

## THE GRAVITATIONAL PULL OF *MIRANDA'S* BLACKHOLE: THE CURIOUS CASE OF *J.D.B. V.* *NORTH CAROLINA*

Ronald J. Allen \*

Some problems are simply intractable; I fear juvenile justice may be an example. People obviously tend to go through a maturation process as they age, and one can generalize about older and younger individuals. Such points seem rather banal. But what are their implications for constructing a legal system? The obvious answer is that children are different from adults in predictable ways that plausibly can be the basis of policies that treat the two sets differently. It is crazy to hold an infant to standards of liability that require cognitive and emotional processes that the infant does not possess. But the development of those processes seems to be both idiosyncratic and on a relatively smooth curve from barely formed in a newborn to whatever their ultimate evolution is in an adult. This poses at least two regularity problems: First, how to know where in that evolutionary process any particular individual is, and whether the person has reached the limits of his development. Second, how to know how any particular stage in that development fits into legal categories, such as whether a person is responsible for his actions, is capable of informed choice, and so on. Suppose a three-year-old is crawling around on a balcony and pushes a brick off the edge, which hits someone on the head and kills him. Rather obviously, subjecting the infant to the criminal law is crazy beyond belief, but what about seventeen-year-old De'Marquise Elkins and fifteen-year-old Dominique Lang, who approached Sherry West and her thirteen-month-old son, Antonio, and demanded money from her?<sup>1</sup> When she said she had none, Elkins drew a handgun and asked her: "Do you want me to kill your baby?"<sup>2</sup> According to West, the gunman shot her twice, wounding her in

---

\* John Henry Wigmore Professor of Law, Northwestern University. I am indebted to Tim Fry, Northwestern Law class of 2013, for excellent research assistance.

1. See *Georgia Mom Says Teen Told Her, 'Do you Want Me to Kill Your Baby?' Before Son Fatally Shot*, FOX NEWS (Mar. 23, 2013), [www.foxnews.com/us/2013/03/23/georgia-mom-says-teen-told-her-do-want-me-to-kill-your-baby-before-son-fatally/](http://www.foxnews.com/us/2013/03/23/georgia-mom-says-teen-told-her-do-want-me-to-kill-your-baby-before-son-fatally/) [hereinafter FOX NEWS]. Elkins was, in fact, convicted of this crime and sentenced to life in prison on September 12, 2013, but, for the purpose of discussion, this Article will treat the case as undecided. See Iris Carreras, *Antonio Santiago Murder Update: De'Marquise Elkins, Ga. Teen Convicted of Killing Baby in Stroller, Sentenced to Life in Prison*, CBSNEWS (Sept. 13, 2013, 10:06 AM), [http://www.cbsnews.com/8301-504083\\_162-57602801-504083/antonio-santiago-murder-update-demarquise-elkins-ga-teen-convicted-of-killing-baby-in-stroller-sentenced-to-life-in-prison/](http://www.cbsnews.com/8301-504083_162-57602801-504083/antonio-santiago-murder-update-demarquise-elkins-ga-teen-convicted-of-killing-baby-in-stroller-sentenced-to-life-in-prison/).

2. See FOX NEWS, *supra* note 1 (internal quotation marks omitted).

the leg and grazing her left ear.<sup>3</sup> He then approached her baby and shot him in the face, killing him.<sup>4</sup> West and the boy's father had just celebrated Antonio's first birthday.<sup>5</sup>

The baby who pushed the brick plainly is not criminally responsible, but how should the law treat Elkins and Lang? And should the law treat the fifteen-year-old differently from the seventeen-year-old? The law has tended to respond to such questions with relatively rigid rules, categorizing people by age with some concomitant capacity to make individual adjustments.<sup>6</sup> The result of this approach was, first, an absolute bar to criminal liability under a certain age, coupled with a requirement of treatment in the adult courts for those above a second age, and treatment of those who fall in between in juvenile court.<sup>7</sup> This treatment often came with a gray area in which a juvenile, by age, could be tried as an adult, depending upon the circumstances of the allegation.<sup>8</sup> Whether any of this is defensible is another matter, and whether it led to the phrase "juvenile justice" being oxymoronic in the same way "military justice" is often accused of being, other panelists may discuss. I have never studied these institutions systematically, and only have half-formed opinions. Many juvenile justice systems are roundly criticized for their cavalier treatment of rights that an adult would possess, but, at the same time, the diminishing of those rights is compensated for by ameliorated conditions following adjudication.<sup>9</sup> How all this balances out, and whether the balancing is being done by inappropriately comparing the median to outlying cases is beyond my pay grade, but I look forward to being edified by this Symposium on some of these important questions. Many years ago, when I did some exploration of the field, I remember coming away with the abiding conviction that, generally speaking, the worst thing that could happen for everybody—the person and society—was for a juvenile delinquent to get caught. Uncaught, he would outgrow his youthful stupidity; caught, he would end up in juvenile detention facilities or jail, where he would learn the ropes of being a real criminal, and, with the disadvantaged prospects in life coming from that very detention, evolve into a considerably more

