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Taking Back Juvenile Confessions

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ABSTRACT

The limited capacity of juveniles to make good decisions on their own—based on centuries of common sense and empirically supported in recent decades by abundant scientific research—informs almost every field of legal doctrine. Recent criminal justice reforms have grounded enhanced protections for youth at punishment and as criminal suspects on their limited cognitive abilities and heightened vulnerability. One area of criminal procedure doctrine lags behind this legal, scientific, and social consensus. Despite historical recognition of the need for special protections for interrogated youth, current law regarding the waiver of the rights to silence and to counsel at interrogation predominantly treats juvenile suspects like adults. As a result, courts regularly admit statements by juveniles that empirical research consistently concludes are not the result of knowing, intelligent, and voluntary waivers of constitutional rights. This not only underenforces their rights, but also raises the risk of wrongful convictions.

This Article considers whether interrogation law should correct course by incorporating a rule akin to contract law's centuries-old infancy doctrine, which permits juveniles to void a contract and be relieved of agreements that they may not have fully understood or that were ill-advised. Permitting individuals to retract uncounseled Miranda waivers elicited by law enforcement while they were juveniles would, like the infancy doctrine, protect juveniles from both crafty adults as well as their own immaturity and vulnerability. This is especially important for decisions made under stressful conditions, such as custodial interrogation by law enforcement, that exacerbate juveniles' cognitive impairments and vulnerabilities. The rule would bring interrogation law into alignment with the longstanding recognition of juveniles' limited decisionmaking capacities, as well as modern developmental science and Supreme Court criminal justice jurisprudence premised on the idea that juveniles require enhanced protections. While retractable Miranda waivers would come with law enforcement costs, they would ensure greater respect for juvenile suspects' dignity while maintaining their autonomy to make informed decisions about their rights.

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INTRODUCTION

The law has long recognized the limited capacity of young people to make good decisions on their own. The centuries-old infancy doctrine in contract law famously provides that a minor does not possess the required contractual capacity to be bound under the law of contract. "[B]ased on the presumption that unequal bargaining power always exists between [juveniles and adults], with the power, and therefore, the potential for overreaching, inuring to the adult,"[1] the infancy doctrine allows minors to void a contract at any time before reaching majority or within a reasonable time afterwards.[2] This enables young people to void agreements that they may not have fully understood or that were ill-advised.[3] The doctrine exists, as one court put it, to protect minors from "foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them."[4]

The criminal justice system, by contrast, has tended to disregard the limited decisionmaking capabilities of juveniles. Laws make it easy, and often mandatory, to treat juvenile suspects as adults, and to judge and punish their behavior by the same standards as adults.[5] Recently, however, criminal justice reforms have increasingly recognized that juveniles' limited ability to make good decisions matters. Propelled by scientific findings regarding adolescent cognitive development, the U.S. Supreme Court has held in a trio of cases that juveniles lack the moral and cognitive capabilities that would justify holding them to the same standard for their offenses as adults.[6] In a fourth case, the Supreme Court explained that the differences between juveniles and adults matter not just for punishment, but also for the proper behavior of law enforcement while it investigates suspects.[7] Legislatures have likewise restricted the occasions when juveniles may

1. Loveless v. State, 896 N.E.2d 918, 921 (Ind. Ct. App. 2008).
2. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 424–25 (2d ed. 1998). For a more detailed discussion of the infancy doctrine, see *infra* Part III.A.
3. *See* Simon Goodfellow, Note, *Who Gets the Better Deal?: A Comparison of the U.S. and English Infancy Doctrines*, 29 HASTINGS INT'L & COMP. L. REV. 135, 141 (2005).
4. Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980).
5. *See* PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE,, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011) (noting that most states have multiple mechanisms for charging juveniles in criminal court).
6. *See* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (prohibiting mandatory life without parole for juvenile offenders); Graham v. Florida, 560 U.S. 48 (2010) (prohibiting life without parole for non-homicide offenses committed by juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting death penalty for juvenile offenders).
7. *See* J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) (holding that law enforcement must take age into account when deciding whether a suspect is in custody for Fifth Amendment purposes).

be charged and judged as adults.[8] Together, these reforms reflect a social, scientific, and legal consensus that juveniles are different from adults with regard to their capacity for mature judgment and that criminal law "cannot proceed as though they were not children."[9]

One area of criminal procedure doctrine lags behind this legal, scientific, and social consensus. Despite historical recognition of the need for special protections for interrogated youth,[10] the law regarding the waiver of the rights to silence and to counsel at interrogation predominantly treats juvenile suspects like adults.[11] Current *Miranda* doctrine does not meaningfully accommodate juveniles' limited cognitive ability to understand their constitutional rights, their limited ability to assert those rights in a custodial setting dominated by adult authority figures, their increased susceptibility to the coercive pressures and interrogation strategies designed to exploit their vulnerabilities, and their elevated tendency to falsely confess.[12] As a result, courts regularly find that juvenile suspects as young as ten years old validly waive constitutional rights that research establishes they do not understand, and with profound consequences that they do not foresee. Existing non-constitutional safeguards—such as parental notification laws and video recording requirements—have a limited, and sometimes perverse, role in protecting juvenile suspects' rights.[13]

Numerous scholars have offered solutions to this problem, proposing either a more developmentally informed inquiry regarding a juvenile's waiver of his rights to silence and counsel, or mandatory counsel at interrogation.[14] This

8. *See* Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 200 (2014) (citing CARMEN E. DAUGHERTY, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2011-2013, at 5–6 (2013), http://www.campaignforyouthjustice.org/documents/ST2013.pdf [https://perma.cc/FPR2-TBEK]) (noting that twelve states since 2006 have made it more likely that juveniles will remain in the juvenile justice system).

9. *Miller*, 132 S. Ct. at 2466; *Graham*, 560 U.S. at 76 ("[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

10. *See infra* Part II.A.

11. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (describing the privilege against self-incrimination as belonging to the individual without any regard to age).

12. *See infra* Parts I, II.B.

13. *See infra* Part II.C (explaining how parental presence can increase the coercive pressures on a juvenile suspect).

14. *See, e.g.*, Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 110 (2012) ("J.D.B., properly extended, requires that counsel be afforded to any minor suspect prior to and during any police interrogation."); Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 434 (2006) (proposing "a rule that a child cannot waive any rights during custodial interrogation, unless she is represented by counsel who is present and has had adequate time to interview and advise the child before questioning commences").

Article considers a novel solution that nevertheless relies on a principle of contract law that is centuries old. It argues that interrogation law should incorporate a rule akin to contract law's infancy doctrine and permit individuals to retract uncounseled *Miranda* waivers elicited by law enforcement while they were juveniles.[15] A retracted waiver would make the custodial confession inadmissible against the individual at trial. The reasons to impose such a rule in the juvenile interrogation context overlap with the justifications for the infancy doctrine in contract law. A retractable waiver rule would better protect young people from the consequences of an agreement with a crafty adult that primarily served the adult's interests and was likely to be ill-advised at the moment it was made. It would allow juveniles to reconsider a fateful decision made under stressful conditions at a time and place where the decision could be more informed and most deliberately made.[16] In addition, like the infancy doctrine, a retractable waiver rule would disincentivize behavior by adults that intentionally exploits juveniles' developmental immaturity. This would moderate law enforcement's laser focus on extracting confessions, and minimize the risk of wrongful prosecutions based on false confessions.[17] The rule would also enable modern interrogation doctrine to better fulfill the dignity objectives that lie at the heart of the privilege against self-incrimination.[18]

Retractable *Miranda* waivers would prevent the regular admission of statements by courts that empirical research consistently concludes are unlikely to be the result of knowing, intelligent, and voluntary waivers of the constitutional privilege against self-incrimination and more likely to be false. In fact, a retractable waiver rule would make it almost completely unnecessary for courts to

15. For an argument from the infancy doctrine that minors should be presumed to lack the capacity to waive their Miranda rights, see Michael Wayne Brooks, *Kids Waiving Goodbye to Their Rights: An Argument Against Juveniles' Ability to Waive Their Right to Remain Silent During Police Interrogations*, 13 GEO. MASON L. REV. 219 (2004), which recommends that the presumption of incapacity only be overcome if a parent, guardian or adult advocate is present at the interrogation and affirms the waiver. For a fuller discussion, see *infra* Part III.B.

16. *See, e.g.*, Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL., PUB. POL'Y, & L. 115, 119 (2007) ("[A]dolescents are much less capable of making sound decisions when under stressful conditions . . . .").

17. *Cf.* SARAH BURNS, THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING (2011) (recounting how five fourteen-to sixteen-year-olds falsely confessed to, and were wrongly convicted of, raping and violently assaulting a female jogger).

18. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must *accord* to the dignity and integrity of its citizens." (emphasis added)); *see also In re* Gault, 387 U.S. 1, 47 (1967) (recognizing that one of the purposes of the privilege against self-incrimination is "to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction").

answer the vexing question of whether a juvenile *Miranda* waiver was knowing, intelligent, and voluntary, freeing up strained judicial resources for more beneficial use. Moreover, it would rebalance the scales between juvenile suspects and adult interrogators, as well as juvenile defendants and prosecutors.[19] Finally, a retractable waiver rule would bring interrogation doctrine into alignment with the law's longstanding recognition of juveniles' limited decisionmaking capacities, modern developmental science, and recent Supreme Court criminal justice jurisprudence.

Part I of this Article briefly explains police interrogation practices and the special case of juvenile interrogation and confessions. Part II sets out current self-incrimination law, highlighting its application to juveniles. Part III makes the case for allowing juveniles to retract an uncounseled *Miranda* waiver elicited during custodial interrogation. Finally, Part IV responds to potential objections.

I. THE RISKS OF INTERROGATING JUVENILES

Each year, law enforcement arrests hundreds of thousands of juveniles.[20] Many are arrested for serious crimes that carry significant consequences, including incarceration, sex offender registration, and lifetime disenfranchisement.[21] They all, no matter how serious the charge, potentially face custodial interrogation regarding their alleged offense.[22] To frame the discussion that follows, consider the following two recent statements by juvenile suspects that multiple levels of

19. As many have observed: "The criminal justice system runs on plea bargaining, and prosecutors have the stronger hand in plea negotiations." Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677 (2016). By making juvenile confessions less likely to be admissible, and therefore making convictions harder to secure, the rule would reduce prosecutors' leverage during plea bargaining. This could ensure that criminal procedure rights are more fully enforced. *See generally* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (discussing how plea bargaining may thwart the fairness goals of criminal procedural rules).

20. *Crime in the United States 2015*, U.S. DEP'T JUST., https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-38 [https://perma.cc/E684-A8TY] (reporting that 709,333 persons under eighteen years old were arrested in 2015).

21. *See id.* In 2015, just over 200,000 persons under eighteen years old were arrested for the following crimes: murder and nonnegligent manslaughter, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson. *Id.*; *cf.* Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195 (2015) (showing that the amount of information law enforcement collects, stores, and shares about juveniles has markedly increased in the last two decades).

22. The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The Court was particularly troubled by custodial interrogation because "the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

courts found to be made after a knowing, intelligent, and voluntary waiver of the privilege against self-incrimination.

Brendan Dassey was a sixteen-year-old special education student who, during several rounds of police questioning over a forty-eight hour period, without consulting with an attorney, confessed to helping his uncle assault, kill, and dispose of the body of a woman last seen on his uncle's property.[23] Brendan had a "low average to borderline" IQ,[24] and "psychological tests also showed that [his] tendency to 'give in and go along with leading questions' and to 'shift his answers due to pressure' made him 'highly suggestible.'"[25] Brendan plainly did not understand the gravity of the situation or the consequences of what he said. After eventually admitting to participating in a sexual assault and murder, Brendan asked his interrogators, "Do you think I can get [back to school] before one twenty-nine? . . . I have a project due in sixth hour."[26] Throughout the interrogation, the police portrayed themselves as on Brendan's side, telling him "we'll go to bat for ya" and "I promise I will not let you high and dry" and "I wanna assure you that [we] are in your corner, we're on your side."[27] Despite their promises of solidarity, the detectives' sole focus was to get Brendan to confess. They rejected his denials over and over again,[28] threatened him with criminal liability if he would not talk, repeatedly promised leniency if he would confess, and contaminated his confession by feeding him non-public information about the crime.[29] Despite videotape of the troubling interrogation, trial and appellate courts found that the statement followed a valid waiver of his rights to silence and counsel.[30] Based largely on his

23. *See* State v. Dassey, 2013 WI App 30U, ¶¶ 1–4, 346 Wis. 2d 278, 827 N.W.2d 928, *habeas corpus granted by sub nom.* Dassey v. Dittman, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016.
24. *Dassey*, 2013 WI App 30U, at ¶ 6.
25. Brief for Defendant-Appellant, *Dassey*, WI App 30U (No. 2010AP3105), 2011 WL 6286867, at *78.
26. Interview by Mark Wigert & Tom Fassbender with Brendan Dassey, in Calumet Cty. Sheriff's Dep't, at 613 (Mar. 1, 2006), http://www.stevenaverycase.org/wp-content/uploads/2016/02/Brendan-Dassey-Interview-Transcript-2006Mar01_text.pdf [https://perma.cc/4YCU-VSJ3]; *see also* Brief for Defendant-Appellant, *supra* note 25, at *87 (arguing that Dassey's remarks during and after his interrogation indicated that he did not understand the import of what was happening).
27. Brief for Defendant-Appellant, *supra* note 25, at *11, *10, *15 (errors in original).
28. *Id.* at *85 ("We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know . . . .").
29. *See* Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 850–52, 856–57 (2012).
30. *See* State v. Dassey, 2013 WI App 30U, ¶¶ 1, 6, 346 Wis. 2d 278, 827 N.W.2d 928, *habeas corpus granted by sub nom.* Dassey v. Dittman, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016; Steven Avery & Brendan Dassey cases, *Brendan Dassey Police Interview/Interrogation May 13, 2006 – Steven Avery Making a* Murderer, YOUTUBE (Dec. 29, 2015), https://www.youtube.com/watch?v=nN-4qFhRttE&t=4546s [https://perma.cc/4HCY-3D8L] (presenting a video recording of one of Brendan Dassey's interrogations).

dubious confession, a jury found the sixteen-year-old Dassey guilty and he was sentenced to life in prison.[31] It took eleven years of appeals, a famous wrongful conviction lawyering team, and a wildly popular Netflix documentary for a court to finally find that Brendan's confession was involuntary.[32]

Joseph H. was just ten years old when he waived his rights to silence and counsel and admitted to police that he shot his father early one morning as his father slept.[33] His age alone made it highly unlikely that he understood his rights and intelligently waived them.[34] His "low-average intelligence" increased those odds.[35] Joseph's interrogator seemed to recognize this, beginning the interrogation by telling him: "Now, I'm going to read you something and it's—it's called your *Miranda* Rights. And, I know you don't understand really what that is."[36] When asked if he knew what it meant to have the right to remain silent, Joseph proved the interrogator's intuition about his understanding correct, saying "[y]es, that means that I have the right to stay calm."[37] Joseph's explanation of his right to counsel was incomprehensible.[38] The detective then said: "That means, you have the choice. That you can talk to me with your mom here or you can wait and have an attorney before you talk to me."[39] This explanation conveyed to Joseph (contrary to his right to remain silent) that whatever choice he made, ultimately, he would not remain silent but would talk to the police. The trial court found that Joseph knowingly, intelligently, and voluntarily waived his rights

31. Dassey v. Dittman, 201 F. Supp. 3d 963, 985 (E.D. Wis. 2016). There are strong reasons to believe that Dassey did not participate in the crime. *See* Nirider, *supra* note 29, at 857 (showing that Dassey "was not able to say anything provably correct about the crime absent the guiding hand of contamination," which is "a red flag of unreliability").

32. *See Dassey*, 201 F. Supp. 3d at 1006 ("The investigators repeatedly claimed to already know what happened on October 31 and assured Dassey that he had nothing to worry about. These repeated false promises, when considered in conjunction with all relevant factors, most especially Dassey's age, intellectual deficits, and the absence of a supportive adult, rendered Dassey's confession involuntary under the Fifth and Fourteenth Amendments."), *appeal filed*, 7th Cir., Sept. 9, 2016. Dassey's conviction was a focus of the popular documentary *Making a Murderer: Season One* (Netflix, Inc. & Synthesis Films Dec. 18, 2015).

33. *In re* Joseph H., 367 P.3d 1, 1 (Cal. 2015) (Liu, J., dissenting), *cert. denied sub nom.* Joseph H. v California, 137 S. Ct. 34 (2016).

34. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1160–61 (1980) (concluding that those age fourteen and below are incompetent to waive their rights to silence and legal counsel).

35. *But see Joseph H.*, 367 P.3d at 1 (Liu, J., dissenting) (describing the appellate court's decision to uphold Joseph's waiver even after considering his "low-average intelligence").

36. *Id.* at 2.

37. *Id.* at 3.

38. *Id.* (noting that the record showed Joseph's statement as follows: "It means, don't talk until that means to not talk till the attorney or . . .").

39. *Id.* The adult present at Joseph's interrogation was not his mother, but his stepmother. *Id.* at 1.

to silence and counsel.[40] Over an unusual dissent, the California Supreme Court declined to review the lower court's holding.[41] The U.S. Supreme Court likewise denied review, leaving in place the lower court's holding that ten-year-old Joseph knowingly, voluntarily, and intelligently waived his privilege against self-incrimination.[42]

This Part explains how three interacting factors give statements by juveniles like Brendan and Joseph a heightened risk of being unreliable and unconstitutionally compelled: police interrogation tactics, adolescents' diminished competence to understand and exercise their rights (a deficit that is exacerbated under stressful conditions), and adolescents' vulnerability to coercion and proneness to confessing falsely.

A. Psychologically Oriented Interrogation Methods

Police interrogation is "inherently compelling."[43] American police are trained to direct this compulsion toward extracting confessions. The most widespread interrogation technique taught to law enforcement in the United States is known as the Reid method.[44] The Reid method involves nine steps of relentless psychological pressures designed to weaken the presumptively guilty suspects' resistance and obtain a confession.[45] Interrogators combine "'minimization' techniques like feigning friendship, flattery, and false sympathy, with 'maximization' techniques like lying about or exaggerating the strength of evidence," to achieve their goal.[46]

40. *In re* Joseph H., 188 Cal. Rptr. 3d 171, 185–87 (Ct. App. 2015).
41. *Joseph H.*, 367 P.3d at 1. The dissent noted that a leading California Supreme Court decision on juvenile waivers involved a juvenile thirty-eight days short of his eighteenth birthday and "predates by several decades the growing body of scientific research that the high court has repeatedly found relevant in assessing differences in mental capabilities between children and adults." *Id.* at 4. According to one law firm, Justice Liu's dissenting opinion from the denial of a petition for review was the first from the California Supreme Court in over fifty years. David Ettinger, *The Case for Publishing Justice Liu's Dissent*, HORVITZ & LEVY: AT THE LECTERN, (Nov. 2, 2015, 2:30 PM), http://www.atthelectern.com/the-case-for-publishing-justice-lius-dissent [https://perma.cc/7TPC-49Q8].
42. *See* Joseph H. v. California, 137 S. Ct. 34 (2016), *denying cert. to Joseph H.*, 367 P.3d 1.
43. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
44. Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2560 (2008) ("The most influential current training method for law enforcement is the Reid technique, outlined in Reid and Inbau's book *Criminal Interrogation and Confessions*.").
45. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 188–89, 5 (5th ed. 2013) ("An interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt."); Steven A. Drizin & Beth A. Colgan, *Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 127 (G. Daniel Lassiter ed., 2004).
46. Drizin & Colgan, *supra* note 45, at 127.

