Boston College Law Review

Volume 61 | Issue 7 Article 8

10-30-2020

Major Reforms for Minors' Confessions: Rethinking Self-Incrimination Protections for Juveniles

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MAJOR REFORMS FOR MINORS' CONFESSIONS: RETHINKING SELF-INCRIMINATION PROTECTIONS FOR JUVENILES

Abstract: The right against self-incrimination has been a part of American law since before the enactment of the Fifth Amendment. In the twentieth century, extreme police interrogation methods led the U.S. Supreme Court to institute further protections of this constitutional principle. Most significantly, in 1966, in *Miranda v. Arizona*, the Supreme Court permanently altered American criminal procedure and culture by extending the now-famous *Miranda* rights to individuals before custodial interrogation. Over fifty years later, these procedural safeguards to the right against self-incrimination have met virtually universal criticism for their ineffectiveness. Matters are particularly dire for juveniles because the law has failed to establish meaningful protections to ensure that they can understand and use their right against self-incrimination. Further, there is a growing amount of evidence that developmental limitations make juveniles especially susceptible to making uninformed, involuntary choices during interrogation. The recent innocence revolution provides proof that this leads to false confessions that unduly prejudice children in the criminal justice system and result in wrongful convictions. This Note argues that major change is necessary to protect juveniles from self-incrimination, and that confession evidence from juvenile interrogation should be inadmissible in court for due process and evidentiary reasons.

INTRODUCTION

Teresa Halbach, a twenty-five-year-old photographer from Wisconsin, was reported missing on November 3, 2005.[1] In the ensuing hunt for Halbach, searchers determined that she was last seen on October 31 at an appointment to photograph a van for sale at Avery Salvage Yard, near Two Rivers, Wisconsin.[2]

[1] State v. Avery, 2010 WI App 124, ¶ 6, 337 Wis. 2d 351, 804 N.W.2d 216 (Ct. App. 2011) (noting that Teresa Halbach's mother reported her missing on November 3, 2005); Transcript of Jury Trial Day 1 at 49, State v. Avery (*Avery Trial*), No. 05-CF-381 (referencing that Halbach was twenty-five at the time), *aff'd*, 2010 WI App 124, ¶ 75, 804 N.W.2d at 242.

[2] Dassey v. Dittmann (*Dassey I*), 201 F. Supp. 3d 963, 967–68 (E.D. Wis. 2016), *aff'd*, 860 F.3d 933 (7th Cir.), *rev'd en banc*, 877 F.3d 291 (7th Cir. 2017). On October 31, Steven Avery met Halbach by his trailer at Avery Salvage Yard to photograph a van he wanted to sell, an appointment he arranged through Auto Trader. *See id.* at 968–69 (noting that Halbach told her employer, Auto Trader, that she was on her way to Avery Salvage Yard); *Steven Avery Nov 5 Interview in Crivitz*, YOUTUBE (Jan. 30, 2016), https://www.youtube.com/watch?v=m-5ZUFmV2lU&feature=youtu.be [https://perma.cc/LR4F-Z7K4] (recording Avery telling police on November 5 that Halbach came to the salvage yard for the photography shoot on the afternoon of October 31). Avery Salvage Yard is near Two

Several members of the Avery family worked at the salvage yard, a forty-acre property containing approximately four-thousand vehicles, and many of them lived in trailers on the property.[3] On November 5, volunteers canvassing the salvage yard found Halbach's car under debris along the property's perimeter, opposite the trailers and near a back access.[4]

From November 5 through November 12, police searched the property and found: charred bone fragments in a burn pit; charred pieces from a cellphone of the type Halbach had; blood stains in Halbach's car; and the key to Halbach's car in plain view during their sixth search of Steven Avery's trailer.[5] DNA from tissue on the bone fragments fit Halbach's profile, and some of the blood in the car was also hers.[6] Other blood stains in Halbach's car belonged to Steven Avery, and his DNA was on her car key.[7]