---

3. *Id.*

4. *Id.*

5. *Id.*

6. *See, e.g.*, N.D. CENT. CODE ANN. § 12.1-04-01 (West 2013), *validity called into doubt by* *Graham v. Florida*, 130 S. Ct. 2011 (2010); TEX. PENAL CODE ANN. § 8.07 (West 2011); UTAH CODE ANN. § 76-2-301 (West 2013).

7. *See, e.g.*, N.D. CENT. CODE ANN. § 12.1-04-01; TEX. PENAL CODE ANN. § 8.07; UTAH CODE ANN. § 76-2-301.

8. *See, e.g.*, ALA. CODE §12-15-204 (2013); KAN. STAT. ANN. § 38-2347 (West 2013); TEX. PENAL CODE ANN. § 8.07(b).

9. *See, e.g.*, Tamara L. Reno, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas*, 26 TEX. TECH L. REV. 1421, 1423 (1995).

dangerous person. But back then, we were not talking about teenagers shooting babies in the face.

Having disabused you all of the idea that I have anything to add to this conversation, I nonetheless do have one caution—an unthinking extension of the juvenile context into the adult, or relatedly, forgoing of the line-drawing of the present system for a totality of the circumstances consideration of how to treat a person, may simply exacerbate preexisting anomalies, rather than serve any enduring or important interests—and actually may be counterproductive. A perfect example of this is *J.D.B. v. North Carolina*, which involved an intersection of the juvenile justice system with something I do know something about, *Miranda v. Arizona*.<sup>10</sup> Before turning to the topic at hand, I need to be clear about what “unthinking” means. I mean it here not to refer to the efforts of lawyers to use extant legal resources to advance their clients’ interests. That is precisely what lawyers should do, and I congratulate J.D.B.’s lawyers for their innovative and successful advocacy. Whether its results are in the long-term best interests of people analogous to J.D.B. and others, or in the long-term interests of society, are different questions. Those questions need to be addressed by clear thinking about those legal materials and political discussions about the nature of social interests. I mean to comment here on the conceptual foundations of those legal materials, in particular *Miranda v. Arizona*, in an effort to advance clear thinking. In my opinion, the Legal Academy should be embarrassed to the core by our involvement in foisting this inane and misshapen caricature of intelligent social policy upon an unsuspecting public. Given that view, it will come as no surprise that I am quite dubious of any derivation from, or extension of, this incoherent disaster. The intellectual problem is that *J.D.B.* is just such a derivation or extension, and it cannot be justified, I suspect, if its progenitor suffers from the disabilities of which I accuse it.

*Miranda*’s disabilities have been systematically displayed, and given the press of time, I will simply outline them here.

1. *Miranda* rests upon the insupportable assumption of free will. You think you possess free will, but why do you make the choices that you do? There are only two answers:

- a. Randomness, which is where most “libertarian philosophers” locate free will, but this is a version of free will that drains it of identity, subjectivity, and agency—all the things that make you rather fervently want to believe in it; or
- b. You choose because of your reasons for choice. But then your reasons determine your choice, which means it is not free. Either

---

10. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398 (2011); *Miranda v. Arizona*, 384 U.S. 436 (1966).

you choose your reasons for reasons or you choose your reasons for no reasons, and the infinite regress opens up. It is not a surprise that the search for a fictional entity has been problematic.<sup>11</sup>

2. If free will exists, it always exists in the context of confessions. The question here is not true compulsion, such as pushing your finger against a trigger by physical force. The question here is the “choice” to send nerve signals to your voice box to produce coherent and well-formed sentences, and that is always a choice, no matter the stringency of the conditions.