Interrogators are also trained to deliver the *Miranda* warnings in a way that induces waivers. This includes de-emphasizing the significance of the warnings and persuading a suspect that waiving his rights is in his best interest and will result in tangible or intangible benefits.[47]

The Reid method does not call for modified tactics when interrogating youth, nor does it teach interrogators to be mindful of juveniles' heightened vulnerabilities and susceptibility to suggestion. According to the current edition of the training text: "[T]he principles . . . discussed with respect to adult suspects are just as applicable to the young ones."[48] Researcher Jessica Meyer, who "participated in a full 4-day, 32-hour Reid & Associates 'Interviewing and Interrogation' training program," reported that "only 10 minutes of instruction were dedicated to youths, and this was to advocate for the use of the same strategies with youths as with adults."[49]

The Reid training manual, in fact, encourages law enforcement to take advantage of the characteristics of youth to help extract a confession. It encourages law enforcement to use the fact that many juvenile suspects live in "conditions and circumstances [that] place youths in a much more vulnerable position for wrongdoing" as a way to get them to confess.[50] It suggests that law enforcement place the blame for a young person's alleged conduct on others or the neighborhood in which the young suspects lives.[51] The manual suggests, for example, that,

> [W]here one or both parents were alcoholics, drug addicts, or for some other reason neglected the suspect as a child, the investigator may say: I can pretty well understand what would have happened to me if that condition existed in my home. . . . No wonder you finally got into something like this. You were worse off than an orphan.[52]

The almost 500-page Reid manual devotes one page of text to "precautionary considerations" for interrogating juveniles.[53] It states that those under ten years old

47. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 126–28 (2008); *see also* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 78–91 (2001).
48. INBAU ET AL., *supra* note 45, at 250.
49. N. Dickon Reppucci et al., *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67, 69 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).
50. INBAU ET AL., *supra* note 45, at 250.
51. *Id.* at 251.
52. *Id.*
53. *See id.* at 254–55.

"should not be subjected to active persuasion techniques during interrogation."[54] It further advises that those under ten are "incapable of fully understanding the implications of waiving *Miranda* rights."[55] This concession protects a decidedly small population of criminal suspects—those under ten accounted for one tenth of 1 percent of all arrests in 2015.[56] And as shown below, it vastly undercounts the population of juveniles who are incapable of understanding their rights and the implications of waiving them.[57]

For adolescents, which the Reid manual defines restrictively as those aged ten to fifteen,[58] the manual endorses "a confrontational interrogation . . . involving some active persuasion."[59] The only technique the manual advises to avoid when interrogating a youthful suspect (though it does not ban it, as have Great Britain and most European countries, for all suspects)[60] is the use of false evidence, and only then when the suspect has "low social maturity or . . . diminished mental capacity."[61] Presumably the manual means low social maturity and diminished mental capacity compared to other juveniles, because youth as a class have lower social maturity and diminished mental capacity compared to adults.[62] This restrictive view of when caution is warranted keeps high the number of juvenile suspects who law enforcement treat the same as adult suspects at interrogation.

54. *Id.* at 254. Active persuasion techniques include "themes" like sympathizing with the suspect, minimizing the moral seriousness of the offense, condemning others, and presenting alternative questions that each require an inculpatory answer. *Id.* at 210–20, 293–94. Police report that they use minimization techniques less frequently with juveniles not out of concern for juveniles' vulnerability, but because they felt that "minimizing seriousness or using blame-shifting themes did not play well on tape for fact-finders." BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 140 (2013).

55. INBAU ET AL., *supra* note 45, at 254–55.

56. *Crime in the United States 2015*, *supra* note 20.

57. *See infra* Part I.B.

58. INBAU ET AL., *supra* note 45, at 254. The prevailing definition of adolescence extends until at least age eighteen and as far as the mid-twenties. *See, e.g.*, LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 5 (2014) (using the term adolescence to refer to the period lasting from age ten to twenty-five).

59. INBAU ET AL., *supra* note 45, at 254.

60. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 17 (2010).

61. INBAU ET AL., *supra* note 45, at 255. The false evidence ploy involves telling the suspect that the police have evidence, such as eyewitnesses or DNA evidence, inculpating the suspect when they do not have such evidence. *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 146 (1997) ("When an interrogator deceives a suspect as to the nature of the evidence against him, falsely leading him to believe that the police have overwhelming evidence of his guilt, the suspect is likely to give an untrustworthy confession.").

62. *See* STEINBERG, *supra* note 58, at 187–89.

Not all police interrogate using the Reid Method. Some officers approach interrogation less accusatorially and confrontationally, aiming instead to allow suspects to provide a narrative and to develop facts instead of extracting a confession.[63] This investigative approach, developed in England in the 1990s,[64] prioritizes the gathering of evidence from a suspect over extracting a confession.[65] Moreover, the investigative method recognizes the vulnerabilities of youth and the need to treat them differently than adults.[66] As a result, it produces better, more reliable information, protecting against false confessions more effectively than the accusatory approach of the Reid method.[67] On account of its advantages, the investigative approach is slowly gaining adherents in the United States.[68] And model policies and trainings increasingly urge police to take care to avoid coercing particularly vulnerable suspects like juveniles.[69]

Nevertheless, studies of actual interrogation practices find that police overwhelmingly use the same old-school, relentless, psychologically manipulative interrogation techniques with juveniles as they do with adults. One study found that while police "have knowledge similar to researchers about youth's diminished developmental capacities and diminished psychosocial maturity" they "do not seem to apply this fundamental developmental knowledge to the interrogation context."[70] A survey of police at a metropolitan county police department likewise revealed that police demonstrate "a general view . . . that youth can be dealt with in the same manner in interrogations as adults."[71] Barry Feld's study of

63. *See, e.g.*, Kassin et al., *supra* note 60, at 28 (explaining that the purpose of such interrogations is "fact finding rather than confession").
64. *Id.* at 13.
65. *See* Note, *Juvenile Miranda Waiver and Parental Rights*, 126 HARV. L. REV. 2359, 2361 n.17 (2013) (explaining that the "investigative interviewing" technique "favors neutral information gathering over coercive confession seeking"); *see also* REBECCA MILNE & RAY BULL, INVESTIGATIVE INTERVIEWING: PSYCHOLOGY AND PRACTICE (1999).
66. MILNE & BULL, *supra* note 65, at 77.
67. *Cf.* Christian A. Meissner et. al., *Interview and Interrogation Methods and Their Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REVS., Jan. 2012, 1, 31 (finding that accusatorial interrogation methods such as the Reid method "significantly increase the likelihood of obtaining a false confession from an innocent [individual]").
68. *See* Robert Kolker, *Nothing But the Truth*, MARSHALL PROJECT (May 24, 2016, 7:00 AM), https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth#.P21BmqEzN [https://perma.cc/SUH4-LKVL].
69. *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, INTERVIEW AND INTERROGATION OF JUVENILES 2 (2011), http://njdc.info/wp-content/uploads/2013/12/Training-Key-652-Interview-and-Interrogation-of-Juveniles-1-1.pdf [https://perma.cc/6DWZ-PAL9].
70. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 775, 773 (2007) (citation omitted).
71. *Id.* at 777.

over 300 videotaped interrogations of juveniles likewise found that police used similar tactics with juveniles as they did with adults.[72]

These interrogation practices nearly always accomplish their goal. Studies have found that somewhere between 78 and 93 percent of the sampled suspects waive their rights to remain silent and to counsel during interrogation and give statements to police.[73] The numbers for juvenile suspects come in at the high end of the range. Barry Feld, for example, found that 92.8 percent of approximately 300 sixteen- and seventeen-year-olds charged with felony offenses waived their *Miranda* rights at interrogation.[74] Such waiver rates would raise little concern if the *Miranda* warnings accomplished their goals and juvenile suspects understood their rights before voluntarily waiving them. But as the next subsection shows, most juvenile statements are given without such understanding.[75]

B. Juveniles' Limited Ability to Understand and Assert Their Rights

After advising suspects that they have a right to counsel and the right to remain silent, police typically ask a suspect some version of the following questions:

> Q: Do you understand each of the rights as I've explained them to you?
>
> Q: Do you wish to speak with me?

These deceptively simple questions require juveniles to do a cognitive task that often exceeds their abilities. Overwhelming empirical evidence shows that juveniles do not understand their constitutional privilege against self-incrimination, or the consequence of waiving their rights.[76] This is not new

72. *See* FELD, *supra* note 54, at 60, 110, 140.

73. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 851, 859 & n.115 (1996) (finding that 84 percent of interrogated suspects waived in a study of 129 interrogations conducted in Salt Lake County, Utah); Anthony J. Domanico et al., *Overcoming* Miranda*: A Content Analysis of the* Miranda *Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 11, 13 (2012) (finding that 93 percent of interrogated felony murder suspects waived in a study of twenty-nine electronically-recorded interrogations conducted in Milwaukee County, Wisconsin); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 276 (1996) (finding that 78 percent of interrogated suspects waived in a study of 175 interrogations conducted by three police departments, one located in a major, urban area).

74. FELD, *supra* note 54, at 170, 274–75 (examining 307 videotaped or transcribed interrogations of sixteen-and seventeen year-olds charged with felony offenses conducted in Minnesota).

75. *See infra* Section I.B.

76. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 202–03 (1981); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (concluding that over 90 percent of the juvenile suspects had failed to understand their rights, and yet had still voluntarily waived them); Richard A.

information. In the early 1980s, Thomas Grisso found that a significant percentage of young people did not understand their rights to silence and legal counsel.[77] Specifically, Grisso concluded that those aged fourteen and below are incompetent to waive their rights to silence and legal counsel, that this incompetence extends to those age fifteen and sixteen with an IQ under eighty, and that 33–50 percent of juveniles aged fifteen and sixteen with an IQ above eighty also lack the requisite competence to waive their rights.[78]

More recent studies affirm, add nuance to, and expand Grisso's findings. Some have found that understanding certain portions of the *Miranda* warnings requires high school reading levels.[79] Another found that "preteen suspects are rarely able to appreciate the typical Miranda warnings presented to them . . . . Even older adolescent suspects are unlikely to understand critical components of the warnings and waivers currently in use . . . ."[80] The authors added that this is particularly true "when educational, intellectual, and mental health limitations are considered."[81] More broadly, research shows that full psycho-social maturity and adult-like decisionmaking competence does not completely develop until the twenties.[82] This is in part because juveniles have less life experience and less

Lawrence, *The Role of Legal Counsel in Juveniles' Understanding of Their Rights*, JUV. & FAM. CT. J., Winter 1983–1984, at 49, 52 (finding that more than 25 percent of children either did not remember or understand the *Miranda* warnings).

77. Grisso, *supra* note 34, at 1160; *see also* GRISSO, *supra* note 76.

78. *See* Grisso, *supra* note 34, at 1160. Grisso also found that only 20.9 percent of juveniles under age seventeen understood all four *Miranda* warnings. *Id.* at 1151 n.77, 1153; *see also* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 233 (2006) (summarizing research on adolescents' abilities to exercise their *Miranda* rights and their adjudicative competence as showing that youths as a class "understand legal proceedings and make decisions less well than do adults" and that "[y]ouths fifteen years of age and younger exhibited the clearest and greatest disability").

79. *See, e.g.*, Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 L. & HUM. BEHAV. 177, 184–86 (2007) (finding that some versions of the *Miranda* warnings a reading level greater than or equal to the 12th grade); Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 L. & HUM. BEHAV. 124 (2008) (finding the same, and "recommend[ing] that any vocabulary requiring [greater than or equal to a] 10th grade education be avoided in Miranda warnings").

80. Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCHOL., PUB. POL'Y, & L. 63, 82 (2008) [hereinafter Rogers et al., *Comprehensibility and Content*] (noting that key words used in *Miranda* warnings, such as "counsel," "appointed," and "waive," require a high school or college education to understand); *see also* Grisso, *supra* note 34, at 1151–52.

81. Rogers et al., *Comprehensibility and Content*, *supra* note 80, at 82.

82. *See* FELD, *supra* note 54, at 47; *see also* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 44 (2010) ("[L]arge-scale structural change tak[es] place in the brain during [adolescence and into the early twenties] in the frontal lobes, most importantly within the prefrontal cortex . . . ."). As Scott and Steinberg explain: "The prefrontal cortex is central to what psychologists call 'executive functions,' advanced thinking processes that are employed in

knowledge to draw on, and consider fewer options when making decisions.[83] Moreover, whatever cognitive capacities juveniles have in their teens wilt under stressful conditions.[84] Additionally, since many juveniles in delinquency proceedings have learning disabilities or lower IQs,[85] juvenile suspects are at a greater risk than the general juvenile population of failing to understand their rights.

On top of juveniles' general cognitive deficiencies, the social dynamics of interrogation enhance their susceptibility to the strategies used by interrogators. Youth are taught to do what adults say, especially adults in a position of authority, and to answer questions posed by authority figures.[86] The ingratiating, rapport-building, small talk deployed by interrogators before mentioning the warnings, and portrayals of the investigator "as the suspect's friend, confidant, or guardian," more easily convince a juvenile suspect to waive his rights and confess.[87] For example, detectives told Brendan Dassey that "even if those statements are

planning ahead and controlling impulses, and in weighing the costs and benefits of decisions before acting." SCOTT & STEINBERG, *supra*; *cf.* Jay N. Giedd, *The Amazing Teen Brain*, SCI. AM., June 2015, at 32, 33 ("MRI studies show that the teenage brain is not an old child brain or a half-baked adult brain; it is a unique entity characterized by changeability . . . . [T]he prefrontal cortex, which controls impulses, does not mature until the 20s.").

83. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (noting children "are more vulnerable or susceptible to . . . outside pressures"); Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[Children] often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."); Brief Amicus Curiae of the American Bar Ass'n in Support of the Respondent at 11, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 1617399, at *11 ("[J]uveniles have fewer life experiences to inform their decision making.").

84. *See, e.g.*, Aronson, *supra* note 16, at 119 ("[A]dolescents are much less capable of making sound decisions when under stressful conditions . . . ."); *see also* Haley v. Ohio, 332 U.S. 596, 599 (1948) (stating that interrogation tactics that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens").

85. *See, e.g.*, PETER LEONE & LOIS WEINBERG, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 12 (2012), http://cjjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeedsofChildrenandYouth_May2010.pdf [https://perma.cc/X6CE-VMCD] (noting that youth in the child welfare and juvenile justice systems are three to seven times more likely to need special education services than children outside of the systems); Pamela M. Henry-Mays, Note, *Farewell* Michael C., *Hello* Gault*: Considering the* Miranda *Rights of Learning Disabled Children*, 34 N. KY. L. REV. 343, 356 (2007) (noting that juveniles with learning disabilities range from 30 to 70 percent of the incarcerated juvenile delinquent population).

86. *See* Feld, *supra* note 78, at 230 ("Social expectations of obedience to authority and children's lower social status make them more vulnerable than adults during interrogation."); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003) ("Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent . . . ."); Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 715–16 (1992) (noting that children are socialized to obey authority figures).

87. Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing With the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 438 (1999).

against your own interest . . . I'm thinkin' you're all right. OK, you don't have to worry about things. . . . [W]e're there for ya."[88] Pressured and scared, Dassey presumably took the adult officers at their word. A federal court recently held that the repeated false promises of leniency, "when considered in conjunction with all relevant factors, most especially Dassey's age, intellectual deficits, and the absence of a supportive adult, rendered Dassey's confession involuntary" and therefore inadmissible.[89]

Juveniles are also easily misled by interrogators who seek to persuade a suspect that waiving his *Miranda* rights will be in his best interest and result in tangible or intangible benefits.[90] Brendan Dassey, for example, testified that he understood the officers to have promised him during his interrogation that "no matter what . . . I wouldn't be taken away from my family and put in jail."[91] Juveniles' relative lack of sophistication also allows another common tactic—portrayals of the reading of the rights as a bureaucratic ritual—to fool juveniles into thinking that the reading and waiving is just that: what always happens before the suspect talks.[92]

Further characteristics of juvenile decisionmaking increase their vulnerability during interrogation. Adolescents typically underestimate the amount and likelihood of risks compared to adults, more heavily discount the future, and prioritize potential immediate gains over more distant (even if certain) losses.[93] When interrogators explain that a confession will end the interrogation, juveniles value that immediate gain over the unknown negative consequence that attends confessing to a crime.[94] This leads juveniles to waive their rights and speak with law enforcement where adults would assess the decision differently.

Compounding these challenges is young people's different understanding of a right. Research has shown that "adults typically see a legal right as an 'entitlement,' which is provided to them by law and cannot be revoked. In contrast, . . . children

88. Brief of Defendant-Appellant, *supra* note 25, at *16. The detective added: "[Y]eah we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you." *Id.* at *9.

89. Dassey v. Dittmann, 201 F. Supp. 3d 963, 1006 (E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016.

90. *See, e.g.*, LEO, *supra* note 47, at 130 (recounting an interrogation of a juvenile suspected of murder in which the officer told the juvenile that he would have "the opportunity to clear this whole matter up," suggesting that talking might lead to no charges or being charged as a juvenile instead of an adult).

91. Brief of Defendant-Appellant, *supra* note 25, at *44.

92. *See* LEO, *supra* note 47, at 127.

93. Jennifer Mayer Cox et. al, *The Impact of Juveniles' Ages and Levels of Psychosocial Maturity on Judges' Opinions About Adjudicative Competence*, 36 LAW & HUM. BEHAV. 21, 21 (2012).

94. *Cf.* SCOTT & STEINBERG, *supra* note 8282, at 39–40 ("[A]dolescents tend to discount the future more than adults do, and to weigh more heavily short-term consequences of decisions . . . in making choices" such that "[t]o a young person, a short-term consequence may have far greater salience than one five years in the future").

think of a right as 'conditional'—something that authorities allow them to have, but that could also be retracted."[95] Thomas Grisso found that many youth, when asked to explain what police mean by the right to remain silent, respond by saying things like "[y]ou have to be quiet unless you are spoken to" or "[y]ou can be silent unless you are told to talk."[96] Recall that when ten-year-old Joseph H. was asked if he knew what it means to have the right to remain silent, he replied "[y]es, that means that I have the right to stay calm."[97] The different understanding of a right seems to be especially detrimental for youth from poorer and ethnic-minority backgrounds, who are disproportionately likely to contact the criminal justice system.[98] Research indicates that they are more likel to "anticipate that law enforcement officials will punish them if they exercise their rights," further discouraging them from doing so.[99]

All told, research paints a dubious picture of juvenile suspects' capacity to understand and assert their rights during custodial interrogation. The reality is likely even worse than the research shows. Because of limits on experiments involving human subjects (researchers cannot ethically replicate the capacity-reducing stress of an interrogation room), the findings discussed above likely *overstate* youths' ability to understand and assert their rights.[100] Even if juveniles did understand their rights and voluntarily waived them, the developmental characteristics of youth produce a significant risk of false confessions.[101]

95. Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, 12 CRIM. JUST. 4, 7 (1997); *see also* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 43 (2006) ("[A]dolescents have difficulty grasping the basic concept of a 'right' as an absolute entitlement that they can exercise without adverse consequences.").

96. Grisso, *supra* note 95, at 8.

97. *In re* Joseph H., 367 P.3d 1, 3 (Cal. 2015), (Liu, J., dissenting), *cert. denied sub nom.* Joseph H. v. California, 137 S. Ct. 34 (2016).

98. For material on the disproportionate likelihood of poor and minority youth to contact the criminal justice system, see generally DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) and NAT'L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007), http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf [https://perma.cc/9WRA-JFXM].