Police were familiar with Steven Avery because, in 2003, DNA evidence had exonerated him of a 1985 rape conviction.[8] But Avery's freedom was short lived; police charged him with Halbach's murder on November 15, 2005.[9] In 2007, a jury found Avery guilty of Halbach's murder, and a Wisconsin judge sentenced him to life in prison.[10] Avery maintains his innocence, and he is currently fighting for a new trial in Wisconsin appellate court, alleging that the prosecution withheld possibly exculpatory evidence and that the state's physi-

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Rivers, Wisconsin, a small city on Lake Michigan approximately thirty-five miles southeast of Green Bay. Dassey v. Dittmann (*Dassey II*), 860 F.3d 933, 937 (7th Cir.), *rev'd en banc*, 877 F.3d 291 (7th Cir. 2017); *see* Northeast Wisconsin, *Maps*, TRAVELWISCONSIN.COM, https://www.travelwisconsin.com/pdf/wi_northeast.pdf [https://perma.cc/HAW6-WKDP].

[3] *Dassey II*, 860 F.3d at 939; *Avery*, 2010 WI App 124, ¶ 5, 804 N.W.2d at 220.

[4] *Dassey I*, 201 F. Supp. 3d at 967–68; *Avery*, 2010 WI App 124, ¶ 6, 804 N.W.2d at 221. *Compare* Exhibit 92, *Avery Trial*, No. 05-CF-381, http://www.stevenaverycase.org/wp-content/uploads/2016/02/Exhibit-92-Animation-Photos.jpg [https://perma.cc/7D3S-DNJ3] (showing Steven Avery's trailer and others on the northeastern, grassy corner of the property), *with* Exhibit 96, *Avery Trial*, No. 05-CF-381, http://www.stevenaverycase.org/wp-content/uploads/2016/02/Exhibit-96-Animation-Photos.jpg [https://perma.cc/V9H9-LCS6] (showing the location where searchers found Halbach's car by the southwestern corner of the property).

[5] *Avery*, 2010 WI App 124, ¶ 7, 804 N.W.2d at 221.

[6] *Dassey I*, 201 F. Supp. 3d at 968.

[7] *Id.*

[8] *See Steven Avery*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3003 [https://perma.cc/9Y6N-ZYN2] (noting that a judge accepted a joint motion by the Manitowoc District Attorney's Office and the Wisconsin Innocence Project to dismiss the charges against Avery and release him after DNA evidence matched the profile of convicted sex offender Gregory Allen, who strongly resembled Avery). During the search for Halbach, Avery was in the middle of a lawsuit against Manitowoc County for wrongful conviction and imprisonment from the 1985 case. *See* Civil Complaint at 1, Avery v. Manitowoc County, 428 F. Supp. 3d 891 (E.D. Wis. 2006) (No. 04-CV-986), 2004 WL 2598197 (detailing Avery's claims for wrongful conviction and false imprisonment for damages up to $36,000,000).

[9] *See* Criminal Complaint, *Avery Trial*, No. 05-CF-381.

[10] *See* Judgment of Conviction, *Avery Trial*, No. 05-CF-381.

cal evidence was planted.[11] In building their case against Avery, investigators obtained much more powerful evidence from Avery's nephew, Brendan Dassey, "perhaps the most powerful evidence of guilt admissible in court": a confession.[12]

When Teresa Halbach disappeared, Brendan Dassey was sixteen years old and living in a trailer at the Avery Salvage Yard.[13] He was an eager high school student enrolled in mostly special education classes.[14] Dassey was initially Steven Avery's alibi and a possible defense witness, until he became a defendant himself months after Avery's arrest.[15] At seventeen, Dassey was sentenced to life in prison for Halbach's rape and murder.[16] Dassey's case elicited partic-