3. Suppose the previous two points—which in my opinion are analytically, not just empirically, correct—are false. There is literally no test that sorts out the exercise of free will from its absence. Does a quick confession indicate the exercise of free will or its opposite? If a person confesses after thirty-six hours, is that because the will has been overborn, or because he has finally come to realize that confession is good for the soul? No one knows, and no one will ever know. Even if *Miranda* did not rest on analytical and ontological hogwash, an impenetrable, epistemological barrier remains.

I suspect it is precisely the power of the preceding points that explains the spectacle that has become the defense of the *Miranda* regime. Again, given the press of time, I must simplify. Consider just two points: First, in the debate over whether *Miranda* should be preserved, its defenders argue for its preservation on the ground that it has essentially no effect.<sup>12</sup> Yes, you heard (or read) that correctly—its defenders argue for its preservation because it is ineffectual. Second, its defenders have literally no answers to the conceptual and empirical points made above. The literature on *Miranda* is vast and tedious beyond belief precisely for the reason that *Miranda*'s defenders have literally nothing interesting to say and simply repeat the same rhetoric over and over again about police abuse and the limits of the voluntariness test.<sup>13</sup> The quintessential example is the recent eighty-five-

---

11. For an example of the endless fascination free will presents to professional philosophers and the complexity of the arguments they construct around it, see David Widerker, *Libertarianism and the Philosophical Significance of Frankfurt Scenarios*, 103 J. PHIL. 163 (2006).

12. See RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 856–59 (3d ed. 2011) (discussing whether to preserve *Miranda* on the ground that it essentially has no effect).

13. Although looking at law school course descriptions might suggest to the contrary, the Fifth Amendment self-incrimination clause and the *Miranda* doctrine are not coterminous, and interesting work continues on the former. See, e.g., LOUIS MICHAEL SEIDMAN, *SILENCE AND FREEDOM* 54–94 (2007); GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* 219–39 (2012); Ronald J. Allen & Kristin M. Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 243–44 (2004); Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 433 (2000).

page article of Yale Kamisar, the single most influential voice on the creation of the Warren Court era, and intellectual godfather of *Miranda*.<sup>14</sup> Professor Kamisar is fully aware of the conceptual flaws of *Miranda*.<sup>15</sup> He had excerpts from my articles in the previous edition of his casebook that have now, without being answered, been removed. His eighty-five-page article pursues the same tack. Kamisar complains incessantly about the problems of the voluntariness test, but not once does he give a cogent explanation as to how anyone could think that the *Miranda* regime could surmount its internal incoherence.<sup>16</sup> The article has other curiosities. Kamisar complains, again incessantly, about the complexity and ambiguity of the voluntariness test, while simultaneously discussing, seemingly without any self-consciousness or embarrassment whatsoever of the anomalousness of the situation, the endless stream of *Miranda* cases that make it one of the most complex areas of constitutional criminal procedure.<sup>17</sup>

The defenders of *Miranda* also ignore the single most salient point about the voluntariness test, which is that, while on its surface it purports to regulate free will, in reality, it was providing a regulatory regime for something that actually can be regulated—police practices. There plainly were, and are, investigatory abuses. One cannot regulate police practices by tests geared to nonexistent or impenetrable mental states, but one can regulate the manner of investigation, including its public nature and the extent of pressure that can be brought to bear on an individual. The real problem with police interrogation was, and remains, its secretiveness, which goes a long way in explaining *Miranda*'s ineffectiveness—it does not deal with the controlled and secret nature of interrogation practices at all. In my opinion, the historical anomaly of not being able to call a defendant to the stand should be scrapped, along with a refusal to allow admissions where there are plausible claims that unrecorded interrogation techniques were applied to a suspect. And of course, some police practices can simply be ruled out of bounds, which is precisely where the voluntariness test was going until derailed by the muddle-headedness of the *Miranda* revolution.

---

14. See generally Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012) (examining the history of *Miranda*).

15. *Id.* at 971.

16. *Id.* at 967.

17. See *id.* The apparent intractable complexity of the voluntariness test was supposedly established by the stream of cases that reached the Supreme Court. Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2201 n.17 (1996). There were thirty-six of those from 1936 to 1963. *Id.* There have been approximately seventy-two “*Miranda*” cases dealt with by the Supreme Court. James. L. Buchwalter, Annotation, *Construction and Application of Constitutional Rule of Miranda—Supreme Court Cases*, 17 A.L.R. FED. 2d 465, 472–76 (2007). The defenders of *Miranda* are silent on this point, so far as I can tell.

