Vulnerable and Valued: Protecting Youth from the Perils of Custodial Interrogation

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INTRODUCTION

It had been four long days since the baby died and Lacresha Murray had last been allowed to see or talk to her grandparents, who adopted her when she was two.[1] Now she was sitting in a small room with an angry police officer looming over her, the gun at his waist directly at her eye level. She did not have much experience talking to police officers, but she had seen the police stop and search other Black people, and she had heard her grandparents tell her older sister that she should always do exactly what officers say. "Get home safe," Lacresha remembered her grandparents telling her sister every time they talked about the police. Now, Lacresha did not know how she would get home, and she did not feel safe. The police officer began pounding his fist on the table, insisting she tell him how she killed the baby.[2] "Why would I want to hurt a child?," eleven-year-old Lacresha asked in utter disbelief.[3] Thirty-nine times she told the officer she did not hurt the baby.[4] The officer kept pressuring her, telling her he would put her grandparents in jail if she did not confess.[5] After three hours, believing she had no choice, Lacresha decided she would say whatever he wanted if it meant she could go home.[6] The officer handed her a typed confession and asked if she "[could]

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1. Carlton Stowers, *Innocence Lost*, DALL. OBSERVER (Oct. 18, 2001, 4:00 AM), https://www.dallasobserver.com/news/innocence-lost-6391352 [https://perma.cc/3T8M-FLQ7].

2. Maurice Possley, *Lacresha Murray*, THE NAT'L REGISTRY OF EXONERATIONS (June 28, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3499 [https://perma.cc/98MU-3TA6].

3. Bob Herbert, Opinion, *In America; A Child's 'Confession*,*'* N.Y. TIMES, Nov. 15, 1998, at 15.

4. Stowers, *supra* note 1.

5. Possley, *supra* note 2.

6. *See id.*

read pretty good."[7] She said, "no," her IQ was only seventy-seven,[8] "but I try hard."[9]

Lacresha spent three years incarcerated before her exoneration.[10] Her life was irreparably harmed by the abuse the justice system inflicted upon her. She experienced trauma after trauma, from the coercive interrogation, to the anxiety of trials and appeals, to being denied the nurturing environment of a family home while she was incarcerated.[11]

We may never know how many youth have experienced similar traumas as a result of coercive interrogations. While a small number of children's coerced confessions make the news, many more are never brought to light because the children do not have access to attorneys or post-conviction legal remedies.[12] Many youth who are coerced into confessing end up resolving their cases with a guilty plea.[13] They crumble under the overwhelming pressure of prosecutors' threats to transfer them to adult court and the risk of many years of incarceration.[14] Although the stories of these youth often go untold, the harms they suffer are no less real. Arizona must take steps to ensure all youth have equal access to their constitutional rights, which protect children from the overwhelming pressures of interrogations and the subsequent harms of coerced confessions.

The Fifth Amendment right to remain silent, mirrored in the Arizona State Constitution, protects children from police coercion.[15] The U.S. Supreme Court rooted this right in the fundamental rights to liberty and privacy, calling it "the essential mainstay of our adversary system."[16] A government seeking to punish an individual must "produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[17]

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7. Herbert, *supra* note 3.
8. Possley, *supra* note 2.
9. Herbert, *supra* note 3.
10. Stowers, *supra* note 1. Medical evidence was key in Lacresha's exoneration, showing that the baby's death was caused by repeated abuse over a long period of time and had nothing to do with Lacresha's care for her the day she died. Possley, *supra* note 2.
11. Stowers, *supra* note 1.
12. Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553, 562 (2012) (explaining many states limit post-conviction relief to adult criminal convictions and citing ARIZ. R. CRIM. P. 32.1, which does not include adjudicated juveniles as eligible for post-conviction relief).
13. *Id.* at 555–56.
14. *See id.* at 574 (describing the need for legislation to allow youth who were pressured into pleading guilty to avoid transfer to adult court to seek post-conviction relief).
15. *In re* Gault, 387 U.S. 1, 47 (1967); ARIZ. CONST. art. II, § 10.
16. Miranda v. Arizona, 384 U.S. 436, 460 (1966).
17. *Id.* (citing Chambers v. Florida, 309 U.S. 227, 235–38 (1940)).

Recognizing that the power of the State is so much greater than that of the individual, the Court in *Miranda v. Arizona* found that special measures must be enacted to protect individuals' rights.[18] The Court required that all people must be informed—prior to custodial interrogation—of their right to remain silent, their right to counsel, that anything they say can be used against them, and that only they themselves have the power to make a knowing, intelligent, and voluntary waiver of those rights.[19] Courts must use a totality of the circumstances test to evaluate the validity of these waivers, and they must consider the particular vulnerabilities of the individual.[20]

Children by the very nature of their ongoing development have a harder time than adults in asserting their rights and resisting the overwhelming governmental force they face in custodial interrogation.[21] This is especially true for youth of color, for whom the reality of police brutality and police-community relationships will make the custodial environment even more coercive. Under current law and practice, the courts and legislators have not given adequate attention to the importance of age in evaluating the validity of waivers and do not consider the impact of race.

This article recommends judicial and legislative reform to ensure that all youth are protected against coercive interrogation. Part I reviews Arizona and federal constitutional law related to youth *Miranda* waivers. In Part II, we consider the impact of adolescence and race on *Miranda* waivers, beginning by exploring the substantial body of research on adolescent development and a growing body of research on racial bias and the experiences of youth of color. We assert that the current protective measures to safeguard youth rights are insufficient. Arizona must protect children's rights by treating age and race as lenses through which to view all other factors in the totality of the circumstances test. While adopting this new framework is essential to remedying invalid *Miranda* waivers after the fact, in Part III we argue that youth will not have full access to their right to silence and be protected from the myriad harms of police coercion until they are given meaningful access to counsel to advise them prior to interrogation.

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18. *Id.* at 444.
19. *Id.*
20. Moran v. Burbine, 475 U.S. 412, 421 (1986).
21. *In re* Gault, 387 U.S. 1, 45–46 (1967).

I. PROTECTING YOUTH AGAINST POLICE "FORCE OR COERCION" IN INTERROGATION

A. Due Process: Ensuring Youth's Confessions Are Voluntary

The Supreme Court began evaluating the admissibility of confessions long before the familiar *Miranda* warnings were instituted.[22] The Court first turned its attention to the particular vulnerabilities of youth facing custodial interrogation in its 1948 decision in *Haley v. Ohio*.[23] Relying on the Fourteenth Amendment Due Process doctrine of voluntariness and using a "totality of the circumstances" test to determine whether a confession was freely made, the Court reversed fifteen-year-old Haley's conviction based on "force or coercion."[24] Paying careful attention to age, the Court acknowledged that a child can be an "easy victim of the law" and that "special care" must be taken in evaluating the circumstances of the interrogation.[25] As to Haley, the Court stated that

> [a]ge 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.[26]

The Court noted that the time the interrogation began, shortly after midnight; the five-hour length of questioning; and the interrogation techniques that included showing alleged confessions of other children also contributed to the coercive and involuntary confession.[27]

The right to counsel, and meaningful ability to access counsel, is inextricably linked to the right to remain silent. The Court emphasized the importance of attorneys in ensuring a waiver of the right to remain silent is voluntary, stating that an adolescent "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

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22. The Court largely relied upon the Fourteenth Amendment's Due Process Clause to protect individuals from coerced confessions by police officers. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948); Leyra v. Denno, 347 U.S. 556, 561 (1954); Spano v. New York, 360 U.S. 315, 315 (1959); Gallegos v. Colorado, 370 U.S. 49, 51–52 (1962).

23. 332 U.S. at 599–601.

24. *Id.*

25. *Id.* at 599.

26. *Id.*

27. *Id.* at 598, 600–01.

crush him."[28] The Court went on to describe how Haley's vulnerability was exploited by his lack of an attorney: "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."[29] The Court further stated that it would not "indulge those assumptions" that an adolescent Haley's age would be able to fully understand and appreciate his rights or have freedom of choice in waiving them "without aid of counsel."[30]

In 1962 in its opinion in *Gallegos v. Colorado*, the Court again gave special consideration to the vulnerabilities of a child without access to the advice of counsel, stating

> [h]e 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.[31]

While the Court refers to another trusted adult in the alternative to a lawyer, it is specific in the lawyerly type of assistance that adult must provide, namely, explaining the consequences of confession and waiving their rights.[32] This advice must be provided by "someone concerned with securing him those rights," and the advice must be "mature," meaning both knowledgeable of the law and wise in its application to his situation.[33] Ultimately, the Court also found fourteen-year-old Gallegos's confession involuntary, citing age, lack of access to counsel, and the five days he was detained incommunicado among other factors in reaching its determination.[34]

28. *Id.* at 600.
29. *Id.*
30. *Id.* at 601.
31. Gallegos v. Colorado, 370 U.S. 49, 54 (1962).
32. *Id.*
33. *Id.*
34. *Id.* at 55.

B. Kids Have Rights Too: The Privilege Against Self-Incrimination

The Court instituted proactive safeguards for the right against self-incrimination, and along with it further expounded upon the importance of attorneys in protecting this right, four years later in its opinion in *Miranda v. Arizona*.[35] The Court found that even full-grown men with prior experiences in the criminal justice system, like Ernesto Miranda, are vulnerable to involuntarily waiving their rights in custodial interrogation.[36] The Court emphasized the inherent coerciveness of custodial interrogation and distinguished it from other types of interrogation by stating that its "atmosphere carries its own badge of intimidation" with "no purpose other than to subjugate the individual to the will of his examiner."[37] The Court found that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[38] In response to this finding, the Court determined that law enforcement must make people aware of their right to remain silent and right to counsel and of the consequences of waiving those rights prior to custodial interrogation.[39] This became known as the *Miranda* warning. Noting that it is "not just the subnormal or woefully ignorant" who were vulnerable to the "inherent pressures of the interrogation atmosphere," the Court made the *Miranda* warnings "an absolute prerequisite" for everyone in a custodial interrogation.[40]

Along with the warnings, the *Miranda* Court made clear that the right to counsel is inextricably tied to protecting the right against self-incrimination.[41] In particular, the Court was concerned with ensuring that the right to silence did not become "but a 'form of words,' in the hands of government officials."[42] Access to counsel at interrogation is necessary to give the right to silence true impact. The Court made clear that the warnings it required in *Miranda* are merely a threshold but not the only or even the best way to protect the rights of the accused.[43] Other measures may be better suited to

35. Miranda v. Arizona, 384 U.S. 436, 466–71 (1966).

36. *Id.* at 455–56; Ron Dungan, Miranda *and the Right To Remain Silent: The Phoenix Story*, AZCENTRAL (June 11, 2016, 7:04 AM), https://www.azcentral.com/story/news/local/phoenix/2016/06/11/miranda-and-right-remain-silent-phoenix-story/85206416/ [http://perma.cc/95Z5-SKNH].

37. *Miranda*, 384 U.S. at 457.

38. *Id.* at 458.

39. *Id.* at 467–69.

40. *Id.* at 468.

41. *Id.* at 469.

42. *Id.* at 444 (citation omitted).