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[11] *See generally* Brief of Defendant-Appellant, State v. Avery, No. 2017-AP-002288 (Wis. Ct. App. Oct. 18, 2019) (detailing multiple issues regarding the planting and testing of evidence and trial counsel's ineffectiveness in developing those issues). A prosecution's suppression of evidence (in good or bad faith) that is favorable to the defense and material to a trial issue is known as a *Brady* violation and constitutes a due process violation. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Avery has alleged six *Brady* violations. *See* Brief of Defendant-Appellant, *supra*, at 33–64. In-depth discussion of Avery's 150-page brief is beyond the scope of this Note; however, it bears mentioning that the claimed law enforcement misconduct, in relation to the alleged *Brady* violations, would be extremely disturbing if true. *See generally id.* For example, Avery contends that issues deserving attention in a new trial, stemming from both withheld evidence and newly uncovered evidence, include the possibilities that: Halbach's car was planted at Avery Salvage Yard; Halbach's car key was planted in Avery's trailer; and Avery's blood was planted in Halbach's car. *See id.* at 33–89.

[12] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 9 (2010) (drawing this conclusion from the U.S. Supreme Court's comments on the power of confession evidence as strong enough to render a trial superfluous); *see infra* notes 15–20, 27–28, 38–50 and accompanying text (outlining the details and circumstances of Dassey's confession, as well as the relationship between Dassey's case and Avery's).

[13] *See Avery*, 2010 WI App 124, ¶ 5, 804 N.W.2d at 220 (recording that Dassey lived at the Avery Salvage Yard in a trailer with his mother and two brothers in October 2005); Brian Gallini, *The Interrogations of Brendan Dassey*, 102 MARQ. L. REV. 777, 783–84 (2019) (noting that Dassey was born on October 19, 1989, and that Halbach went missing on October 31, 2005).

[14] *See* Gallini, *supra* note 13, at 783–84 (explaining that Dassey wanted to attend class, that he was failing three classes, and that he was taking special education classes); Michele LaVigne & Sally Miles, *Under the Hood: Brendan Dassey, Language Impairments, and Judicial Ignorance*, 82 ALB. L. REV. 873, 925–26 (2018) (noting Dassey's low overall and verbal IQs—80 and 65, respectively—and that each, but particularly his verbal impairments, impacted his life inside and outside of school).

[15] *See Making a Murderer: Season 1, Episode 3, Plight of the Accused* 48:48–49:28, 1:00:00–1:00:34 (Netflix 2015) [hereinafter *Making a Murderer, 1:3*] (showing Avery's trial lawyers' commentary on the strategy behind, and benefit for, the police in turning Dassey from a defense witness into a defendant); *infra* notes 16–18 and accompanying text. As Dassey's family, Avery's lawyers, and scholars have observed, interrogators knew that they could manipulate Dassey to help build what was still an incomplete case against Steven Avery months after his indictment. *See, e.g.*, Gallini, *supra* note 13, at 800; *Making a Murderer, 1:3*, *supra*, at 48:48–49:28.

[16] *See* Judgment of Conviction at 1–2, State v. Dassey (*Dassey Trial*), No. 06-CF-88 (Wis. Cir. Ct. Manitowoc Cty. Aug. 2, 2007) (sentencing Dassey as a party to the crime of (1) first-degree intentional homicide to life in prison with the possibility of parole on November 1, 2048, as well as to the crimes of (2) mutilating a corpse and (3) second-degree sexual assault to shorter terms of imprisonment to run concurrently with the homicide sentence), *aff'd*, 2013 WI App 30, ¶ 23, 346 Wis. 2d 278, 827 N.W.2d 928 (Ct. App. 2013). Steven Avery, the original and primary suspect in the state's investigation, had already been convicted of Halbach's murder. *See* Judgment of Conviction, *supra* note 10.

ular shock because no physical evidence had connected him to the crime.[17] In fact, the only evidence against Dassey was a confession that he immediately recanted.[18] Although Dassey faced other notable challenges in his defense,[19]

