman, C.J., dissenting).

264. *See id.* at 974–75 (majority opinion). In his dissenting opinion, Chief Judge Lippman used the social scientific literature on the characteristics of youth, *see id.* at 979 n.4 (Lippman, C.J., dissenting), as well as the relevant legal authorities, *see id.* at 979, to argue persuasively that, even if “an experienced adult” may not have been “misled by misrepresentations such as those made by the detective to Jimmy,” the “facts before us simply do not permit” a finding of adequate waiver by “a child, and to all appearances a very unsophisticated one with no prior involvement with the juvenile justice system, improperly deprived of parental support and guidance at a time when it would have been crucial to the protection of his interests.” *Id.*

265. For a description of the process by which the IJA-ABA *Juvenile Justice Standards* were developed, see ALAIRE BRETZ RIEFFEL, AM. BAR ASS’N, *THE JUVENILE JUSTICE STANDARDS HANDBOOK* 11–12 (1983). Rieffel was the Project Director of the ABA’s Juvenile Justice Standards Implementation Project.

ABA recommended that the following safeguards be afforded in all police interrogations of juveniles:

- “Following an arrest, a juvenile may be questioned only after conferring with counsel. All such questioning must take place in counsel’s presence unless the right to counsel has been previously waived.”
- “The right to counsel may only be waived after the juvenile has conferred with counsel and this waiver must take place in counsel’s presence.”²⁶⁶

In making these recommendations, the *Juvenile Justice Standards* stated that the protections are needed because “most ‘juveniles are not mature enough to understand their rights and are not competent to

266. INSTITUTE OF JUDICIAL ADMINISTRATION—AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO POLICE HANDLING OF JUVENILE PROBLEMS 69–70 (1980). In this same passage of the Standards, the IJA and ABA also recommended that, in all juvenile cases, the police must administer *Miranda* warnings not only to the juvenile but also to his or her parent or guardian. *See id.* at 69. Some States have adopted such a requirement by statute or state caselaw, and many state courts have ruled that parental presence is a significant factor in assessing the voluntariness of a statement and the voluntariness of a child’s *Miranda* waiver. *See* HERTZ ET AL., *supra* note 61, at 518–22. We agree with these States that parental presence is a useful protection, but we believe that the only effective remedy is the other one recommended by the IJA-ABA Juvenile Justice Standards Project: access to counsel. In many cases, a parent or guardian is not much better able than the child to resist police pressure and to make an adequately knowing and voluntary assessment of the child’s interests. Indeed, in arguing against the rule that was adopted in *J.D.B.*, Justice Alito observed that “many persons over the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2413 (2010) (Alito, J., dissenting). Although we certainly agree with the *J.D.B.* majority that this was not a reason for withholding a needed protection for children below the age of eighteen, it underscores the point that many parents and guardians will not be capable of playing the role of consultant and bulwark that the Juvenile Justice Standards Project envisioned. Moreover, at least some parents and guardians will make judgments based on their own relationships with the child and concern for the child’s moral well-being. They may, for example, encourage a child to confess to a crime in order to take responsibility, whereas an adult criminal defendant who fully understands his or her rights would think in terms of the implications and consequences for the outcome of the pending criminal investigation. *See* GRISSO, *supra* note 127, at 183–85, 187, 199 (reporting results of empirical study of effects of parental presence during interrogation of child, which found that “parents generally cannot be relied on to provide juveniles with explanations of the rights and their significance” and that “[m]ost parents gave no direct advice to their children regarding the waiver decision, and those that did offer advice almost always urged their children to waive rights”); *see also* INST. OF JUDICIAL ADMIN.-AM. BAR ASS’N, *supra*, at 77 (“Counsel is preferable to a parent during any interrogation in many instances because a parent may either not know or not care about what is in a child’s best interest.”).

exercise them.”²⁶⁷ In support of this proposition, the *Standards* quoted a 1969 law review article, which did not present empirical data for this proposition (since such data was not yet available) and instead relied partly on some anecdotal evidence and primarily on common sense.²⁶⁸ As we have already seen, the years since 1969 have produced extensive empirical data to support the point.²⁶⁹ But it is also the case, as Justice Sotomayor’s *J.D.B.* opinion explains, that “commonsense” can suffice to establish propositions about the nature of childhood that “any parent knows” and for which “citation to social science and cognitive science authorities is unnecessary.”²⁷⁰

The *Juvenile Justice Standards* acknowledged that “[n]o court has yet fully adopted this approach,”²⁷¹ and that has continued to be the case in the ensuing years. But the *Standards* also note:

267. INST. OF JUDICIAL ADMIN.-AM. BAR ASS’N, *supra* note 266, at 70 (quoting Elyce Zenoff Ferster & Thomas F. Courtless, *Legislation: The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender*, 22 VAND. L. REV. 567, 596–97 (1969)).