99. Feld, *supra* note 95, at 43; *cf.* GRISSO, *supra* note 76, at 123 (finding that only 33.2 percent of juveniles understood that there was no penalty for asserting a right).

100. *See* FELD, *supra* note 54, at 54. This is because actual police interrogation is much more stressful than an interrogation reproduced in a laboratory, so whatever capacity juvenile research subjects show in laboratory interrogations is undoubtedly diminished under the high-stakes stressors of actual custodial police interrogation. *See id.*

101. *See infra* Section I.C.

C. Juveniles' Heightened Susceptibility to False Confessions

"A confession," the U.S. Supreme Court has said, "is like no other evidence"[102] because "[n]o other class of evidence is so profoundly prejudicial."[103] Confession evidence colors the perceptions of investigators, judges, and juries alike. It can cause individuals to view inculpatory evidence as stronger than it is, and discount exculpatory evidence.[104] According to interrogation expert Richard Leo, "[c]onfessions exert a strong biasing effect on the perceptions and decision-making of criminal justice officials and lay jurors alike because most people assume that a confession . . . is, by its very nature, true."[105] Indeed, "the introduction of a confession makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes, occurs when the confession is obtained."[106] Prosecutors know this. At closing arguments in Brendan Dassey's trial, for example, the prosecutor stated: "People who are innocent don't confess. The defendant confessed because he was guilty. Because he did it. An innocent person is . . . not going to admit to this."[107]

At the same time, the Supreme Court has recognized "mounting empirical evidence that [custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed."[108] The risk of a

102. Arizona v. Fulminante, 499 U.S. 279, 296 (1991); *see also* Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). *But see* 4 WILLIAM BLACKSTONE, COMMENTARIES 357 (8th ed. 1778) (condemning confessions as "the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces").

103. Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting).

104. *See* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 440–41 (2012).

105. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 340 (2009); *see also* Kassin et al., *supra* note 60, at 24 ("[M]ost people reasonably believe that they would never confess to a crime they did not commit and have only rudimentary understanding of the predispositional and situational factors that would lead someone to do so.").

106. *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) (quoting E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 923 (2004) ("Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it."); Leo, *supra* note 105, at 340 ("Confession evidence . . . tends to define the case against a defendant, usually overriding any contradictory information or evidence of innocence.").

107. Brief of Defendant-Appellant, *supra* note 25, at *45.

108. Corley v. United States, 556 U.S. 303, 321 (2009); *see also* AM. PSYCH. ASS'N, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (collecting works on the problem of police-induced false confessions); Christine S. Scott-Hayward,

false confession is particularly "acute . . . when the subject of custodial interrogation is a juvenile."[109] Because of the weight that confession evidence carries in court, false confessions lead to the most devastating error the criminal justice system can make: wrongful convictions.[110] Not surprisingly, research has demonstrated that juveniles make up a disproportionate share of documented false confessions. While juveniles represent approximately 8.5 percent of all arrests,[111] Steven A. Drizin and Richard A. Leo's study of 113 documented false confessions found that juveniles were overrepresented, comprising approximately one-third (33 percent) of false confessions.[112] Brandon Garrett similarly found that "[o]ver one-third of all sixty-six false confessions [examined in his article] involved juveniles."[113] Another study by Samuel Gross and others found that 42 percent of all juvenile wrongful convictions involved false confessions, compared to only 13 percent of adult wrongful convictions.[114]

Juveniles are more likely to confess falsely for two main, and often overlapping, reasons: (1) they wish to end the stressful interrogation, and (2) they attempt to please their adult interrogator.

The same stressors that lead juvenile suspects to waive their rights and speak to law enforcement also increase the likelihood that they will falsely confess to end an interrogation.[115] One twelve-year-old who falsely confessed later said: "I just felt like I was in a maze. I couldn't find my way out. . . . If I said I did it, I'll go home. That's what I thought."[116] A thirteen-year-old who falsely confessed explained that he did so because he was "desperate to go home" and "believed he

Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation, 31 L. & PSYCHOL. REV. 53, 61 (2007) ("[Y]oung people are especially prone to confessing falsely.").

109. J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011); *see also* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 952–53 (2010).

110. *See* Feld, *supra* note 78, at 221 (noting that an incriminating statement "leads almost ineluctably to a plea or conviction," regardless of the statement's veracity); Kassin et al., *supra* note 60, at 5 ("81% of [the studied] false confessors . . . whose cases went to trial were wrongfully convicted.").

111. *Crime in the United States 2015*, *supra* note 20. Those aged five to seventeen represent approximately 17 percent of the American population. LINDSEY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, at 2 (2011), http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf [https://perma.cc/M6V4-K7NE].

112. Drizin & Leo, *supra* note 106, at 944, 945 tbl.3.

113. Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 400 (2015).

114. Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

115. *In re Jerrell*, 699 N.W.2d 110, 117 n.6 (Wis. 2005) ("[B]ecause juveniles are incapable of fully realizing the consequences of their decisions, they may confess because they believe it is the only way to end a psychologically coercive interrogation.").

116. *See* Drizin & Colgan, *supra* note 45, at 131–37.

could take back his false confession later."[117] The same goes for the juveniles who came to be known as the Central Park Five.[118] All were fourteen to sixteen years old at the time of their arrest.[119] All were given *Miranda* warnings, and all but one had a parent or legal guardian present at the police station.[120] Nevertheless, each waived his right to silence and confessed to participating in a rape and violent assault that none of them committed.[121] More than one later said that he confessed falsely to end the interrogation.[122]

Juveniles will falsely confess not just to end the interrogation, but also because they weigh more heavily the approval of an adult interviewer than they do the negative consequences of falsely admitting responsibility.[123] This makes them more likely to change their responses to conform to the guilt-presumptive expectations of police interrogators.[124] For example, research has found that "[c]hildren who are asked the same question more than once may assume they gave the 'wrong' answer the first time, and feel pressure to provide the 'right' answer when the question is repeated."[125] Youth are also more likely to answer "yes" to questions about their understanding of their rights to avoid admitting that they do not understand.[126] Not surprisingly, laboratory studies and documented

117. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28–29 (2000).
118. *See* BURNS, *supra* note 17.
119. People v. Wise, 752 N.Y.S.2d 837, 843 (Sup. Ct. 2002).
120. *See generally* BURNS, *supra* note 17, at 37–63 (recounting the interrogations of the Central Park Five youths).
121. *Id.* Thirteen years after the crime, the true perpetrator confessed and the convictions were vacated. *See Wise*, 752 N.Y.S.2d at 850 (vacating convictions of the Central Park Five).
122. THE CENTRAL PARK FIVE (Florentine Films & Sundace Selects 2012).
123. See Stealing Innocence: Juvenile Legal Issues and the Innocence Project Symposium, *Panel 1: Legal Issues Affecting Juveniles*, 18 CARDOZO J.L. & GENDER 578, 595 (2012), for an explanation by Donna Henken, who was a prosecutor in the Manhattan District Attorney's office, that "the kids had a desire to please [her] and the police." *See also* Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings From Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428, 440 (2012) (finding that adolescents have "a much stronger tendency . . . to make choices in compliance with the perceived desires of authority figures").
124. *Cf.* INBAU ET AL., *supra* note 45, at 5 ("An interrogation is accusatory."); Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193, 198 (2013) ("Interrogation is guilt-presumptive.").
125. John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 23 (1996).
126. King, *supra* note 14, at 459 ("[C]hildren do not like to admit that they do not understand, especially if they think they should understand."). This is especially true for those with developmental delays or learning disabilities, who are overrepresented among those who have contact with the criminal justice system. LEONE & WEINBERG, *supra* note 85, at 12.

false confessions show that the younger the juvenile, the more likely she is willing to accept responsibility for an act she did not commit.[127]

Sometimes, the pressures are so great and their psyches so vulnerable that juveniles not only admit to acts that they did not commit, but come to believe that they committed those acts.[128] Fourteen-year-old Michael Crowe, for example, was interrogated about the death of his sister "for more than ten hours over three days" without his parents' knowledge and without an attorney.[129] In the face of repeated declarations by his interrogators that he had killed his sister, Michael went from denying he had done it, to doubting whether he had done it, to eventually breaking down weeping and saying "I'm not sure how I did it. All I know is I did it."[130] DNA tests eventually linked a transient man who had been "seen in the Crowes' neighborhood the night of the murder and reported by several neighbors for strange and harassing behavior" to the murder scene, and the charges against Michael were dismissed.[131]

Typical adolescent behaviors, such as slouching and lack of eye contact, can also lead interrogators to mistakenly believe that a suspect is guilty. The Reid

127. *See* Samuel R. Gross et al., *supra* note 114, at 545 & tbl.4 (reporting that in a study of juvenile wrongful convictions, 69 percent of the exonerated juveniles aged twelve to fifteen falsely confessed, compared to 25 percent of the exonerated juveniles aged sixteen to seventeen who falsely confessed); Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 148–52 (2003) (finding that in controlled experiment, twelve-and thirteen-year-olds were more likely to falsely confess to pressing a computer key that they did not press than were fifteen-and sixteen-year-olds, who in turn were more likely to falsely confess than were young adults—78 percent, 72 percent, and 59 percent of the three groups, respectively, falsely confessed).

128. Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 78 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) (describing coerced-internalized false confessions where the false confessors come to believe they committed the act).

129. LEO, *supra* note 47, at 211–13; WHITE, *supra* note 47, at 172–74; Mark Sauer, *Justice Delayed*, SAN DIEGO MAG. (June 11, 2010, 1:18 PM), http://www.sandiegomagazine.com/San-Diego-Magazine/June-2010/Justice-Delayed [https://perma.cc/38S3-VBPU]. Michael's parents were unaware of the interrogation because Michael had been removed from his family and placed in a temporary emergency center for children. Crowe v. County of San Diego, 608 F.3d 406, 418 & n.3 (9th Cir. 2010).

130. Drizin & Colgan, *supra* note 45, at 141; *cf.* Steven A. Drizin, *Interrogation Gone Bad: Juvenile False Confessions in the Post-DNA Age*, http://nij.gov/topics/courts/indigent-defense/Documents/drizin.pdf [https://perma.cc/36C4-W45W] (quoting juveniles who explained why they falsely confessed). After Michael's confession, police interrogated his high school friend who they believed had stood lookout during the crime. *See* Mark Sauer & John Wilkens, *Haunting Questions: The Stephanie Crowe Murder Case. Part 4: More Arrests*, SAN DIEGO UNION TRIBUNE (May 14, 1999), http://legacy.sandiegouniontribune.com/news/reports/crowe/crowe4.html [https://perma.cc/J44D-NMFC]. They succeeded in getting Michael's friend to falsely confess and implicate Michael and another high school friend. Mark Hansen, *Untrue Confessions*, A.B.A J., July 1999, at 50, 51.

131. *Crowe*, 608 F.3d at 417.

manual's chapter on behavioral analysis includes a picture of "[d]eceptive slouched posture" and the statement that "[g]enerally speaking, a suspect who does not make direct eye contact is probably withholding information."[132] Brendan Dassey's videotaped interrogation shows him predominantly sitting in a slouched manner and rarely making eye contact with his interrogator.[133] One study of over 300 law enforcement officers found that 83 percent "of police claimed to use body language to detect deception, without discrimination of the age of the subject."[134] As Jessica Meyer and N. Reppucci have noted: "If police perceive these [typical juvenile] behaviors as deceptive, this may increase the frequency with which they judge young suspects to be guilty, therefore increasing the frequency with which they subject youth to coercive and deceptive interrogations to obtain a confession."[135] Indeed, some research suggests that "the Reid Technique may not be effective—and . . . may be counterproductive—as a method of distinguishing truth from deception."[136]

As this Part demonstrates, the developmental characteristics of youth make it more likely that, in a stressful situation in which trained adults wield tremendous power, young people lack the ability to resist the pressures exerted on them. The next Part shows that, while juveniles are less able to understand and assert their rights and more susceptible to false confessions, and despite a stated commitment throughout the law to guard juveniles from their immaturity and vulnerability, Fifth Amendment jurisprudence offers juvenile suspects few special constitutional protections.

II. THE FAILURE OF INTERROGATION DOCTRINE TO PROTECT JUVENILES

Part I showed why there is every reason for Fifth Amendment self-incrimination doctrine to be especially protective of juvenile suspects. That the Supreme Court has, on four separate occasions in the last dozen years, restricted

132. INBAU, ET. AL., *supra* note 45, at 126, 135.

133. *See* Steven Avery & Brendan Dassey cases, *supra* note 30 (showing video footage from one of Brendan Dassey's interrogations).

134. Meyer & Reppucci, *supra* note 70, at 774. This is despite evidence that police do not fare significantly better than lay individuals at detecting deception by juveniles. Kari L. Nysse-Carris et al., *Experts' and Novices' Abilities to Detect Children's High-Stakes Lies of Omission*, 17 PSYCHOL., PUB. POL'Y, & L. 76, 80–81 (2011) ("Research investigating the effect of expertise on adults' ability to detect *children's* lies has been mixed thus far but generally indicates that professionals who have experience interviewing and judging lies are not more accurate than are novices.").

135. Meyer & Reppucci, *supra* note 70, at 775.

136. Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 L. & HUM. BEHAV. 499, 512 (1999).

the ability of the criminal justice system to disregard the relevance of youth further underscores the propriety of special protections for juvenile suspects. Yet, despite early interrogation decisions that urge special care with juvenile suspects, modern courts have predominantly declined to treat Fifth Amendment self-incrimination claims by juveniles differently than adult claims. This Part explains how current constitutional doctrine fails to adequately protect youth suspects, and identifies the limits of state-imposed special protections for youth, setting the scene for the reform proposal that follows.

A. Early Recognition of the Need for Special Protections

Courts have long recognized that they must consider confessions by juveniles carefully. As early as 1818, in the case of a ten-year-old slave who confessed to murder, the New Jersey Supreme Court said that "it is necessary to be exceedingly guarded" with juvenile statements.[137] Similarly, in its first two cases addressing the interrogation of juveniles, the U.S. Supreme Court embraced robust protections for juvenile suspects. In 1948, in a case called *Haley v. Ohio*,[138] the U.S. Supreme Court considered a challenge from a fifteen-year-old who had been interrogated by relays of police from midnight until he confessed around 5:00 a.m.[139] Mindful of the suspect's youthfulness and vulnerability, a plurality concluded that the statement was involuntary and coerced in violation of the Due Process Clause of the Fourteenth Amendment.[140] "[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . He cannot be judged by the more exacting standards of maturity."[141] That law enforcement advised the youth of his rights was not enough for the Court. Intuiting what research has shown in recent decades, the Court stated that it could not "indulge [the] assumptions" that a fifteen-year-old, "without the aid of counsel, would have a full appreciation of that advice and that . . . he had a freedom of choice."[142]

137. State v. Aaron, 4 N.J.L. 232, 239 (1818) (vacating the conviction in part because the confession was not lawful evidence against the defendant).
138. 332 U.S. 596 (1948).
139. *Id.* at 596.
140. *See id.* at 601. Until the mid-twentieth century, the Fourteenth Amendment's Due Process Clause regulated police interrogation. *See generally* U.S. CONST. amend. XIV, § 2 (declaring that no person be deprived of "life, liberty, or property without due process of law"). It required that confessions be voluntary, prohibiting law enforcement from overbearing the will of a suspect to get her to confess. *See* Spano v. New York, 360 U.S. 315, 320–24 (1959).
141. *Haley*, 332 U.S. at 599.
142. *Id.* at 601.

Fourteen years later, in *Gallegos v. Colorado*, the Supreme Court reiterated that a juvenile subject of police interrogation "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[143] Juvenile interrogation, the court explained, involves "a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights."[144] Gallegos was a fourteen year-old held for five days without seeing a lawyer, parent, or other friendly adult who, after being advised of his right to silence, confessed to an assault.[145] As in *Haley*, the Court held that his confession was obtained in violation of due process. For the Court, a juvenile suspect simply could not, by himself, "know, let alone assert, such constitutional rights as he had."[146]

Together *Haley* and *Gallegos* held that youth suspects are particularly vulnerable and require additional safeguards to ensure that the statements they make during police interrogation are not unconstitutionally coerced, but instead are made voluntarily. While the Supreme Court did not require the presence of counsel at interrogation in these cases, it made it clear that advisals from law enforcement were not enough to guarantee that juvenile suspects knew and were able to assert their constitutional rights.[147]

After the Supreme Court held that the Fifth Amendment was incorporated against the states,[148] the Court decided *Miranda v. Arizona*[149] in 1966. The *Miranda* majority reviewed the history of the privilege against self-incrimination and found at the privilege's core a demand that government respect the dignity and integrity of suspects.[150] In the Court's words, "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[151] The Court held that to dispel

143. Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (arguing that juveniles, "no matter how sophisticated," are inadequately knowledgeable or prepared when dealing with law enforcement).
144. *Id.*
145. *Id.* at 49–50.
146. *Id.* at 54.
147. *See Haley*, 332 U.S. at 601.
148. *See generally* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); Malloy v. Hogan, 378 U.S. 1, 6–8 (1964).
149. 384 U.S. 436 (1966).
150. *Id.* at 459.
151. *Id.* at 460; *see* ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2013) (exploring the role of dignity rights as limiting state power); Louis Michael Seidman, *The Problems With Privacy's Problem*, 93 MICH. L. REV. 1079, 1082 (1995) ("The modern Fifth Amendment is about individual will and freedom of thought . . . ."); *see also* George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 333 n.214 ("The privilege is based in part on an almost metaphysical

the inherent compulsion of interrogation and effectuate the privilege's core values, law enforcement must, at a minimum, warn custodial suspects of their rights to silence and counsel.[152] This would, the Court presumed, dispel the coercion inherent in interrogation by providing the suspect with the knowledge necessary to make an informed decision. Because of the depth of the values protected by the privilege, *Miranda* made it clear that law enforcement must meet a "heavy burden" to demonstrate a waiver of the privilege.[153]

A year after *Miranda*, the Supreme Court extended the Fifth Amendment privilege against self-incrimination to juveniles in *In re Gault*.[154] The language of *Gault* echoed *Haley* and *Gallegos*, averring that "admissions and confessions of juveniles require special caution."[155] They did so because juveniles' "immaturity and greater vulnerability place them at a greater disadvantage in their dealings with police."[156] While *Gault* too stopped short of requiring counsel at interrogation for youth, it said that in the absence of counsel at interrogation, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[157] The Court reiterated the centrality of suspects' dignity, observing that the privilege "insists upon the equality of the individual and the state. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."[158] Juvenile suspects' enhanced vulnerability to coercion made this core concern about dignity especially salient.[159]

notion that encouraging a person to participate in his own 'downfall,' *i.e.* his criminal conviction, is inconsistent with the person's inherent dignity as a human being . . . .").

152. *Miranda*, 384 U.S. at 467–69. The Court explained: "[T]o combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." *Id.* at 467.

153. *See id.* at 475 ("[A] heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.").

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

155. *Id.* at 45.

156. Grisso, *supra* note 34, at 1137.

157. *Gault*, 387 U.S. at 55.

158. *Id.* at 47.

159. *See supra* text accompanying note 152.