The application of this to *J.D.B.* is obvious: It is *Miranda*-lite, although it deals with knowledge of custody, a state of mind that, unlike free will, I am fairly sure exists. It is not just knowledge that counts though, and here is the rub: It is comprehension of its implications and ability to exercise that non-existent bugaboo of free choice in light of an individual's state of comprehension. In other words, here we go again. But let us not go down the dead-end, free-will lane again; let us just stay with the epistemological problem of sorting out the states of mind of infinitely variable individuals, regardless of their age.

I have no doubt, and cheerily concede, that some "children" are different from some adults, but that is about all one can confidently say. Even the distinction between babies and adults is problematic, because the category of "adults" includes the mentally disabled and those suffering from various forms of dementia. I equally have no doubt, as the Supreme Court asserted in a passage that it will come to regret, that "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."<sup>18</sup> This, of course, demonstrates remarkable blindness to what the Court was purporting to do in *J.D.B.* The question is not whether one can discern relatively gross chronological age differences; the question is whether one can discern subtle emotional and cognitive differences. The question will virtually never be how a seven-year-old is discernibly different from a competent adult; the question will much more typically be how the seventeen-year-old Elkins and his partner in crime, the fifteen-year-old Lang, are different. Or more precisely, is it possible to reliably know how they differ in the pertinent cognitive and emotional scales and where they are in their development? And even if you did know the stage of an accused's development, what would that tell you? Suppose a fifteen-year-old has reached his peak of maturity—what then? Treat him like an adult, or alternatively, treat him like a child forever?

Such questions are really beside the point because there will never be reliable data about either the absolute or the relative development of people such as Elkins and Lang. Grossly speaking, and of course it is obvious, individuals go through emotional and cognitive evolutionary processes that result in discernible average differences based on age, but the science that has now validated that proposition has also validated that it cannot determine how the development of any particular individual maps algorithmically onto questions of criminal responsibility or how to make inter-subject comparisons in all but the rarest of cases.<sup>19</sup> In other words, to

---

18. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2407 (2011).

19. See *infra* notes 41–44 and accompanying text.

tell the police to take into account a child's age, when the question is not comparing a seven-year-old to an eighteen-year-old, but instead a seventeen-year-old compared to a fifteen-year-old, is to tell them to do the impossible. That same science has other implications. It is not just age that is correlated with cognitive and emotional abilities. Males develop differently from females, members of different races differ in their developmental arc, and adults go through declines that bring them back toward children.<sup>20</sup> If the distinction between different ages is a relevant variable, are these others not as well? But, of course, the science does not exist to allow such distinctions to be made reliably in individual cases, either.

I will briefly review the science and its use by the Supreme Court. In a series of recent cases, the Supreme Court has developed a three-part rationale for divergent criminal punishments for juveniles and adults—"a lack of maturity and an underdeveloped sense of responsibility, a heightened susceptibility to negative influences and outside pressures, and the fact that the character of a juvenile is 'more transitory' and 'less fixed' than that of an adult."<sup>21</sup> In this development, scientific and sociological studies have been essential in providing support, and it is this body of cases that undergirds *J.D.B.*'s conclusions. In *Roper*, while ending the death penalty for juvenile criminals, the Court cited studies of adolescents regarding their recklessness, their vulnerability to environmental pressure, and their still-forming characters.<sup>22</sup> In *Graham*, while ending life sentences for non-homicidal crimes, the Court added that brain science suggested fundamental differences in juvenile and adult minds.<sup>23</sup> These studies led the Court to assert that it would be "misguided to equate the failings of a minor with those of an adult."<sup>24</sup>

Following this reasoning,<sup>25</sup> the *J.D.B.* Court very well may have extensively cited brain science to suggest that youth have different developmental capacities to understand their *Miranda* warning. Indeed, the Court quoted *Graham*'s conclusion on brain science in a footnote to support the need for police officers to consider a suspect's age to fulfill the *Miranda* warning.<sup>26</sup> The Court generally believed that police officers only needed

---

20. See *infra* notes 42–46 and accompanying text.

21. *Graham v. Florida*, 130 S. Ct. 2011, 2038 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

22. *Roper*, 543 U.S. at 569–70.