The prosecution charged Avery with Halbach's murder months before investigators began pressuring Dassey for information. *Compare* Criminal Complaint, *supra* note 9 (not mentioning Dassey and bringing charges in November 2005), *with* Criminal Complaint at 4, *Dassey Trial*, No. 06-CF-88 (evidencing a break in the investigation from November 2005 to February 2006, when investigators began targeting Dassey). After Dassey gave a problematic confession (discussed below), the prosecution in Avery's case amended its criminal complaint to charge Avery with additional crimes, including first-degree sexual assault. *See* Amended Criminal Complaint at 1, *Avery Trial*, No. 05-CF-381 (adding three charges in Avery's case); *infra* notes 27–51 and accompanying text (discussing Dassey's confession). Avery's counsel, however, argued that "the state's discovery materials disclose no admissible evidence in support of a claim of sexual assault or kidnaping," and the court ultimately dismissed the added charges. *See* Defendant's Motion to Dismiss Sexual Assault, Kidnaping, and False Imprisonment Charges at 5, *Avery Trial*, No. 05-CF-381.

[17] *Dassey II*, 860 F.3d at 938 (noting that the state was unable to find any physical evidence connecting Dassey to Halbach's death); Transcript of Jury Trial Day 5 at 103, *Dassey Trial*, No. 06-CF-88 (noting that none of the evidence that the prosecution brought to trial was scientific evidence connecting Dassey to Halbach's death); *see* Gallini, *supra* note 13, at 791–814 (addressing the significant volume of media coverage on Dassey's interrogations alone). In fact, Dassey's confession was "starkly inconsistent with the physical evidence." Petition for a Writ of Certiorari at 3, Dassey v. Dittmann, 138 S. Ct. 2677, No. 17-1172 (Feb. 20), *cert. denied*, *id.* (June 25, 2018). One of Avery's trial lawyers commented, "It's not that there was a lack of physical evidence to corroborate Brendan, it's that there was a wealth of physical evidence to disprove the statements attributed to him." *Making a Murderer, 1:3*, *supra* note 15, at 58:53–59:07.

[18] *See* Dassey v. Dittmann (*Dassey III*), 877 F.3d 297, 319, 330–31 (7th Cir. 2017) (en banc) (Wood, C.J., joined by Rovner & Williams, JJ., dissenting) (observing that the confession was the "only serious evidence supporting [Dassey's] murder conviction" and that the case "was almost nonexistent" without it); Mariel Padilla, *Brendan Dassey of 'Making a Murderer' Is Denied Clemency*, N.Y. TIMES (Dec. 21, 2019), https://nyti.ms/39401eY [https://perma.cc/686R-4B5N] (referencing a statement made by Dassey's lawyers that Dassey is in prison only because of a false confession that does not match the facts of the case, that scientific evidence disproves, and that Dassey recanted at once). Many portions of Dassey's interrogation are available on YouTube. *See, e.g.*, *Brendan Dassey Police Interview / Interrogation Part #1 (Making a Murderer Steven Avery Case)*, YOUTUBE (Dec. 28, 2015), https://www.youtube.com/watch?v=NYOaIDxirHE&list=PL7aG4xdJnM5QwSiGnLQgjtwC75jCKsVaF&index=3 [https://perma.cc/Y7KP-CQM9]; *see also* Transcript of Brendan Dassey Manitowoc Cty. Sheriff's Dep't Interview, *Dassey Trial*, No. 06-CF-88 [hereinafter March 1 Interrogation Transcript]; Northwestern Pritzker Sch. of Law, *Brendan Dassey: A True Story of a False Confession*, YOUTUBE (May 9, 2016), https://www.youtube.com/watch?v=Z7jDf5wWdDQ [https://perma.cc/KT2Y-ADL7] (breaking down Dassey's March 1 confession).