43. *Id.* at 467.

accomplish the Court's goal of ensuring people know they have the right to remain silent, can exercise it, and are aware of the consequences of forgoing it.[44]

The Court also made clear that the right to silence and right to counsel could not be waived prior to custodial interrogation unless the State proved that the waiver was "made voluntarily, knowingly[,] and intelligently."[45] The Court clarified in *Moran v. Burbine* that this is a two-part test, holding that "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal[s] both an uncoerced choice and the requisite level of comprehension" in regards to both the nature of the right being abandoned and the consequences of the decision to abandon it may *Miranda* rights be waived.[46] *Moran* reiterated that the purpose of *Miranda* is to limit the inherently coercive nature of the interrogation room.[47]

The Supreme Court eliminated any doubt that the Fifth Amendment right to silence and the right to counsel applied to children accused of delinquent offenses in juvenile courts in its opinion in *In re Gault*.[48] The Court again rooted its treatment of the privilege against self-incrimination in the importance of protecting the rights of the individual in the face of the State's great power.[49] The Court found that the child's right to equality, and the subsequent need to protect the child from the power of the State, is more foundational even than the need to eliminate coercion to ensure reliable confessions.[50] Children have the same rights as adults, and because their minds are much more easily, even inadvertently, overborne, they require greater protection than adults.[51]

While it is clear that youth require extra protection, the Supreme Court has not given a great deal of consideration to what that protection might be apart from including age as a factor in the totality of the circumstances test.[52] The U.S. Supreme Court has not decided a case concerning the validity of a child's *Miranda* waiver since it issued its opinion in *Fare v. Michael C.* in 1979, holding that the use of the totality of the circumstances test in

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44. *Id.* at 467–69.
45. *Id.* at 444.
46. Moran v. Burbine, 475 U.S. 412, 421 (1986) (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)). The Supreme Court clarified in *Colorado v. Connelly*, 479 U.S. 157, 158 (1986), that this is the same totality of the circumstances test for voluntariness used to evaluate Fourteenth Amendment Due Process.
47. *Moran*, 475 U.S. at 426.
48. 387 U.S. 1, 47 (1967).
49. *Id.*
50. *Id.*
51. *Id.* at 47, 55.
52. *See id.* at 55; Haley v. Ohio, 332 U.S. 596, 599–601 (1948).

determining whether a waiver was "made voluntarily, knowingly[,] and intelligently" was sufficient for youth.[53] Michael C. was a sixteen-year-old who had requested to speak to his probation officer during the interrogation.[54]

The Court reaffirmed the importance of the right to counsel in protecting a child's Fifth Amendment rights in finding that Michael C.'s request to speak to his probation officer could not be considered a substitute for a request for an attorney.[55] As the Court noted,

> [T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court [in *Miranda*] found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court.[56]

In *Michael C.*, the Court made clear that if a child waives their *Miranda* rights outside the presence of counsel, then a "heavy burden" rests on the State to prove that the child did in fact make a knowing, intelligent, and voluntary waiver of their *Miranda* rights.[57] The question of waiver is not one of form, but of the validity of that waiver based on what the child actually knew and the freedom of their own will in waiving.[58] A waiver may be invalid if the child did not actually understand what was being asked of them or appreciate the consequences of giving up their rights.[59] While there must be some coercive police action for a waiver to be involuntary, and a finding of involuntariness cannot be based solely on the individual's characteristics, those must be considered as potentially making them particularly vulnerable to coercion in the "totality of the circumstances" test.[60]

C. Arizona Law: Protecting the Vulnerability of Arizona Youth

The Arizona Constitution also establishes the right against self-incrimination, and the Arizona Revised Statutes state that trial judges "shall

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53. Miranda v. Arizona, 384 U.S. 436, 444 (1966); Fare v. Michael C., 442 U.S. 707, 728 (1979).
54. *Michael C.*, 442 U.S. at 710.
55. *Id.* at 721–22.
56. *Id.* at 719 (quoting *Miranda*, 384 U.S. at 469).
57. *Id.* at 724.
58. *Id.* (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)).
59. Moran v. Burbine, 475 U.S. 412, 421 (1986).
60. Colorado v. Connelly, 479 U.S. 157, 157–58 (1986).

take into consideration all the circumstances surrounding the giving of the confession" to determine its voluntariness before it may be admitted as evidence.[61] Arizona law, like federal constitutional law, begins with the presumption that all confessions and waivers are invalid, and the burden rests on the State to prove that the waiver was knowing, intelligent, and voluntary by a preponderance of the evidence before confessions can be admitted.[62] While Arizona law has developed similarly to the U.S. Supreme Court jurisprudence, there are several important areas of distinction.

Arizona law requires coercive state action for a finding of involuntariness, but its case law includes "coercive pressures not dispelled," along with impermissible conduct by the police, as factors that can render a confession involuntary.[63] In determining coerciveness, courts must consider factors that were known by the police at the time of arrest and would affect the child's ability to understand the proceedings.[64] These include, but are not limited to,

> the presence of the child's parents or their consent to a waiver of rights, the juvenile's prior exposure to *Miranda* warnings because of previous arrests, and the juvenile's physical and emotional health at the time of questioning, including lack of sleep or food . . . [and the effect of] mental illness on a defendant's ability to make a cognitive waiver of *Miranda* rights.[65]

Concerning these factors, the Arizona Supreme Court cites *Gault*'s requirement that the "greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[66] The court goes on to say police conduct must be evaluated for coerciveness in the youth context by "carefully scrutinizing not only the external circumstances under which the juvenile was questioned but also the juvenile's reasonably apparent cognitive abilities."[67]

The Arizona Supreme Court has gone farther than the U.S. Supreme Court in emphasizing the detrimental impact of excluding parents from interrogations. The Arizona Supreme Court in *In re Andre M.* held that there is a "strong inference" that the State excluded a parent from interrogation to

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61. ARIZ. CONST. art. II, § 10; ARIZ. REV. STAT. ANN. § 13-3988 (2020).

62. *Connelly*, 479 U.S. at 158; State v. Amaya-Ruiz, 800 P.2d 1260, 1272 (Ariz. 1990); State v. Rivera, 733 P.2d 1090, 1096 (Ariz. 1987).

63. *Rivera*, 733 P.2d at 1096. The U.S. Supreme Court made clear the requirement for coercive police conduct in its opinion in *Connelly*, 479 U.S. at 166–67.

64. State v. Jimenez, 799 P.2d 785, 790 (Ariz. 1990).

65. *Id.* at 791–92 (citations omitted).

66. *Id.* at 790 (quoting *In re* Gault, 387 U.S. 1, 55 (1967)).

67. *Id.*

"maintain a coercive atmosphere or to discourage the [child] from fully understanding and exercising his constitutional rights" if the State fails to establish "good cause" for excluding them.[68] The court described the presence of a parent as helping to satisfy the *Moran* two-part test by protecting against the coercive environment of interrogations and ensuring the child has proper knowledge of their Fifth Amendment rights.[69] Deliberately excluding Andre M.'s mother was a "significant factor" in the totality of the circumstances test, and the court assigned it a "negative inference."[70] The burden of overcoming this negative inference and the initial presumption of involuntariness remains with the State.[71] This incentivizes police to contact parents and make real efforts to secure their presence at any interrogation. The court, however, affirmed its commitment to the totality of the circumstances test and maintained that a "per se rule" excluding all statements where parents were not present is inappropriate.[72]

While the Arizona Supreme Court and the Arizona Court of Appeals have issued several decisions concerning the presence of parents at interrogations,[73] it has been almost forty-five years since the courts last considered the importance of attorneys during custodial interrogations of youth. In 1976 in its opinion in *State v. Toney*, the Arizona Supreme Court held that youth have

> the capacity to make voluntary inculpatory statements, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a statement depends not on his age alone but on a combination of that factor with other circumstances, including his intelligence, education, experience and ability to comprehend the meaning and effect of his statement.[74]

Since the late 1960s, Arizona has included a specific warning regarding the possibility of transfer to adult court as part of *Miranda* waiver forms for

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68. *In re* Andre M., 88 P.3d 552, 556 (Ariz. 2004).

69. *Id.* at 555.

70. *Id.* at 555, 557.

71. *Id.* at 554; *Jimenez*, 799 P.2d at 789–90 ("We start with the presumption that confessions resulting from custodial interrogation are inherently involuntary; to rebut that presumption, the state must show by a preponderance of the evidence that the confession was freely and voluntarily made.").

72. *In re Andre M.*, 88 P.3d at 555.

73. *See id.*; State v. Carrillo, No. 1 CA-CR 14-0381, 2016 WL 423788, at *3 (Ariz. Ct. App. Feb. 4, 2016) (finding that while Carrillo initially said he wanted his mother present, his "overriding, stated" desire was to speak with police); *Jimenez*, 799 P.2d at 792–94 (considering the absence of Jimenez's parents and aunt and uncle, who were acting as his guardians, at his interrogation, but ultimately deciding that the fact that Jimenez was seventeen and did not specifically request them supported the decision that his waiver was valid).

74. State v. Toney, 555 P.2d 650, 653 (Ariz. 1976).

children.[75] The Arizona Supreme Court held in *State v. Maloney* that this was a matter of "fundamental fairness" and required by statute at the time.[76] While confessions without this specific warning are no longer considered "per se" inadmissible, an omission would be considered in the totality of the circumstances surrounding waiver of the right to remain silent.[77] The lasting impact of this precedent is that Arizona children are read youth-specific *Miranda* warnings, which vary by law enforcement agency, some including language intended to be "youth-friendly" and others merely adding warnings regarding the presence of parents and the possibility of transfer to adult court to the *Miranda* script.[78]

The Arizona Court of Appeals preceded the U.S. Supreme Court in reaching the conclusion that age must be considered in a *Miranda* custody analysis by almost ten years.[79] In its opinion in *In re Jorge D.*, the court stated that the objective test for determining whether a child is in custody must include elements additional to those considered for adults, including age, maturity, prior "experience with law enforcement[,] and the presence of a parent or other supportive adult."[80] The U.S. Supreme Court addressed this question in *J.D.B. v. North Carolina*, where it relied on commonsense knowledge of the hallmarks of adolescence, supported and explained by the growing body of research on the science of adolescent brain development, to require that a "reasonable child" standard be used in evaluating whether a reasonable person would have felt free to leave a police encounter.[81] The Court cited *Haley* and *Gallegos* as demonstrating the Court's precedence for treating a youth's confession with special consideration, making clear that protecting the rights of children requires safeguards that adults may not require.[82]

In *J.D.B.*, the Court also referred to its line of decisions concerning youth and the Eighth Amendment in *Roper v. Simmons* and its progeny, noting that children "lack the capacity to exercise mature judgment and possess only an

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75. State v. Maloney, 433 P.2d 625, 628–29 (Ariz. 1967).

76. *Id.* at 629.

77. State v. Hardy, 491 P.2d 17, 17–18 (Ariz. 1971); *Jimenez*, 799 P.2d at 791.

78. *See, e.g.*, MARICOPA CNTY. SHERIFF'S OFF., MARICOPA COUNTY SHERIFF'S OFFICE POLICY AND PROCEDURES 6 (2013), https://www.mcso.org/documents/Policy/Patrol/EA-19.pdf [https://perma.cc/6AJH-U9Y5] (referring to the "Office *Juvenile Miranda Warnings Form*" (emphasis in original)).

79. *See In re* Jorge D., 43 P.3d 605, 608–09 (Ariz. Ct. App. 2002); J.D.B. v. North Carolina, 564 U.S. 261, 264–65 (2011).

80. *In re Jorge D.*, 43 P.3d at 608–09 (quoting State v. Doe, 948 P.2d 166, 173 (Idaho Ct. App. 1997)).

81. *J.D.B.*, 564 U.S. at 264–65, 272.