23. *Graham*, 130 S. Ct. at 2026.

24. *Roper*, 543 U.S. at 570.

25. See *Miller v. Alabama*, 132 S. Ct. 2455, 2464–65 (2012) ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."); see generally *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (presenting the reasoning that the Court followed and extended when invalidating mandatory life without the possibility of parole sentences for juveniles).

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

common sense to recognize that there are differences between juveniles of various age groups, and between those age groups and adults.<sup>27</sup>

At the outset of this discussion, I again acknowledge the obvious—children *are* different. For instance, neuroscience has utilized MRI studies of the brain to show that the frontal lobe—necessary for “volition, planning, selection, sequential organization, and self-monitoring of actions”<sup>28</sup>—continues to develop throughout adolescence.<sup>29</sup> Additional studies have shown an increase in neural pathways of the brain during this same period in life.<sup>30</sup> Since these discoveries, neuroscience has been used to explain a number of adolescent behaviors, including risk-taking,<sup>31</sup> alcohol consumption,<sup>32</sup> tobacco dependence,<sup>33</sup> and even depression.<sup>34</sup> Social

---

27. See *id.* at 2407.

28. Céline Chayer & Morris Freedman, *Frontal Lobe Functions*, 1 CURRENT NEUROLOGY & NEUROSCIENCE REP. 547, 547 (2001).

29. See, e.g., Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–62 (1990) (using MRI to reveal a pre-adolescent increase in cortical gray matter and a constant increase in white matter throughout adolescence); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1990) (using MRI to reveal maturation of brain regions from childhood to young adulthood); see also Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 83 (2006) (using MRI to reinforce previous findings on frontal regions, and also finding that the dorsal prefrontal cortex—important to control impulses—does not reach full size until the early twenties).

30. Tomás Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCI. MAG. 1908, 1908 (1999).

31. See, e.g., L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BEHAV. REVS. 417, 421–24 (2000) (arguing changes in the prefrontal cortex and limbic brain regions of adolescents across a variety of species explain the risk-taking behavior of many adolescents); Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why?*, 1021 ANNALS N.Y. ACAD. SCI. 51, 57 (2006) (“My argument is that heightened risk taking during this period is likely to be normative, biologically driven, and inevitable.”).

32. See, e.g., Barbara J. Markwiese et al., *Differential Effects of Ethanol on Memory in Adolescent and Adult Rats*, 22 ALCOHOLISM CLINICAL & EXPERIMENTAL RES. 416, 416 (1998) (finding “memory is more potently impaired by ethanol in adolescent animals, compared with adults”); Marisa M. Silveri et al., *Adolescents at Risk for Alcohol Abuse Demonstrate Altered Frontal Lobe Activation During Stroop Performance*, 35 ALCOHOLISM CLINICAL & EXPERIMENTAL RES. 218, 218 (2011) (finding a greater regression of brain activation in adolescents with family histories positive for the alcoholism category compared to family histories that are negative); Linda Patia Spear, *The Adolescent Brain and the College Drinker: Biological Basis of Propensity to Use and Misuse Alcohol*, J. STUD. ON ALCOHOL & DRUGS, Supp. 14, at 71, 77 (2002) (“[T]he brain of the adolescent is unique and differs from that of younger individuals and adults in numerous regions, including stressor-sensitive, mesocorticolimbic DA projections that are critical for modulating the perceived value of reinforcing stimuli, including use of alcohol and other drugs.”).

33. See, e.g., Jennifer M. Brielmaier et al., *Immediate and Long-Term Behavioral Effects of a Single Nicotine Injection in Adolescent and Adult Rats*, 29 NEUROTOXICOLOGY & TERATOLOGY 74, 74 (2007) (concurring with previous studies and finding that a single dose of nicotine for an adolescent rat has more reward to the brain than for an adult rat); Theodore A. Slotkin, *Nicotine and the Adolescent Brain: Insights from an Animal Model*, 24 NEUROTOXICOLOGY & TERATOLOGY 369, 369 (2002) (“Effects of nicotine on critical components of reward pathways and circuits involved in learning, memory and mood are likely to contribute to increased addictive properties and long-term behavioral problems seen in adolescent smokers.”).



science research in fields such as psychosocial development<sup>35</sup> support this finding—that children exhibit different behaviors, including decision-making,<sup>36</sup> response to peer influence,<sup>37</sup> and even temperament.<sup>38</sup>