B. Modern Courts Reject Special Constitutional Protections

Haley, *Gallegos*, *Miranda*, and *Gault* seemed to promise a robust, protective self-incrimination regime for juvenile suspects. Intervening decades have left the protective vision largely unfulfilled. While *Miranda* was not meant to displace the due process voluntariness inquiry, *Miranda* "drastically changed the landscape of confession suppression jurisprudence and shifted much of the courts', litigants', and commentators' attention from the due process issue of involuntariness to issues concerning the application and waiver of *Miranda* rights."[160] In recent decades, the Supreme Court has "gutted criminal suspects' *Miranda* . . . protections,"[161] leading scholars to conclude that "*Miranda* has effectively been overruled."[162] What is left of *Miranda* has become little more than a checkbox that police can easily satisfy in order to obtain an admissible confession.[163] Moreover, the special solicitude for juvenile suspects apparent in the cases described above has faded from modern jurisprudence. Not only have courts refused to extend special protections to juvenile suspects, they have made suspects' youth largely irrelevant, applying the same standard to youth for determining the admissibility of confessions as is applied to adults. In short, courts have crafted confession law in such a way that decreases the chances that juvenile suspects will understand their rights and makes it easier to find that they voluntarily waived them nonetheless.

After the back-to-back *Miranda* and *Gault* decisions, the Supreme Court did not return to juvenile confessions until 1979. In *Fare v. Michael C.*,[164] the Court held that sixteen-year-old Michael C. had not invoked his Fifth Amendment right to counsel by asking to speak with his probation officer at the outset of an interrogation and had waived his right to remain silent when he made incriminating statements to officers.[165] The primary issue before the Court was whether juveniles should be judged by the same standard as adults when determining

160. *See* Guggenheim & Hertz, *supra* note 14, at 120; Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 3 (2015) (noting that the Due Process voluntariness requirement still applies, but is "as hazy and unfocused as ever . . . and almost always arriving at the conclusion that what the police did was, all things considered, acceptable").

161. Primus, *supra* note 160, at 3.

162. *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 24 & n.138 (2010).

163. *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility . . . ."); GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 172 (2012) ("*Miranda* in effect creates a procedural minefield for police and then politely provides a map of where the mines are buried.").

164. 442 U.S. 707 (1979).

165. *Id.* at 709–11, 727.

whether they had validly waived their *Miranda* rights.[166] *Haley*, *Gallegos*, and *Gault* all pointed clearly in the direction of a more protective standard. The Court, however, decided that the same totality of the circumstances test used to assess waivers by adults governed juvenile cases as well.[167] The Court could "discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so."[168] Over three decades later, the federal system, the District of Columbia, and thirty-three states continue to apply to juveniles the same totality of the circumstances approach that applies to adults.[169]

Ostensibly, the *Michael C.* test is not blind to youth. According to the majority, the inquiry should consider "the juvenile's age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[170] Given the research described in Part I, it would seem that such an inquiry would lead courts to invalidate many waivers by juveniles, particularly for juveniles under fifteen years old, or any young person with a cognitive delay or who had never been interrogated before.

While the scientific evidence described above plainly demonstrates that juvenile suspects struggle to (if not fail to) understand, appreciate, and assert their rights in the custodial setting, "there are legions of cases in which judges have ignored or paid lip service to the unique vulnerabilities of children in the interrogation process."[171] Barry Feld has shown that trial courts regularly find that youth as young as ten years old, with no prior police contact, with cognitive delays or mental health disorders, and who lacked adult assistance, validly waived their rights to silence and counsel.[172] The Supreme Court of Illinois found a

166. *Id.* at 725. A waiver "must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception,' and 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" Berghuis v. Thompkins, 560 U.S. 370, 382–83 (2010) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

167. *Fare*, 442 U.S at 725.

168. *Id.*

169. Brief of Amicus Curiae Human Rights Watch in Support of Petition for Writ of Certiorari at 8, Joseph H. v. California, 137 S. Ct. 34 (2016) (No.15-1086), 2016 WL 1254458, at *8.

170. *Fare*, 442 U.S. at 725.

171. Drizin & Colgan, *supra* note 45, at 130.

172. *See* FELD, *supra* note 54, at 43. Several appellate courts have affirmed these decisions. *See, e.g.*, Ingram v. State, 918 S.W.2d 724 (Ark. Ct. App. 1996) (twelve-year-old suffering from Attention Deficit Hyperactivity Disorder); *In re* Jorge R., No. G028977, 2002 WL 31121106 (Cal. Ct. App. Sept. 25, 2002) (twelve-year-old); W.M. v. State, 585 So. 2d 979, 983 (Fla. Dist. Ct. App. 1991) (ten-year-old child who attended learning disability classes); *In re* Goins, 738 N.E.2d 385 (Ohio Ct. App. 1999) (eleven-year-old); State *ex rel.* Juvenile Dep't v. Cecil, 34 P.3d 742 (Or. Ct. App.

nine-year-old's waiver to be knowing and voluntary despite "his young chronological age, his even younger mental age, his mental deficits, his lack of experience with law enforcement, and his inability to understand the legal proceedings."[173] My research has revealed that courts have upheld a waiver by a child as young as eight years old.[174]

Courts also regularly admit statements by older juveniles with significant cognitive impairments.[175] Statements by older juveniles with no significant cognitive impairments are admitted largely as a matter of course.[176] This illustrates the inattention and superficiality that typifies modern judicial scrutiny of *Miranda* waivers by juveniles. As long as law enforcement recites the warnings, and the juvenile suspect talks, that suffices for a valid waiver.[177]

The occasional appellate court decision overruling a trial court's admission of a juvenile suspects' custodial statement does not absolve current interrogation practices and passing trial court review. To the contrary, cases like *In re Elias V.*[178] and *In re J.M.*[179] demonstrate that law enforcement regularly employs Reid Method interrogation techniques on juvenile suspects and that, fifty years after *Miranda* and *Gault*, trial courts fail to protect juvenile suspects from coercive police tactics and their own immaturity and vulnerability. Moreover, as Megan Annitto has shown, the dearth of juvenile delinquency appeals further hampers the ability

2001) (twelve-year-old); *In re* Christopher W., 329 S.E.2d 769 (S.C. Ct. App. 1985) (eleven-year-old); State v. F.G.H., No. 27319-9-III, 2009 WL 3593089 (Wash. Ct. App. Nov. 3, 2009) (twelve-year-old).

173. *In re* D.L.H., 32 N.E.3d 1075, 1092 (Ill. 2015).

174. *See In re* Ronald Y.Z., No. D-02419-05, 2005 WL 3607076, at *4 (N.Y. Fam. Ct. Nov. 14, 2005).

175. *See, e.g.*, State v. Moses, 702 S.E.2d 395, 402 (S.C. Ct. App. 2010) (finding a seventeen-year-old in special education, who could read and write at the third-grade level, able to meaningfully understand *Miranda* warnings); People *ex rel.* J.M.J., 726 N.W.2d 621, 631 (S.D. 2007) (admitting confession of sixteen-year-old with learning disabilities and a low IQ); *cf.* Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions*, Miranda, *and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 113 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("Courts readily admit the confessions of . . . juveniles with I.Q.s in the sixties whom psychologists characterize as incapable of abstract reasoning.").

176. *Cf.* FELD, *supra* note 54, at 43 ("[J]udges invalidate waivers or exclude confessions only under the most egregious circumstances.").

177. *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility . . . .").

178. *In re* Elias V., 188 Cal. Rptr. 3d 202, 217 (Ct. App. 2015) (reversing trial court decision that thirteen-year-old's confession was voluntary and finding that the detective's "accusatory interrogation was dominating, unyielding, and intimidating" and deployed "deception and overbearing tactics").

179. *In re* J.M., 8 N.E.3d 1213, 1219–21 (Ill. App. Ct. 2014). The appellate court reversed a trial court decision admitting the confession of a thirteen-year-old with the mental capacity of a seven-year-old and an IQ in the mid-fifties. *Id.* In addition, the minor was unable to explain the meaning of the word "silent," was also told his mother would want him to tell the truth, and was, according to expert testimony, unable to knowingly and intelligently waive his rights. *Id.*

of appellate courts to correct the missteps of trial courts and send signals to law enforcement broadly regarding the constitutionality of its interrogation practices.[180]

It's not just that courts regularly fail to recognize juvenile suspects' limited experience and education, and reduced cognitive capacities under the stress of custodial interrogation. Self-incrimination doctrine has developed to the profound detriment of juvenile suspects in other ways. Under the clear statement rule, after a suspect has been given the *Miranda* warnings, "law enforcement may continue questioning until and unless the suspect clearly requests an attorney."[181] Similarly, the implicit waiver rule holds that a suspect who responds to interrogation without invoking his rights is said to have implicitly waived his rights.[182] Together, these rules limit the number of invocations because many people are intimidated and unlikely to use assertive language in stressful, custodial environments where they are interacting with authority figures such as police.[183] This is particularly true for juveniles, who are less likely to be assertive, and less likely to clearly invoke their rights than are adults.[184] Moreover, juveniles from traditionally disempowered communities—such as racial minorities that disproportionately come in contact with the criminal justice system—often speak less assertively and use indirect patterns of speech with authority figures.[185]

The only aspect of constitutional interrogation doctrine that has arguably made a protective turn for juveniles in recent years is the custody inquiry. In *J.D.B. v. North Carolina*,[186] the Supreme Court considered a challenge to an un-*Mirandized* statement taken from a thirteen-year old by police at his middle

180. *See generally* Megan Annitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671 (2012).

181. Davis v. United States, 512 U.S. 452, 459 (1994) (holding that a suspect who wishes to invoke the right to counsel must do so unambiguously).

182. *See* Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010) (holding that a suspect who wishes to invoke the privilege against self-incrimination must do so unambiguously); North Carolina v. Butler, 441 U.S. 369 (1979) (holding that an explicit waiver is not required and that a suspect may impliedly waive his Fifth Amendment rights).

183. *See* Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under* Miranda, 17 WM. & MARY BILL RTS. J. 773, 806 (2009) ("[I]t is inevitable that people react to custodial interrogation with some degree of intimidation. It is normal to respond to intimidation by sounding meek or tentative rather than precise, clear, and assertive." (footnote omitted)).

184. *Cf.* Lauren Gottesman, Note, *Protecting Juveniles' Right to Remain Silent: Dangers of the* Thompkins *Rule and Recommendations for Reform*, 34 CARDOZO L. REV. 2031, 2068 (2013) (urging a per se rejection of implicit waivers by juveniles).

185. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 317–18 (1993) (discussing groups who have a greater tendency to use indirect speech patterns and the potential consequences under waiver rules that require explicit assertions of rights); Feld, *supra* note 78, at 230 ("Less powerful people, such as juveniles or racial minorities, often speak indirectly with authority figures . . . .").

186. 564 U.S. 261 (2011).

school.[187] The Court held that law enforcement must consider age when determining whether a suspect is in custody for *Miranda* purposes.[188] The Court based its holding on common sense and empirical findings about adolescents, declaring: "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."[189] Whereas the Court in *Fare v. Michael C.* could "discern no persuasive reason" to treat juveniles differently than adults, the *J.D.B.* Court could see "no reason for police officers or courts to blind themselves to that commonsense reality" that juveniles are different from adults.[190] As a result of *J.D.B.*, more juvenile suspects interrogated by police should be considered in custody for Fifth Amendment purposes, thereby triggering the duty of police to warn them of their rights.

J.D.B. is a plain acknowledgement that youth matters to the constitutionality of juvenile confessions. Following the trio of juvenile punishment cases,[191] *J.D.B.* may portend a more protective approach to juvenile interrogation when the next case addressing it reaches the Court.[192] Indeed, the Court observed that "to ignore the very real differences between children and adults . . . would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees."[193] It seems unlikely, however, that *J.D.B.* alone will change much about the interrogation of juveniles and the admissibility of their statements. As Marty Guggenheim and Randy Hertz acknowledge, if *J.D.B.* is "nothing more than a requirement that a minor suspect's age be factored into the assessment of *Miranda* custody," then "it will accomplish little indeed."[194] Warning more juveniles offers no protection when those juveniles do not understand their rights, when they waive their rights over 90 percent of the time, and when their waivers are invariably upheld by courts as knowing and voluntary.

C. The Limits of State-Imposed Special Protections

While current constitutional doctrine does little to protect juvenile suspects from unwittingly giving up their constitutional rights, courts, legislators, and law

187. *Id.* at 265.
188. *Id.* ("[A] child's age properly informs the *Miranda* custody analysis.").
189. *Id.* at 264–65, 269–72.
190. *Id.* at 265; Fare v. Michael C., 442 U.S. 707, 725 (1979).
191. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012) (prohibiting mandatory life without parole for juvenile offenders); Graham v. Florida, 560 U.S. 48 (2010) (prohibiting life in prison without parole for non-homicide offenses committed by juveniles); Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting death penalty for juvenile offenders).
192. *See* Guggenheim & Hertz, *supra* note 14, at 109–10.
193. *J.D.B.*, 564 U.S. at 281.
194. Guggenheim & Hertz, *supra* note 14, at 167.

enforcement have made some efforts to fill the gap. This Subpart briefly reviews three kinds of protective reforms, requiring: videotaping interrogations, adult notification and presence, and the presence of counsel.

1. Videotaping

Videotaped confessions are a low-cost means to enable judicial review of custodial interrogations. They allow courts to better determine whether law enforcement violated an individual's constitutional rights and protect law enforcement from unwarranted civil rights claims.[195] The number of jurisdictions that record interrogations increases every year. As of 2015, twenty states and the District of Columbia require recording by statute or case law.[196] Since 2014, the Department of Justice has required federal authorities to record interrogations.[197] In addition, many law enforcement agencies that are not required by law to record choose to record at least some custodial interrogations.[198] A few jurisdictions have juvenile-specific recording rules. California, North Carolina, Illinois, Wisconsin, and the District of Columbia all require that at least some juvenile interrogations be recorded.[199]

Despite its benefits, videotaping interrogations does not ensure that statements taken from juveniles are constitutionally obtained. Current interrogation practices "fail[] to develop an adequate record of a suspect's knowledge and

195. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM L. 309, 314 (2003) (explaining the benefits of taping interrogations); William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L REV. 975, 981 n.19 (2001) ("[T]he need for video- and audiotaping is the one proposition that wins universal agreement in the *Miranda* literature."); *see also* THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 4, 19–20 (2004), http://mcadams.posc.mu.edu/Recording_Interrogations.pdf [https://perma.cc/88LN-JF4H] (concluding that videotaping does not affect law enforcement's ability to obtain cooperation, admissions, and confessions).

196. *See* Garrett, *supra* note 113, at 416 & nn. 96–97 (2015) (cataloging the jurisdictions that require recording).

197. Memorandum From James L. Cole, Deputy Attorney Gen., U.S. Dep't Justice on Policy Concerning Electronic Recording of Statements, (May 12, 2014), https://assets.documentcloud.org/documents/1165406/recording-policy.pdf [https://perma.cc/R7AW-CTR8].

198. *See Custodial Interrogation Recording Compendium by State*, NAT'L ASS'N CRIM. DEF. LAW., http://www.nacdl.org/usmap/crim/30262/48121/d [https://perma.cc/28AD-GGW2].

199. CAL. PENAL CODE § 859.5 (West Supp. 2016); CAL. WELF. & INST. CODE § 626.8 (West 2016) (requiring electronic recording of any juvenile suspected of murder); 705 ILL. COMP. STAT. 405/5-401.5(b-5) (2012) (custodial statements by juveniles inadmissible unless electronically recorded); N.C. GEN. STAT. § 15A-211 (2015) (requiring all interviews of juveniles to be videotaped); *In re* Jerrell, 699 N.W.2d 110, 120–23 (Wis. 2005) (holding that all custodial interrogations of juveniles must be recorded where feasible); D.C. Metro. Police Dep't, Electronic Recording of Custodial Interrogations, General Order SPT-304.16 (Feb. 2, 2006), https://go.mpdconline.com/GO/GO_304_16.pdf [https://perma.cc/SYR8-CLN7].

understanding at the time of the waiver."[200] Being able to watch a young person answer "yes" in response to short questions about his understanding of his rights gives little aid in determining whether he truly understood his rights and whether his waiver was voluntary.[201] Nor does it decrease juveniles' vulnerability to coercion. Videotaping also does not prevent the admission of false confessions. The notorious Central Park Five interrogations were all videotaped, and Steve Drizin and Beth Colgan noted that trial courts admitted four of five videotaped false confessions they examined, finding they were made after a voluntary and knowing waiver of rights.[202] In the absence of affirmative efforts by law enforcement to have a juvenile suspect in his own words explain back to the officer his rights and the consequences of waiving them, videotaping's benefits remain largely limited to curbing the most egregious police behavior and protecting police from false claims by suspects of physical coercion during interrogation.[203]

2. Adult Notification and Presence

Fourteen states require law enforcement to make some effort to either contact an adult (parent, guardian, or interested adult), enable the juvenile to consult with an adult, or secure an adult's presence before a juvenile suspect may waive his rights.[204] Federal law requires reasonable efforts to contact an adult if the juvenile is suspected of committing a felony.[205] While well-meaning, parental notification and presence requirements nevertheless fail to protect juveniles' rights for several reasons.[206] Many parents either take no active role at interrogation, or

200. Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1438 (2012).

201. *See* FELD, *supra* note 54, at 90 ("Juveniles' appearance of comprehension—an affirmation of understanding . . . [and an] absence of signs of confusion—may reflect compliance with authority or passive acquiescence rather than true understanding.").

202. Drizin & Colgan, *supra* note 45, at 156.

203. *See* FELD, *supra* note 54, at 90–91.

204. *See* King, *supra* note 14, at 451–52. Approximately ten states require that a parent or "other interested adult" assist juveniles before recognizing a valid waiver. FELD, *supra* note 54, at 43. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-137(a) (2009) (making confession inadmissible against children under sixteen years old unless a parent or guardian is present at interrogation). *But see* State v. Ledbetter, 818 A.2d 1, 17–18 (Conn. 2003) (holding that the rule applies only to youth tried in juvenile court and not to youth who are prosecuted as adults in criminal court). Other states only require police to make an effort to contact an adult, but do not require the adult's presence or that the juvenile have the opportunity to consult with the adult before waiving. *See* N.Y. JUD. CT. ACTS LAW § 305.2(7) (McKinney 2008) (stating that a child shall not be questioned unless he and a parent or other person legally responsible for the child's care have been advised of the child's rights).

205. 18 U.S.C. § 5033 (2012); United States v. Wendy G., 255 F.3d 761 (9th Cir. 2001).

206. *See, e.g.*, Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1278 (2004) (identifying "the inadequacies of

they encourage juveniles to waive their right to counsel and silence.[207] Studies have shown that the presence of a parent or guardian has little to no impact on the rate at which juveniles waive their rights.[208] In fact, some contend that the presence of a parent actually increases the coercive pressure on juveniles.[209]

Additionally, Hillary Farber has identified "an array of conflicts that may plague a parent" or adult that "undermine the efficacy of relying on [parental presence] to insure the juvenile's Fifth Amendment rights."[210] A conflict of interest can arise from the adult's "responsibilities to or relationship with a third party," such as a relationship with another suspect or the victim(s).[211] A personal conflict of interest is present when an adult believes herself to be, or may actually be, a suspect for the same or a separate crime. Joseph H. was accompanied at this interrogation by his stepmother, who was doubly conflicted as both the spouse of the victim and because she was facing possible criminal charges herself.[212]

assigning either a parent or guardian as the sole protector of" a child's *Miranda* rights); Stephen M. Reba et al., *"I Want to Talk to My Mom": The Role of Parents in Police Interrogation of Juveniles*, *in* JUSTICE FOR KIDS: KEEPING KIDS OUT OF THE JUVENILE JUSTICE SYSTEM 219, 231 (Nancy E. Dowd ed., 2011) (aiming to "cast a critical eye on the assumption that the mere presence of the parent is sufficient to protect the child's rights" during interrogation").

207. Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 419 (2008); Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Right in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 213–14 (1979) ("[E]mpirical evidence suggests that parents who are present at juveniles' interrogations may provide little or no advice for juveniles and may have no appreciable effect on the outcome of police requests for information."). One study of nearly 400 interrogations in which parents were present found: "[O]only about one third of the parents offered advice to their children, with 60% of these parents advising waiver of rights to silence and counsel and about 16% (about 4% of the total sample) advising against waiver." *Id.* Another survey of approximately 750 parents of high school students found that "only about 20 percent of the parents believed that juveniles should be allowed to withhold information from police . . . . [O]ver half of the parents expressly disagreed with the idea that juveniles should be allowed to avoid incriminating themselves by withholding information." GRISSO, *supra* note 76, at 170, 175.

208. *See* Kassin et. al., *supra* note 60, at 9 ("[T]he presence of parents at *Miranda* waiver events typically does not result in any advice at all or, when it does, provides added pressure for the youth to waive rights and make a statement.").

209. Feld, *supra* note 175, at 117; *see also* Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 182 (1984) ("Rather than mitigating the pressures of interrogation, parents appear predisposed to coercing their children to waive the right to silence.").

210. Farber, *supra* note 206, at 1305, 1289.

211. *Id.* at 1293. The adult may, in such a situation, consciously or subconsciously want to know what happened more than she wants to protect the juvenile's rights. For example, when juveniles are accused of molesting a younger sibling, the parent is stuck between protecting one child's rights by encouraging silence and finding out what might have happened to another child.

212. *See In re* Joseph H., 367 P.3d 1, 1, 3 (Cal. 2015), *cert. denied sub nom.* Joseph H. v California, 137 S. Ct. 34 (2016); Petition for a Writ of Certiorari at 29, 3, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15-1086), 2016 WL 792197, at *29, *3 (indicating that Joseph's stepmother "immediately faced criminal charges of her own for her involvement in the offense" and that she "ultimately pled

Alternatively, the adult may have an interest in the juvenile being removed from her physical custody, which would be facilitated by the juvenile waiving his rights and confessing to the police.[213] Adults may also have a financial conflict of interest and believe that the young person's cooperating with the police is the cheapest option for the adult.[214] Finally, a moral conflict can arise relating to the adult's role in the upbringing of the child.[215] The duty to impart a lesson about taking responsibility and truth-telling can turn a parent from "a nurturer, protector, and greatest ally to the child's most dangerous enemy" in the interrogation room.[216]

Potential conflicts are not the only reason parental presence requirements fail to protect juvenile suspects. Police are trained to take advantage of the parent's role and responsibilities during interrogation. The Reid manual encourages interrogators to gain the "cooperation and support of the parent" before questioning the child because it will make the subsequent interrogation "that much easier."[217] Interrogators are instructed to advise parents to refrain from talking during the interrogation, and to sit the parent away from the juvenile suspect.[218] Police may even use the parent-child relationship to secure confessions outside *Miranda*. In one illustrative example from Georgia, a fifteen-year-old suspect was allowed to speak with his mother in the interrogation room, with the doors shut, without any officers present.[219] The mother's main objective in talking with her son was to learn what had happened so she could counsel him about the situation.[220] Unbeknownst to either of them, law enforcement was recording the conversation. Because the youth never invoked his right to counsel, the court found that his surreptitiously recorded incriminating statement was admissible.[221]

guilty to a child endangerment charge in connection with the offense and testified for the prosecution against Joseph").

213. Farber, *supra* note 206, at 1296 (discussing a case where a juvenile was suspected of threatening violence against his father and the police brought the juvenile's father to the police station to advise his son regarding waiving his rights).

214. *See id.* at 1297 ("[An] adult may be consciously or subconsciously influenced by the potential financial repercussions of the juvenile's behavior," such as the costs of having to hire an attorney or having to miss work or arrange for child care to appear at court).

215. *See* Reba et al., *supra* note 206, at 219 (stating that "a parent's instincts and duties as a truth seeker and disciplinarian" can force a parent to choose between teaching a moral lesson about taking responsibility and protecting the youth from exposure to criminal liability).

216. *Id.*; *see* Farber, *supra* note 206, at 1295; *e.g.*, Anglin v. State, 259 So. 2d 752, 752 (Fla. Dist. Ct. App. 1972) (quoting a parent telling a child to tell "the truth" or "she would clobber him").

217. INBAU ET AL., *supra* note 45, at 252.

218. *Id.*

219. Dickerson v. State, 666 S.E.2d 43 (Ga. Ct. App. 2008).

220. Reba et al., *supra* note 206, at 220.

221. *Dickerson*, 666 S.E.2d at 47–48.

Simply put, laws requiring parental notification and presence have a limited, and sometimes perverse, role in protecting juveniles' self-incrimination rights.

3. Counsel

Randy Hertz and Martin Guggenheim have asserted that the "only way to ensure adequate enforcement of children's due process and Fifth Amendment rights during police interrogation is a remedy proposed a long time ago but never adopted: establish a bright-line rule that a child under the age of eighteen must be afforded an opportunity to confer with counsel before police interrogation."[222] As explained above, the Supreme Court strongly urged, but stopped short of requiring, counsel in its pre-*Miranda* juvenile interrogation cases.[223]

Counsel would solve many of the rights-based concerns about interrogating juveniles. Providing youth with an adult trained in the law whose exclusive job is to inform the juvenile of his legal rights and protect his legal interests eliminates the problem of parental conflict and coercion. It would best ensure that a juvenile suspect has his rights fully explained to him, and the consequences of a waiver made plain, before the juvenile decides to assert or waive his rights. And because it would undoubtedly reduce the number of statements given, some of which would be false, it would reduce the number of wrongful convictions based on false confessions—probably to zero.

A handful of states require counsel before waiver. In New Jersey, juveniles may not waive their *Miranda* rights "except in the presence of and after consultation with counsel."[224] Texas requires that a child's waiver of *Miranda* rights be in writing and preceded by a warning from a magistrate.[225] Some states, like Illinois, New Mexico, and West Virginia, make counsel mandatory only for certain youth.[226]

Despite its benefits, providing counsel at interrogation is administratively difficult, costly, and can potentially frustrate important early investigative efforts

222. Guggenheim & Hertz, *supra* note 14, at 170; *see also* FELD, *supra* note 54, at 254 (proposing mandatory counsel for those under fifteen years old).

223. See *supra* Part II.A for a discussion on how the Court decided *Haley* and *Gallegos*.

224. N.J. STAT. ANN. § 2A:4A–39(b)(1) (West 2010 & 2016 Supp.); State *ex rel.* P.M.P., 975 A.2d 441, 448 (N.J. 2009).

225. TEX. FAM. CODE ANN. §§ 51.09, 51.095 (West 2014 & Supp. 2016).

226. 705 ILL. COMP. STAT. 405/5-170 (2014) (requiring counsel for minors under age thirteen for certain offenses); N.M. STAT. ANN. § 32A-2-14(F) (2010) (excluding all statements by juveniles under age thirteen, and establishing a rebuttable presumption against admissibility for statements by thirteen-and fourteen-year-olds); W. VA. CODE ANN. § 49-4-701(l) (LexisNexis Supp. 2016) (deeming a statement by a child under age fourteen inadmissible unless counsel is present).

by police.[227] It simply may not be feasible in some jurisdictions to have attorneys on call to serve as counsel for every suspect that the police interrogate.[228] Fiscally, it would be costly to provide every interrogated suspect with a lawyer. These difficulties, delays, and costs would undoubtedly prevent some confessions and prosecutions. Whatever the reason, the vast majority of jurisdictions do not require counsel before a juvenile suspect can waive his rights, and a move in that direction does not appear likely in the near future, either as a constitutional requirement or as a non-constitutional legislative reform.[229]

As this Part has shown, current Fifth Amendment doctrine largely ignores the youth of juvenile suspects. Some jurisdictions have imposed non-constitutional protections, but short of providing counsel to all juveniles prior to interrogation, they are limited in effect. The next Part proposes that interrogation law meaningfully recognize juvenile suspects' limited capacity to understand and asserts their rights by incorporating a rule that has long regulated agreements entered into by juveniles: the infancy doctrine.

III. A SOLUTION: RETRACTABLE FIFTH AMENDMENT WAIVERS BY JUVENILES

The liberal admissibility of statements elicited by law enforcement from juveniles ignores their limited capacity to understand and assert their constitutional rights under the pressures of custodial interrogation. This leaves interrogation law outside the social, scientific, and legal consensus that juveniles are different and demand special protections.[230] It also presents two significant problems for the criminal justice system. First, juveniles' heightened susceptibility to confessing falsely raises serious questions about the accuracy of criminal proceedings where a juvenile's statement is entered into evidence. Any practice that undermines

227. *Cf.* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE, 223 (2011) ("Introducing defense lawyers into police interrogation seemed more a means of banning police interrogation than a means of regulating it.").

228. The majority in *Miranda* said that its ruling did not require "that each police station must have a 'station house lawyer' present at all times to advise prisoners." Miranda v. Arizona, 384 U.S. 436, 474 (1966). And not all custodial interrogations take place in the police station. At the moment of arrest, a suspect is in custody, and the right to silence and counsel attaches. Orozco v. Texas, 394 U.S. 324 (1969) (holding that a person is in custody at arrest and that *Miranda* warnings must be given).

229. Indeed, California Governor Jerry Brown recently vetoed legislation that would have provided youth with counsel at interrogation. Letter from Edmund G. Brown, Jr., Governor, Cal. to Cal. State Senate, Veto of Senate Bill 1052 (Sept. 30, 2016) (vetoing S.B. 1052, 2015–2016 Leg., Reg. Sess. (Cal. 2016)).

230. *See* Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) ("[I]t is the odd legal rule that does *not* have some form of exception for children.").

confidence in criminal justice outcomes deserves scrutiny.[231] Second, by ignoring juveniles' limited ability to understand and assert their constitutional rights, the law effectively dispenses with the dignity-based roots of the Fifth Amendment's privilege against self-incrimination. When they realize that their statements are being used to secure a conviction against them, juveniles may feel like they were not just misled, but intentionally tricked by interrogators into giving up rights they did not fully understand.[232] Given the evidence that juveniles' perception of fairness is causally linked to their likelihood of reoffending, critical attention must be directed at rules that countenance deceptive and manipulative tactics designed to get juveniles to unwittingly waive their rights to their detriment.[233]

One solution to the problem could be to flatly refuse to recognize a young person's waiver of constitutional rights.[234] A ban on waivers would be supported by the research discussed above, especially for those under sixteen years old.[235] And it would not be unprecedented to prevent juveniles from waiving a constitutional right. Some states, for example, prevent juveniles from waiving counsel at trial.[236] Similar proposals, arising out of similar concerns about the power imbalance between youth and law enforcement, the enhanced likelihood of coercion, and the difficulty in assessing voluntariness, have been made to ban consent

231. *See, e.g.*, *2015 Annual Meeting: Reprioritizing Accuracy as the Primary Goal of the Criminal Justice Process*, ASS'N AM. L. SCH. (Jan. 5, 2015) [hereinafter *2015 Annual Meeting*], https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=SesDetails&ses_key=15f8fedf-4af7-4cbd-859a-3700945163a2 [https://perma.cc/2EBN-RA49] (advocating "reforms that seek to prioritize accuracy as the primary goal of the investigative and adjudicative processes").

232. *See In re* Gault, 367 U.S. 1, 51–52 (1976) ("[I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.").

233. *See* Tamar Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1479–83 (2009).

234. *See* Farber, *supra* note 206, at 1309 ("The mandatory, non-waivable right to counsel in the pre-interrogation setting is the soundest method of ensuring that juveniles receive the constitutional protections they are entitled to."); Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1324–26 (1989) (arguing that waiver of counsel should not be allowed in the case of juveniles).

235. *See supra* Part I.B.

236. *See* Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 316 (2003); *see also* RANDY HERTZ ET AL., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT 59 (2014) (discussing how Iowa and Texas have prohibited the waiver of counsel by juveniles; Wisconsin prohibits waiver by juveniles under age fifteen; and several other states permit waiver but only after the juvenile has been advised of the consequences of waiver by an attorney, judge, or after a hearing).

searches of minors.[237] Such a prohibition would, however, severely impair the autonomy of youth. Because there are situations where a juvenile suspect might wish to waive and confess, a complete prohibition on waivers would seem to go too far.[238]

Another solution would be to disentangle the now-dominant *Miranda* warn-and-waive regime from the due process voluntariness inquiry, and revitalize the import of the due process clause's requirement that a confession be voluntary and not the result of law enforcement overbearing the will of a suspect.[239] Due process voluntariness was, in fact, the basis of the decision to overturn the admissibility of Brendan Dassey's confession, and was an argument not raised by Joseph H.'s lawyers in his unsuccessful petition for review.[240] Given the successful result in Dassey's case, the robustness of the voluntariness standard's protections for juveniles in early interrogation case law, and the anemic protections provided by the modern *Miranda* regime, the revival of due process voluntariness as the touchstone of interrogation law is an important line of scholarly inquiry going forward.[241] That analysis, however, is beyond the scope of this Article.

This Part explores a solution that sits between current *Miranda* doctrine, which far too often finds waivers by juveniles to be knowing, intelligent, and voluntary, and a complete ban on *Miranda* waivers by juvenile suspects. While the proposal here is novel in *Miranda* scholarship, it relies on a principle of contract law that is centuries old. Consistent with the infancy doctrine, interrogation law should allow juveniles to retract (or void) a waiver of the privilege against self-incrimination. Such a rule would recognize the immaturity of young people and their limited ability to make informed decisions when dealing with interested adults in stressful situations. It would better fulfill the dignity objectives that lie at the heart of the privilege against self-incrimination.[242] And by providing juveniles

237. *See* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271 (2001).
238. *See infra*, Part III.B.1.
239. *See* Spano v. New York, 360 U.S. 315, 320–24 (1959) (holding that a confession must be voluntary to be admissible and prohibiting law enforcement from overbearing the will of a suspect to get her to confess); Primus, *supra* note 160, at 3; *see also* Guggenheim & Hertz, *supra* note 14 (identifying the importance of due process voluntariness in early interrogation cases of *Miranda*, *Gault*, and *J.D.B.*).
240. Dassey v. Dittmann, 201 F. Supp. 3d 963 (E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016; Petition for a Writ of Certiorari, *supra* note 212, at i, (framing the question presented in terms of *Miranda* and whether Joseph's stepmother's potential conflict of interest affected the waiver analysis).
241. *See supra* Part II.
242. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege is the respect a government—state or federal—must *accord* to the dignity and integrity of its citizens." (emphasis added)); *In re* Gault, 387 U.S. 1, 47 (1967) (recognizing that one of the purposes of the privilege against self-incrimination is "to prevent the state, whether by force or by

with the option to affirm their waiver after consulting with counsel, it would also honor the autonomy of youth in a way that a rule banning waivers would not.

A. The Infancy Doctrine

The infancy doctrine in contract law dates back to at least the thirteenth century.[243] By the fifteenth century, contracts entered into by infants (those under eighteen years old) were generally considered voidable at the minor's option.[244] Today, in the United States, contracts that do not cover necessaries are voidable by the minor.[245] A contracting minor may repudiate a contract at any time before reaching majority or within a reasonable time afterwards.[246] Upon attaining majority, an individual may ratify a contract he made while a minor, thus ending his ability to void it.[247] This allows young people "to secure the advantage of contracts which turn out to be advantageous" and void agreements that were ill-advised.[248]

The infancy doctrine is a middle ground between complete freedom of contract for youth and a paternalistic prohibition on their entering into binding agreements. It "is based on the presumption that unequal bargaining power always exists between [juveniles and adults], with the power, and therefore, the potential for overreaching, inuring to the adult."[249] It recognizes developmental differences that leave juveniles "generally more vulnerable to exploitation than adults and less capable of comprehending the nature of the legal obligations associated with a contract."[250] The doctrine's intended purpose, therefore, is ultimately protective. As one court put it, it exists to protect minors from "foolishly

psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction").

243. RICHARD A. LORD, 5 WILLISTON ON CONTRACTS § 9:2 (4th ed. 2010).

244. *Id.*; *see also* Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U.L. REV. 481, 486 (1995). At common law, the line was set years later, at the day before the minor's twenty-first birthday. RESTATEMENT (SECOND) OF CONTRACTS § 14 cmt. A (AM. LAW INST. 1981).

245. FARNSWORTH, *supra* note 2, at 424; Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 50–51 (2012). "Necessaries" is a muddy term that, at the least, covers food, clothing, shelter, and medical expenses. *See* 42 AM. JUR. 2D *Infants* § 66 (2011).

246. FARNSWORTH, *supra* note 2, at 425.

247. *Id.* at 426. Ratification can be done in one of three ways: express ratification, ratification by conduct, or failure to void it within a reasonable time after attaining majority. *See id.* at 425–26.

248. Goodfellow, *supra* note 3, at 141.

249. Loveless v. State, 896 N.E.2d 918, 921 (Ind. Ct. App. 2008).

250. Cheryl B. Preston, *Cyber Infants*, 39 PEPP. L. REV. 225, 231 (2012); *see also* City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544, 551 (App. Div. 1999) (stating that juveniles lack "knowledge of the probable consequences of [their] acts or omissions and the capacity to make effective use of such knowledge as he or she has").

squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace."[251] Another court said: "It is the policy of the law to look after the interests of [minors], . . . to protect them from their own folly and improvidence, and to prevent adults from taking advantage of them."[252] Another averred: "It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people . . . ."[253]

The infancy doctrine allows juveniles to escape bad agreements with adults and discourages adults from entering into contractual agreements with juveniles.[254] It does so not based on individualized inquiries into the dealings between an adult and a particular juvenile, but by granting juveniles as a class the right to void their agreements. An adult, therefore, cannot prevent a juvenile from invoking the infancy doctrine by showing that the particular juvenile was cognitively able or mature enough to understand and be bound by the agreement.[255]

The rule has been widely adopted and maintained even though it disrupts a major goal of contract law: facilitating enforceable agreements.[256] Reported cases, for example, uphold a minor's decision to void an agreement to purchase a vehicle, disaffirm a liability release signed before use of a motocross park, and refuse to enforce employment contract provisions requiring arbitration of disputes.[257]

There are limits on the ability of juveniles to void a contract under the infancy doctrine. The voiding minor may have to return the tangible remnant of an item

251. Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980).
252. *Stringfellow's*, 684 N.Y.S.2d at 551.
253. Michaelis v. Schori, 24 Cal. Rptr. 2d 380, 381 (Ct. App. 1993).
254. *See Michaelis*, 24 Cal. Rptr. 2d at 381 (finding that the infancy doctrine discourages adults from contracting with minors); Preston & Crowther, *supra* note 245, at 50–51; *see also* 42 AM. JUR. 2D *Infants* § 39 (2014).
255. *Cf.* Belotti v. Baird, 443 U.S. 622, 647–48 (1979) (stating that under the mature minor doctrine, an individual minor can demonstrate that he or she has the capacity to make a decision regarding an abortion without first obtaining the consent of a parent).
256. *See* United States v. Stump Home Specialties Mfg., Inc., 905 F.2d 1117, 1121 (7th Cir. 1990) ("[O]ne of the main purposes of contracts and of contract law is to facilitate long-term commitments . . . ."); *Michaelis*, 24 Cal. Rptr. 2d at 381 (finding that, while "in many instances such disaffirmance may be a hardship upon those who deal with" juveniles, courts enforce the rule because "the right to avoid his contracts is conferred by law upon a minor for his protection against his own improvidence and the designs of others" (internal quotation omitted)).
257. *See* J.T. *ex rel.* Thode v. Monster Mountain, LLC, 754 F. Supp. 2d 1323 (M.D. Ala. 2010) (holding that liability release not binding on minor); Foss v. Circuit City Stores, Inc., 477 F. Supp. 2d 230, 237 (D. Me. 2007) (holding that juvenile employee not bound to submit discrimination claim to arbitration); Stroupes v. Finish Line, Inc., No. 1:04-CV-133, 2005 WL 5610231, at *5 (E.D. Tenn. Mar. 16, 2005) (holding that employment contract was voidable due to minority and was voided by filing of lawsuit); Halbman v. Lemke, 298 N.W.2d 562, 563–64, 568 (Wis. 1980) (permitting minor to disaffirm contract for purchase of vehicle).

sold to the minor in order to receive back any payment made to the adult.[258] This prevents minors from securing an advantage from their decision to enter into and then void a contract, leaving them instead in the same position they would have been absent the contract. A contrary rule would "encourage young people in habits of trickery and dishonesty."[259] Additionally, adults who determine that, in good faith on a reasonable investigation of the other party's evidence of age, they are dealing with an adult, although that belief is later proven wrong, can prevent a juvenile from voiding a contract.[260] Courts have also denied the benefit of the infancy doctrine to a minor who demonstrated sufficient bad faith and intentional purpose to defraud.[261] Statutory exceptions also exist in some states that limit the applicability of the doctrine to contracts by child and adolescent entertainers.[262]

B. Retractable Waivers

To better protect the rights of juvenile suspects, interrogation law could incorporate a rule akin to contract law's infancy doctrine. Under the rule, individuals would be able to retract uncounseled *Miranda* waivers elicited by trained adult interrogators while the individual was under eighteen years old. The upshot would be that courts would not enforce the purported waiver and any statements would be inadmissible substantive evidence at trial.

