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Protections for Juveniles in Self-Incriminating Legal Contexts, Developmentally Considered

Thomas Grisso

My comments use a developmental perspective on adolescents' capacities as a way to supplement the conclusions of three previous articles in this volume (Tepfer, Nirider and Drizin;¹ Frumkin;² and Heilbrun et al.³) that discuss policies to protect juveniles in legal contexts in which they are asked to make self-incriminating statements.

The Tepfer and Frumkin articles provide ample reason for concern about adolescents' responses to police interrogation. They argue adolescents are at greater risk of making false confessions (as they are more susceptible to police interrogation strategies) and are more likely to waive their rights due to poor understanding or acquiescence. Tepfer and his coauthors point out that we have entered an era of juvenile justice reform that recognizes that "adolescents are different," a perspective that has received special emphasis by the U.S. Supreme Court in several recent cases.⁴ Age, the Court says, must be taken into consideration when weighing the validity of a confession.⁵ Frumkin describes some of the things that mental health examiners can do to assist courts in weighing youths' capacities and vulnerability—especially their suggestibility—in individual cases that challenge confessions. Both articles refer broadly to differences between adolescents and adults. My comments add some complexities that arise when we go beyond these differences to address diversity *among* young people across the adolescent age span. This leads me to suggest some refinements in our thinking about the types of protections needed for juveniles in police interrogations.

In a very different legal context, Heilbrun and his coauthors focus on practice in many states that allows pretrial transfer evaluations to include examiners' discussions with juveniles about their involvement in their alleged offenses. The presumed value of talking about the alleged offense is to determine whether the youth has empathy or remorse, which is relevant for judging whether the young person can be rehabilitated or, if not, should be tried and potentially sentenced as an adult. This may seem like an entirely different context than police interrogation. Yet when viewed from a developmental perspective, as I will do later, we encounter some of the same concerns about youths' capacities that arise in discussions of

their behaviors in police interrogations. And here too a developmental perspective leads us to some considerations that seem not to have been recognized by courts when shaping law and policy for juvenile transfer proceedings.

ADOLESCENTS' FUNCTIONAL DEVELOPMENT

Adolescents are different from adults because they are still undergoing development in several areas that influence comprehension and decision making. The evidence comes from neuroscience regarding adolescent brain development as well as from behavioral studies of adolescents' functioning on tasks that demonstrate comprehension and decision making. The evidence can be summarized as follows.⁶

In general, several abilities continue to develop and improve throughout adolescence that might make a difference in teens' capacities in legal contexts. These include: (a) basic knowledge of the world, including the risks associated with various decisions; (b) the ability to handle abstract concepts (like the meaning of a "right"); (c) the ability to delay impulses by stopping to think about consequences before deciding (for example, about whether to admit or deny involvement in an alleged offense); (d) using judgment that weighs long-term positive or negative consequences, not just short-term gains; and (e) a developing sense of independent autonomy and identity associated with making decisions that are not merely acquiescent or oppositional responses to peers or authority figures. Readers of the Tepfer and Frumkin articles will see the relation between these developing abilities and our concerns about adolescents' capacities to make voluntary, knowing, and intelligent decisions about their rights and their responses to police questioning.

Recognizing that "adolescents are different from adults" in these ways is essential when fashioning special protections for juveniles in police interrogations. But that distinction only takes us partway to our objective, because it focuses on adolescent–adult differences and does not consider differences *among* adolescents.

Variability among adolescents in their capacities can be framed in two ways. First, younger adolescents are far less

Footnotes

1. Joshua Tepfer, Laura Nirider, and Steven Drizin, *Scrutinizing Confessions in a New Era of Juvenile Jurisprudence* 50 CT. REV. 4 (2014).
2. Bruce Frumkin, *Expert Testimony in Juvenile and Adult Alleged False Confession Cases* 50 CT. REV. 12 (2014).
3. Kirk Heilbrun, Sanjay Shah, Elizabeth Foster, Michael Keesler, and Stephanie Brooks, *Empathy, Acceptance of Responsibility, and Compelled Testimony in Juvenile Transfer Hearings: Legal Context*

and Empirical Evidence 50 CT. REV. 20 (2014).

4. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 129 S. Ct. 2157 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).
5. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).
6. For an excellent synthesis of the research on adolescents' developmental capacities as they relate to juvenile justice questions, see ELIZABETH SCOTT AND LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008).

capable than older ones. Improvements in ability are continuous across the six years between the 12th birthday and the 18th birthday. The risks of vulnerability due to lesser capacities are greater in the younger teen years than for the “average” adolescent and far greater than for older adolescents.⁷ (We recognize this when we allow older but not younger adolescents to obtain a driver’s license.) It is true that various fMRI studies of adolescent brain development find that changes in areas of the brain relevant for decision making continue well into the 20s.⁸ In this sense, even older adolescents have not achieved the neurodevelopmental status of adults. Yet on tasks involving *Miranda* comprehension and abilities related to competence to stand trial, research typically finds little average difference in performance between 16–17 year olds and young adults.⁹ The same studies find much difference between early teens and these age groups. Thus, there is great variability in capacities across the adolescent years because of substantial differences on average between younger and older adolescents.

Second, variability in the capacities of adolescents that make them generally less mature than adults is seen not only between younger and older adolescents, but also within any specific age. Most forensic mental health professionals who evaluate juveniles can provide examples of some 14-year-olds whose understanding of *Miranda* warnings or ability to make reasonable decisions under stress surpassed those of some adults, as well as examples of 18-year-olds who were more vulnerable than the average 14-year-old. Courts are right to require attention to age when weighing young people’s capacities, because on average these change with each advancing year until they stabilize in adulthood. Yet a youth’s age itself is an imperfect factor for making assumptions about an individual, because any specific age group includes young people with capacities ranging from far below to far above the average.

In summary, “adolescence” as a period of development from about ages 12 through 17 is a meaningful class for many purposes when thinking about needed protections in police interrogation. Yet the needs and capacities of most 12-year-olds are quite different from those of most 17-year-olds, thus making “juvenile” or “adolescent” a less-than-meaningful class for some purposes. These simple developmental observations are at the heart of challenges to our efforts to fashion protective policies for juvenile interrogations. I will return to those challenges in a moment.

DEVELOPMENTAL PSYCHOPATHOLOGY

The Tepfer and Frumkin analyses explore complexities in identifying youths’ capacities. Those complexities are even greater, however, if one considers the mental disorders among young people who are arrested and questioned by law enforcement officers. A significant body of research¹⁰ sup-

ports the conclusion that at least 60% of youth who are arrested and enter juvenile detention centers meet standard psychiatric diagnostic criteria for one or more mental disorders. About 40% have more than one disorder, and about 20% have serious, persistent, and chronic mental disorders. Symptoms of disorders found among delinquent youths often include clinically significant anxiety (sometimes related to trauma), depression (related to affective disorders), and impulsiveness (especially related to ADHD). As a consequence, many young people who are questioned by law enforcement officers are burdened not only by immature capacities related to their level of development, but also by symptoms of mental disorders.

Symptoms of mental disorder have two general effects that are relevant to consider in the context of young persons’ vulnerability during police questioning. First, most of these symptoms increase a youth’s susceptibility to interrogation strategies and decrease the ability to use the already-immature capacities that the youth might have. Second, persistent mental disorder can cause delays in an adolescent’s general development, such that the youth lags behind his or her peers both cognitively and socially. This is another reason that age norms for adolescent functioning are only a starting point for considering the capacities of individual young people.

IMPLICATIONS OF DEVELOPMENTAL DIVERSITY FOR LAW AND POLICY IN POLICE INTERROGATIONS

The diversity of abilities among younger and older adolescents—and within any specific age group—is important to consider when we analyze our laws and policies for protecting juveniles’ rights in police interrogations. Our mechanisms for protection are at two levels: (a) guiding and restricting police interrogations at the time that confessions are obtained, and (b) judicial adjudication of cases in which claims are made that waivers and confessions obtained in police interrogation were invalid. The diversity of abilities among adolescents across or within various ages is addressed by the modes of protection provided in the latter context, but not the former.

Regarding the latter, courts’ scrutiny of the validity of confessions or waiver of rights is guided by a “totality of circumstances” test.¹¹ This presumes that no specific characteristic of the child and no specific interrogation behavior of law enforcement officers are determinative of the validity of waiver or the

“[Vulnerabilities are far more likely] in the younger teen years than for the ‘average’ adolescent and far greater than for older adolescents.”

7. THOMAS GRISSO, JUVENILES’ WAIVER OF RIGHTS (1981) [hereinafter GRISSO, JUVENILES’ WAIVER]; Thomas Grisso, Laurence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Sandra Graham, Fran Lexcen, N. Dickon Reppucci, and Robert Schwartz, *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) [hereinafter Grisso et al., *Juveniles’ Competence*].