268. See Ferster & Courtless, *supra* note 267.

269. See *supra* notes 127–37, 176–79, 183–84, 196 and accompanying text.

270. *J.D.B.*, 131 S. Ct. at 2403 n.5.

271. INST. OF JUDICIAL ADMIN.-AM. BAR ASS’N, *supra* note 266, at 72. The *Standards* explained that “only one case could be found that required that a juvenile have the assistance of counsel before making a statement, [but that] other courts have noted the desirability of such a requirement.” *Id.* An accompanying footnote cites a single case: *Ezell v. State*, 489 P.2d 781 (Okla. Crim. App. 1971). INST. OF JUDICIAL ADMIN.-AM. BAR ASS’N, *supra* note 266, at 72 n.112. In *Ezell*, the Oklahoma Court of Criminal Appeals found a sixteen-year-old’s confession to be inadmissible because “[t]here was no evidence as to the ability of the minor to comprehend the effect of his [Miranda] waiver,” “[n]or [was there] any evidence showing the ability of his mother or legal custodian [who were present during the interrogation] to properly advise him.” *Id.* at 783–84. The court explained that state law prohibits the admission of evidence of a minor’s statement

where there is absence of parent or guardian, or counsel, since such defendants should be deemed incapable of waiving the constitutional and statutory safeguards provided by law in a criminal case, unless it appears beyond a reasonable doubt that the minor defendants fully understood the effect and the results growing out of such a waiver.

Id. at 783 (quoting *Story v. State*, 452 P.2d 822, 825 (Okla. Crim. App. 1969)); see also *Garner v. State*, 500 P.2d 1340, 1341–42 (Okla. Crim. App. 1972) (distinguishing *Ezell* and upholding trial court’s denial of suppression of seventeen-year-old’s confession, notwithstanding absence of both parent and counsel during interrogation, because “[d]efendant in the instant case, by his own testimony, acknowledged that he understood the consequences of the waiver of his Miranda rights”).

The *Standards* also explained that “[s]till other[] [cases] have required that a juvenile be given an opportunity to consult with a parent, counsel, or a mature advisor, following which a waiver may be obtained in that person’s presence.” INST. OF JUDICIAL ADMIN.-AM. BAR ASS’N, *supra* note 266, at 72. The decision cited in support—*Lewis v. State*, 288 N.E.2d 138 (Ind.

The recommendation derives some support from two early Supreme Court decisions. In *Haley v. Ohio* [in 1948], Justice Douglas' plurality opinion came close to suggesting that the factor of age alone may require the presence of an attorney before a confession could be held to be voluntary. Fourteen years later, Justice Douglas, writing this time for a majority of the Court in *Gallegos v. Colorado* [in 1962], used a totality of the circumstances approach but suggested that special tests be used for a juvenile because "a 14 year old boy, no matter how sophisticated" cannot be expected to comprehend the significance of his actions.²⁷²

As this passage recognizes, and as Part I's discussion of *Haley* and *Gallegos* showed in detail, the Court in these early cases demonstrated a keen understanding of a juvenile's need for the assistance of counsel in a stationhouse interrogation.²⁷³ As Part I also showed, this was true as well of the Court's 1967 opinion in *In re Gault*,²⁷⁴ in which the Court proclaimed that a juvenile charged with a crime "requires the guiding hand of counsel at every step in the

1972)—held that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless both he and his parents or guardian were informed of his rights to an attorney, and to remain silent," and that "[f]urthermore, the child must be given an opportunity to consult with his parents, guardian or an attorney representing the juvenile as to whether or not he wishes to waive those rights." *Id.* at 142. This common law rule was subsequently superseded by the enactment of a statute. *See Whipple v. State*, 523 N.E.2d 1363, 1370 n.2 (Ind. 1988) (recognizing superseding). That statute, which is currently codified at IND. CODE § 31-32-5-1 (2010), provides that "[a]ny rights guaranteed to a child . . . may be waived" by (1) counsel, or (2) "the child's custodial parent, guardian, custodian, or guardian ad litem," if "that person has no interest adverse to the child" and has "meaningful[ly] consult[ed]" with the child, and "the child knowingly and voluntarily joins with the waiver," or (3) the child, even "without the presence of a custodial parent, guardian, or guardian ad litem," if "the child has been emancipated" and "knowingly and voluntarily consents to the waiver." *Id.* Thus, except for children who have been emancipated, a child's waiver is not effective without an accompanying waiver from a custodial parent, guardian, custodian, or guardian ad litem. In this regard, the statute expands the protections established in the 1972 decision. *See Whipple*, 523 N.E.2d at 1370 n.2. However, as is apparent, the statute does not go as far as requiring that the child be afforded an opportunity to confer with counsel before being interrogated by the police. For further discussion of state law requirements that a child be permitted to consult with a parent or guardian before police interrogation, see HERTZ ET AL., *supra* note 61, at 518–22.

272. INST. OF JUDICIAL ADMIN.-AM. BAR ASS'N, *supra* note 266, at 72 (footnotes omitted).

273. *See supra* notes 43–48 and accompanying text (discussing *Haley*), and *supra* notes 49–53 and accompanying text (discussing *Gallegos*).