A formal contract is not required to bring something akin to the infancy doctrine to interrogation law. Still, a *Miranda* waiver is similar to an agreement between the juvenile suspect and his interrogator. Almost all law enforcement agencies use a pre-printed *Miranda* form that states the required warnings.[263] Suspects typically initial the document next to each warning to indicate that the warning was read and that they understood it. Suspects then sign the document indicating that they wish to waive their rights. To the suspect, it looks very much like a contract.

258. Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 KAN. L. REV. 343, 347 (2012).
259. Dodson v. Shrader, 824 S.W.2d 545, 550 (Tenn. 1992).
260. Preston, *supra* note 250, at 233.
261. *Id.*
262. *See* N.Y. ARTS & CULT. AFF. LAW, § 35.03 (McKinney Supp. 2016); *see also* CAL. FAM. CODE § 6751 (West 2013) (authorizing courts to approve or disapprove a minor's entertainment contract before the performance begins, and preventing the minor from later voiding the contract).
263. *See* Feld, *supra* note 175, at 118 (discussing use of simplified waiver forms for juveniles).

While a valid waiver may not be induced in exchange for any promise,[264] interrogators are trained to hint at (without specifically promising) a quid pro quo.[265] Interrogators will suggest that the decision to waive the right to silence and talk will inure to the suspect's benefit.[266] Brendan Dassey's interrogators, for example, made many promises of leniency to Dassey that "clearly led Dassey to believe that he would not be punished for telling them the incriminating details they professed to already know."[267] As explained above, juvenile suspects like Dassey frequently recount that they thought that confessing to the police would end the interrogation, allowing them to go home, or would result in reduced charges against them.[268] In short, many juvenile suspects waive their *Miranda* rights believing (as their interrogators intentionally want them to believe) that they are receiving something in exchange for doing so and speaking with law enforcement. To the suspect, it feels very much like a deal.

Like contracting between adults and juveniles in general, the interrogation of juvenile suspects by adult interrogators involves unequal bargaining power, "with the power, and therefore, the potential for overreaching, inuring to the adult."[269] Not only are juveniles especially vulnerable to exploitation and less capable of comprehending the nature of their legal rights, law enforcement officers are trained to exploit that vulnerability and immaturity, and their own superior power, to secure waivers and confessions. This makes juvenile suspects equivalent to, if not more at risk than, the improvident juveniles that the infancy doctrine has long protected.[270] And it makes trained adult interrogators the "crafty adults" seeking their own advantage that the infancy doctrine has long protected juveniles from in contract law.[271]

264. *Cf.* United States. v. Vera, 701 F.2d 1349, 1364 (11th Cir. 1983) ("[A] confession induced by threats or promises is not voluntary."); Bram v. United States, 168 U.S. 532, 542 (1897) (holding waivers induced by promises are invalid).

265. Drizin & Leo, *supra* note 106, at 916 (explaining that interrogators "present[] the suspect with inducements that communicate that he will receive some personal, moral, communal, procedural, material, legal and/or other benefit if he confesses").

266. *See supra* note 47 and accompanying text. The federal district court that found Dassey's confession to be involuntary was particularly troubled by the fact that his interrogators "frequently reassured him that he did not have anything to worry about." Dassey v. Dittman, 201 F. Supp. 3d 963, 1002 (E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016.

267. *Id.* at 1003.

268. *See supra* text accompanying notes 115–122.

269. Loveless v. State, 896 N.E.2d 918, 921 (Ind. Ct. App. 2008).

270. *See, e.g.*, Aronson, *supra* note 16, at 119 ("[A]dolescents are much less capable of making sound decisions when under stressful conditions . . . . The traits that are commonly associated with being an adolescent . . . can quickly undermine one's ability to make sound decisions in periods of hot cognition.").

271. Halbman v. Lemke, 298 N.W.2d 562, 564 (Wis. 1980).

Under a retractable waiver rule, an individual who waived his rights and gave a statement while under eighteen years old could void that waiver. As a result, any custodial statements made by him to police after the waiver would be inadmissible as substantive evidence at trial. Juveniles who were allowed to consult with counsel prior to waiving their *Miranda* rights would be foreclosed from retracting any such waiver.[272]

Consistent with the infancy doctrine, individuals would be required to indicate their intention to void a waiver while they were juveniles, or within a reasonable time after turning eighteen.[273] They could announce their intention to void a waiver via a pretrial motion to suppress their custodial statement.[274] As with the infancy doctrine, prosecutors would be able to assert in response that law enforcement had a good faith basis to believe, based on a reasonable investigation, that it was dealing with an adult instead of a juvenile at the time of the interrogation, in order to prevent that person from retracting a waiver. Because of the rule's preference for protecting youth, the burden of mistake should be carried by the prosecution until it shows that it reasonably believed the juvenile was eighteen or older. Because there is no incentive for juveniles to engage in trickery or dishonesty in order to facilitate an agreement to waive their rights, there would be no need for the "retains benefit" exception to the infancy doctrine in interrogation doctrine.

Allowing juvenile suspects to take back their *Miranda* waivers would address several problems raised by juvenile confessions and further several important goals of the criminal justice system. First, retractable waivers would protect juveniles from ill-advised agreements by moving the moment of decisionmaking regarding the waiver of constitutional rights to a time and place where the decision can be more informed and most deliberately made. Second, it would disincentivize behavior by adults that raises significant risks of exploitation and false confessions by juveniles. Finally, it would align interrogation doctrine with the law's longstanding recognition of juveniles' limited capacity to make good decisions on their own, and the modern social, scientific and legal consensus

272. This is because the overriding concerns discussed above about current doctrine—that it finds knowing and intelligent waivers when juvenile suspects did not fully understand their rights and the consequences of waiving them—would be significantly reduced, if not eliminated, if a juvenile suspect was able to consult with counsel prior to waiving his rights.

273. Delays between investigation and prosecution can mean a suspect gives a statement following a waiver while seventeen, but isn't before a court until he is eighteen or nineteen. Since prosecutions are likely to closely follow a confession, this is unlikely to be a significant problem.

274. A juvenile could assert his intention to retract a waiver prior to that, such as while under investigation. Absent formal charges, however, there would be little need to do so. If a juvenile failed to retract a waiver during trial when his statement was offered against him, he would forfeit the ability to do so at a later time and force a retrial.

that juveniles deserve special protections. This would enable modern interrogation doctrine to better fulfill the dignity objectives at the heart of the privilege against self-incrimination. It would accomplish all this while allowing juveniles to retain the autonomy to decide whether to waive their rights.

1. A Better Time and Place for Decisionmaking

The infancy doctrine protects juveniles primarily by allowing youth who enter into agreements with adults to, at a later time, reconsider their decision. If it turns out that the agreement is not to their benefit, they can void the agreement. Agreeing to waive the right to silence and counsel during custodial interrogation is, from the suspect's perspective, generally a bad idea. By facilitating the government's ability to mount a successful prosecution, a waiver serves the adult interrogator's interests and was likely to have been ill-advised in most cases the moment it was made. Whatever benefits law enforcement may suggest will follow a waiver in order to get a suspect to talk rarely come to fruition. As Bill Stuntz so concisely observed, the downsides to waivers make them "seem, by definition, something less than knowing and intelligent."[275]

Research shows that juveniles do not have the same ability as adults to make the waiver decision. While scientific evidence supports the claim that, by mid-adolescence, "adolescents' capacities for understanding and reasoning in making decisions roughly approximate those of adults,"[276] the context of decisionmaking matters. Research has emphasized the distinction between deliberative decisionmaking (cold cognition), during which logical reasoning predominates, and impulsive decisionmaking, with its focus on emotional arousal (hot cognition).[277] Whereas many juveniles may exhibit cognitive abilities on par with adults under cold cognition circumstances, their decisionmaking abilities wither under conditions of high emotion or arousal.[278]

275. STUNTZ, *supra* note 227, at 223.

276. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 812 (2003); *see also* MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, DEVELOPMENT AND CRIMINAL BLAMEWORTHINESS (2006), http://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf [https://perma.cc/5G7L-SL2H] ("By age sixteen, individuals show adult levels of performance on tasks of basic information processing and logical reasoning.").

277. *See, e.g.*, Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS Spectrums 60, 61 (2001) ("Cold cognition refers to thinking under conditions of low emotion and/or arousal, whereas hot cognition refers to thinking under conditions of strong feelings or high arousal.").

278. *See* Scott & Steinberg, *supra* note 276, at 812–13 (noting that studies on cognitive abilities may have limited usefulness in "understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings"); *see also* Aronson,

Decisions made during custodial interrogation undoubtedly fall under hot cognition. A retractable waiver rule would move the time and place of decisionmaking regarding the waiver of constitutional rights out of the stressful station house to a time and place where the decision could be more informed and most deliberately made. With the aid of adult, nonconflicted counsel, and apart from the stress and coercion of custodial interrogation, a juvenile could better understand his rights and the consequences of waiving them. If it turned out that the decision to waive was no longer to his benefit, the juvenile could void the waiver. While it would not prevent adult interrogators from taking advantage of juvenile suspects in the first place, it would better protect juveniles from their own ignorance, "folly and improvidence."[279]

Retractable waivers would also address the concern that current doctrine works to the particular detriment of immature, unsavvy, or compliant youth. Rather than suffering for not being assertive and clear in the face of custodial interrogation, juveniles can be clear, through their counsel, after they have had the space and time to fully understand the decision. And rather than suffering the consequences of their own immaturity and vulnerability, juveniles can be relieved of the effect of an agreement they did not fully understand or were unable to resist. The judicial system could then be more confident that a decision regarding a waiver of the constitutional privilege against self-incrimination was knowing, intelligent, and voluntary.

Allowing juveniles to retract uncounseled waivers would align interrogation law not only with contract law, but also with the many other limits the law places on the ability of juveniles to make decisions on their own. In thirty-seven states, for example, juveniles cannot decide to abort a pregnancy without the consent of either a parent or guardian, or the permission of a judge.[280] Most states prevent anyone under eighteen years of age from getting married without parental

supra note 16, at 119 ("[A]dolescents are much less capable of making sound decisions when under stressful conditions or when peer pressure is strong. Psychosocial researchers have referred to cognition in these different contexts as cold versus hot. The traits that are commonly associated with being an adolescent—short-sightedness (i.e., inability to make decisions based on long-term planning), impulsivity, hormonal changes, and susceptibility to peer influence—can quickly undermine one's ability to make sound decisions in periods of hot cognition." (emphasis omitted) (citations omitted)).

279. City of New York v. Stringfellow's of N.Y., Ltd., 684 N.Y.S.2d 544, 551 (App. Div. 1999).

280. Molly Redden, *This Is How Judges Humiliate Pregnant Teens Who Want an Abortion*, MOTHER JONES (Sept.–Oct. 2014), http://www.motherjones.com/politics/2014/07/teen-abortion-judicial-bypass-parental-notification [https://perma.cc/QV9C-A9WF]. *But see, e.g.*, Ohio v. Akron Ctr. For Reprod. Health, 497 U.S. 502 (1990) (upholding law that allows minors to prove maturity or best interest to make abortion decision by themselves via judicial bypass procedure).

consent.[281] Some states prevent juveniles from waiving counsel at trial.[282] And the military will only permit enlistment by juveniles if they have written consent of a parent or guardian.[283] As the Supreme Court put it:

> States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. . . . [Because] during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.[284]

Like deciding whether to get married or to enlist in the military, the decision to waive constitutional rights and give law enforcement a self-incriminating statement certainly has potentially serious consequences.[285] There is nothing about juvenile suspects that would lead courts or legislators to conclude that they do not, like juveniles generally, "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[286] To the contrary, juveniles who come into contact with the criminal justice system are more likely than the general juvenile population to have developmental delays or learning disabilities.[287]

Rather than paternalistically prohibiting juveniles from making the decision by themselves, a retractable waiver rule would, like the infancy doctrine, allow (but not require) juveniles to reconsider a decision. This preservation of autonomy is especially important because it accounts for those situations where a juvenile might want to waive, confess, and not later retract the waiver. For example, suspects do sometimes receive benefits after they waive and confess, such as release without

281. In thirty-six states and the District of Columbia, a juvenile cannot get married without parental consent. MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 1, 11 (2009), http://www.campaignforyouthjustice.org/documents/NR_TimeOut.pdf [https://perma.cc/29A8-9JET].

282. The Illinois Juvenile Court Act, for example, provides that in delinquency proceedings, "a minor may not waive the right to the assistance of counsel in his or her defense." 705 ILL. COMP. STAT. ANN. §§ 405/5-170(b), 405/5-115.5 (West 2014). Texas similarly prohibits juveniles from waiving counsel at any transfer, adjudicatory, disposition, detention, or mental health commitment review hearing. TEX. FAM. CODE ANN. § 51.10(b) (West 2014 & 2016 Supp.); see also WIS. STAT. ANN. § 938.23(1m)(a) (West Supp. 2016) (juveniles under 15 may not waive counsel); Feld, *supra* note 234, at 1324–25 (arguing that waiver of counsel should not be allowed).

283. 10 U.S.C. § 505 (2012).

284. Belotti v. Baird, 443 U.S. 622, 635 (1979).

285. Moreover, these limitations are based on the state's "*parens patriae* interest in preserving and promoting the welfare of [children]." Santosk v. Kramer, 455 U.S 745, 766 (1982). It is hard to see how the state could argue that waiving constitutional rights and giving self-incriminating statements promote the welfare of a young person.

286. *Belotti*, 443 U.S. at 635.

287. LEONE & WEINBERG, *supra* note 85, at 12.

detention, especially if their alleged crime is not violent or serious. And in situations where a juvenile's defense is based on his admitted but minimal participation, or a claim of duress, the juvenile may not seek to suppress his statement at trial. Put in more traditional contract terms, there is a bargaining zone for *Miranda* waivers by juveniles where the decision is, or may be, a net gain for the juvenile both at the time of interrogation and proceeding through a prosecution. As such, a rule that did not preserve the opportunity to make and confirm the waiver would not be justified.[288]

Moving the time and place for the waiver decision would benefit the judicial system as well. Retractable waivers would make it almost completely unnecessary for courts to answer the vexing question of whether a waiver was knowing, intelligent, and voluntary. Instead, the only issues for the court to resolve regarding the admissibility of a custodial statement would be two simple ones: (1) was the suspect who gave a statement under age eighteen and warned, and (2) does he wish to retract his waiver of his rights to silence and counsel?[289] This would eliminate hours of time spent investigating and adjudicating suppression motions, freeing up strained judicial, prosecutorial, and defense counsel resources for more beneficial use.

2. Reduce False Confessions and Wrongful Convictions

The infancy doctrine discourages adults from contracting with juveniles in part out of a worry that juveniles will agree to something that they do not wish to agree to, or fully understand, because of pressure from or manipulation by the adult. A retractable waiver rule would similarly recognize the worry that juvenile suspects will ill-advisedly waive their rights and admit to crimes that they did not commit because of pressure from an adult. As explained above, the vulnerabilities and immaturity of juveniles make them much more susceptible to false confessions.[290]

In the same way that the infancy doctrine makes a contract with a juvenile unenforceable at the option of the juvenile, a retractable waiver rule would increase the probability that any police-induced statement by a juvenile would be inadmissible in court. As such, it would similarly disincentivize troubling adult

288. Contrast the *Miranda* waiver situation with the decision to waive counsel by juveniles. There, arguably, there are no situations where waiving counsel makes a juvenile defendant better off. Therefore, a complete prohibition against making such a decision would be justified.

289. Where no warnings were given in a custodial interrogation, or no valid waiver was obtained, a retractable waiver rule would not be relevant because the statement would be unconstitutional under current doctrine. *See supra* Part II.A.

290. *See supra* Part I.C.

behavior—in this context, law enforcement's laser focus on extracting confessions. Law enforcement would instead be motivated to seek and develop verifiable information during the interrogation that could be used to further the investigation against that juvenile or others. This would promote accurate prosecutions by minimizing the risk of convictions based on false confessions.[291]

Consider the notorious Central Park Five case as an example.[292] Once the police detained several youths who had been in the park at the time of the assault, they presumed that they were guilty and proceeded to extract confessions from them.[293] The confessions were essentially the entire case against the youths.[294] There was no other evidence that they had done the crime (which is not surprising, since they did not commit the crime).[295] The statements, however, conflicted with each other and did not match the physical evidence.[296] After the true perpetrator confessed, and in response to a motion to vacate the convictions, Manhattan District Attorney Robert Morgenthau acknowledged that:

> [A] comparison of the statements reveals troubling discrepancies. . . . [T]he accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place. . . . And some of what they said was simply contrary to established fact.[297]

Had police focused on obtaining verifiable information from the youths, instead of getting the juveniles to say that they did it, or had the youths been able to retract their *Miranda* waivers, the tragedy of their wrongful convictions and wrongful imprisonment could have been avoided.

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291. Research suggests that the Reid method increases the number of false confessions, and that the investigative method of interrogation results in fewer false confessions. *See* Gisli H. Gudjonsson & John Pearse, *Suspect Interviews and False Confessions*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 33, 34–35 (2011).

292. *See* BURNS, *supra* note 17.

293. *See* Drizin & Leo, *supra* note 106, at 896 (noting that the involvement of two Sex Crimes Unit prosecutors at the "early stage of the investigation indicated that the D.A.'s office also believed the boys to be responsible for the sexual assault").

294. *See* BURNS, *supra* note 17, at 103 ("If the judge threw out the statements, there would be no case . . . .").

295. *Id.* ("With no DNA matches or other strong physical evidence linking any of the teens to the crime, the confessions became the only meaningful evidence for the prosecution to take to trial.").

296. *Id.* at 64 (noting that the "descriptions of the rape var[ied] widely" in the five statements).

297. Affirmation in Response to Motion to Vacate Judgment of Conviction at 45–46, People v. Wise, 752 N.Y.S.2d 837 (Sup. Ct. 2002) (No. 4762/89), http://news.findlaw.com/cnn/docs/crim/nywiseetal120502aff.pdf [https://perma.cc/7MY7-AKH6].

