

Miranda is not Enough: What Every Parent in the United States Should Know About Protecting Their Child

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Abstract

Juveniles often lack the legal sophistication and cognitive development necessary to cope successfully with police officers seeking to interrogate them. They are often unable to understand the substance of their Miranda rights and do not appreciate the ramifications of waiving their rights. Many juveniles do not even comprehend that a lawyer is supposed to act as an advocate for them and protect their interests. This lack of capacity and understanding has resulted in a number of tragic cases where juveniles waived their rights and were coerced into falsely implicating themselves in crimes they did not commit. This article seeks to provide parents with an understanding of their children's legal rights as well as concrete advice about how to protect their children from adverse encounters with law enforcement.

Keywords: "Juvenile", "Miranda", "Waiver", "Parents"

Introduction

It is every parent's worst nightmare. Your child has gone missing. When you are notified that your son or daughter is in police custody and is safe you are initially relieved. But, now the police are saying that your child committed an armed robbery at around 8:00 pm last night. You know that is not true because your child was with you at 8:00 pm last night.

In fact, the whole family was together watching a movie in your living room at that time.

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When you try to tell the police they are mistaken, your child was at home, they blithely inform you that your child has already confessed and is going to be charged. You are stunned, how could your child have confessed to something he or she could not possibly have done? The alarming answer is more easily than you think.

The disquieting reality is that there is mounting evidence children will confess to crimes they have not committed (see, Boyd, 2004; Kassin et al., 2010; Meyer & Reppucci 2007). One of the best known cases of a juvenile falsely implicating himself in a crime involves the murder of twelve-year-old Stephanie Crowe. On the night of January 20, 1998, Richard Tuite,² a mentally ill vagrant, entered the Crowe home. The vagrant slipped into little Stephanie's room and stabbed her to death. Since murdered children are usually killed by someone they know, the police focused on Stephanie's family from the beginning. Michael was a quirky kid who liked to wear black and play violent video games. He had more than a passing interest in dungeons and dragons. The police decided that was good enough.

Whether the police in the Crowe case were lazy, incompetent or both is not entirely clear but what is clear is that the police virtually ignored leads about Tuite and instead subjected fourteen-year-old Michael to a lengthy, high-pressure and deceptive interrogation which resulted in Michael falsely implicating himself in his sister's murder (see, Boyd, 2004; Scott-Hayward, 2007; LaMontagne, 2013). Before you dismiss Michael as weak-willed or mentally disturbed, you should note that the police were also successful in getting Michael's alleged co-conspirator (his friend) to incriminate himself in the fictitious crime as well.

What Parents Need to Know About the Law

The Fifth Amendment protects Americans from being forced to incriminate themselves. The constitutional protections extend only to involuntary incrimination, however. Voluntary self-incrimination is perfectly constitutional. Thus, if your child confesses to the police or makes another statement implicating him or herself in a crime, it can probably be used against him or her by the state so long as the statement was made voluntarily.

² Richard Tuite was convicted of killing Stephanie in 2004 but his conviction was subsequently overturned on appeal. On retrial in December of 2013, a new jury found insufficient evidence to convict Tuite. Despite this turn of events, Mr. Tuite is widely regarded as the actual killer.

Voluntariness is determined under the totality of circumstances. At a minimum, establishing that a confession was not voluntary requires a showing of some coercive conduct by the police (see *Colorado v. Connelly*). Physical abuse, mental or emotional abuse, sleep deprivation and explicit threats of harm or promises of leniency will all render a confession involuntary (see, e.g., *Brown v. Mississippi*). But, absent something egregiously coercive, the police are permitted, if not encouraged, to act in ways calculated to get a confession.

The rules are slightly more protective if your child is being questioned while in police custody. Custody is determined based upon whether a reasonable person in the suspected child's position would believe they were free to leave (see, e.g., *Yarborough v. Alvarado*). The Supreme Court recently amended this test slightly for juveniles. In *J.D.B. v North Carolina*, the Court confronted the issue of whether a child's age should be considered in evaluating whether the child was in custody for *Miranda* purposes. Noting that a child's age may well influence his reasonable belief regarding whether he was free to leave, the U.S. Supreme Court held that it was reversible error for the lower court to refuse to consider the child's age in ruling on the suppression motion. This ruling provides some protection for children because custody for juveniles will henceforth be evaluated in light of what a reasonable child of that same age, as opposed to a reasonable adult, would have thought about whether s/he was free to leave.