82. *Id.* at 272, 280–81.

incomplete ability to understand the world around them."[83] The Court called these "commonsense conclusions" and held that they must be applied to the objective custody analysis.[84] If such commonsense conclusions about the impact of adolescence must be applied to the objective custody analysis, surely these same facts about adolescence must give great weight to the impact of youthfulness on the validity of *Miranda* waivers through the subjective totality of the circumstances test. Several other states have drawn that conclusion, providing greater protections for youth.[85]

While Arizona led the way on considering youth in the objective custody analysis with *In re Jorge D.*, many Arizona youth are still vulnerable to interrogation without a valid *Miranda* waiver. As demonstrated by the U.S. Supreme Court in *J.D.B.*, we now know considerably more about the adolescent brain than when the Arizona Supreme Court decided *State v. Toney* almost forty-five years ago. A review of Arizona case law shows that courts do not adequately require the State to prove the child understood their rights prior to interrogation.[86] Too often reviewing courts have been satisfied with evidence that the youth merely said they understood and would waive.[87] There is occasionally evidence of a child's grade level, but nothing more, and these are typically not given much weight even if the child is struggling

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83. *Id.* at 273.

84. *Id.* at 272.

85. *See, e.g.*, N.M. STAT. ANN. § 32A-2-14 (2020) (barring *Miranda* waivers by children under age thirteen and requiring the State to make extra consideration of the validity of waivers for youth ages thirteen to fourteen); CAL. WELF. & INST. CODE § 625.6 (West 2020), https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=625.6 [https://perma.cc/3YUH-E6S9] (requiring youth fifteen and younger to consult with an attorney prior to waiving their *Miranda* rights).

86. *See, e.g.*, State v. Carrillo, No. 1 CA-CR 14-0381, 2016 WL 423788, at *2 (Ariz. Ct. App. Feb. 4, 2016) (relying solely on Carrillo telling officer at the time of waiver that he understood his rights and wanted to waive, making no mention of his education or intelligence, let alone the impact of adolescent development on his ability to understand and assert his rights); State v. Nuñez, No. 2 CA-CR 2010-0140, 2011 WL 3073919, at *4 (Ariz. Ct. App. July 20, 2011) (holding that Nuñez's invocation of his right to an attorney was not unequivocal, and he made a knowing and intelligent waiver of his *Miranda* rights, citing only his prior court involvement and agreement that he understood his rights, and giving no meaningful consideration to his age of fifteen years); *In re* Jeffery W., No. 1-CA-JV 08-0198, 2009 WL 2168689, at *3 (Ariz. Ct. App. July 21, 2009) (relying on Jeffrey telling the interrogating officer he understood his rights and wished to waive); State v. Enos, No. 1 CA-CR 07-0882, 2009 WL 44739, at *2 (Ariz. Ct. App. Jan. 8, 2009) (giving no meaningful consideration to whether Enos's waiver was knowing and intelligent, simply noting that he said he understood, was seventeen years old, had an eighth grade education, and had prior contact with the justice system).

87. *See, e.g.*, *Carrillo*, 2016 WL 423788, at *2; *Enos*, 2009 WL 44739, at *2.

academically.[88] While consideration may be given to a child's atypically low intelligence, the reviewing courts have not given adequate consideration to the typical characteristics of adolescence that impact a child's ability to understand, appreciate, and voluntarily waive their rights.[89] Likewise, courts do not mention race as a factor that could impact the voluntariness of a waiver.[90] Although the State has the burden to prove by a preponderance of the evidence that a child's waiver of their right to remain silent was knowing, intelligent, and voluntary, Arizona courts largely have been satisfied with scant evidence from the State. In most cases reviewed, the State need only show that the child waived, and there was no blatantly coercive police action.[91] Without a more rigorous analysis of the child's waiver, the totality of the circumstances is inadequate to protect youth's rights and ensure confessions are not coerced.

Police delivering *Miranda* warnings is simply not sufficient to ensure that youth can meaningfully assert their rights. The U.S. Supreme Court acknowledged that the messenger greatly impacts the delivery of the message. In discussing the right to an attorney prior to and during interrogation, the Court stated,

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88. *See, e.g.*, State v. Cannon, No. 1 CA-CR 10-0052, 2011 WL 797444, at *5 (Ariz. Ct. App. Mar. 8, 2011) (finding that Cannon's waiver was voluntary, and giving no consideration to the impact of his age and development on his ability to meaningfully understand his rights or assert them in the interrogation setting apart from noting that "[d]espite his age, Cannon did not appear to be confused or unaware of what was happening" and noting that he had "low to average grades" and prior arrests); *Enos*, 2009 WL 44739, at *2 (failing to give any consideration to the fact that Enos was almost eighteen years old and only has an eighth grade education).

89. *See, e.g.*, State v. Ntiamoah, No. 1 CA-CR 17-0683, 2019 WL 1715865, at *2–3 (Ariz. Ct. App. Apr. 16, 2019) (considering Ntiamoah's age of fifteen years and education, but not considering the hallmarks of adolescent development and how they impact all other factors in the totality of the circumstances.); *In re Jeffery W.*, 2009 WL 2168689, at *3 (citing State v. Adams, 703 P.2d 510, 513 (Ariz. Ct. App. 1985) to hold that low intelligence alone is not sufficient to invalidate a waiver but not meaningfully considering the combination of Jeffrey's age and low intelligence); *Enos*, 2009 WL 44739, at *2, *5 (holding that an eighth-grade education did not invalidate a waiver by a seventeen-year-old who had prior experience with law enforcement and stated his understanding of the juvenile *Miranda* rights read to him).

90. No Arizona juvenile case in our research considers the impact of race on *Miranda* waiver. The court concluded that ethnicity did not have an impact in the case of two adults. State v. Rivera, 733 P.2d 1090, 1096 (Ariz. 1987) (noting that Rivera was from Mexico and concluding that even though he had no prior experience in the U.S. justice system, his waiver was valid); State v. Amaya-Ruiz, 800 P.2d 1260, 1274 (Ariz. 1990*)* (noting twenty-year-old Amaya-Ruiz's cultural background as an alien from El Salvador and finding that this did not invalidate his waiver).

91. *Carrillo*, 2016 WL 423788, at *2; State v. Dawkins, No. 2 CA-CR 2007-0212, 2009 WL 161873, at *10 (Ariz. Ct. App. Jan. 22, 2009) (finding Dawkins's waiver voluntary and not considering the coercive impact of police conduct through the eyes of sixteen-year-old Dawkins who had not slept in at least twenty-four hours).

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. *A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.* A mere warning given by the interrogators is not alone sufficient to accomplish that end.[92]

This is all the more true for youth of color.

II. THE INTERSECTION OF ADOLESCENCE AND RACE IN CUSTODIAL INTERROGATION

A. "Fright, Fantasy, or Despair": The Adolescent Brain Encounters Custodial Interrogation

The characteristics that define the developmental stage of adolescence render youth more vulnerable to the coercive and confusing nature of a custodial interrogation. Teenagers are more impulsive and emotional than adults.[93] They place a greater focus on short-term gains and often fail to appreciate long-term consequences.[94] Advances in science have not only confirmed what adults have always known to be true about teenagers. We now know how adolescence affects a young person's ability to think and control their emotions and what is realistic to expect of them as their brains continue to develop.[95]

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92. Miranda v. Arizona, 384 U.S. 436, 469–70 (1966) (emphasis added). The Court in *Miranda* clarifies that it is not requiring "a 'station house lawyer' present at all times to advise prisoners," but it also does not say this is a completely ridiculous idea either. The Court says "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." *Id.* at 474.

93. Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCH. 459, 482 (2009).

94. *Id.* at 469.

95. *Id.* at 481–82.

During adolescence, the brain's cognitive reasoning and emotional control centers develop at different rates.[96] The executive functioning of the brain, including the abilities to control inhibitions, weigh risks and rewards, and consciously control thoughts and make decisions to achieve a goal, develops slowly over a span of years.[97] Young adults are much more adept than younger teenagers at this type of complex processing and theoretical application of information to real life.[98] Meanwhile, the brain's emotion center, called the limbic system, becomes very active, very quickly during adolescence, before the cognitive control system can catch up.[99] This causes the teenage brain to place great focus on the immediacy of emotions.[100]

This uneven development of the brain's emotion center and its cognitive control system leads adolescents to be much more emotionally reactive and reward-seeking than adults.[101] Their brains encourage them to make decisions based on the urgency of emotions.[102] They are less able to make decisions supported by reason and long-term goals,[103] and they have a limited ability to control these impulses.[104] They also attach greater value to potential, even unlikely, immediate rewards.[105] As the brain grows into adulthood, the imbalance of these two areas of the brain is reduced, and the cognitive reasoning and emotional control centers reach full development, allowing the kind of measured decision-making of which adults are capable.[106] During adolescence, however, youth's brain development provides a very real impediment to their ability to make decisions based on logic and long-term goals, especially in situations that are inherently highly emotional, like custodial interrogations.[107]

1. Knowing and Intelligent

For a *Miranda* waiver to be "knowing," youth must understand their right to remain silent and their right to the assistance of counsel.[108] While this may seem relatively simple, it requires youth to engage the cognitive reasoning

96. *Id.* at 466.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 466, 468.
103. *Id.* at 466.
104. *Id.* at 469–70.
105. *Id.* at 469.
106. *Id.* at 467.
107. *Id.*
108. *See* Miranda v. Arizona, 384 U.S. 436, 469–71 (1966).

portions of their brain that are still developing, including their working memory, so they can consider all aspects of the *Miranda* warning and their knowledge of the court system, its processes, and the functions of judges, law enforcement, prosecutors, and defense attorneys.[109] Even simple vocabulary like the meaning of "interrogation" or "consult" that adults take for granted are misunderstood by youth.[110] Many youth do not know that their right to remain silent persists beyond the interrogation and mistakenly believe that they will eventually have to tell the judge everything anyway.[111] Youth deeply misunderstand the role of attorneys, often mistakenly believing that the lawyer will eventually have to tell the judge what they said or that the lawyer can only protect their rights if they are factually innocent.[112] These basic misunderstandings and knowledge gaps make it clear that courts cannot assume that a child actually understood their rights simply because they said they did.

Younger teenagers are even more at risk for invalid waiver based on a lack of basic understanding of the *Miranda* warnings.[113] Additionally, youth who have lower levels of intelligence are more likely to misunderstand *Miranda* warnings regardless of their age.[114] In studies of youth's comprehension of their *Miranda* rights, researchers found that the majority of youth aged fourteen and younger did not comprehend at least one of their *Miranda* rights.[115] Regardless of age, over half of youth with IQ scores at ninety or lower were not able to demonstrate adequate comprehension of their *Miranda* rights.[116]

For a *Miranda* waiver to be "intelligent," youth must then understand how those rights apply to their specific situation and appreciate the potential consequences of waiving those rights.[117] This requires teenagers to be able to think to the future—predicting what may happen if they choose to invoke their rights, and in the alternative, imagining the possible outcomes of

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109. Naomi E. S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of Miranda Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 24–25 (2018).

110. Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 366 (2003).

111. Allison D. Redlich et al., *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 BEHAV. SCIS. & L. 393, 403–04 (2003).

112. Goldstein et al., *supra* note 110, at 366.

113. Thomas Grisso et al., *Juveniles' Competence To Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356 (2003).

114. *Id.*

115. Thomas Grisso, *Juveniles' Capacities To Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1155 (1980).

116. *Id.*

117. Miranda v. Arizona, 384 U.S. 436, 469–71 (1966).

waiving their rights and speaking to the police. These predictions must include not only the immediate consequences of either decision but also the possible consequences for each stage of the case against them thereafter and the long-term impact this may have on their life. Police officers may even unintentionally convey by their tone or demeanor that the *Miranda* warnings are merely a formality, thereby making an intelligent waiver even more impossible for youth who are already struggling to understand the significance of their rights.[118] Youth have a much harder time than adults in appreciating the importance of their *Miranda* rights and the detrimental impact waiving them may have on their lives.[119]

Even older youth who have the cognitive capacity to understand the *Miranda* warnings and the possible impact of waiving them will likely have more difficulty than an adult in using this knowledge to make an "intelligent" waiver in the stressful and highly emotional setting of a custodial interrogation.[120] In these stressful situations, sometimes called "hot cognition" settings, the emotional centers of a child's brain are exceptionally activated, leading them to take risks, chase after short-term rewards, and make poorly reasoned decisions.[121] While youth may be able to recite their rights and explain possible outcomes later when they are no longer sitting across the table from a police officer who is accusing them of a crime, the stress of the interrogation and their misguided belief that they can end it quickly by being agreeable keep them from being able to apply their knowledge to make an intelligent waiver.[122]

2. Voluntary

For a *Miranda* waiver to be "voluntary," youth must be able to overcome the inherent coerciveness of the custodial interrogation context and make a decision that is not the product of an overborne will or "adolescent fantasy, fright[,] or despair."[123] Youth are generally more susceptible to even the

118. Goldstein et al., *supra* note 109, at 27.

119. Grisso et al., *supra* note 113, at 356–57.

120. Goldstein et al., *supra* note 109, at 26 (citing Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCH. 286, 295 (2006)).

121. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 455 (2013).

122. Goldstein et al., *supra* note 109, at 33.

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

inadvertent influence of peers and adults.[124] They are highly suggestible.[125] When interacting with adult authority figures, such as parents, teachers, and law enforcement, they are even more attuned to what they believe those authority figures desire.[126] They are much more likely than adults to make choices to please them, especially if they think it will diffuse a stressful situation or help them escape the consequences of some purported wrongdoing.[127]

Even adults feel pressured to consent to a police officer's requests.[128] Many people feel compelled to cooperate with police and tend to "interpret questions or suggestions as orders when they come from a person of authority."[129] Youth, who are socialized to comply with adult authority figures, are even more likely to interpret such comments as orders.[130] They are not only less cognitively able to understand and appreciate their rights, but they also have less knowledge, practice, and capacity to make decisions that require them to assert their own authority over police officers.[131] Youth acquire most of their knowledge of police from television, internet, and social media, which offer little reason to believe they can decline to speak to a police officer.[132] Young people who know their rights are still especially vulnerable to coercive circumstances and may crumble under pressures that adults would have been able to resist.[133]

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124. Steinberg, *supra* note 93, at 468, 476.

125. Fiona Jack et al., *Age-Related Differences in the Free-Recall Accounts of Child, Adolescent, and Adult Witnesses*, 28 APPLIED COGNITIVE PSYCH. 30, 31 (2014).

126. Steinberg, *supra* note 93, at 476.

127. *Id.*

128. Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1207–08 (2008) (discussing studies that suggest that the inherently coercive nature of a police–citizen encounter pressures the majority of adults to give in to demands by police).

129. Josephine Ross, *Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment*, 18 WASH. & LEE J.C.R. & SOC. JUST. 315, 332 (2012).

130. Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCH. REV. 53, 62 (2007) (citing Grisso et al., *supra* note 113, at 357) (explaining that youth tend to heed authority figures when making choices).

131. *See* Steinberg, *supra* note 93, at 475.

132. *See, e.g.*, Cristina Dacchille & Lisa Thurau, *Improving Police–Youth Interactions*, 15 CHILD.'S RTS. LITIG. 6, 10 (2013) (noting that youth are often confused in interactions with police because they learn incorrect information from television).

133. *See* J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go.").

B. Doubly Vulnerable: Youth of Color and the Inherently Coercive Custodial Interrogation

1. Race and Voluntariness

The race of a child will have as much impact on the voluntariness of their waiver as does their age. After the Supreme Court issued its opinion in *J.D.B.*, requiring that age be considered as part of the "reasonable person" standard in determining whether an interrogation was "custodial," scholars and advocates began to argue that race should also be included in the objective "reasonable person" standard.[134] These arguments assert that ignoring race in the reasonable person context "ignores the real world" and promotes "social inequities"[135] that reinforce prevailing racial biases within the criminal justice system. The same can be said for failing to account for the realities of race when evaluating the voluntariness of a child's *Miranda* waiver.

Tensions between the police and communities of color further complicate youth's ability to voluntarily waive their rights. Distrust, fear, and even hostility between police and youth of color exacerbate the psychological atmosphere that undermines the voluntariness of *Miranda* waivers. While there is no empirical research on the impact of race and adolescence on the voluntariness of *Miranda* waivers, commonsense conclusions can be drawn from existing available research on both race and adolescence.

Black and Latinx[136] youth's view of police is shaped by police-community relationships that have deep roots spanning decades, if not centuries, of violence perpetrated or endorsed by law enforcement. Police violence against Black people is threaded throughout American history—in slavery, Jim Crow, convict leasing, lynching, and mass incarceration.[137] Latinx people have experienced other types of police torture including police-condoned mob violence in the early twentieth century and over-policing and police brutality from the modern era of policing through today.[138] While Arizona has made strides in reducing the impact on youth of color in its juvenile

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134. *See, e.g.*, Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513, 1514 (2018); Christy E. Lopez, *The Reasonable Latinx: A Response to Professor Henning's* The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment, 68 AM. U. L. REV. F. 55, 56 (2019).

135. Henning, *supra* note 134, at 1529 (citing Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 73 (2007)).

136. Throughout this article, we use the word "Latinx" to describe a person of Latin American origin or descent in a gender-neutral or non-binary way unless a particular study or data source uses the term "Hispanic" or "Latino."

137. Henning, *supra* note 134, at 1530.

138. Lopez, *supra* note 134, at 79–80.

justice system, Black youth are detained at two to five times the rate of White youth.[139] Black and Latinx youth in Arizona are disproportionately transferred to adult court.[140]

On social media and in the news, youth of color experience vicarious trauma from the persistent national coverage of the epidemic of police brutality and killings of people who look like them.[141] Youth of color in Arizona are no exception. In 2018, Phoenix had forty-four police shootings, twenty-two of which were fatal.[142] This is more than any other police department in the United States with Los Angeles and New York following behind with thirty-three and twenty-three police shootings, respectively.[143] Sixty-eight percent of the Phoenix police shootings from 2010 to 2019 happened in neighborhoods where the majority of residents are people of color, and the median family income is approximately $26,000.[144] Fifty-five percent were in neighborhoods where Hispanic people make up more than half of the residents.[145] While teenagers may not make up the majority of people shot or killed by police, they are certainly not immune.[146] A Tempe

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139. *United States of Disparities*, THE W. HAYWOOD BURNS INST., https://usdata.burnsinstitute.org/decision-points/3/arizona#comparison=2&placement=1&races=2,3,4,5,6&offenses=5,2,8,1,9,11,10&odc=0&dmp=1&dmp-comparison=2&dmp-decisions=10&dmp-county=-1&dmp-races=1,2,3,4,7,5,6&dmp-year=2012 [https://perma.cc/DN96-J29A].

140. *Id.*

141. Brendesha M. Tynes et al., *Race-Related Traumatic Events Online and Mental Health Among Adolescents of Color*, 65 J. ADOLESCENT HEALTH 371, 375 (2019); Sirry Alang et al., *Police Brutality and Black Health: Setting the Agenda for Public Health Scholars*, 107 AM. J. PUB. HEALTH 662, 663 (2017) (explaining that witnessing or experiencing police brutality can be a stressor that can have a negative impact on mental and physical health); *see, e.g.*, Kenya Downs, *When Black Death Goes Viral, It Can Trigger PTSD-Like Trauma*, PBS NEWS HOUR (July 22, 2016, 8:04 PM), http://www.pbs.org/newshour/rundown/black-pain-gone-viral-racism-graphic-videos-can-create-ptsd-like-trauma [https://perma.cc/L3LY-435S] (citing research suggesting that "for people of color, frequent exposure to the shootings of Black people can have long-term mental health effects").

142. Bree Burkitt & Uriel J. Garcia, *Phoenix Police Shot at More People than NYPD Did in 2018. Will That Change?*, AZCENTRAL (Jan. 30, 2020, 6:57 PM), https://www.azcentral.com/in-depth/news/local/arizona-investigations/2019/06/20/phoenix-police-shootings-outpace-other-major-us-cities/3651151002/ [https://perma.cc/ZX7B-3L3E].

143. *Id.*

144. *Id.*

145. *Id.*

146. Bree Burkitt, *14-Year-Old Tempe Police Shooting Victim Youngest in Nearly a Decade*, AZCENTRAL (Jan. 20, 2019, 6:59 PM), https://www.azcentral.com/story/news/local/tempe/2019/01/18/tempe-police-14-year-old-shooting-victim-youngest-nine-years-antonio-arce/2607043002/ [https://perma.cc/FR6P-JQHY] (stating twenty-two of the 405 police shootings (5.4%) from 2011 to 2018 involved youth ages fifteen to nineteen); Dani Coble, *All 4 Police Shootings in Maricopa County in 2019 Have*

police officer shot and killed fourteen-year-old Antonio Arce while he was running away.[147] He was later found to be carrying a non-lethal toy airsoft gun.[148]

Youth's view of law enforcement is shaped from a young age as they learn of or see firsthand the experiences of their friends and family members, especially those who have been verbally or physically assaulted by police.[149] In September 2019, 77% of people Phoenix police held at gunpoint were people of color.[150] Of the 1,300 people who had an officer point a gun at them from September 1 to November 30 of that year, the majority were people of color.[151] Black people experienced the most significant disparity with 24% of those instances involving Black people, while only approximately 7% of Phoenix's population was Black.[152] Phoenix Police Chief Jeri Williams acknowledged that "when a gun is pointed [at] someone, that's a traumatic event."[153] The impact on Phoenix's young people is clear. A citizen member of the Phoenix mayor's ad-hoc committee for policing spoke out on behalf of Black youth, saying "[o]ur children should not have to carry someone else's bias. They have to behave a certain way because you're fearful of them."[154]

Researchers found that Black men are significantly more likely than White men to anticipate feeling anxious in police encounters and fear that they will

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Involved Teens, AZCENTRAL (Jan. 17, 2019, 1:39 PM), https://www.azcentral.com/story/news/local/phoenix/2019/01/16/4-police-shootings-maricopa-county-date-have-involved-teens/2598698002/ [https://perma.cc/NF6F-89PF].

147. Bree Burkitt, *No Charges for Tempe Police Officer Who Shot and Killed 14-Year-Old Antonio Arce*, AZCENTRAL (Jan. 31, 2020, 5:17 PM), https://www.azcentral.com/story/news/local/tempe/2020/01/31/criminal-charges-tempe-police-officer-joseph-jaen-who-fatally-shot-14-year-old-antonio-arce/3887747002/ [https://perma.cc/BUP9-9FFQ].

148. *Id.*

149. *See* Yolander G. Hurst et al., *The Attitudes of Juveniles Toward the Police: A Comparison of Black and White Youth*, 23 POLICING 37, 49 (2000) (discussing that Black youth are more likely than White youth to have family members who have been verbally or physically abused by police); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435, 450 (2002) (stating the same).

150. Melissa Blasius, *Phoenix Police Point Guns at People 10 Times a Day*, ABC 15 (Jan. 10, 2020, 10:50 AM), https://www.abc15.com/news/local-news/investigations/phoenix-police-point-guns-at-people-10-times-a-day [https://perma.cc/49TD-DXDW].

151. *Id.*

152. Melissa Blasius, *Data Shows Phoenix Police Pulled, Pointed Guns at 450 People in One Month*, ABC 15 (Dec. 18, 2019, 11:05 AM), https://www.abc15.com/news/local-news/investigations/data-shows-phoenix-police-pulled-pointed-guns-at-450-people-in-one-month [https://perma.cc/B6B9-W3WK].

153. *Id.* (quoting Phoenix Police Chief Jeri Williams).