Unsurprisingly, these studies were quickly seized upon to justify divergent treatment and added protection for adolescents under the law.<sup>39</sup> As I have mentioned, some of this divergent treatment is justified; the law has long treated adults and children differently.<sup>40</sup> The jurisprudential problem comes when resting on these studies to go beyond the crude measures of extant law. The evidence is not able to establish the age when

34. See, e.g., Susan L. Andersen & Martin H. Teicher, *Stress, Sensitive Periods and Maturational Events In Adolescent Depression*, 31 TRENDS NEUROSCIENCES 183, 187–88 (2008) (finding that hippocampus and prefrontal cortex development impacts the emergence of depression in adolescents and the gender differences in such conditions).

35. See, e.g., Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 239 (1995) (“[A]dolescents may not appreciate the long-term consequences or potentially serious ramifications of criminal conduct for themselves and others.”); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249, 267–68 (1996) (finding psychosocial factors show a marked difference between early and late adolescence, justifying a legal line around sixteen or seventeen).

36. See generally Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. ADOLESCENCE 265 (1989) (reviewing research comparing adolescent and adult reasoning and decision-making capacities).

37. See, e.g., Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 163 nn.99–102 (1997) (discussing studies of peer influence on adolescent behavior and decision-making).

38. See, e.g., Avshalom Caspi et al., *Temperamental Origins of Child and Adolescent Behavior Problems: From Age Three to Age Fifteen*, 66 CHILD DEV. 55, 55 (1995) (finding behavioral markers impacting a child’s temperament); Myra C. Kawaguchi et al., *Mothers, Fathers, Sons, and Daughters: Temperament, Gender, and Adolescent–Parent Relationships*, 44 MERRILL-PALMER Q. 77, 93 (1998) (finding a large correlation between parent temperament and the relationship with and development of a child’s temperament).

39. See generally, e.g., ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008); Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality*, 19 LAW & HUM. BEHAV. 245 (1995); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709 (1997); Scott & Grisso, *supra* note 37; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003). These arguments appear to have had a major impact on adolescent criminal punishment: The Court has cited these types of arguments in striking down the death penalty for juveniles under eighteen, *Roper v. Simmons*, 543 U.S. 551, 568 (2005), life imprisonment without parole for non-homicide crimes, *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010), and mandatory life sentences without parole, *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012).

40. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (holding that the requirement of parental consent before a minor’s abortion is constitutional); *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (holding that parents can make medical decisions for their children over the child’s objection); *Ginsberg v. New York*, 390 U.S. 629, 637 (1968) (upholding a statutory ban against selling obscene materials to minors); 1 WILLIAM BLACKSTONE, COMMENTARIES \*434, \*448 (citing natural law for the requirement of parents’—or in their absence, a ward’s—care for children that do not have the same rights as adults); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 191 (1827) (“[U]ntil the infant has attained the age of twenty-one years[,] . . . [m]ost of the acts of infants are voidable . . .”).

legal treatment should differ.<sup>41</sup> Brain science shows not just that the brain develops during adolescence, but also that this development continues well into at least young adulthood.<sup>42</sup> It is also reasonably clear that around age forty-five the brain begins to deteriorate,<sup>43</sup> leading one to at least wonder if the rules for adolescent criminal punishment reforms also should extend to seniors.<sup>44</sup> Indeed, “psychosocial maturity, rather than age, is the more powerful predictor of decision-making,”<sup>45</sup> which is an individual determination that, to be sure, a uniform rule cannot address.<sup>46</sup> The Court acknowledged this line-drawing problem in *Roper*,<sup>47</sup> but its use to justify a bright-line rule only casts doubt on requiring the police officer to consider maturity in giving a *Miranda* warning in *J.D.B.*, precisely because these studies also reveal major differences in the onset of puberty—and thus brain development—between males and females<sup>48</sup> and even different races.<sup>49</sup> Taking the science to its logical implications, this line of thinking—different culpability levels based on brain science—leads to the contradictory conclusions that, on the one hand, no bright lines can be employed, and, on the other hand, no techniques can sort the culpable from the non-culpable.<sup>50</sup>

Specifically regarding *Miranda* rights, this science and research has led commentators to worry about the ability of adolescents to understand

41. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 741 (2000).