Assuming your child is in custody, the U.S Supreme Court mandates that the police advise her or him before questioning that s/he has the right to remain silent and that if s/he chooses to give up that right anything s/he says may be used against him/her in a court of law. S/he must also be informed that s/he has the right to an attorney prior to answering any questions and if s/he cannot afford an attorney, one will be provided for him or her free of charge (*Miranda v. Arizona* and *Dickerson v United States*).³ These are, of course, the now familiar *Miranda* warnings. If you watch American T.V. at all, you are probably already familiar with them.

³Once charges have been filed, the Sixth amendment attaches. The Sixth Amendment provides a right to counsel at post-arraignment interrogations (*Michigan v Jackson*, 475 U.S. 625 (1986)).

J.D.B. v North Carolina is also important for parents because it highlights a stratagem frequently used by the police. By confronting your child at school, at your house or by asking you to bring your child to the police station, they can make the encounter non-custodial and avoid having to give you or your child *Miranda* warnings.

This is often done deliberately with the intent to deceive both children and parents about the seriousness of the situation and the true purpose of the meeting, which is usually to get your child to implicate him or herself in whatever crime the police are investigating.

Miranda warnings are of no use to your child or any other suspect unless they actually invoke those rights. Even juveniles are required to invoke their rights clearly and unambiguously. For example, in *Fare v Michael C*, a juvenile was given *Miranda* warnings and in response asked to speak to his probation officer. The U. S. Supreme Court found that asking to speak to a probation officer was not the same thing as requesting to speak to an attorney so the juvenile was not found to have invoked his Fifth Amendment rights.

If a child does not effectively invoke his rights, he is likely to be found to have waived them. While children, like adults, may invoke their *Miranda* rights, the Supreme Court has found that suspects, including children, can also waive those rights and speak to the police so long as the waiver is knowing, voluntary and intelligent (see *Fare v Michael Cand Maryland v Shatzer*). A voluntary, knowing and intelligent waiver must not only be free from threats and coercion, it must also, at least in theory, be made with an understanding of what the right is and with an intention to relinquish this known right (see, e.g., *Johnson v Zerbst, Iowa v Tovar, Maryland v Shatzer, and Davis v Unites States*). Unfortunately, the courts are not overly exacting in making sure juveniles actually understand their rights or the ramifications of waiver and often seem to rely on the child's statement that s/he understands the rights and wants to waive them in determining that the waiver was valid (see Viljoen, Zapf, & Roesch, 2007).

While the U.S. Supreme Court has failed to do very much to protect juveniles who are targets of police interrogations, some states have imposed additional safeguards for juveniles facing custodial interrogations in their state. For example, a number of states require that the juveniles be afforded the opportunity to consult with a parent, guardian or other trusted adult before they can waive their *Miranda* rights and/or have that adult present during the interrogation (see Feld, 2013).

Some states require that juveniles accused of what for an adult would be a felony must be informed of the possibility of criminal prosecution in adult court in order for a waiver of their rights to be deemed valid (see e.g., *State v Benoit*).

Quite a few jurisdictions use specialized *Miranda* warnings for juveniles. These special juvenile *Miranda* warnings are designed to more clearly explain the content and meaning of *Miranda* rights in the hope that children will be better informed about their rights. For example, these warnings may say “you do not have to talk to anyone” as opposed to “you have the right to remain silent” (see Rogers et al., 2012). These special warnings are often quite lengthy (Rogers et al, 2012). Research indicates that some jurisdictions use juvenile *Miranda* warnings that are in excess of 300 words long (Rogers et al, 2012). Many of these lengthier warnings require juveniles to retain and process many more concepts than even adults with excellent working memory would be capable of handling (Rogers et al, 2012). Oral administration of warnings, which is typical, exacerbates the difficulty in comprehension caused by sheer length alone. More troubling still, research indicates that some of these juvenile warnings are written for those with college level reading ability, although most are written at a middle school level (7th to 9th grade education) (Rogers et al, 2012).