154. *Id.* (quoting Janelle Wood).

be perceived as guilty when they are actually innocent.[155] They are more likely to engage in self-regulatory efforts (such as making eye contact and hyper-awareness of their body language and word choice) to try to counteract police stereotypes about their guilt.[156] This remained true even when all study participants were instructed to imagine the same kind of police encounter in terms of how likely it would be for a police officer to confront them or view them as suspects.[157] Ironically, these self-regulatory efforts are interpreted as suspicious by police.[158] This phenomenon is called "stereotype threat" by researchers.[159] The anxiety, fear, and self-regulatory efforts are mentally taxing, reducing cognitive capacity and the ability to think clearly.[160] This creates an additional impediment for youth of color to understand their *Miranda* rights and make a knowing, intelligent, and voluntary waiver.

Youth of color may have their own first negative experience with police while they are at school. Even when School Resource Officer programs are intended to improve youth-police relations, youth feel criminalized by officers who patrol their schools with guns, Tasers, and military gear.[161] Youth of color who experience policing as aggressive, unnecessary, and discriminatory are more likely to fear and resent law enforcement.[162]

Outside the school walls, youth of color experience hostile treatment by police in on-the-street encounters.[163] The Supreme Court in *Terry v. Ohio*

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155. Cynthia J. Najdowski, Bette L. Bottoms & Phillip Atiba Goff, *Stereotype Threat and Racial Differences in Citizens' Experiences of Police Encounters*, 39 LAW & HUM. BEHAV. 463, 464 (2015); *see also* Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCH. PUB. POL'Y & L. 562, 566–67 (2011).

156. Najdowski et al., *supra* note 155, at 464; *see also* Najdowski, *supra* note 155, at 569–576.

157. Najdowski et al., *supra* note 155, at 465–68.

158. *Id.* at 464; *see also* Najdowski, *supra* note 155, at 569.

159. Najdowski et al., *supra* note 155, at 463–64; *see also* Najdowski, *supra* note 155, at 569.

160. Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision To Confess*, 18 PSYCH. PUB. POL'Y & L. 673, 689–90 (2012).

161. *See* ADVANCEMENT PROJECT & THE ALL. FOR EDUC. JUST., WE CAME TO LEARN 31–32, 78 (2018), http://advancementproject.org/wp-content/uploads/WCTLweb/docs/We-Came-to-Learn-9-13-18.pdf [https://perma.cc/4QYV-6S3G]; Brad A. Myrstol, *Public Perceptions of School Resource Officer (SRO) Programs*, 12 W. CRIMINOLOGY REV. 20, 21, 35 (2011); Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009); *Police in Schools: Arresting Developments*, ECONOMIST (Jan. 9, 2016), http://www.economist.com/news/united-states/21685204-minorities-bear-brunt-aggressive-police-tactics-school-corridors-too-many [https://perma.cc/8YGC-EZC2].

162. Kristin Henning, *Boys to Men: The Role of Policing in the Socialization of Black Boys*, *in* POLICING THE BLACK MAN 57, 68 (Angela J. Davis ed., 2017).

163. *Id.* at 68–69.

conceded that there is a tenuous relationship between police and youth and minorities in a footnote:

> [T]he frequency with which 'frisking' forms a part of field interrogation practice . . . cannot help but be a severely exacerbating factor in police-community tensions[,] . . . particularly . . . in situations where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer . . . .[164]

Black youth are repeatedly exposed to videos of "stop and frisks" that escalate to violent beatings or deadly shootings of Black boys and girls.[165] When they are stopped by police, youth of color experience emotional distress during the stop and later experience post-traumatic stress symptoms, such as a pounding heart and trouble breathing.[166] In reflecting on their personal encounters, Black youth describe police as mean, disrespectful, and antagonistic and report that police officers use inflammatory language like racial slurs, profanity, and demeaning names.[167]

Fearing for the safety of their children and teens, families teach Black youth to show the police deference and respect, keep their hands visible in all police encounters, and avoid sudden movements when they are stopped.[168] While these measures are intended to keep children safe, they also reflect long-held fears and resentments of the police within the Black community and condition Black youth to comply with police authority. Latinx

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164. 392 U.S. 1, 14 n.11 (1968) (quoting THE PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE (1967)).

165. Tynes et al., *supra* note 141, at 375–76; Alang et al., *supra* note 141, at 663.

166. Dylan B. Jackson et al., *Police Stops Among At-Risk Youth: Repercussions for Mental Health*, 65 J. ADOLESCENT HEALTH 627, 628 (2019) [hereinafter Jackson et al., *Police Stops*]; *see also* Juan Del Toro et al., *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS 8261 (2019); Dylan B. Jackson et al., *Low Self-Control and the Adolescent Police Stop: Intrusiveness, Emotional Response, and Psychological Well-Being*, 66 J. CRIM. JUST. 1, 5 (2020) [hereinafter Jackson et al., *Low Self-Control*]; Dylan B. Jackson et al., *Police Stops and Sleep Behaviors Among At-Risk Youth*, 6 SLEEP HEALTH 435 (2020).

167. *See* Rod K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20 GENDER & SOC'Y 531, 541, 548–49 (2006).

168. *See* Ulysses Burley III, *Dear Son, a Letter to My Unborn [Black] Son*, SALT COLLECTIVE, http://thesaltcollective.org/letter-unbornblack-son [https://perma.cc/35WU-92ZV]; Celia K. Dale, Opinion, *A Black Mother's Painful Letter to Her 8-Year-Old Son: How To Behave in a World that Will Hate and Fear You*, ATLANTA BLACK STAR (Nov. 26, 2014), http://atlantablackstar.com/2014/11/26/letter-son [https://perma.cc/9HST-SYGJ]; Geeta Gandbhir & Blair Foster, Opinion, *A Conversation With My Black Son*, N.Y. TIMES (Mar. 17, 2015), http://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html [https://perma.cc/5NXV-UBH6]; *see also* Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819, 833 (1999).

communities also teach their youth to fear law enforcement and prioritize their own safety by being compliant with police demands.[169]

While there is not the same level of data available concerning the policing of Latinx people,[170] the data that is available shows that Latinx people are also over-policed, more likely than White people to experience police abuse,[171] and more likely to be incarcerated, even when comparing property or drug crimes.[172] Latinx people are subjected to police use of force at more than twice the rates of White people and are searched at higher rates as well.[173]

Deportation and immigration enforcement add another layer of complexity to the fear Latinx children have of police. While an adult may be able to distinguish between federal immigration law enforcement and local police or sheriffs, teenagers and younger children easily conflate the two.[174] This conflation has become more salient in recent years as federal authorities have deputized local law enforcement to assist in efforts to investigate and detain people in furtherance of immigration enforcement.[175] Local law enforcement and the local criminal justice system are often the first step in the immigration detention and deportation process.[176] This collaboration

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169. *See* Melissa Block & Michel Martin, *'The Talk:' How Parents of All Backgrounds Tell Kids About the Police*, NPR (Sept. 5, 2014, 4:08 PM), https://www.npr.org/2014/09/05/346137530/the-talk-how-parents-of-all-backgrounds-tell-kids-about-the-police [https://perma.cc/75X4-Z8BU] (noting that Latinx parents teach their children to be prepared for police bias).

170. *See* Lopez, *supra* note 134, at 66 (citing Sarah Eppler-Epstein, *We Don't Know How Many Latinos Are Affected by the Criminal Justice System*, URB. INST. (Oct. 16. 2016) https://www.urban.org/urban-wire/we-dont-know-how-many-latinos-are-affected-criminal-justice-system [https://perma.cc/2NH5-XSKL]) (finding that fewer than 30% of states publicly report a "Hispanic" or "Latino" category for arrest statistics and only about 20% publish the data); *id.* at 67–68 (explaining that Latinx people may identify as Latinx and White or Black, indigenous, or people of color, and that while the needed data on the policing of Latinx youth could be collected and reported, even with this complexity, it has not been in the majority of states with any regularity).

171. *See, e.g.*, Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Just., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/SS3S-LKP3].

172. Lopez, *supra* note 134, at 73 n.69 (citing data showing that Latinx are imprisoned at 1.4 times the rate of Whites, and Latinx are more likely to be imprisoned for both property and drug crimes than Whites).

173. Lopez, *supra* note 134, at 73.

174. *Id.* at 76 n.80 (describing how school-aged children connect experiences of immigration enforcement with policing).

175. *See id.* at 75–76.

176. The U.S. Immigration and Customs Enforcement (ICE) 287(g) Program, authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 287(g), partners with

between local law enforcement and federal immigration authorities has caused Latinx people to feel they are under greater suspicion than before.[177] Even U.S.-born Latinx people feel this way.[178] Their fears are logical, especially given the Supreme Court's holding that it is lawful for Latinx people to be explicitly profiled by law enforcement in certain circumstances for the purposes of immigration enforcement.[179]

In Arizona, those fears became reality when Maricopa County Sheriff Joe Arpaio made a name for himself through his unabashed discrimination against Latinx people and the harsh criminal justice policies he implemented, including resurrecting the juvenile "chain gang."[180] A 2011 Department of Justice investigation covering Sheriff Arpaio's rampant and intentional discrimination against Latinx people found that it "flow[ed] directly from a culture of bias" in his department.[181] A leading expert on measuring racial profiling, who conducted a statistical analysis of traffic stops by Arpaio's deputies, concluded that it was the "most egregious racial profiling in the United States that he ha[d] ever personally seen in the course of his work, observed in litigation, or reviewed in professional literature."[182] Arpaio lost his 2016 bid for reelection and was found guilty of criminal contempt by a federal judge in 2017 for refusing to follow a court order requiring him to stop his illegal detention practices that were discriminatory against Latinx people.[183]

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state and local law enforcement agencies to enforce federal immigration policy. *See Delegation of Immigration Authority § 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/287g [https://perma.cc/6W3A-NYBN] (listing six Arizona state and local law enforcement Memoranda of Agreement).

177. *See* Lopez, *supra* note 134, at 76 (citing NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT 12 (2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [https://perma.cc/D7TJ-VYYX]).

178. *See id.*

179. United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

180. *See* Lopez, *supra* note 134, at 87 (describing Arpaio's dehumanizing rhetoric and embrace of racism); Randy James, *Sheriff Joe Arpaio*, TIME (Oct. 13, 2009), http://content.time.com/time/nation/article/0,8599,1929920,00.html [https://perma.cc/F642-FUFP] (describing juvenile chain gang).

181. Letter from Thomas E. Perez to Bill Montgomery, s*upra* note 171, at 6, 17–18 (describing intentionality in discriminatory practice in immigration-focused policing and jail practices).

182. *Id.* at 6.

183. Colin Dwyer, *Ex-Sherriff Joe Arpaio Convicted of Criminal Contempt*, NPR: THE TWO-WAY (July 31, 2017, 4:08 PM), https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt [https://perma.cc/9B7Q-XXXJ].

President Trump, also notorious for dehumanizing rhetoric aimed at Latinx people,[184] pardoned Arpaio and spared him from serving any jail time.[185] In 2018, the year after the pardon and two years into Trump's presidency, the Phoenix Police Department saw a 110% increase in police shootings of civilians compared to the year before, as described above.[186] Crime did not rise in Phoenix during this time, and the increase in police shootings of Latinx people is closely correlated with anti-Latinx rhetoric and policies at the national level.[187] The Phoenix Police Department contracted with the National Foundation of Police to study this increase in shootings.[188] While they were unable to find a root cause, they cited tense community relations as a possible reason.[189]

The vicious combination of rhetoric, persistent police violence, tense police-community relations, youth's own personal experiences with police, and the developmental features of adolescence make youth of color particularly vulnerable to the coercive pressure of police interrogation.[190] Arizona's Black and Latinx youth are even less likely than White youth to be able to make a free and voluntary choice regarding *Miranda* waivers. Youth's immature cognitive abilities make them much more likely to focus on the short-term impact of a decision and overestimate what they perceive to be the likely immediate reward.[191] This leads many youth to place great emphasis on their desire to end the interaction with police as quickly as possible while failing to see or appreciate the possible long-term consequences of waiving

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184. *See* Lopez, *supra* note 134, at 84 (describing Trump's rhetoric and contributions to the current anti-Latinx climate).