8. For a recent review, see B. J. Casey, Rebecca Stone, and Robert Hare, *The Adolescent Brain*, 1124. N.Y. ACAD. SCI. 111 (2008).

9. See GRISSO, JUVENILES’ WAIVER, *supra* note 7.

10. For a review, see THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 6–13 (2004).

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

“[W]hile juveniles as a class need special protections during interrogation, the youngest adolescents need even more.”

voluntariness of a youth’s confession. For example, the younger the juvenile, the more carefully the matter of susceptibility to coercion may be scrutinized. But the mere fact that the youth is 13 or 14 is neither dispositive nor even presumptive regarding an answer to the legal question. Every case must be weighed according to the balance of factors in the specific

case. This approach provides for individual consideration of the wide range of developmental and psychiatric statuses of adolescents. As Frumkin describes, many of these characteristics can be assessed by mental health professionals who can provide such information to the court when waivers and confessions are questioned.

But regarding the first type of protective intervention, policies to guide police questioning, a “totality of circumstances” approach is of questionable value. There are three reasons.

First, police are provided operating procedures to apply to adolescents in general. There are exceptions in some jurisdictions; for example, some require parents’ presence when suspects are 14 or younger. But by and large police are not provided separate procedures for younger and older adolescents.

Second, judicial “totality of circumstances” opinions do not provide meaningful guidance for police officers regarding how to manage interrogations with adolescents of different ages. We sometimes presume that juvenile court decisions about the validity of youths’ confessions or waiver of rights will somehow “set precedent” that will be translated into better police practices. Yet there is relatively little for police to learn from judicial decisions in this arena. When each case is decided on the “totality of circumstances,” no single factor is likely to be highlighted in a manner that “sends a message” to police about how to adjust their practices. For example, a 13-year-old’s vulnerability may weigh heavily in the court’s decision in one case and be offset by other factors in another case. The multiplicity of factors weighed in those cases creates no clear guidance about how police officers are to translate any of the factors into judgments about their handling of juvenile cases.

Third, even if it were clear that certain developmental or pathological characteristics of adolescents create greater risk of invalid waivers, this offers law enforcement officers little assistance. The circumstances of police investigations do not allow for individual assessments, and law enforcement officers should not be expected to “assess” youths’ developmental capacities and mental disorders before questioning them. Such a requirement would hold law enforcement officers accountable for employing discretion that they cannot be expected to

exercise meaningfully.

Tepper and Frumkin offer one approach to this problem. They refer to the value of judicial use of the best-practices guidelines for juvenile interrogations developed by the International Association of Chiefs of Police.¹² If used consistently by judges, the guidelines might clarify some factors for police. But will guidelines such as those offered by the IACP be adequate to deal with the diversity of capacities across the adolescent age spectrum? For example, will “limiting juvenile questioning sessions to an hour” have the same ameliorative effect for the average 12-year-old as for a 16-year-old? Will non-leading and dispassionate interviewing do anything at all to address younger adolescents’ vulnerability to making statements based primarily on their desire to escape the immediate situation rather than considering longer-range consequences of their choices?¹³ Will the simplified *Miranda* warning, “You have the right to get help from a lawyer right now,” and the youth’s reply, “It means I can get a lawyer right now if I want,” have any protective value for the majority of 13-year-olds, if they do not know the types of help a lawyer might provide?¹⁴

For purposes of fashioning protective police practices in the interrogation of adolescents, developmental considerations do not support the notion that “one size fits all.” There is sufficient research on the behavioral, cognitive, and functional differences between youth 14 and under and older juveniles to require protections for younger adolescents that go beyond those that law and policy for police interrogations might fashion for juveniles as a class. When I performed the first studies of juveniles’ capacities to understand and waive *Miranda* rights, I concluded that juveniles 14 and younger were especially poorly equipped to understand *Miranda* rights and to make decisions to waive them.¹⁵ Since that time (30 years ago), much more research has examined youths’ capacities related to *Miranda* waivers and confessions¹⁶ and to abilities relevant for competence to stand trial.¹⁷ Most of those studies have found results consistent with my suggestion that while juveniles as a class need special protections during interrogation, the youngest adolescents need even more. The same project provided evidence that merely requiring the presence of parents offered little meaningful protection. My suggestion at the time—I was young and exuberant—was a legal requirement that interrogation of adolescents 14 and younger should not occur without the presence of legal counsel.