Findings concerning whether juveniles understand requests to waive their *Miranda* rights are similarly concerning. Research suggests that the language the police use to ask juveniles to waive their rights encourages waiver and rarely mentions the risks associated with waiving their rights (see Rogers et al, 2012; Feld, 2013). Moreover, there are significant comprehension problems associated with waiver language as well (see, Goldstein & Goldstein, 2010; Rogers et al., 2012), meaning many children agree to waive their rights without understanding the substance of what they are giving up nor the likely consequences of their actions. Nothing in the Supreme Court’s recent cases suggests that the Court is on the verge of doing anything about this. Thus, children will presumably continue to face the prospect of being asked by the police to waive their rights without benefit of legal, or even parental, assistance. Children are particularly at risk of waiving their rights in part because they do not appreciate why an attorney is important. Defense attorneys are trained advocates who have an ethical obligation to zealously represent their clients within the bounds of the law, irrespective of the client’s factual guilt or innocence (See ABA Model Code of Professional Responsibility, Canon 7).

In other words, defense attorneys cannot use perjured testimony or otherwise deceive the court but they can and should exploit every technicality that favors their client and assert their client's rights to the full extent of the law (see Sterling, 2009).

Attorneys are also prohibited from disclosing client confidences. Attorney-client privilege prohibits attorneys from disclosing to third parties anything their clients tell them during the course of the representation, except in rare instances where such disclosure is necessary to prevent a crime or substantial bodily harm from occurring, unless the client consents to the disclosure or waives the privilege (See ABA Model Code of Professional Responsibility, Canon 4). This privilege extends to all clients irrespective of the client's age or status as a juvenile (see, e.g, Sterling, 2009). Attorney-client privilege enables clients to fully disclose what happened so that their attorneys can properly prepare their defenses without fear of their lawyers becoming witnesses against them or otherwise assisting the state in establishing a case against them.

Unfortunately, children often do not understand an attorney's role as an advocate or attorney-client privilege. If a child does not understand why a defense attorney can help them and why talking to a defense attorney is not the same thing as talking to the police, there is little reason to think they will, absent parental intervention, understand that they should to invoke their rights.

What Parents need to Know About the Adolescent Brain

You have probably noticed that your child does not think like you do. S/he is probably more impulsive, less worried about consequences and less able to delay gratification. S/he may forget part or all of what you just told him or her. There is a good reason for this. Your child's cognitive skills and brain structures associated with impulse control, working memory and risk assessment continue to develop throughout adolescence (Feld, 2013; Scott & Grisso, 1997; Scott & Steinberg, 2008; Johnson, Blum & Giedd, 2009).

The evidence suggests these physiological and mental differences make it more difficult for juveniles, as compared to adults, to understand the substance of their *Miranda* rights as well as the ramifications of waiving those rights (Feld, 2013; Viljoen & Roesch, 2005).

In other words, juveniles are demonstrably less able than adults to comprehend their *Miranda* rights and knowingly and intelligently waiving those rights (see, Viljoen, Zapf, & Roesch, 2007). These deficits increase as the age of the child decreases (see, Viljoen & Roesch, 2005; Grisso et al. 2003; Viljoen, Zapf, & Roesch, 2007).

Even as older juveniles develop cognitive skills that are comparable to adults, they continue to lack maturity of judgment until their twenties and thus remain at a deficit when making legal decisions like whether to waive their *Miranda* rights (Feld, 2013)

What Parents Need to Know about What Goes on in an Interrogation

Even when the police do not try to talk to children in a non-custodial settings so that they can avoid giving them *Miranda* warnings altogether, most children will probably fail to invoke their rights and will probably end up agreeing to talk to the police. Research consistently shows that about 80% of adult suspects waive their rights (see e.g. Kassin et al., 2007). With children, the waiver rate exceeds 90% (Feld, 2013).

Why do so many people waive their rights? People waive their rights because the police are good at their jobs. Police employ a variety of stratagems to induce waiver so they can interrogate the suspect. *Miranda* is often presented as a meaningless bureaucratic ritual. This distracts from its importance and lulls suspects into waiving their rights. Sometimes the police present waiving of *Miranda* rights as the only means for suspects to get consideration of their side of the story. Something along the lines of "if you didn't mean to kill her Jonny this is your opportunity to set the record straight." Suspects, especially innocent ones, often think they have nothing to fear from the police and as good citizens they think they should cooperate with the police. Suspects may also fear that invoking their rights will make them look guilty. Some suspects, especially juveniles, feel like they must acquiesce to police authority and do what the police want. In an interrogation situation, the police clearly want suspects to waive their rights and submit to interrogation.

Whether it is called an interview, an interrogation or an informational chat, the fact is if the police want to talk to your child about a crime they probably think your child was involved in some way.