[19] *See Dassey I*, 201 F. Supp. 3d at 975–78 (showing that Dassey's pretrial counsel, Len Kachinsky, focused on the media coverage of the case, rather than on the case itself, and that Kachinsky employed an investigator who expressed strong dislike for the Avery family); Brief of Defendant-Appellant at *29–40, State v. Dassey, 2013 WI App 30, 346 Wis. 2d 278, 827 N.W.2d 928 (Ct. App. 2013) (No. 2010AP3105), 2011 WL 6286867 (detailing Kachinsky's incredibly poor and unprofessional handling of Dassey's interactions with investigators and Kachinsky's paltry defense of Dassey at a hearing to suppress his confession), *habeas corpus granted*, *Dassey I*, 201 F. Supp. 3d 963, *aff'd*, *Dassey II*, 860 F.3d 933, *rev'd en banc*, *Dassey III*, 877 F.3d 297 (7th Cir. 2017); Gallini, *supra* note 13, at 816, 820–29 (detailing Kachinsky's poor representation of Dassey and citing it as a significant reason for Dassey's conviction in addition to his confession). The Wisconsin Supreme Court has since suspended Kachinsky from his position as a municipal judge for inappropriate treatment of a court employee. *See* Debra Cassens Weiss, *Brendan Dassey's Meowing Former Lawyer Is Suspended from*

whether his confession was voluntary or the result of law enforcement coercion became the central issue.[20]

Avery and Dassey's cases attracted much attention as the subject of the hit Netflix series *Making a Murderer*.[21] Many viewers strongly condemned what they saw as injustices that Avery and Dassey suffered at the hands of the criminal justice system.[22] But the investigation, interrogation, and prosecution of Dassey in particular generated significant public outcry.[23] Dassey's recanted confession, subsequent struggle to defend himself, and continuing incarceration prompt the question: should it be possible for minors to be convicted as adults for felonies based solely on confessions?[24] Dassey's case shows that the answer is currently yes.[25] This Note argues that the answer should be no, and it

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the Bench, ABA J. (July 10, 2019), http://www.abajournal.com/news/article/brendan-dasseys-meowing-former-lawyer-is-suspended-from-the-bench [https://perma.cc/82LD-8ZJE].

[20] *See* Petition for a Writ of Certiorari, *supra* note 17, at 3–4 (identifying the voluntariness of Dassey's confession as the issue on appeal).

[21] *Making a Murderer* (Netflix 2018) (including two seasons, with the first premiering in 2015 and the second in 2018). The show was a large success, and its first season won four Emmys. *See Making a Murderer*, EMMYS, https://www.emmys.com/shows/making-murderer [https://perma.cc/6R6W-X4AA].

[22] *See* Mike Hale, *Review: 'Making a Murderer,' True Crime on Netflix*, N.Y. TIMES (Dec. 16, 2015), https://www.nytimes.com/2015/12/17/arts/television/review-making-a-murderer-true-crime-on-netflix.html [https://perma.cc/255S-62VT]. Still, some have criticized the series as not presenting the full picture. *See* Monica Davey, *'Making a Murderer' Town's Answer to Netflix Series: You Don't Know*, N.Y. TIMES (Jan. 26, 2016), https://www.nytimes.com/2016/01/29/us/making-a-murderer-town-netflix-steven-avery.html [https://perma.cc/HR9G-M9LU] (detailing local reaction to the case as more accepting of its outcome than the documentary's global audience). *But see* Daniel Holloway, *'Making a Murderer' Filmmakers Fire Back at Prosecutor: 'He's Not Entitled to His Own Facts,'* THE WRAP (Dec. 31, 2015), https://www.thewrap.com/making-a-murderer-filmmakers-fire-back-at-prosecutor-hes-not-entitled-to-his-own-facts/ [https://perma.cc/V5JA-QF4M] (detailing claims of objectivity by the series's creators and directors, defense of their work as representative of the case's facts, and specific refutation of criticisms that a prosecutor involved with the case levied against their work). In fact, the first series created so much popular support for Avery and Dassey that a petition asking the White House for their full pardon gained close to 130,000 signatures. *See* Lisa Respers France, *White House Responds to 'Making a Murderer' Petition*, CNN, https://www.cnn.com/2016/01/08/entertainment/making-a-murderer-white-house-petition-feat/index.html [https://perma.cc/ZN2F-T2LE] (reporting that the White House denied the request because the president has no power to pardon individuals for state criminal offenses) (last updated Jan. 8, 2016).