185. Kevin Liptak et al., *Trump Pardons Former Sheriff Joe Arpaio*, CNN, https://www.cnn.com/2017/08/25/politics/sheriff-joe-arpaio-donald-trump-pardon/index.html [https://perma.cc/FN6R-MJWW] (Aug. 27, 2017, 2:32 AM).

186. Lopez, *supra* note 134, at 88; Megan Cassidy, *When Is a Police Shooting Most Likely To Happen? Republic Analysis Reveals Surprising Pattern*, AZCENTRAL (Jan. 17, 2017, 5:54 PM), https://www.azcentral.com/story/news/local/phoenix/2017/01/11/2016-officer-involved-shootings-maricopa-county-police-phoenix/96270780/ [https://perma.cc/9WDQ-Z246].

187. Lopez, *supra* note 134, at 88.

188. JEFF ROJEK ET AL., NAT'L POLICE FOUND., ANALYSIS OF 2018 USE OF DEADLY FORCE BY THE PHOENIX POLICE DEPARTMENT 2 (2019), https://www.policefoundation.org/publication/analysis-of-2018-use-of-deadly-force-by-the-phoenix-police-department/ [https://perma.cc/4XBP-KUKV].

189. Bree Burkitt & Uriel J. Garcia, *$150,000 Study of 2018 Phoenix Police Shootings Offers No Clear Answers*, AZCENTRAL (Apr. 19, 2019, 7:15 PM), https://www.azcentral.com/story/news/local/phoenix-breaking/2019/04/19/phoenix-police-release-study-2018-record-breaking-police-shootings/3520041002/ [https://perma.cc/GB6B-5YC6].

190. *See* Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1, 5 (2014) (discussing the psychology of coercion and its application to police encounters with children).

191. Steinberg, *supra* note 93, at 482.

their rights.[192] Youth of color are likely to focus on their immediate concern for their physical safety. Black and Latinx youth have the added complication of fear, anxiety, and parental instructions to comply with police to stay alive. They are even more vulnerable than White youth or adults to the blatant and subtle characteristics of the interrogation environment that can coerce consent.

2. Implicit Racial Bias and Evaluation of Knowing and Intelligent Waiver

A child's race exposes them to additional stereotypes and judgments, which can directly influence the way system actors treat them. Implicit bias affects decision-making at all phases of the criminal justice system.[193] Cognitive science has found that all people use cognitive shortcuts when their brains must quickly process large amounts of new information, make sense of other people's actions, and seek to reduce stress.[194] Implicit racial bias occurs when these cognitive shortcuts involve race.[195] They include both unconscious beliefs about people of a certain race, called stereotypes, as well as attitudes and feelings, either positive or negative, about groups.[196] Because we are generally not aware of our own implicit racial biases, we often act on

192. *See* Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 35–36, 39 (2009) (measuring young people's capacities to plan ahead and anticipate consequences); Brief for the Am. Med. Ass'n & the Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae Supporting Neither Party, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237, at *14–36 (describing studies that found that adolescent brains have a hyperactive reward-drive system that results in impulsive behavior); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812 (2005) (noting the development of the prefrontal cortex continues through adolescence).

193. Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 653–57 (2017) (summarizing studies showing evidence of implicit racial bias in the criminal and juvenile justice systems).

194. Henning, *supra* note 134, at 1543 (citing Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 984–85 (1999)) (concluding categorization of information provides benefits for human organization); *see also* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 877 (2004) (explaining that these associations help differentiate between important and non-important information); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293, 297 (2012) (noting that while cognitive shortcuts allow humans to make sense of the world around them, these shortcuts may lead to errors in judgement)).

195. Thompson, *supra* note 194, at 984–86; Eberhardt et al., *supra* note 194, at 883.

196. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630 (2013).

them reflexively or subconsciously.[197] They are built from exposure to the cultural stereotypes that permeate our society, including those that associate crime and race.[198] Studies show that people of all races, ages, and occupations have implicit racial biases, including those who explicitly reject racism and affirm egalitarian values.[199]

Implicit bias has a profound effect on how police perceive and engage with youth. Researchers have found that police officers perceive Black and Latinx youth to be older and more culpable than their same-aged White peers.[200] In one study, the researchers showed police officers photos of White, Black, and Latino boys, told them that the pictured youth were accused of either a misdemeanor or a felony, and asked them to estimate the child's age.[201] Police officers overestimated by almost five years the age of Black youth accused of a felony and Latinx youth by over two years, while simultaneously underestimating the age of similarly accused White youth by one year.[202] This means that police officers are likely to perceive Black youth as legal adults when they are merely thirteen years old. Black youth and Latinx youth were both perceived as being more culpable than White youth, with Black youth experiencing the most significant difference in perceived culpability based on race.[203]

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197. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1143 (2000); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 956 (2004); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 759 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2043 (2011).

198. Richardson & Goff, *supra* note 196, at 2630; *see also* Justin D. Levinson et al., *Implicit Racial Bias: A Social Science Overview*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 9, 10–12 (Justin D. Levinson & Robert J. Smith eds., 2012) (explaining that events can trigger unconscious behavior); CHERYL STAATS, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 36–45 (2013), http://www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf [https://perma.cc/YUB3-GYF3] (discussing studies that measure the association between race and criminality in the criminal justice context).

199. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1539–40 (2004); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (explaining that even people who "embrace nondiscrimination norms" may still "hold implicit biases that might lead them to treat black Americans in discriminatory ways"); Richardson, *supra* note 197, at 2039 (noting that individuals of all races have implicit biases); *see also* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006) (discussing studies, including those in which test subjects have been African American and Latino and reject racism but still display implicit bias).

200. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 530, 534 (2014).

201. *Id.* at 533.

202. *Id.* at 533–34.

203. *Id.* at 534.

Another study surveyed over 325 adults from across the United States and found that adults perceive Black girls as less innocent and more like adults than their White peers.[204] This discrepancy in perception begins as early as age five and is most significant in mid-childhood and early adolescence.[205] After age fifteen, adults still view Black girls as older and more adult-like, but the gap between their views of Black and White girls begins to diminish.[206] Adults believe Black girls know more about adult topics, are more independent, and need less nurturing, protection, support, and comfort.[207]

These studies have important application to the *Miranda* waiver context.[208] When officers perceive youth of color as older and guiltier, they may be more likely to assume those youth are familiar with the *Miranda* rights. This assumption would then impact the care and precision with which the officer read the rights, whether they added any additional explanation, if that additional explanation tended to minimize the importance of the rights, and whether they asked if the youth had any questions. If the officer perceives the child as more culpable, they may be subconsciously more motivated to secure a *Miranda* waiver from that child. Even when an officer knows a child's age before administering *Miranda*, implicit racial bias may still cause the officer to think of the child as older, guiltier, and more experienced even after they are told the child's real age.

The same researchers who did the study on police officers discussed above did a similar study with similar results using college students instead of police.[209] This demonstrates that members of the general public, including judges and lawyers, are also susceptible to this implicit racial bias. Judges may be more likely to assume that a Black or Latinx child's *Miranda* waiver is knowing, intelligent, and voluntary because they perceive them to be more adult-like and thus more capable of overcoming the "inherently coercive" interrogation environment.[210] When judges subconsciously perceive youth of color as adults, they believe youth of color have adult-like abilities to exert

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204. REBECCA EPSTEIN ET AL., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 7–8 (2017).

205. *Id.* at 8.

206. *Id.* at 7–8.

207. *Id.* at 8.

208. The few studies that have examined the potential impact of race on youth's actual understanding and appreciation of *Miranda* rights have found no "generalized racial or ethnic differences." ALAN M. GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS 69 (2010) (citing Goldstein et al., *supra* note 110, at 359–69); THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS (1981).

209. Goff et al., *supra* note 200, at 529.

210. Moran v. Burbine, 475 U.S. 412, 426 (1986).

their own free will and make an uncomplicated *Miranda* waiver, when in reality, youth of color experience the same developmental challenges to understanding and asserting their rights as White youth.[211] Their perception of a Black or Latinx child as more culpable may make them subconsciously more willing to find the waiver valid whereas their belief in the innocence of a White child may make them hesitate and spend more time scrutinizing the totality of the circumstances and give greater weight to factors, such as immaturity, in determining that a waiver was invalid.

While there are fewer empirical research studies that look at the impact of implicit racial bias on Latinx people, it is likely that similar implicit biases impact police's, judges', and attorneys' perceptions of Latinx youth. Implicit bias is built by repeated exposure to stereotypes in the media.[212] Like Black people, Latinx people have been portrayed as criminal, anti-American, gang members, and called "rapists" and other dehumanizing terms by political leaders including the President of the United States.[213] These stereotypes have surged in the media since 2016 as President Trump sought to use violent rhetoric to advance his immigration policies.[214] Latinx Americans may experience varying levels of implicit racial bias based on their skin tone or where they live, but it is undeniable that Americans are regularly exposed to a variety of Latinx stereotypes that can lead to implicit racial bias.

3. Race and Age Frame the *Miranda* Waiver Analysis

Although we know much about the way age and race impact a child's waiver of their *Miranda* rights, Arizona courts fail to adequately apply this knowledge to the totality of the circumstances test for *Miranda* waivers. In order to meaningfully account for the impact of race, as well as adolescence, courts should use race and age as a lens to view all factors in their *Miranda* waiver analysis. Courts should make written findings analyzing the validity of *Miranda* waivers, explicitly examining the impact of age and race. The burden is already on the State to prove by a preponderance of the evidence a child's waiver was knowing, intelligent, and voluntary.[215] In making this determination, courts must ascertain what the child actually understood and

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211. EPSTEIN ET AL., *supra* 204, at 7–8.

212. RACHEL D. GODSIL ET AL., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTH CARE 22 (2014) ("Regular exposure to [racial stereotypes] in the media can result in inaccurate and hostile associations toward people who fit into those social categories.").

213. Lopez, *supra* note 134, at 78–79.

214. *Id.* at 79.

215. *Moran*, 475 U.S. at 426.

carefully consider characteristics that make them more vulnerable to police tactics.[216] Merely considering race and age as individual factors in the totality of the circumstances is not enough, as it obscures their true, pervasive impact on all other factors in a child's *Miranda* waiver.

When evaluating whether a waiver was knowing and intelligent, courts cannot merely rely on a child's declaration to police officers that they understand their rights and the consequences of waiving them. Instead of only citing a child's age, along with their level of education and the fact that a police officer read the *Miranda* warnings out loud at a reasonable speed, courts should consider the impact of adolescent brain development on the child's ability to appreciate the full meaning of the rights and the gravity of waiving them. The court should determine whether the police spoke with the child in age-appropriate language, allowed the youth to ask questions, and took adequate time with the child. The court should review any evidence that the youth has learning disabilities or other impairments that make it difficult for them to comprehend and appreciate what is being said to them. Facial expressions and other physical signs of hesitation, confusion, and distress may indicate that a child did not fully understand the conversation. Even if evidence suggests that a child was previously exposed to *Miranda* warnings, the court must determine whether the child truly understood how their right to an attorney or right to counsel did or could have benefited them in that previous encounter with the police. An adolescent's previous exposures to *Miranda* warnings may have served to simply confirm their false belief about the meaning and cannot be relied upon to show true understanding. The court should also consider how the youth's preference for short-term rewards may override a reasoned consideration of their rights. Although youth may be told an attorney will be provided for them, the adolescent brain overvalues immediate rewards and may lead youth to think it would be better to speak with the officer right away rather than wait days to meet with an attorney. A waiver fueled by this false sense of urgency characteristic to adolescence is not "intelligent."