My point is not to argue for this specific protection, but to supplement the two preceding articles by arguing the need for a tiered perspective when fashioning policies for police practices in juvenile interrogations. Protections based on an “average” for adolescents may be insufficient for the youngest adolescents, most of whom are developmentally immature even in relation to the average for young people seen in juvenile courts.

12. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE’S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION (2012).

13. Grisso et al., *Juveniles’ Competence*, *supra* note 7.

14. GRISSE, JUVENILES’ WAIVER, *supra* note 7.

15. *Id.*

16. For a recent review, see ALAN GOLDSTEIN AND NAOMI GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *MIRANDA* RIGHTS 54–66 (2010).

17. For a recent review, see IVAN KRUIH AND THOMAS GRISSE, EVALUATION OF JUVENILES’ COMPETENCE TO STAND TRIAL 60–74 (2009).

IMPLICATIONS OF DEVELOPMENTAL IMMATURITY FOR TRANSFER EVALUATIONS

Heilbrun and his coauthors reviewed laws and policies allowing or prohibiting inquiry about the alleged offense when mental health professionals examine a juvenile for a transfer hearing. The authors explain that courts believe discussion of the offense is important to learn whether the juvenile in question experiences remorse and acceptance of responsibility, suggesting better prospects for treatment in the juvenile system. They review research on the relation of empathy and future offending, finding some limited evidence for it. This analysis is certainly helpful, but a developmental perspective offers additional questions.

First, as the authors of the Heilbrun article explain, affective and cognitive empathy appear to have some relation to offending among juveniles, and the relation is a bit stronger in juveniles than in adults. They also explain that empathy involves the ability to understand (cognitive) or feel (affective) the condition of the other person. Many of the studies they cite use methods that assess whether the person can recognize others' emotions. Yet if we are interested in whether empathy serves to reduce offending, we must know whether a person can recognize others' emotions *before* those emotions are displayed—indeed, often at times before an offense when the potential victim is not yet present. “How would a hypothetical person feel if, hypothetically, I were to do something to them?” This “empathy in advance” requires more than recognizing and feeling another person's emotions. It requires some level of ability to think abstractly about people and feelings that do not yet exist. Developmental psychology tells us that reasoning about abstractions is one of the capacities that is developing early in adolescence. Typically it has formed by ages 12 or 13, but for many youth with developmental delays (due to intellectual disability, mental disorders, or economic disadvantage), it may still be developing well into mid-adolescence.

If the capacity for this type of “empathy in advance” is changing (increasing) across some part of adolescence, then what we learn about an adolescent's empathy at a given point in time may simply be the youth's current level of development regarding empathic responsiveness, not an indication of the youth's capacity for it in the future. We have some evidence of the implications of this. The Heilbrun article points out that lack of empathy has been related to measures of “callous-unemotional trait,” which is one component of psychopathy. Yet a well-constructed longitudinal research study recently found that if we use a high score on a measure of such characteristics at age 14 to predict that the youth's score will be high ten years later, we will be right only 16% of the time.¹⁸ Callous-unemotional trait and capacities for empathy may be more developmentally stable when measured in older adolescents.

But in states that allow 13- and 14-year-olds to face transfer hearings, assessing their empathy at that age tells us their current empathic functioning at best, but may tell us little about their future capacity for empathy.

Second, judging from Heilbrun's description of court decisions on this issue, few if any courts have been thinking about transfer evaluations as events to which adolescents respond according to their developmental characteristics. They are focusing on protecting defendants from self-incrimination in future legal proceedings. But in the language of validity of waivers in police interrogations, they are not thinking about the “totality of circumstances.” Given youths' relative immaturity—and given the procedures employed by forensic examiners—what are the possible threats to the *reliability* of the information that will be obtained for the transfer hearing? Even with adequate protections against the use of self-incriminating statements in future adjudication of the offense, what are the implications for the quality of information for purposes of the transfer hearing itself?

To examine these implications, we must talk about the context.¹⁹ There are some similarities between the transfer evaluation and the police interrogation. In both contexts, an authority figure meets with a subject in a setting in which the subject is not free to leave (or is likely to perceive the situation in that way). The authority figure and the subject are alone; there is no legal counsel present.²⁰ The authority figure gives the subject a warning that the information can be used for some future legal purpose. Both contexts typically involve some type of “conversation” about the subject's life circumstances (school, home, etc.) before discussing the offense, often designed in part to create a condition in which the subject will talk freely. Eventually the topic of the alleged offense is raised, and the authority figure asks the subject to talk about it. With some variability, the authority figures in both contexts may display a manner that suggests to the subject that the reason for talking about the alleged offense is in part to advance the subject's own welfare.