274. 387 U.S. 1 (1967).

proceedings against him,” and recognized that the administration of the privilege against self-incrimination in juvenile cases should take into account whether there was “participation of counsel.”²⁷⁵

Haley, *Gallegos*, and *Gault* reflect the Supreme Court’s early recognition that the assistance of counsel is essential in juvenile cases in order to guard against what *Gault* termed the high risk that a juvenile’s confession is “the product of . . . adolescent fantasy, fright or despair” or “the product of ignorance of rights.”²⁷⁶ Everything that we have learned about juveniles since—the social scientific data cited in the Supreme Court’s decisions in *Roper v. Simmons* and *Graham v. Florida*²⁷⁷ and the statistics that *J.D.B.* referenced regarding the high incidence of false confessions by juveniles²⁷⁸—confirms and underscores these early cases’ “commonsense” understanding.

In our view, the time has come to implement the vision of the *Juvenile Justice Standards* and to establish a bright-line rule that a juvenile’s waiver of *Miranda* rights will be deemed ineffective unless the youth was first given the opportunity to confer with counsel.²⁷⁹ We appreciate how difficult it will be to implement a rule of this sort. In many parts of the United States, juveniles even today do not receive the full benefit of the constitutional right to counsel established by *In re Gault* in 1967.²⁸⁰ A bold call for lawyers to be

275. *Id.* at 36, 55. For discussion of *Gault*, see *supra* notes 83–97 and accompanying text.

276. *Id.* at 55.

277. See *supra* notes 176–79, 183–84 and accompanying text.

278. See *supra* note 226 and accompanying text.

279. Precisely because this is a bright-line rule, it avoids a criticism that Justice Alito’s dissenting opinion in *J.D.B.* leveled at the rule adopted by the majority. Justice Alito asserted that “[t]he Court’s decision greatly diminishes the clarity and administrability that have long been recognized as ‘principal advantages’ of *Miranda*’s prophylactic requirements,” *J.D.B. v. North Carolina*, 131 S. Ct. at 2417 (Alito, J., dissenting), by requiring that “judges attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be” to determine, for example, “whether the differences between a typical 16 1/2-year-old and a typical 18-year-old with respect to susceptibility to the pressures of interrogation are sufficient to change the outcome of the custody determination,” *id.* at 2416. The rule we propose eliminates the need for such individualized assessments and provides the police and the reviewing courts with a clear, straightforward mandate of what procedures must be followed in any case involving a suspect below the age of eighteen.

280. See, e.g., PATRICIA PURITZ ET AL., AM. BAR ASS’N JUVENILE JUSTICE CTR., JUVENILE LAW CTR., & YOUTH LAW CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2002); Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. ON POVERTY L. & POL’Y 543 (2009).

available to appear with their juvenile clients at police precincts imagines a world quite different from ours. But it is a world that, in our view, is absolutely necessary in order to safeguard the important rights at stake.

CONCLUSION

In this Article, we have focused exclusively on *J.D.B.*'s implications for confession suppression law. In closing, it is worth noting that *J.D.B.* certainly has important implications for many other aspects of juvenile rights in criminal and delinquency proceedings. Most obviously and directly, the Court's reconfiguration of the *Miranda* "custody" requirement to incorporate the age of a minor suspect calls for an equivalent reshaping of the Fourth Amendment standards for a *Terry* stop and an arrest.²⁸¹ Equally relevant are other aspects of Fourth Amendment law for which a suspect's age can affect the constitutional analysis, such as the rules for determining the validity of an individual's consent to a search.²⁸² Less obvious and with even more profound ramifications, *J.D.B.*'s analysis of the inherent qualities of youth, and its treatment of this subject matter as self-evident "commonsense propositions," strongly reinforces commentators' calls for reconsidering whether juveniles can be held to adult criminal standards of mens rea, criminal culpability, and competence to stand trial²⁸³—and for reassessing standards for transfer of youth to criminal court.²⁸⁴ All of these developments in the law were foreseeable when the Court issued *Roper v. Simmons* in 2005 and *Graham v. Florida* in 2010, but the Eighth Amendment

281. For discussion of the current state of the law on these issues, see Hertz ET AL., *supra* note 61, at 405–17.

282. For current standards on this issue, see *id.* at 442–45.

283. See, e.g., Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 27 (2000); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16 (1999); Thomas Grisso, *Adolescents' Decision Making: A Developmental Perspective on Constitutional Provisions in Delinquency Cases*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3 (2006); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143 (2003).

284. See, e.g., Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

context of those cases may have been regarded by some courts as standing in the way of a broader application of their analyses of the nature of youth and its legal relevance. By extending the reasoning of those decisions to a bedrock rule of criminal procedure, *J.D.B.* has opened the door to an extensive reshaping of juvenile rights in criminal and delinquency cases.