In evaluating voluntariness, courts must consider how a young person with their current developmental stage and cognitive limitations would experience the combination of potentially coercive factors. Virtually every factor related to voluntariness is impacted by age—the time and length of the interrogation, the presence of one or more uniformed officers, use of restraints, prior history with the police, and interrogation in narrowly confined space. If a lengthy late-night interrogation by the police is difficult for an adult, it is even more so for a child. The amount of time spent in police custody must be considered

216. Fare v. Michael C., 442 U.S. 707, 724–26 (1979).

through the lens of a child who often perceives time to be longer than adults and who is only able to focus for shorter amounts of time.[217] Physical conditions like hunger or tiredness also impact children differently than adults, increasing youth's motivation to comply with the officer's request in hopes that they can more quickly eat or sleep. The presence of multiple officers, especially if armed, will be more intimidating to youth than adults, adding to their fears that they could become the victim of force by officers who outsize them and that no one will believe their account of what happened. A child's prior contact with police is not likely to provide any meaningful buffer to an officer's coercive tactics in a subsequent arrest. In fact, the child's repeated contact with the police—especially if perceived to be unfair—may convince the child that any attempt to assert their rights is futile.

Race should also be applied as a lens to view all the factors contributing to the involuntariness of a *Miranda* waiver. Courts should evaluate the potential impact of implicit racial bias on the police officer's delivery of *Miranda* warnings and whether the child made a knowing and intelligent waiver. The judge's own implicit racial bias can also lead them to take less care in considering the immaturity of a child of color and lead them to incorrectly believe that the child was experienced enough to have fully comprehended their rights and waiver.[218] Courts must also consider how race impacts the child's perception of interrogation contexts. Unless race is considered explicitly, Whiteness becomes the default, and the interrogation context will be evaluated from the lens of a White youth. The court must acknowledge that Black youth will perceive and experience police encounters—including the police interrogation—as significantly more coercive than White youth. The history of race relations in America creates additional hurdles for a Black youth to overcome when seeking to exercise their free will during interrogation. Failing to account for those hurdles is not ignoring race but is instead merely considering only Whiteness and applying a standard of Whiteness to all youth.

It's not enough to simply note the child's race, and then consider other factors separately. As is true with age, each factor in the totality of the

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217. *See* Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y. REV. 1, 20–21 (2013) (noting that youth are especially vulnerable to making false confessions during lengthy interrogations).

218. Judges, along with police officers and attorneys, must be explicit in acknowledging their own vulnerability to implicit racial bias and actively take steps to counteract it to ensure fairness as they make decisions about youth's *Miranda* waivers. Several strategies can aid judges and other system actors who wish to overcome their own implicit racial bias, including individuation and counter-stereotypic imaging. *See* Henning, *supra* note 193, at 682–86 (discussing impact of implicit bias on defense attorneys and research on overcoming bias).

circumstances test must be looked at through the lens of the child's race. What is intimidating and coercive to a youth of color may very well not be to a White adult. Youth of color who have grown up with a fear of police are often paralyzed by the presence of multiple officers, in uniform, carrying guns. Some youth will have been traumatized on the street by the officer's aggressive tone or intrusive touch in stop-and-frisk before the interrogation even begins.[219] A Black or Latinx child may fear they are being racially profiled, especially if the interrogating officer uses language like "thug" or "gangbanger." Courts should consider that this fear, called "stereotype threat" by researchers, will cause additional stress for youth of color and negatively impact their ability to think clearly as they make a decision about waiving their rights. Youth of color will also experience their interrogator's body language differently than White youth. When the officer reaches down to touch the weapon at his waist or leans forward toward the child, youth of color may fear for their physical safety and become more compliant in an effort to fend off anticipated violence. These factors cannot be considered individually but must be looked at comprehensively and in intersection with each other. The age and race of the child impact every other factor considered in the totality of the circumstances test.

III. PREVENTING THE HARMS OF POLICE COERCION BY ENSURING ACCESS TO COUNSEL FOR YOUTH

Courts are the last line of defense in protecting youth against coercive interrogations, but attorneys should be the first. Although Arizona law and the U.S. Supreme Court have made clear that all people may invoke their right to counsel prior to custodial interrogation, youth are not able to meaningfully access this right. Children are not able to consult with an attorney before they have to decide whether to waive their rights unless they hire one. Very few parents will be able to assist their child with hiring counsel, even if they are aware of the child's need. There is still no access for children whose parents refuse to help, cannot help because they do not understand the law, are conflicted by their own involvement in their child's alleged criminal behavior, or for the many children whose parents cannot afford an attorney.[220] Early access to counsel reduces the instance of waiver

219. *See* Jackson et al., *Police Stops*, *supra* note 166, at 629; *see also* Del Toro et al., *supra* note 166, at 8266–67; Jackson et al., *Low Self-Control, supra* note 166, at 3–4.

220. Delays in the appointment of counsel contribute to youth waiving additional important rights. An estimated 20% of children in one Arizona jurisdiction entered guilty pleas at their first appearance before a judge, called the advisory hearing, without ever having spoken to counsel.

and ensures that children fully understand their rights, the process, and future possible outcomes of their decisions.[221] There is simply no substitute for access to counsel at interrogation. While including youth and race as lenses in the *Miranda* waiver analysis provides a remedy after a youth's rights have been violated, we can spare youth the trauma of police coercion and increase the trust youth and their families have in the legal system by providing them with access to attorneys before they waive their important rights.

A. Adopting a New Policy: Access to Counsel Prior to Interrogation for All Arizona Youth

While there is no available data on the instance of custodial interrogation in Arizona, the National Juvenile Defender Center's investigation into access to counsel for youth found that no Arizona jurisdiction provided counsel at interrogation.[222] The Assessment also found that there were few trials in Arizona and reported that a probation officer speculated this was because "kids confess more than adults."[223] The absence of counsel at interrogation, along with lack of motions filed challenging the validity of *Miranda* waivers, is a cause of the low number of trials.[224]

After its investigation, the National Juvenile Defender Center recommended that the Arizona legislature require the automatic appointment of a qualified juvenile defender for every child prior to any interrogation or interviews by law enforcement.[225] Per their recommendation, the waiver of the right to counsel should be considered invalid unless it happens in open court after counsel has had the opportunity to advise the youth of the consequences of waiving the right.[226] The court should be required to put in writing the evidence upon which it relied in finding that the waiver was knowing, intelligent, and voluntary.[227]

The legislature should adopt a law that ensures youth have meaningful access to counsel before waiving their *Miranda* rights. Prior to custodial interrogation, police must call the county's public defender office, which will

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AMANDA J. POWELL ET AL., ARIZONA: BRINGING *GAULT* HOME, AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL 26 (Amy Borror et al. eds., 2018).

221. *Id.* at 27.

222. *Id.*

223. *Id.* at 35.

224. *Id.*

225. *Id.* at 69, 74.

226. *Id.* at 74.

227. *Id.* This finding is currently required by ARIZ. R. P. JUV. CT. 10(D), but the court's findings do not have to be in writing.

provide an attorney for the child.[228] The attorney will meet privately with the child to explain their *Miranda* rights and the consequences of waiving or asserting those rights. These attorneys must be juvenile defender specialists who are well-equipped to communicate complicated legal principals to youth, identify learning disabilities or trauma histories that can impact youth's understanding and ability to waive, and adapt their communication to these needs where possible. After meeting with the attorney for as long as may be necessary, the child can decide whether to assert their right to silence or waive the right for the purposes of this instance of custodial interrogation. Youth who do desire to waive their right to silence may choose whether they would like to have an attorney present with them during the interrogation. Youth who choose to go forward without an attorney will still have the right to assert their right to silence at any time during the interrogation and questioning shall cease. If a child is not given access to an attorney prior to custodial interrogation, subsequent statements will be excluded from evidence. No fee for the services of the attorney should ever be assessed to the child or their family.

The state legislature will need to provide additional funding to the counties to ensure appointed counsel can meet this obligation. Defenders must receive additional training in client communication so they can adequately advise their clients. Defenders must be trained to identify invalid *Miranda* waivers and violations of the new law, draft suppression motions, and include race and adolescence in their arguments. Judges will need training on applying the new standard and counteracting implicit racial bias. Police must also be required to recognize and counteract their own implicit racial bias, identify custodial interrogations, contact the public defender to counsel youth, and not accept waiver of *Miranda* until after the child has consulted with the attorney.

B. Identifying the Harms

Ensuring youth's access to attorneys prior to *Miranda* waivers is also important to protect children from the harms that can accompany coercive interrogation.

228. This would be best practice for counties that have public defender offices. In counties that have an alternative system of indigent defense delivery, a substitute agency should be given the responsibility to coordinate assigning an attorney for the child prior to interrogation.

1. Wrongful Convictions and False Confessions

Adolescents are at a high risk of giving false confessions once they waive their *Miranda* rights. Police interrogation experts estimate that 10% of innocent people will give false confessions.[229] The true percentage may be even higher for youth. While only 10% of now-exonerated adult wrongful convictions involved false confessions,[230] 36% of all exonerated youth falsely confessed to the alleged crime.[231] The risk is even higher for younger youth. Eighty-six percent of exonerees who were under fourteen at the time of the alleged crime falsely confessed.[232] Fifty-seven percent of all exonerations of youth aged fourteen and fifteen at the time of the alleged crime involved false confessions.[233] False confessions were involved in 28% of exonerations of youth aged sixteen and seventeen at the time of the alleged crime.[234]

Some of the same hallmarks of adolescent development that contribute to youth's greater inability to make a knowing, intelligent, and voluntary waiver render them more likely to falsely confess after they waive their rights.[235] Youth are highly suggestible compared to adults and are thus even more vulnerable to common interrogation tactics that can lead to false confessions.[236] These include suggestive interviewing techniques, such as asking leading questions or telling the child that accomplices have already confessed when they have not.[237] Adolescent immaturity results in a weakened ability to weigh future consequences against their perceptions of immediate rewards, which also contributes to the likelihood they will falsely confess.[238] Youth may think that they can more quickly escape police contact by simply confessing, and they do not understand or appreciate the coming consequences of that choice.[239]

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229. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 770–71, 775 (2007).

230. THE NAT'L REGISTRY OF EXONERATIONS, AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED (2020), http://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf [https://perma.cc/U3GL-P5S7].

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Goldstein et al., *supra* note 109, at 43.

236. *See* Jack et al., *supra* note 125, at 30–31.

237. Goldstein et al., *supra* note 109, at 43.

238. *Id.*

239. *Id.*

Trauma likewise increases the risk of false confessions.[240] Traumatic experiences can change the way the brain functions and increase difficulty in regulating emotions, interpreting social cues, and creating "memory disturbances."[241] Youth who have contact with the juvenile justice system have higher rates of traumatic and adverse childhood experiences.[242] Black and Hispanic youth, who have a particularly high rate of traumatic experiences,[243] may falsely confess to avoid or shorten the traumatic experience of police interrogation. Black people make up over half of all exoneration cases that involve false confessions.[244] Sixty-seven percent of exonerated youth who falsely confessed were Black.[245] Additionally, implicit racial bias, including police officer's interpretation of the "stereotype threat response" described above, may render police more likely to misclassify Black people as guilty and use coercive questioning tactics that can lead to false confessions.[246] Furthermore, the stress caused by the "stereotype threat response" can be mentally taxing, interfering with youth of color's ability to think clearly and resist pressure, putting them at even greater risk of false confession.[247]

The harm of false confessions to both youth and the general public cannot be overstated. Confessions almost always lead to convictions, ensuring that youth who falsely confess will be drawn deeper into the system.[248] Those youth who falsely confess to serious crimes for which they may be prosecuted in the adult criminal legal system may end up serving long prison sentences.