42. Leslie Sabbagh, *The Teen Brain, Hard at Work No, Really*, SCI. AM., Aug./Sept. 2006, at 20, 24 (sharing scientists’ surprise at “how long [the brain] changes into young adulthood”); Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCIENCE 309, 314 (2003) (studying individuals ranging in age from seven to eighty-seven).

43. Sowell et al., *supra* note 42, at 312 (showing myelination peaks around age forty-five); see also Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296, 299, 307 nn.25–27 (2004) (collecting and discussing studies of brain decline in older humans).

44. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152–53 (2009) (citing testimony of a neuroscientist that older people also become less culpable).

45. Cauffman & Steinberg, *supra* note 41, at 755.

46. *Id.* at 759 (“[V]ariability among adolescents of a given chronological age is the rule, not the exception.”).

47. *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“It is difficult even for expert psychologists to differentiate between . . . juvenile . . . immaturity, and . . . irreparable corruption.”).

48. See Judy L. Cameron, *Interrelationships Between Hormones, Behavior, and Affect During Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 134, 139 (2004) (discussing studies showing different levels of stress responsiveness in males compared with females); Rhoshel K. Lenroot & Jay N. Giedd, *Sex Differences in the Adolescent Brain*, 72 BRAIN & COGNITION 46, 46 (2010) (explaining research that shows that males and females may use different strategies for cognition because of different brain structures and development).

49. See Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 ANNALS N.Y. ACAD. SCI. 1, 12–13 fig.3 (2004) (showing that African-American females are entering puberty sooner than Caucasian females and, thus, are experiencing developmental changes sooner).

50. See Maroney, *supra* note 44, at 157–60.

their rights,<sup>51</sup> but again, the message of the data is messy. At least one “study indicates that sixteen- and seventeen-year-old juveniles do understand their *Miranda* warnings and at least some can exercise their rights effectively.”<sup>52</sup> Further, it is not clear whether youth really face a different challenge with *Miranda* than adults.<sup>53</sup> For instance, psychologist Thomas Grisso’s widely-cited article, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, showed a low number of juveniles understanding all four tested warnings (20.9%), but it also showed that most adults did not understand the warnings either (only 42.3% of adults understood the four tested warnings).<sup>54</sup> Other studies have found that nearly one-fifth of “mentally typical” adults on probation (and, therefore, likely *Miranda*-rights targets), fail to understand one or more warnings.<sup>55</sup> *Miranda* warnings are also usually presented such that an uneducated adult would not understand them.<sup>56</sup> All of this presupposes the issue of free will, which this research also indirectly calls into question, as those being questioned feel compelled to falsely confess<sup>57</sup> and to answer police questions<sup>58</sup> despite their rights.

Some of the findings are entirely useless for the legal system. Suppose it is generally true that individuals’ capacities tend to evolve through their late teens and early twenties, with some discontinuing development well before then and others extending even later. What is the legal system supposed to do with that knowledge? Postpone proceedings against a fifteen, seventeen, nineteen, or twenty-one-year-old to do brain scans over

---

51. See generally, e.g., Thomas Grisso, *Juveniles’ Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) (arguing that reform is necessary as youth almost universally waive their *Miranda* rights, but understand these rights at a lower level than adults).

52. Barry C. Feld, *Juveniles’ Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 90 (2006).

53. Grisso, *supra* note 51, at 1153.

54. *Id.*

55. Solomon M. Fulero & Caroline Everington, *Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 53, 62 (2004) (comparing this number favorably with the 90% of those suffering mild to moderate mental retardation who failed to understand one or more *Miranda* warnings).

56. Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 185–89 (2007) (reporting that over 60% of jurisdictions that responded to a study required tenth-grade reading comprehension to understand the right to free legal services).

57. See, e.g., Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 14–15 (2010) (psychological studies indicate that people want to end the questioning more than they want to understand the consequences of a false confession); Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 484 (2005) (demonstrating that an interrogator’s technique can raise false confessions in a student population from 6% to 43%).

58. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 172–85 (2002) (discussing and collecting studies in which people did not feel that they had a choice, despite meeting the Supreme Court’s test of waiving their *Miranda* rights and responding to police questioning).

time to see how things are going? And then what? What difference does it make if, suppose, we find that a fifteen-year-old's capacities continued to develop until he was twenty-three, whereas a seventeen-year-old's stopped at seventeen? Quite possibly, the seventeen-year-old's final stage of development would be considerably below the norm, and thus, the fifteen-year-old might be in a considerably better position than the seventeen-year-old to conform his conduct to the law. What will the law do then? Without some sort of algorithm relating absolute, not just relative, measurements to the questions that concern the law, no sensible individualization can occur.