Police departments and other law enforcement units spend a lot of time and money training their personnel on how to get a confession (Feld, 2013). And, they are good at it. The Reid technique, one of the more popular interrogation techniques, boasts a success rate in excess of 50% (Jayne, 2014). The police themselves estimate that they get incriminating statements from about 68% of the suspects they interrogate (Kassin et al., 2007). In other words, if the police can get a waiver of rights, they will probably get a confession.

Unfortunately, some of those confessions will be false and the likelihood of getting a false confession goes up significantly if the suspect is a juvenile (see Wrightsman & Pitman, 2010).

Once the police secure a waiver, they will seek to get a confession. An interrogation is not a neutral fact-finding process. Interrogations are confrontational and designed to elicit confessions (Inbau et al., 2005). The police will try a variety of sophisticated and psychologically manipulative techniques to extract a confession. One of the most powerful and least known techniques involves deception. To put it simply, the police are allowed to lie about the strength of the evidence against a suspect, even a child suspect (McMullen, 2005). They can tell a suspect that DNA, fingerprints or other forensic evidence proves the suspect committed the crime. They can tell the suspect that an eye witness identified him or her. While the courts usually prohibit the state from creating false evidence, like a bogus DNA report purportedly from a forensic lab, the police can lie about the existence of evidence. They can carry props like thick "evidence" folders and do other things to communicate that the state has a rock solid case implicating the suspect and that conviction is inevitable (see, e.g., *State v. Cayward*; *State v. Patton*). Naive suspects might reasonably conclude that their conviction is a foregone conclusion and their best chance is to confess and hope for leniency. Faced with overwhelming "evidence," some suspects may actually come to believe they committed the offense (see, Feld, 2013; Boyd, 2004; Scott-Hayward, 2007; LaMontagne, 2013).

What Parents Need to do to Protect Their Children

If you happen to live in a jurisdiction that prohibits interrogating juveniles without their parents being present, you have an advantage. Sadly, many parents squander this opportunity and do not intervene on behalf of their children (see, e.g., Rogers et al., 2012; Viljoen, Klaver, & Roesch, 2005).

If you are consulted prior to your child being interrogated or interviewed, you should take advantage of the opportunity and intervene. Never agree to let your child speak to the police before consulting with an attorney. You should also decline to speak to the police yourself about any substantive matters, such as where you or your child was at a particular date and time, until after you have consulted with an attorney.

Even if you are one-hundred percent positive that your child was not involved in any wrong-doing, you should not allow your child to make any statement to the police without your child's attorney being present. If your family cannot afford an attorney, the state is obligated to provide your child with an attorney free of charge. Take advantage of that right and insist that your child have counsel. Except in very rare circumstances, an attorney will not allow her client to talk to the police. Thus, in the absence of specific advice, you should assume that is what an attorney would tell you to do.

The police may try to make you think that if your child has nothing to hide, he or she should have nothing to fear from the police. Nothing could be further from the truth. Remember Michael Crowe. If the police have decided to talk to your child, they think your child is guilty or at least involved in something illegal. Your child will not be able to convince them otherwise by talking to them. Your child can only lose by talking to the police. Best case scenario, your child will be able to maintain his or her denials. It is, however, extremely unlikely that these denials will be believed. Your child will not improve his or her position by "co-operating" with the police. At best, your child will be no worse off than before the interrogation began. More likely, however, your child will end up incriminating herself in some manner or even fully confessing. False confessions are a leading cause of wrongful convictions (Drizin & Leo, 2004). If your child falsely confesses, he may spend a very long time in prison for something someone else did. You do not want that to happen.

The time to talk to your child about dealing with the police is before he or she comes into contact with the police. This is especially important if you live in a jurisdiction where the police need only give your child *Miranda* warnings and then may interrogate any juvenile who waives those rights without parental consent or notification. In such a jurisdiction, by the time the police contact you, it will be too late.

Tell your children explicitly that they do not have to talk to the police. Children should be told that they should never tell the police anything besides their name, address, date of birth and contact information for their parent(s). Under no circumstances should they respond to questions about where they were or what they were doing at any particular point in time. They should be strongly cautioned to make no statement of any kind.