While the rule will frustrate some prosecutions,[298] it would insert fewer barriers to police investigation and successful prosecutions than a prohibition on waivers or a requirement of counsel at interrogation.[299] A retractable waiver rule does not bar interrogations of juveniles.[300] Law enforcement would remain free to interrogate within the bounds of the law. This would prevent any significant delays or prohibitive costs with regard to investigation while ensuring more robust protections of juvenile suspects' Fifth Amendment privilege. In addition, discouraging adults from extracting *Miranda* waivers and confessions from juvenile suspects will minimize the risk of false confessions by juveniles (and worse, convictions based on false confessions), thereby promoting accurate prosecutions.

3. Fulfill the Dignity Vision of the Self-Incrimination Clause

As explained above, *Miranda* found that "the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[301] Likewise, *Gault* emphasized that the roots of the Fifth Amendment's privilege go "far deeper" than a concern for the reliability of police-induced statements.[302] The privilege, the Court said, "insists upon the equality of the individual and the state. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."[303] By requiring that a waiver be knowing, intelligent, and voluntary, current doctrine aims to protect against the mind being "pressed by the government into an instrument of its own destruction."[304]

As shown above, however, courts readily admit statements by juvenile suspects following a waiver of their constitutional rights that science and common

298. See *infra* Part IV.A for thoughts on why the impact on investigations will not be substantial.
299. STUNTZ, *supra* note 227, at 223 ("Introducing defense lawyers into police interrogation seemed more a means of banning police interrogation than a means of regulating it.").
300. Indeed, *Miranda* does not bar interrogations that do not involve warnings and waivers. It just makes statements obtained under those circumstances inadmissible.
301. Miranda v. Arizona, 384 U.S. 436, 460 (1966).
302. *In re* Gault, 387 U.S. 1, 47 (1966).
303. *Id.*
304. H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1146 (1987) (adding that doctrine treat self-incrimination as "invalid unless undertaken with full consciousness of its dire consequences, and in the untrammeled exercise of personal determination"); *see also* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40–41 (1981) (discussing how tactics that "make rational, responsible choice more difficult," such as playing on a suspect's weaknesses, "hardly accord with respect for autonomy and dignity").

sense tell us are not the result of knowing, intelligent, and voluntary waivers. This undermines the core demand that the government respect an individual's dignity. It allows a juvenile, "an easy victim of the law,"[305] to have her will overborne and to be turned by law enforcement into an unwitting agent of her own demise.

To be sure, the dignity concern does have its limits. George Dix, for example, suggested that it "applies equally to all pretrial self-incriminating admissions and thus provides no reasonable way to identify situations that might be more offensive than others."[306] To Dix, a principle that "suggest[s] no basis for distinguishing one confession from another [is] difficult to accommodate in confession law."[307] While it is true that a suspect's dignity is threatened whenever the State extracts a self-incriminating statement and uses that statement against him at trial, the developmental characteristics of juveniles provide a basis to believe that the dignity concern is heightened with regard to juvenile suspects.[308] A retractable waiver rule would better protect the dignity and autonomy of juvenile suspects than current doctrine by preventing the admission of statements that empirical research consistently concludes are not the result of knowing, intelligent, and voluntarily waivers of the constitutional privilege against self-incrimination, and by providing juveniles with the freedom to make informed decisions about their rights.

IV. POTENTIAL OBJECTIONS AND RESPONSES

This Part responds to several potential objections to retractable *Miranda* waivers, and addresses the impact that such a rule could have on criminal justice.

A. The Criminal Justice System Needs Confessions

The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony."[309] The government puts great stock in this right because confessions serve a variety of law enforcement and societal interests. Most importantly, confessions solve crimes. Some cases lack direct physical evidence and eyewitnesses, and a conviction may be nearly impossible without a confession. When confessions confirm available physical evidence or lead to corroborating evidence, they permit greater confidence

305. Haley v. Ohio, 332 U.S. 596, 599 (1948).
306. George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 263 (1988).
307. *Id.*
308. *See supra* Part I.A.
309. Garner v. United States, 424 U.S. 648, 658 n.11 (1976).

that the criminal justice system is punishing the right person.[310] Without confessions available as evidence, some juvenile offenders may escape accountability altogether. This would leave victims unsatisfied and could reduce the deterrence impact of the criminal law. It could also deprive juvenile suspects and offenders of rehabilitative services because a court could not get jurisdiction over them.[311] The failure to successfully convict and punish wrongdoers can undermine public safety and confidence in the criminal justice system.[312] Accordingly, the Supreme Court has called confessions an "unmitigated good" and "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[313]

Confessions also make criminal investigations more efficient. Confessions lead quickly to charges, allowing law enforcement to use its resources to investigate other crimes. Confessions also lead directly to guilty pleas, allowing prosecutors to resolve more cases and the judicial system to concentrate its resources on the cases that require adjudication.[314] Without confessions, many more actors are forced into action, increasing the cost of criminal investigations and prosecutions. By freeing these criminal justice actors—police, prosecutors, judges, court staff, and defense lawyers—to tend to other cases, confessions benefit the community.[315]

Skeptics of retractable waivers might argue that they will mean fewer admissible confessions. That would make convictions more difficult and expensive to obtain, bringing all the negative consequences that attend an inability to identify and convict wrongdoers. This was the primary worry expressed by the *Miranda*

310. *See* Miranda v. Arizona, 384 U.S. 436, 538 (1966) (White, J., dissenting) ("Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty.").

311. Scholars have criticized this judicial approach in so-called problem-solving courts like drug courts, which can surrender due process rights and burdens of proof to their mission to provide needed services to people before the court. *See* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 418 (2009) (criticizing the drug court's "rejection of due process in favor of treatment"); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 124–27 (2001) (describing such efforts as "responsibilization strateg[ies]").

312. THOMAS & LEO, *supra* note 163, at 21 ("No society will long tolerate a legal system in which there is no prospect of convicting unrepentant persons who commit clandestine crimes." (quoting JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 7 (3d ed. 2006))).

313. Maryland v. Shatzer, 559 U.S. 98, 108 (2010) (quoting McNeil v. Wisconsin, 501 U.S. 171, 181 (1991)).

314. Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty*, 40 S. TEX. L. REV. 65, 73 (1999).

315. *Id.*

dissenters and law enforcement in reaction to *Miranda* fifty years ago.[316] Contrary to opponents' concerns, *Miranda* and *Gault* did not mean the end of confessions. But a retractable waiver rule would admittedly go farther than *Miranda* doctrine in protecting juveniles against self-incrimination. They would not only be warned of their rights to silence and counsel, but would have the opportunity to consult with counsel to reconsider a decision to waive their rights. Because defense counsel's primary job is often to keep her client quiet and suppress evidence of guilt,[317] most counsel will advise a juvenile to retract any waiver of the Fifth Amendment privilege against self-incrimination. By depriving the system of a persuasive piece of evidence, this will undoubtedly reduce the chances that the criminal justice system will convict, punish, and provide rehabilitative services to some number of juvenile wrongdoers. Such a significant impact cannot be considered lightly.

Of course, this is the same impact that a rule requiring counsel at interrogation before any waiver would produce. And there is no evidence indicating that providing counsel at interrogation has put an end to confessions. To the contrary, several states have required counsel at interrogation for juveniles for years without undermining the criminal justice system's ability to identify and adjudicate wrongdoing.[318] Since the retractable waiver rule functions as a delayed right to counsel before an enforceable waiver can be obtained, these states' experience does not provide a basis to believe that a retractable waiver rule will end the prosecution of juveniles.

Two additional factors minimize any potential negative impact the rule might have on the criminal justice system. First, since the rule only applies to juvenile suspects, it does not touch the confessions obtained from the vast majority

316. Miranda v. Arizona, 384 U.S. 436, 516 (1966) (Harlan, J., dissenting) ("There can be little doubt that the Court's new code would markedly decrease the number of confessions."); THOMAS & LEO, *supra* note 163, at 165 (recounting a prediction from law enforcement that *Miranda* would end the use of confessions in convicting criminals); *see also* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 176 (1983) (noting that law enforcement's reaction to *Miranda* was that it would end confessions); Richard A. Leo & K. Alexa Koenig, *The Gatehouses and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323, 329 (2010) ("Police and prosecutors complained bitterly that *Miranda* would handcuff their investigative abilities—preventing them from capturing criminals and solving crime—and thus become no more than a shield for the guilty.").

317. This is not always the result. Brendan Dassey's first lawyer arranged for Brendan to be interviewed by detectives outside the lawyer's presence. *See* Dassey v. Dittmann, 201 F. Supp. 3d 963, 987(E.D. Wis. 2016), *appeal filed*, 7th Cir., Sept. 9, 2016. Indeed, in the Supreme Court case that established the ineffective assistance of counsel standard, the client disregarded his lawyer's advice and confessed to three murders to police. Strickland v. Washington, 466 U.S. 668, 672 (1984).

318. There is, for example, no empirical evidence that states like New Jersey or Illinois, which require counsel at interrogation for juveniles, have not been able to successfully prosecute wrongdoing by youth. *See supra* text accompanying notes 224–226.

of criminal suspects. Those under age eighteen represented only 8.5 percent of all arrests in 2015.[319] Because some who are arrested did not commit any criminal offense, not all of those arrests lead to charges and convictions.[320] Of those arrests that do lead to charges, some will not have or need a confession in order to prove guilt. The rule, therefore, will almost certainly impact only a small percentage of the criminal justice caseload. And the cases it would impact—juvenile offenses—are less likely to be the serious, violent crimes that are the core concern of the criminal justice system.[321] In addition, the rule would have no bearing on non-custodial inculpatory statements by juveniles, to which *Miranda* doctrine does not apply.

Moreover, a retractable waiver rule would not prevent interrogations, nor would it interfere with law enforcement's ability to investigate crime. It operates at the very back end of a criminal investigation and prosecution, coming into play only if and when the prosecution seeks to introduce as substantive evidence a juvenile's inculpatory custodial statement. Because law enforcement will prefer to have a potentially admissible confession to no confession at all, it will continue to warn and seek waivers from juvenile suspects.[322] And interrogated juveniles will remain likely to waive their rights and give a statement to law enforcement. Since a juvenile suspect with a retractable waiver rule in place will be no more likely than he is today to be able to confer with an attorney prior to an interrogation, there is no reason to suspect that more juveniles will invoke their rights to silence and counsel during interrogation.[323] Law enforcement can then direct its investigation to pursuing evidence that corroborates the confession.[324] It can also

319. *Crime in the United States 2015*, *supra* note 20.

320. *See, e.g.*, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 8 (2013), https://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf [https://perma.cc/3RXX-JQJC] (finding that "close to half" of all arrests made during a stop-and-frisk from 2009 to 2012 did not result in conviction).

321. Most juvenile arrests involve nonviolent crimes. *Crime in the United States 2015*, *supra* note 20 (reporting 39,519 arrests of juveniles for violent crime out of over 700,000 arrests of juveniles in 2015). Juveniles represent only 10.2 percent of all violent crime index arrests. *Id.* (reporting that 39,519 individuals under age 18 were arrested for violent crimes in 2015 out of 388,082 total arrests for violent crimes).

322. *But see* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132–36 (1998) (describing police interrogation "outside *Miranda*," which generally means continuing to interrogate a suspect who has invoked his rights to elicit a confession or other evidence, even though the officers know the confession will not be admissible as substantive evidence).

323. *See* FELD, *supra* note 54, at 170, 274 (finding 92.8 percent of sixteen-and seventeen-year-olds waived their *Miranda* rights and 88.4 percent gave an inculpatory statement).

324. See *infra* Part IV.D regarding the admissibility of the fruits of unconstitutionally obtained confessions.

retain any confession made by the juvenile suspect as potential impeachment material.[325]

Fewer admissible confessions from juvenile suspects could actually prompt positive changes in criminal justice. It would encourage law enforcement to develop more proof outside of the juvenile's own words. It could prompt more law enforcement agencies to adopt the investigative method of interrogation, which aims to allow suspects to provide a narrative and prioritizes the development of facts instead of extracting a confession.[326] A Los Angeles Police Department detective supervisor, whose unit has been trained in the technique, has happily found that by not single-mindedly seeking out confessions he has netted enough information from some suspects to amount to a confession and eliminated persons of interest as suspects altogether.[327]

A retractable waiver rule could also lead law enforcement agencies to reprioritize. It may encourage prosecutors and police to focus their efforts on higher priority offenders than juvenile delinquents.[328] The human and economic resources necessary to run juvenile justice systems that specialize in low-level offenses and that may actually be criminogenic for youth[329] could be reallocated to more cost-effective preventive and rehabilitative services. Since current interventions disproportionately impact poor youth of color,[330] such changes may make communities both safer and more just. Separately, a greater pursuit of cooperation agreements instead of prosecutions of youth could allow prosecutors

325. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 722 (1975) (holding that a statement obtained in violation of *Miranda* may be admissible to impeach defendant); Harris v. New York, 401 U.S. 222, 224 (1971) (applying the same rationale as in *Hass*).

326. *See* Kolker, *supra* note 68 (asserting that the investigative method is "geared not toward the extraction of a confession but toward the pursuit of information").

327. Kolker, *supra* note 68.

328. Most juvenile arrests involve nonviolent crimes. *Crime in the United States 2015*, *supra* note 20 (reporting 39,519 arrests of juveniles for violent crime out of over 700,000 arrests of juveniles in 2015).

329. *See* Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, CAMPBELL SYSTEMATIC REVIEWS, Jan. 2010, at 6, https://bibliographie.uni-tuebingen.de/xmlui/bitstream/handle/10900/64674/Review_System_Process_Effect_Juvenile_Delinquency_100129.pdf?sequence=1&isAllowed=y [https://perma.cc/VR8L-V6VE] (finding in a comprehensive meta-analysis that "juvenile system processing appears not to have a crime control effect and across measures appears to increase delinquency"); Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 97 (2012) (discussing studies finding criminogenic effect of juvenile court processing).

330. NAT'L COUNCIL ON CRIME & DELINQUENCY, *supra* note 98, at 1–2 (African American youth are disproportionately arrested in twenty-six of twenty-nine offense categories, overrepresented in cases referred to juvenile court, more likely to be formally charged, more likely to be waived into adult court, and disproportionately detained in both juvenile and adult facilities).

to convert inadmissible juvenile confessions to more socially beneficial convictions of higher-level offenders.[331]

One incontrovertible benefit of a retractable waiver rule to the criminal justice system would be its elimination of wrongful convictions based on false confessions. Every juvenile who falsely confessed would presumably retract his waiver, depriving the prosecution of the most powerful kind of evidence making travesties like the Central Park Five case (which resulted in five teenagers collectively serving over forty years in prison based almost exclusively on false confessions)[332] impossible. It would also reduce the unknown number of wrongful juvenile court delinquency adjudications.[333] While the number of false convictions avoided may be fewer than the number of accurate convictions lost because of retracted waivers, Blackstone long ago identified this as the preferred outcome.[334]

The rule would also alter the incentives that can sometimes lead judges to prioritize convictions over protecting individual rights. As Brandon L. Garrett explains, "[J]udges are understandably highly reluctant to completely exclude confession evidence, even in the face of other exculpatory evidence such as DNA test results, in part because the confession may be the central evidence of guilt in a very serious criminal case."[335] In one case, for example, after a judge initially ruled a confession to be involuntary, the prosecutor informed the judge that if the confession were thrown out, he would have to drop all of the charges.[336] "The judge granted a one-week continuance for the State to put on additional witnesses, and after a second suppression hearing, the judge ruled that the confession was voluntary."[337]

This concern about judicial solicitousness toward constitutionally-suspect confessions is heightened in juvenile court, where one judge typically presides over the arraignment, suppression hearings, and the trial of a single case. From the moment a delinquency case begins, the juvenile court judge learns about the juvenile's various problems and needs.[338] Judges therefore know that suppressing

331. *But see* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009) (explaining how undercover operations and informants corrode the rule of law).

332. *See* BURNS, *supra* note 17, at 184, 190.

333. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 259–60 (2007) (arguing that there is most probably a greater risk of a wrongful conviction in juvenile court than in adult criminal court).

334. BLACKSTONE, *supra* note 102, at 352 ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

335. Garrett, *supra* note 113, at 399; Primus, *supra* note 160, at 3 (stating that judges "don't want to appear soft on crime by freeing confessed criminals").

336. Garrett, *supra* note 113, at 402–03.

337. *Id.*

338. Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 570 n.64 (1998) ("The judge may

a confession means not just that the prosecution's case will be weakened, but that they will lose jurisdiction over a youth who they know could benefit from what they view as supportive court-ordered services.[339] Retractable waivers would take the admissibility decision largely out of judges' hands, eliminating the chance of such conflicted rulings on constitutional rights.

To allay concerns about a world without admissible juvenile confessions, a more moderate version of a retractable waiver rule could limit its applicability to those interrogations where law enforcement obtained a waiver and a confession by explicitly taking advantage of the vulnerabilities and immaturities of a particular juvenile suspect. This would prevent juvenile suspects from blocking the admission of any (and every) uncounseled statement that followed a *Miranda* waiver, and instead concentrate the inquiry on the core concerns of both the infancy doctrine and Part I of this Article: crafty adults taking intentional advantage of juveniles suspects' limited capacities and vulnerabilities. When, for example, police use psychological tactics like the false evidence ploy that juveniles are particularly susceptible to, or when they ingratiate themselves to young suspects with paternal messages of care and protection, the right to a retractable waiver would be triggered. But it would not be available to juveniles who plainly demonstrated an understanding of their rights and who, without inveigling by police, voluntarily waived those rights. Such a moderated version of the rule would still incentivize police to adopt techniques that better ensure that a juvenile suspect understands his rights and the consequences of waiving them, and to develop a clear record of that understanding, such as videotaping interrogations and having juvenile suspects explain their rights back to police before continuing with the interrogation.[340]

It is not clear, however, how such a moderated rule would differ from current interrogation doctrine. As discussed above, the law already recognizes that "admissions and confessions of juveniles require special caution."[341] And it already requires that courts take "the greatest care" to assure that waivers by juveniles are voluntary, intelligent, and not "coerced or suggested, [nor] the product of ignorance of rights or adolescent fantasy, fright or despair."[342] The totality of the circumstances inquiry, moreover, purports to take into account "the juvenile's

know about the youth's background and family circumstances as a result of having presided over the initial hearing in the case (at which a judge makes a determination about pretrial release based upon social factors) . . . .").

339. *Id.*; *see also In re* Gault, 387 U.S. 1, 44, 50–51 (1967) (noting that the Arizona Supreme Court worried that if juveniles were warned about their self-incrimination privilege, then they would not confess their wrongs and the court could not get jurisdiction over the young person).

340. *See* Ferguson, *supra* note 200, at 1441.

341. *Gault*, 387 U.S. at 45.

342. *Id.* at 55.

age, experience, education, background, and intelligence, and . . . whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[343] Together, these requirements should already result in waivers being invalidated where adult interrogators take intentional advantage of juvenile suspects' limited cognitive capacities and enhanced vulnerability. But they do not. Therefore, a moderated, individualized approach to the retractable waiver rule would likely strip the rule of its effectiveness.