This evidence strongly suggests that advocates for the more extensive use of brain science and other psychological research are not going to provide a useful legal answer separating adolescents from adults. At best, the science provides one more indication (or footnote in an opinion) that children are different, which the legal system already knew.<sup>59</sup> At worst, it leads to unequal treatment of defendants based on their gender or race due to different developmental patterns.<sup>60</sup> At the end of the day, no one has a clue how to look at an individual and make anything other than a gross determination of his cognitive and emotional capacities—too gross to ever be useful in sorting out the seventeen-year-old Elkins from the fifteen-year-old Lang.

And would those advocating for special consideration for juveniles really want what they might get? Notwithstanding the annoying inconsistency of child advocates who cite the studies I have mentioned to support the conclusion that adolescent brain development does not allow proper decision-making or the formation of culpability, except when considering sexual consent or abortion choices,<sup>61</sup> this is a two-way street. Designated individuals who presently get the benefit of special consideration are just as apt to lose it when individual consideration becomes the norm as those presently excluded are to benefit from it. If individual consideration is involved, I very much doubt that any judge will treat Elkins and Lang differently. Rules have rough edges, but sometimes they are the best that we can do.

One last thought, returning again to a topic I am somewhat knowledgeable about. Step back from the details of brain science and

---

59. See, e.g., *supra* note 51 and accompanying text.

60. See *supra* notes 48–49 and accompanying text.

61. See *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting) (pointing out the American Psychological Association (APA), as amicus curiae for youth not having full culpability as evidenced by brain science, had previously submitted an amicus brief arguing that brain science showed that adolescents were mature enough not to need parental consent for abortions); see also Megan Annitto, *Consent, Coercion, and Compassion: Emerging Legal Responses to the Commercial Sexual Exploitation of Minors*, 30 YALE L. & POL'Y REV. 1, 15 (2011). But see Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOLOGIST 583, 586 (2009) (reconciling the APA's position based upon psychosocial and cognitive maturity).

maturations rates and ask yourself: What exactly was wrong with what the police did in *J.D.B.*? Or more precisely, what exactly did they do that should be viewed as a violation of a constitutional right? The historical sources of the Fifth Amendment were torture and the trapping of individuals in interrogation practices that made them choose between possible execution or the condemnation of their immortal souls to hell, at a time when people actually believed such things. *Miranda* was a reaction to the lawlessness in state courts that saw such things as Ed Brown and Henry Shields being “laid over chairs and their backs . . . cut to pieces with a leather strap with buckles on it, and they were likewise made . . . to understand that the whipping would be continued unless and until they confessed,”<sup>62</sup> or the continuous interrogation for thirty-six consecutive hours of E.E. Ashcraft.<sup>63</sup> *J.D.B.* was removed from his classroom and interrogated by two policemen for forty-five minutes in the presence of an assistant principal and an administrative intern.<sup>64</sup> He was not physically or, in my opinion, mentally abused.<sup>65</sup> He was not lied to, so far as one can tell from the Court’s opinion.<sup>66</sup> He was not held incommunicado with worried and ill family members distraught about his absence.<sup>67</sup> He was treated the way any sane society would treat a juvenile suspected of multiple home burglaries. If the legal system is to be castigated for its inability to make fine distinctions, it should be castigated more for being unable to distinguish what happened in *J.D.B.* from something that might plausibly give rise to a constitutional right. Once again, this blindness comes from the obfuscating perversity of *Miranda v. Arizona* and viewing the case, rather than what gave rise to the case, as what matters.

Unless, of course, the worst thing that can happen is for a juvenile delinquent to get caught . . . .

---

62. *Brown v. Mississippi*, 297 U.S. 278, 282 (1936).

63. *Ashcraft v. Tennessee*, 322 U.S. 143, 153 (1944).

64. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2399 (2011).

65. *See generally id.* at 2394 (failing to mention any type of abuse).

66. *See generally id.* (failing to mention that the interrogators lied to *J.D.B.*).

67. *See Ashcraft*, 322 U.S. at 153.