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240. Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626, 635 (2017).

241. *Id.*

242. *See id.* at 635–38 (providing further analysis of the impact of trauma on the risk of false confessions for youth).

243. Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race or Ethnicity*, CHILD TRENDS, https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity [https://perma.cc/P4ZP-NWBA] (Feb. 20, 2018).

244. *Spread Sheet Request Form*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Spread-Sheet-Request-Form.aspx [https://perma.cc/T6UG-R2H2].

245. *Id.* The actual number of false confessions is likely much higher than the number of exonerations, as innocent people who plead guilty or falsely confess face more significant obstacles to exonerations. THE NAT'L REGISTRY OF EXONERATIONS, GUILTY PLEAS AND FALSE CONFESSIONS 1, 2 (2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article4.pdf [https://perma.cc/J3D6-WE5R].

246. Najdowski, *supra* note 155, at 574–76.

247. Davis & Leo, *supra* note 160, at 689–90.

248. *See* Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1315 (2008).

Incarcerated youth miss out on important opportunities for healthy development.[249]

Defense attorneys act as an important check on the power of police and prosecutors. Not only can attorneys protect youth's rights by making sure their waivers are knowing, intelligent, and voluntary, but attorneys can help prevent false confessions by identifying and stopping suggestive interrogation tactics and helping youth understand that the consequences of falsely confessing outweigh any perceived rewards of telling the police what the child thinks they want to hear. Their presence also increases public safety by encouraging accuracy in investigations.

2. Custodial Interrogation as Trauma: Mental Health Impacts on Youth

Interrogation, along with other aspects of policing, can be traumatic to youth and impede their healthy adolescent development. While this trauma may not always lead to a diagnosis of Post-Traumatic Stress Disorder, it can have long-term detrimental effects on the mental and physical health of youth.[250] More empirical research on the impact of interrogation on youth mental health is needed. There have been limited studies on how police-initiated contact (including on-the-street stops) affects youth mental health, which can provide insight into the likely effects of interrogations.[251]

Researchers studying the mental health impact of police stops on youth found that being stopped and questioned by the police can cause youth to feel stressed, scared, and unsafe during the interaction.[252] Hispanic youth, older

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249. The highly controlled environment of a youth or adult prison denies teenagers necessary opportunities to practice problem solving, self-control, time-management, and independence that are essential to healthy development. This is especially true for youth in the adult system where there are even fewer developmentally appropriate opportunities for education, work, or mentorship. When youth are released, they will face the additional obstacle of a criminal record impacting their ability to find employment and housing. This combination of factors leads to economic instability, lack of positive peer support, and little access to necessary mental health treatment, all of which can contribute to engaging in criminal activity and decreasing public safety. Additionally, the community is harmed by the expense of both prosecuting and then overturning wrongful convictions and lack of closure for victims.

250. *See* Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2324–25 (2014) (finding young men who experienced more police stops also experienced more trauma symptoms); Abigail A. Sewell & Kevin A. Jefferson, *Collateral Damage: The Health Effects of Invasive Police Encounters in New York City*, 93 J. URB. HEALTH 42, 43 (2016) (finding that exposure to more police stops generally worsens the health of Blacks and Latinos).

251. *See* Jackson et al., *Police Stops*, *supra* note 166; *see also* Jackson et al., *Low Self-Control*, *supra* note 166; Del Toro, *supra* note 166.

252. Jackson et al., *Police Stops*, *supra* note 166, at 629.

youth, and youth with incarcerated fathers experienced the highest levels of emotional distress while interacting with police.[253] The more frequently a teenager is stopped by police, the higher levels of stress during and after the interaction they will experience.[254] The intrusiveness of police behavior, such as frisking and threatening to use force, can raise the levels of stress youth experience during the interaction and also the likelihood that they will experience post-traumatic stress in the days to come.[255] Researchers studying young men in New York City similarly found that more intrusive police contact leads to higher levels of anxiety and trauma associated with the experience.[256] Location matters as well; youth reported significantly higher levels of emotional distress, social stigma, and post-traumatic stress when they were stopped by police at school.[257]

Youth of color may experience additional stress when stopped by police due to perceived or anticipated racism.[258] In one study, researchers found that Black and Hispanic youth were more likely to experience police stop procedures as unfair and unjust, and Black youth in particular were likely to be treated with hostility and intrusiveness by police.[259] Researchers found that any potential crime-control benefits that may be achieved by police tactics like "stop and frisk" (which they acknowledged was not supported by research) are likely offset by "serious costs to individual and community health," meaning that the clear mental health impact costs communities real dollars and erodes police-community relationships.[260]

The same is likely true for aggressive interrogation. These studies on the impact of police stops and intrusive police behavior combined with common knowledge of interrogations can shed light on the likely impact of interrogation on youth mental health. Interrogations of children in the United States look much like interrogations of adults.[261] Although Arizona uses a youth-specific *Miranda* waiver, the vast majority of police officers who interrogate youth have not received special training in the vulnerabilities of

253. *Id.*
254. *Id.*
255. *Id.* at 630.
256. Geller et al., *supra* note 250, at 2324.
257. Jackson et al., *Police Stops*, *supra* note 166, at 629.
258. Geller et al., *supra* note 250, at 2321.
259. Jackson et al., *Low Self-Control*, *supra* note 166, at 8.
260. Geller et al., *supra* note 250, at 2326.
261. Crane, *supra* note 240, at 651 (citing multiple studies that found police used the same interrogation techniques for adults and youth).

adolescents and are not prepared to protect against the extra coercion and suggestibility of adolescents.[262]

It is logical that youth experience custodial interrogation in the same stressful way they experience police stops. Police are trained to ramp up the pressure and intensity of their tone and word choice over the course of the questioning. Interrogators put the suspect in a small room, cut them off any time they assert their own innocence, project total confidence in guilt, and relentlessly accuse them.[263] They lie—saying they have evidence they do not.[264] They manipulate—saying they'll help them if they confess and offering faulty legal justification or a false choice between did you do it and were justified, or are you just an evil person.[265] They choose a small room with no windows and sit between them and the door, leaving them alone for ten minutes or so to increase their anxiety.[266] In the study on the impact of police stops on youth, researchers found that police intrusiveness, specifically patting a child down, searching their bags or pockets, threatening or using physical force, or using harsh language and racial slurs, all contributed to the mental distress youth felt during and after their interaction with police.[267] Many of the same behaviors, called intrusiveness by the researchers, are exhibited prior to or during interrogation.[268]

Feelings of stress and other detrimental mental health impacts may be amplified when youth felt their interaction with police officers was fundamentally unfair, that their rights were violated, or that they were racially profiled and unfairly targeted.[269] Youth place an even higher value on fairness than adults.[270] When youth are fully engaged in the process, trust that their voices are heard, clearly understand their options, and are able to exert their will in choosing how to proceed, their feelings of fairness increase even if they do not ultimately achieve their preferred outcome.[271] Access to specialized juvenile defense attorneys, who effectively communicate with the child prior to interrogation, can increase feelings of fairness, thereby ensuring

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262. *Id.* at 647 (finding that the Reid Technique, designed for adults, is the most used interrogation training across the country).

263. *Id.* at 649.

264. *Id.*

265. *Id.*

266. *Id.* at 648–49.

267. Jackson et al., *Police Stops*, *supra* note 166, at 629.

268. *See id.*

269. *See id.*; Naomi F. Sugie & Kristin Turney, *Beyond Incarceration: Criminal Justice Contact and Mental Health*, 82 AM. SOCIO. REV. 719, 723 (2017).

270. Erika K. Penner et al., *Procedural Justice Versus Risk Factors for Offending: Predicting Recidivism in Youth*, 38 LAW & HUM. BEHAV. 225, 225 (2014) (noting that adolescents are particularly sensitive to issues of fairness and respect).

271. *See id.* at 234.

youth fully understand their rights and feel empowered in their choice to assert or waive those rights, which may lead to a reduction in the negative mental health impacts of interrogation.

3. Public Safety and Erosion of Community Trust in Police and Courts

The mental health impact of policing may be inextricably linked to police-community relations. Both feelings of unfairness and negative mental health outcomes caused by aggressive policing can lead to further damage to police-community relationships.[272] During adolescence, youth form norms and values that will last throughout the rest of their lives. Beliefs and attitudes about law enforcement, the legitimacy of the law, and the fairness of the courts are developed.[273] Negative experiences with law enforcement can permanently impact a young person's opinions on police, staying with them into adulthood.[274] A child's perception of fairness and procedural justice during their interactions with police can impact the likelihood of whether they will engage in criminal behavior or become law-abiding citizens in the future.[275] Researchers have found that youth who perceive the legal system as legitimate and police as behaving fairly are much more likely to comply with the law.[276] Policing that relies on coercing youth into waiving their *Miranda* rights will chip away at public safety by delegitimizing the law.

C. Attorneys Are the Essential Safeguard: Why Other Protective Measures Are Not Enough

Recognizing that youth are particularly vulnerable to coercive interrogation, some states are beginning to require parental presence at interrogations, youth-specific *Miranda* waivers, or videotaping

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272. Geller et al., *supra* note 250, at 2325.

273. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RSCH. 217, 220 (2005).

274. Lyn Hinds, *Building Police–Youth Relationships: The Importance of Procedural Justice*, 7 YOUTH JUST. 195, 196 (2007); Fagan & Tyler, *supra* note 273, at 218–19 (explaining that attitudes toward law and authority are developed early in life and stick with people).

275. Hinds, *supra* note 274, at 196–97.

276. *See* Rick Trinkner & Ellen S. Cohn, *Putting the "Social" Back in Legal Socialization: Procedural Justice, Legitimacy, and Cynicism in Legal and Nonlegal Authorities*, 38 LAW & HUM. BEHAV. 602, 602, 606–08 (2014); Penner et al., *supra* note 270, at 225.

interrogations.[277] These minimal additional protections do not adequately guarantee youth rights or address the particular needs of youth of color. Parents of youth of color will experience the same fear of police as their children. Videotaping and youth-specific *Miranda* waivers do not protect youth of color from the impact of implicit racial bias. In order to guarantee youth rights at interrogation, children must have access to specialized juvenile defense attorneys who can counsel them through their decision to waive their rights and submit to police interrogation.

CONCLUSION

The erosion of the Fifth Amendment rights of the most vulnerable members of our community, youth and youth of color, threatens the very foundation of our democracy and our freedoms that rest upon it. Youth's rights should be honored and not be sacrificed in the haste of a speedy investigation. *Miranda* must not be reduced to a mere "form of words" or a simple box to check before police can move forward with interrogation. Youth are more vulnerable than adults in the face of the overwhelming power of the State at custodial interrogations. They require additional safeguards in order to achieve the same protection of their Fifth Amendment rights that adults enjoy.

A child's age and race tint every experience they have with police. In the inherently coercive interrogation context, age and race undermine the child's comprehension of their *Miranda* rights and their ability to resist police pressure in asserting them. Courts will continue to deny children their rights to silence and counsel at interrogation until they treat age and race not just as solitary factors in a "totality of the circumstances" test, but as lenses through which to view all other factors. While adopting this new framework for evaluating the totality of the circumstances test is essential to remedying invalid *Miranda* waivers after the fact, youth will not have full access to the protection against self-incrimination until they are given meaningful access to counsel to advise them prior to interrogation.

277. Goldstein et al., *supra* note 109, at 47–57 (describing alternative protections and noting that half the states require recording of interrogation in at least some circumstances). Arizona has no state law requiring the recording of custodial interrogations.