They should simply say, and keep repeating if necessary, that they want to talk to their parents(s) and an attorney before they make any statement and that the police should please contact their mom or dad immediately. This might be a good time to tell your children that no matter how much you argue or fight with them, you are always going to have their best interests at heart. Police officers trying to solve a crime they think your child was involved in will never have your child's best interests at heart no matter how friendly they may appear to be.

"If you don't talk you might walk" is an old adage with more than a grain of truth in it. Unfortunately, the flipside "if you talk, you probably won't walk" is also almost certainly true as well, even if your child is completely innocent and has done nothing wrong. Once the police have focused on your child, and if they want to talk to your child, they are probably focusing on him or her no matter what they tell you, they are no longer engaged in neutral investigatory activities. They think your child is guilty. They will be trying to prove that your child did what they think he or she did.

While most police officers are decent people, you should remember that the law allows them quite a bit of latitude to be deceptive and most police routinely exploit this latitude. Explicitly warn your child that the police are likely to lie to them about having evidence implicating them, such as falsely claiming to have finger prints or an eye witness. The police may also lie about having contacted you and even falsely tell your child that you know s/he is at the police station and you are not coming. Make sure your child knows you will always come for him or her and they should not believe police representations to the contrary. If your child is arrested with friends, the police will certainly separate them and will probably tell your child that his or her friend(s) are implicating him or her in a crime in an effort to get your child talking.

While rare, a few police officers might even stoop to threatening or bullying children to get a confession. Make sure your children know that any officer who threatens to harm them if they do not confess is corrupt and not to be trusted. Advise them to continue to ask for you and a lawyer and to respond to no other questions. Given the high likelihood of being caught and sanctioned if an officer seriously harmed a juvenile in his custody, it is unlikely in the extreme that even the worst officer would actually seriously injure your child. Make sure your children know that.

In the unlikely event that they are threatened or harmed, they should know that they should not be afraid to scream for help or to tell any and all of the other people they come into contact with that this officer has threatened or harmed them. Police officers willing to threaten or harm children to get a confession out of them are a very rare breed. It is extremely unlikely that other officers will want to be implicated in that sort of conduct. In any event, if the police are going to these lengths, they are undoubtedly trying to railroad your child on a major offense. He or she needs to realize that no matter what they are threatened with they must not make a statement. A false statement implicating themselves will be very difficult, if not impossible, to retract later.

While overt threats and physical abuse are fortunately exceedingly rare, your child may be subjected to psychological or emotional coercion. The police are likely to try to trick your child into waiving her rights and talking to them. They may try to create a false sense of urgency. Gambits such as "this is your last chance to give your side of the story" or "we don't need your confession, we are about to get some forensic tests back that will bury you but you seem like a decent person and I want to give you a chance to tell us the truth so we can try to help you out with the judge" are common. Assure your children that they will have an opportunity to tell their side of the story after they have talked to you and an attorney. Unfortunately, it is often the innocent suspect who is most willing to talk to the police because they wrongly believe their innocence will protect them.

Realistically, your child is much more likely to encounter a friendly than a scary police officer. Police interrogators typically attempt to befriend suspects, including child suspects.

A prospective interrogator hopes to establish rapport and convince your child he is on your child's side and that your child should feel free to tell him what happened. This is a ruse easily seen through in hindsight but is amazingly effective at producing incriminating statements (see Imbau et al, 2005). Your child should be warned of this possibility and advised that no matter how friendly or trustworthy the officer may seem to be, the officer has a job to do. If the officer is trying to interrogate or interview your child, that officer, at that moment, thinks his or her job is to get a confession from your child.

"Better late than never" is true with most things in life. It is better to invoke your rights late rather than never. Be sure your children understand that they can invoke their right to an attorney at any time and all questioning must immediately cease.

Make sure your children know that if they panic and agree to talk, all is not lost. As soon as your child realizes his or her mistake, she need only say "I want to talk to a lawyer" and all questioning will stop. In addition, your child should be told that invoking his or her rights will in no way hurt them. The state cannot use an invocation of rights against the child. Unfortunately, any warned and voluntary statements made by your child prior to the invocation will be used against your child.

In conclusion, remember, neither you nor your child is required to talk to the police. The more the police try to pressure or cajole you to do so, the more suspicious of their motives you should be. Ethical police officers will not try to coerce you or your children into waiving *Miranda* rights. Any officer attempting to do so should be stopped with a firm and repeated request for counsel. In sum, you should never allow your child to talk to the police unless an attorney representing your child has given you a compelling reason for allowing it.

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