[23] *See* LaVigne & Miles, *supra* note 14, at 874 (noting that viewers of *Making a Murderer* were much less divided over Dassey's innocence than Avery's); Michael Shammas, *Making an Accomplice: Why "Making a Murderer's" Brendan Dassey Deserves a Re-trial—Even if His Uncle Doesn't*, https://www.huffpost.com/entry/making-an-accomplice-why-_b_8936546 [https://perma.cc/XYM9-UJFS] (last updated Jan. 7, 2017) (same).

[24] *See* Megan Crane et al., *The Truth About Juvenile False Confessions*, 16 INSIGHTS ON L. & SOC'Y, Winter 2016, at 10, 15 (remarking that *Making a Murderer* was the first time that the concept of false confessions reached a wide-ranging audience).

[25] *See supra* notes 17–18 and accompanying text (discussing that no physical evidence connects Dassey to the crimes of which he is convicted and how his case hinged on his recanted confession); *infra* notes 27–51 and accompanying text (exploring Dassey's March 1 interrogation and confession).

suggests that confession evidence from interrogations should not be admissible against juvenile defendants.[26]

Dassey's March 1, 2006 confession that prosecutors introduced at his trial as the primary evidence for his conviction occurred during an interrogation by detectives Mark Wiegert and Tom Fassbender at the Manitowoc County Sheriff's Department.[27] This was the sixth time that police had interrogated Dassey.[28] The detectives used an approach known as the Reid method during this March 1 interrogation of Dassey.[29] The Reid method is the most widely used interrogation technique in the United States, yet it is frequently criticized for its tendency to produce false confessions.[30]

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[26] *See infra* notes 291–344 and accompanying text.

[27] *See* March 1 Interrogation Transcript, *supra* note 18; *supra* note 18 and accompanying text (cataloguing the significance of Dassey's March 1 confession and providing sources of documentation and analysis).

[28] *See* Brief of Defendant-Appellant, *supra* note 19, at *4–28 (discussing the timeline, nature, and content of the interrogations); Gallini, *supra* note 13, at 791–814 (analyzing the legal implications, interrogation methods, and content from all six times that police investigators questioned Dassey, and, moreover, characterizing these encounters as interrogations). The first interrogation occurred on November 6, 2005, after a roadside stop by two police officers to confiscate the car Dassey was in as part of a search warrant concerning Avery. *See* Transcript of Interview of Brendan Dassey by Marinette Cty. Detectives at 28–34, 46, *Dassey Trial*, No. 06-CF-88 (showing that officers forcefully asked Dassey questions, isolated him in the back of their squad car, and commented that he was scared); *see also* Gallini, *supra* note 13, at 792–96 (analyzing the police's November 6 encounter with Dassey as an interrogation). *But see* Transcript of Jury Trial Day 4 at 105–10, *Dassey Trial*, No. 06-CF-88 (showing that Dassey's trial attorney nonetheless continually referred to the November 6 stop as an interview when questioning the officer at trial). Dassey's second encounter with the police was four days later, on November 10, 2005. *See* Brief of Defendant-Appellant, *supra* note 19, at *7 (characterizing this interaction as an interview). Detectives Mark Wiegert and Tom Fassbender then questioned Dassey three more times on February 27, 2006: at his school; at the Two Rivers Police Department; and then unrecorded at a hotel room in which they mysteriously put up Dassey, his mother, and one of his brothers for the night. *See id.* at *8–14 (providing a narrative of the day and excerpting from the first two recorded interrogations); Gallini, *supra* note 13, at 796–806 (detailing the interrogatory nature of these events and how the detectives' knowledge of Dassey's susceptibility to their interrogation tactics grew with each successive interrogation, as well as noting Dassey's inability to understand or waive his rights); *see also* Transcript of Jury Trial Day 5 at 9–10, *Dassey Trial*, No. 06-CF-88 (recording investigator Wiegert's testimony that putting Dassey up in a hotel room with his mother and brother was for Dassey's "safety" and the "integrity in the investigation"). Dassey's mother, Barbara Tadych (also known as Barbara Janda), has said that the detectives did not ask her if she wanted to be present during the interrogation on March 1. *See Dassey I*, 201 F. Supp. 3d at 970.