Moreover, the infancy doctrine in contract law makes no such individualized inquiry. On account of the shared characteristics of juveniles in general, and the risks of coercion at the hands of adults, the rule requires only that a person prove his age to benefit from the rule. This avoids difficult, individualized inquiries into dealings between an adult and a particular juvenile (such as whether one, two, or three prior contract negotiations mean that the juvenile cannot invoke the infancy doctrine in the present instance, or whether one prior particularly protracted or sophisticated contract negotiation with an adult would prevent access to the infancy doctrine, or whether the use of one particular negotiating tactic by the adult allows all juveniles, or some subset of juveniles (as decided by some characteristic or factual circumstance), permits resorting to the infancy doctrine, etc.). For similar reasons, the ability to retract a waiver should not be an individualized inquiry, turning on how many prior custodial interrogations a juvenile has been subject to, or the juvenile's IQ level, or some other characteristics or facts. Instead, to best protect juveniles from their immaturity and safeguard their constitutional rights, juveniles as a class should have the ability to reconsider their waiver decision.

If the criminal justice system is viewed as a manufacturer of convictions, then the retractable waiver rule will likely (though not certainly) disrupt production. Pleas may be harder to come by because prosecutors' leverage will be reduced. Some cases may simply not go forward because of a lack of proof. But constitutional rights are not trifles. Like other criminal procedure rules that protect individuals from government investigation, and therefore frustrate efforts to convict offenders, a retractable waiver rule will come with law enforcement costs. Because the criminal justice system is simultaneously an institution that must achieve its goals while respecting and protecting the constitutional rights and the dignity of those before the court, it is a cost the law demands.[344]

343. Fare v. Michael C., 442 U.S. 707, 725 (1979).

344. *Cf.* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 460 (1987) (discussing how criminal procedure guarantees "underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled").

B. Individuals Need Confessions

Society and law enforcement are not the only beneficiaries of confessions. Individuals benefit from confessions as well. Confessions can mitigate the downside of a criminal case in several ways. Law enforcement officers are more willing to bargain with a suspect who promptly confesses because it helps them achieve their primary goal: solving crime.[345] Confessions also enable plea deals, mainly because defendants are more likely to accept plea offers knowing that their confession will be introduced at trial. This typically results in offenders receiving a sentence significantly lower than they could have received had they gone to trial and been found guilty.[346] Judges may also give greater weight to prompt cooperation,[347] and reduce sentences for those who accept responsibility for their acts.[348]

Confessing, the old proverb goes, is also good for the soul.[349] Criminal justice scholar Stephanos Bibas has argued that confessing is the first step to "framing

345. *Cf.* George E. Dix, *Promises, Confessions, and Wayne Lafave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 247 (1993).

346. Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests That Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. Rev. 1667, 1705 (2013) ("There is significant support for the existence of the trial penalty, and studies have shown that there are substantial differences in the sentences imposed after jury trials compared to sentences imposed after guilty pleas.").

347. Dix, *supra* note 345, at 247; Alan Ellis, *An Introduction to Federal Sentencing*, CHAMPION, June 2016, at 28, 37 ("Now that the guidelines are no longer mandatory, courts have the authority to impose lower sentences to reward cooperation—even when the prosecution refused to file a departure motion.").

348. The U.S. Sentencing Guidelines have a section for "Acceptance of Responsibility." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016) (recommending that a judge may reduce the offense level in response to a defendant's clear acceptance of responsibility). Most sentencing judges automatically award acceptance of responsibility reductions to defendants who plead guilty. Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1534, 1539–42 (1997) ("[N]ational data suggests that the bottom-line result, the treatment of section 3E1.1 as a more-or-less automatic plea discount, has been widely replicated."); *see also* Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2175 (2003) ("Although the Guidelines clearly state that the 'acceptance of responsibility' reduction will not be automatically awarded for merely pleading guilty, . . . many courts and practitioners have come to think of the reduction as a plea discount because the vast majority of defendants who plead guilty receive the reduction for doing nothing more.").

349. THE CONCISE OXFORD DICTIONARY OF PROVERBS 51 (John Simpson ed., 3d ed. 1998) (citing seventeenth century Scottish proverb "confession is good for the soul"). Robert Cochran surveyed "a wide variety of Los Angeles clergy" and found that "all would encourage those who had committed a crime to confess to the victim and to the government authorities." Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-At-Law: Lessons From Dostoyevsky*, 35 HOUS. L. REV. 327, 366 n.290 (1998).

a therapeutic response,"[350] setting the confessor on a path of moral reform.[351] With confession can come "forgiveness, reconciliation and a clear conscience" along with peace and redemption.[352] According to Justice Byron White, who dissented in *Miranda*, confessing "may provide psychological relief and enhance the prospects for rehabilitation."[353] Interrogators are trained to appeal to psychological relief as a way to encourage suspects to confess.[354] Juvenile suspects also get the same message from parents who are present at interrogation. In one case, for example, a thirteen-year-old suspect's mother encouraged him to talk to the police because "it would help him to clear his conscience" and that "whatever [was] ailing him inside would come out" and he would feel better.[355]

This sounds all well and good, and might help police sleep better about the way they induce juveniles to confess. But the Supreme Court rejected this "therapeutic" justification for juvenile confessions long ago. In *Gault*, the Supreme Court of Arizona had argued against advising juveniles of their rights to silence and counsel "because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process."[356] The Supreme Court did not buy it, noting evidence that confessions by juveniles do not aid in individualized treatment.[357] In fact, the Court wrote in *Gault*:

> [I]t seems probable that where children are induced to confess by "paternal" urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.[358]

350. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1395 (2003).
351. *See id.* at 1400 ("[Confessing] is a catharsis, literally a cleansing, which is why we often speak of confession as coming clean."); Bradley, *supra* note 314, at 71.
352. Cochran, *supra* note 349, at 332–33, 366.
353. Miranda v. Arizona, 384 U.S. 436, 538 (1966) (White, J., dissenting); Bibas, *supra* note 350, at 1395 (finding that offenders who do not confess and remain in denial "prevent[] therapists from examining cognitive distortions, detecting warning signs, and nurturing empathy for the victims").
354. *See* INBAU, *supra* note 45, at 345 (identifying multiple ways an interrogator can offer benefits to a suspect for confessing, including "[t]he suspect will experience internal relief by reducing feelings of guilt associated with committing the crime").
355. United States v. Erving L., 147 F.3d 1240, 1243 (10th Cir. 1998) (alteration in original).
356. *In re* Gault, 387 U.S. 1, 51 (1967).
357. *Id.*
358. *Id.* at 51–52.

This bait and switch is precisely what the Reid training encourages.[359] And it is what Tom Tyler and other procedural justice scholars have identified as a target for elimination to enhance the legitimacy of, and increase the crime-preventing effectiveness of, the criminal justice system.[360]

As explained above, retractable waivers will not necessarily mean fewer confessions. Indeed, the number of juveniles who confess to the police in a world with retractable waivers will probably remain about the same as it is today. As a result, individuals could still gain whatever soul-serving benefits come from confessing their guilt. And they remain free not to retract their waiver and to allow their confession to be admissible in court, reaping whatever rewards that decision could provide.

Whatever value confessing may offer to the individual, there is, of course, no argument to be made that false confessions are therapeutically beneficial to youth. In fact, they are almost certainly psychologically harmful.[361] By preventing convictions based on false confessions, a retractable waiver rule will reduce this rare but devastating harm.

C. Preserving Reliable Confessions

Another objection to a retractable waiver rule could be that it is overbroad, preventing the admission of false and reliable confessions alike. Few would argue that the law should not be concerned with a doctrine that liberally admits false confessions. But an overcorrection that constructs barriers to the admissibility of reliable confessions could threaten the accuracy and integrity of the criminal justice system as well.[362] Indeed, the U.S. Supreme Court has "cautioned against expanding 'currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries.'"[363]

359. *See supra* Part I.A.

360. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) ("[P]eople's willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the police and the courts."); *see also* Birckhead, *supra* note 233, at 1473–74.

361. *See* Drizin & Leo, *supra* note 106, at 949–50 (identifying the many personal harms that follow a false confession).

362. THOMAS & LEO, *supra* note 163, at 21 ("No society will long tolerate a legal system in which there is no prospect of convicting unrepentant persons who commit clandestine crimes." (quoting JOHN LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 7 (3d ed. 2006))).

363. Colorado v. Connelly, 479 U.S. 157, 166 (1986) (quoting Lego v. Twomey, 404 U.S. 477, 488–89 (1972)). The Court further observed that the "central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Id.* (quoting Delaware v. Van Arsdall, 475

Concern with the reliability of confessions goes back to the birth of the privilege against self-incrimination.[364] According to Dean John Henry Wigmore: "The principle . . . upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*."[365] In this vein, the Supreme Court has observed in cases, including *Gault*, that the privilege is concerned with "the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."[366]

Recently, scholars have sought to reassert reliability as the touchstone of a confession's admissibility, proposing that reliable confessions be admissible in criminal trials even when law enforcement indisputably violated the requirements of *Miranda*. Richard A. Leo and others, for example, sought to "reinvigorate[] the largely forgotten purpose of the rules—reliability of confession evidence" by requiring pretrial reliability hearings separate from pretrial voluntariness hearings and recording all interrogations.[367] Eve Brensike Primus similarly proposed that the prosecution be able to avoid suppression "if it can prove that the resulting confession was in fact reliable by showing, for example, that the police discovered corroborating physical evidence as a result of the confession."[368] The broader social concern in the last decade with accuracy in criminal justice as a prime value gives these reliability proposals particular salience.[369]

To be sure, only reliable confessions should be admitted into evidence at criminal trials. To the extent that these reliability-focused reform proposals supplement the due process and *Miranda* regimes and raise the bar for the admission of confession evidence, they improve interrogation doctrine and enhance the integrity of criminal justice. But reliability is just one of many themes found in interrogation jurisprudence, and it is not the prime concern.[370] The movement

U.S. 673, 681 (1986)). Moreover, the Court posited that the "exclusion of evidence deflect[s] a criminal trial from its basic purpose." *Id.*

364. Dix, *supra* note 151, at 279–85 (discussing reliability as the primary basis for the original common law and succeeding due process requirements that a confession be voluntary).

365. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 822, at 246 (3d ed. 1940).

366. *In re* Gault, 387 U.S. 1, 47 (1967) (extending the privilege against self-incrimination to juveniles).

367. Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486 (2006).

368. Primus, *supra* note 160, at 42.

369. *See, e.g.*, *2015 Annual Meeting*, *supra* note 231 (observing that the criminal justice system "sidelines the accuracy of its somber task in favor of a slew of other goals, interests and constraints," and advocating "reforms that seek to prioritize accuracy as the primary goal of the investigative and adjudicative processes").

370. As the *Miranda* dissent summarized the doctrinal evolution: "To travel quickly over the main themes, there was an initial emphasis on reliability supplemented by concern over the legality and

away from reliability as the core concern began in the 1950s. In *Rogers v. Richmond*, the Court declared that a confession's admissibility "is a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."[371] The *Miranda* majority a few years later did not mention reliability once to explain its decision.[372] In *Lego v. Twomey*, the Court observed that a voluntariness hearing regarding a confession "has nothing whatever to do with improving the reliability of jury verdicts."[373] And *Colorado v. Connelly* gave the "risk of unreliability . . . no independent consideration in fashioning and applying due process voluntariness and waiver standards for fifth and sixth amendment rights."[374]

Today, courts continue to recognize that the Fifth Amendment privilege against self-incrimination, much like the Sixth Amendment's confrontation right, is not primarily about the reliability of evidence.[375] The Fifth Amendment prevents police from coercing waivers and confessions from individuals and using those confessions as evidence even when the resulting confession is, indisputably, reliable. Instead, the primary concern is to limit the coercive powers of the government and protect the dignity interests of suspects.[376] As such, it guards the manner in which confessions are obtained, not whether what is obtained is reliable.[377]

When it comes to safeguarding the privilege against self-incrimination of juvenile suspects, reliability is simply the wrong benchmark for constitutionality

fairness of police practices in an 'accusatorial' system of law enforcement and eventually by close attention to the individual's state of mind and capacity for effective choice." Miranda v. Arizona, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (citations omitted).

371. Rogers v. Richmond, 365 U.S. 534, 544 (1961).

372. A search for the word "reliability" or its variants in the majority opinion in *Miranda* comes up empty. *See Miranda*, 384 U.S. 436.

373. Lego v. Twomey, 404 U.S. 477, 486 (1972).

374. Dix, *supra* note 306, at 272–73; *see also* Colorado v. Connelly, 479 U.S. 157, 167 (1986) ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . .").

375. *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."); Dassey v. Dittman, 201 F. Supp. 3d 963, 999 (E.D. Wis. 2016) ("[D]oubts as to the reliability of Dassey's confession are not relevant considerations in the assessment of whether Dassey's confession was constitutionally voluntary."), *appeal filed*, 7th Cir., Sept. 9, 2016.

376. *See* Dix, *supra* note 306, at 263 (documenting how, just before the mid-twentieth century, "[t]he Court began to stress concerns about human dignity over worries concerning the reliability of contested confessions"); Uviller, *supra* note 304, at 1146 ("[T]he mind, as the center of the self, may not be pressed by the government into an instrument of its own destruction.").

377. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961) ("[C]onfessions cruelly extorted may be and have been . . . found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration."); Dix, *supra* note 306, at 265 ("Voluntariness . . . is distinguishable from and virtually independent of a confession's credibility.").

and admissibility. While it may be wise to use reliability as an additional criteria of admissibility (particularly given juveniles' heightened susceptibility to false confessions), reliability cannot trump the dignity concerns associated with coercive interrogation tactics that take advantage of the immaturity and vulnerability of juvenile suspects.

D. The Fruit of Retracted-Waiver Confessions

Like almost every field of law, self-incrimination doctrine includes a central principle and numerous connected tributaries. A significant change like a retractable waiver rule could muddy the doctrinal waters for confessions. Its interaction with current restrictions on the fruit of the poisonous tree doctrine merit specific attention. According to the fruit of the poisonous tree doctrine, physical evidence discovered as a result of unconstitutional police behavior is inadmissible.[378] This is a general, but not absolute, principle. In *United States v. Patane*,[379] the Supreme Court held that the physical fruits of un-Mirandized statements can be admissible. The Court explained that *Miranda* protects suspects' self-incrimination privilege, and therefore their dignity, by demanding that their confessions be made voluntarily.[380] As a result, the admission of the fruit of voluntary confessions, even if they were given in the absence of *Miranda* warnings, "presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial."[381] Therefore, the Court concluded: "Introduction of the nontestimonial fruit of a voluntary statement . . . does not implicate the Self-Incrimination Clause."[382] Concurring, Justice Kennedy added in support of the result that "the concerns underlying the *Miranda v. Arizona* rule must be accommodated to other objectives of the criminal justice system."[383] Thus, there are currently no constitutional barriers to the introduction of physical evidence discovered by police as a result of a suspect's unwarned but voluntary statement.

Patane illustrates a tension within current self-incrimination doctrine. *Miranda* itself suggested that the fruits of unwarned or improperly warned interrogations were not allowed. Quite simply, the warnings or their equivalent were required to dispel compulsion; absent the warning, any custodial statement was involuntary. As the Court put it: "[U]nless and until such warnings and waiver

378. Wong Sun v. United States, 371 U.S. 471, 485 (1963).
379. United States v. Patane, 542 U.S. 630 (2004) (plurality opinion).
380. *See id.* at 634.
381. *Id.* at 643. Patane interrupted officers as they attempted to warn him of his rights and voluntarily spoke with officers. *Id.* at 635.
382. *Id.* at 643.
383. *Id.* at 645 (Kennedy, J., concurring) (citation omitted).

are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]."[384] Constitutional scholar Barry Friedman explained that "the Court's plain language about the ban on the 'use' of statements meant not only that the statements themselves were to be excluded from evidence, but so too the 'fruits'—that is, any other evidence discovered by obtaining such statements."[385] Yet, current law has withdrawn from that position and permits the admission of the fruits of unwarned confessions provided the statement was voluntary.

A retractable waiver rule could put pressure on *Patane* if the rule was understood to bar not only the admission of the custodial statement, but also any fruit of that custodial statement, because the statement was considered to be involuntary. But the retractable waiver rule need not go that far.[386] The presumptive application of a retractable waiver rule involves an interrogation with *Miranda* warnings and a waiver, neither of which were present in *Patane*.[387] Moreover, it would be a significant burden on law enforcement to restrict the use of evidence obtained as a result of interrogating a validly warned juvenile who waived his rights just because the juvenile later revoked his waiver.[388] If the prosecution establishes that *Miranda* warnings were given and that a facially valid waiver was given by the juvenile (under current doctrine) (even if those warnings were not understood at the time, and the waiver was not knowing or intelligent, as evidence suggests is likely), and the court finds under the due process clause that the statement was voluntary, *Patane* allows the prosecution to use the fruits of the interrogation. All that would be lost by a retractable waiver is the admission of the juvenile's statement itself. Revocation would not turn the entire interrogation, or the statement itself, into a poisonous tree. The fruit of that statement could remain, as it is under current doctrine, potentially admissible.[389]

384. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

385. Friedman, *supra* note 162, at 16.

386. Whether the rule should be understood to make a waiver and confession involuntary *nunc pro tunc*, and therefore bar the admission of fruit resulting from a waiver by a juvenile, is beyond the scope of this paper.

387. Patane, 542 U.S. at 635 (noting that suspect interrupted police before they completed the *Miranda* warnings).

388. Because a retractable waiver rule does not invalidate *Miranda*, the Constitution would still require warnings and a waiver. *See* FELD, *supra* note 54, at 248 (stating that receiving *Miranda* warnings "remains a necessary but not sufficient condition for admissibility of statements").

389. Making exclusion of a confession likely while permitting the fruits of juvenile confessions could incentivize law enforcement to badger youth suspects more than they might otherwise under current law in order to amass more admissible evidence. *Cf.* Weisselberg, *supra* note 322, at 132–36 (describing police interrogation "outside *Miranda*," which generally means continuing to interrogate a suspect who has not been warned or has invoked his rights). However, because the due process voluntariness requirement remains in place (if underenforced by courts today), the extra

As such, the retractable waiver would not necessarily change the current law when it comes to the fruit of statements.

CONCLUSION

Current constitutional doctrine fails to adequately protect juvenile suspects' rights to silence and counsel during custodial interrogation. Notification simply does not suffice, especially when courts fail to appreciate how juvenile suspects' cognitive limitations and heightened vulnerabilities impact their ability to understand and assert their rights. Nonconstitutional solutions such as videotaping interrogations, parental presence requirements, and mandatory counsel are either inadequate to the task or present significant administrative difficulties and considerable costs. Telling courts in a louder voice to account for juvenile suspects' cognitive limitations and heightened vulnerability may solve the problem, particularly if it is the Supreme Court that is talking. But the Supreme Court has urged special care with juvenile confessions on multiple occasions over decades, to little practical effect.

A solution is needed. Contract law has protected juveniles for centuries from crafty adults and their own immaturity and vulnerabilities by allowing them to void agreements that they did not understand or that turned out to be ill-advised. Letting juveniles take back their *Miranda* waivers would bring interrogation law into alignment with the longstanding recognition of juveniles' limited decisionmaking capacities, as well as modern developmental science and Supreme Court criminal justice jurisprudence premised on the idea that juveniles require enhanced protections. That provides reason enough to incorporate retractable waivers into interrogation doctrine. The rule would also enhance the accuracy and integrity of the criminal justice system and more fully protect and promote the dignity of juvenile suspects. As with other criminal procedure rules that protect individuals, including criminal offenders, from government investigation, a retractable waiver rule would come with law enforcement costs. While those costs are not irrelevant, they are an inevitable part of a constitutional system dedicated to protecting dignity and promoting justice.

badgering would increase the likelihood that a court would find the confession involuntary, therefore making the fruits inadmissible as well.