There are also some differences between the two contexts. Unlike the interrogation context, the juvenile is likely to have been advised by legal counsel before the transfer evaluation. The content of the warning in the transfer evaluation will differ from the *Miranda* warnings of police interrogations: for example, that the evaluation will be used by the court to determine whether the youth will remain in juvenile court or be

“[A]ssessing... empathy [of 13- and 14-year-olds facing transfer to criminal court] may tell us little about their future capacity for empathy.”

18. Donald Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORM. PSYCHOL. 155 (2007).

19. My description is based primarily on experience, not on research. Transfer evaluations by mental health professionals are one of the least-researched types of forensic mental health assessment. The

little that has been published in this area has been reviewed in Thomas Grisso, *Clinicians' Transfer Evaluations: How Well Can They Assist Judicial Discretion?* 71 LA. L. REV. 157–89 (2010).

20. In many states, juveniles have the right to have their attorneys present during forensic evaluations. In my experience, attorneys rarely choose to be present.

transferred to be tried as an adult; that if transferred, and if found guilty, the youth will be subject to penalties like an adult; that what the youth says now will not be used in that future trial, only in the transfer hearing. In contrast to the police interrogator, the forensic examiner will ask many more questions about the juvenile's general life and background to meet the clinical purposes of the evaluation, as well as probing much more about the juvenile's motivations for the offense and subsequent feelings about it.

At some point, the forensic examiner will pose the question: "I'd like to talk to you about what happened that night in the alley. Are you willing to do that?" And later, "How did you feel afterwards?" Now the youth has to make some choices, many of which are similar to those made in police interrogations: whether to admit or deny or partially admit or deny and, in any case, how to manage the questioning that will follow. And now we encounter the same questions about the potential influence of developmental immaturity on the youth's decisions. Believing that authority figures like forensic examiners will help them only if they confess, will they confess to things they did not do? Fearing punishment, will they minimize their involvement in the offense in ways that are clearly contradictory to known facts, thus causing them to appear to be avoiding responsibility? Seeking peer approval, will they put on a remorseless face to impress their cohorts who are similarly charged? Being traumatized by the offense itself, will they react as many younger adolescents do by burying their emotions so as not to be overwhelmed by them, leading to a flat appearance that we can easily misinterpret as a sign of lack of remorse?

There is no research to tell us whether or how frequently young people engage in such behaviors in transfer evaluations. But as a forensic examiner who used to do many transfer evaluations, I have seen all of these reactions and had to contend with their meaning. Over time I learned to distrust the transfer evaluation interview as a place to learn about young people's degree of remorse—just as we distrust juveniles' confessions in police interrogations. Observing a young person's sadness and apologies, or lack of them, in the complex social context of a transfer evaluation usually told me little that I could rely on. Much better were data obtained from situations outside the interview: for example, in the case of one youth, the documented fact that while he was fleeing from the alley where he had just stabbed another boy in a fight, he stopped at someone's house to alert 911 to the injured boy's whereabouts before going into hiding. Any competent forensic examiner will look outside the interview for data to arrive at meaningful inferences about remorse and empathy.

Heilbrun and his coauthors concluded that empathy related to the offense was only a "smaller piece of the puzzle" for determining amenability to rehabilitation, so that allowing inquiry about the offense during transfer evaluations is not of great value. Similarly, my analysis suggests that courts may be overestimating the importance of allowing inquiry about the offense in transfer evaluations. My reasoning, however, adds to the problem the risk of the unreliability of information gained in that context, given the influence of developmental immaturity on juveniles' responses to the transfer evaluation inquiry.

CONCLUSION

This brief commentary on the three preceding articles reinforces the value of "thinking developmentally" about adolescents' responses to police interrogations and legally relevant clinical interviews. For police interrogations, it suggests that our future thoughts about policy and law regarding special protections for juveniles may need to go beyond "adolescent-adult differences" to consider special protections related to differences among adolescents themselves—younger and older, average and disabled. For transfer evaluations, our thinking about policy regarding inquiries into the offense to determine remorse and empathy may need to go beyond the question of protections against self-incrimination. We should consider the ways in which juveniles' developmental immaturity may seriously limit the reliability of what we can learn in the context of our inquiry.



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