[29] *See* Gallini, *supra* note 13, at 809–11 (analyzing the detectives' use of the Reid method in their March 1 interrogation of Dassey); *infra* notes 30–37 and accompanying text (explaining the techniques, strategies, and effects of the Reid method as well as its criticisms); *infra* notes 38–50 and accompanying text (detailing how detectives utilized Reid techniques to interrogate Dassey).

[30] *See Dassey III*, 877 F.3d at 320 (Wood, C.J., joined by Rovner & Williams, JJ., dissenting) (noting that the officers interrogating Dassey employed many methods drawn from the Reid technique in their interrogation); *id.* at 335 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) (citing Saul M. Kassin, *False Confessions*, 8 WIREs COGN. SCI. 8 (2017)) (pointing out that scholars have denounced the Reid method for raising the proportion of false confessions); Gallini, *supra* note 13, at 783, 788 (noting that law enforcement agencies use the Reid method in all fifty states and in over two-thirds of police departments, making it the most prevalent interrogation technique in the nation);

The Reid method encourages confessions by using a variety of psychologically manipulative techniques to push a suspect from denial to admission in nine steps.[31] For example, during questioning, interrogators will present the suspect's confession as expected or inevitable by both maximizing guilt (maximization) and minimizing the blame or fault for committing a crime as well as the consequences of confessing (minimization).[32] Maximization involves techniques such as deception, repetition, and escalation, which interrogators employ through tactics including evidence ploys, asserting knowledge that a suspect is lying, or creating false time windows for decision making.[33] Minimization methods include normalizing or sympathizing with criminal action and diminishing the effects of confessing.[34] Additionally, implied threats or promises of leniency can play significant roles in this process.[35] All of these methods, especially when used together, aim to heighten stress, weaken resolve, and push a suspect toward confession.[36]

LaVigne & Miles, *supra* note 14, at 932 (noting that wide acceptance of Reid techniques for extracting confessions persists, despite the facts that it has been involved repeatedly in false confessions and lacks any scientific basis).

[31] *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 111–13 (2008) (providing a history and development of the Reid method and concluding that it has only become more deceptive and manipulative over time); *id.* at 114–16 (illustrating the Reid method's traditional nine steps from confrontation to confession).

[32] *See* Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 413–14 (2013) [hereinafter Feld, *Behind Closed Doors*] (classifying Reid tactics as manipulations that fall into the categories of maximization and minimization); Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 234–35 (1991) (coining the terms "maximization" and "minimization" in reference to these tactics); *infra* note 33 and accompanying text (describing maximization); *infra* note 34 and accompanying text (explaining minimization).

[33] *See Dassey III*, 877 F.3d at 320–21 (Wood, C.J., joined by Rovner & Williams, JJ., dissenting) (commenting that the Reid method depends significantly upon tricking subjects with fake or untrue evidence and other deceptive practices); LEO, *supra* note 31, at 134–50 (discussing what the author calls negative incentives, which align closely with many maximization techniques, including accusations, attacking denials, different kinds of evidence ploys, and other types of pressure, and exploring how these techniques break down suspects' resistance by psychologically altering their self-confidence, beliefs, desires, power, and attitude toward confessing).

[34] LEO, *supra* note 31, at 150–52 (addressing what the author refers to as positive incentives, which include inducements—efforts to convince suspects that they will receive some benefit and prevent some harm by confessing).

[35] *See, e.g.*, Kassin et al., *supra* note 12, at 12 (noting that interrogators regularly employ implied or explicit threats of more serious consequences if suspects continue expressing denial); *id.* at 18–19 (noting that police employ techniques that allow them to make an "implicit but functional equivalent to a promise of leniency").

[36] *See* LEO, *supra* note 31, at 113–16 (explaining that a successful Reid interrogation will "establish[] psychological control" of a suspect through stress inducing and manipulative techniques that ultimately transform a suspect from someone who believes that confessing is the worst choice into someone who sees it as the best choice); Feld, *Behind Closed Doors*, *supra* note 32, at 414 (observing that the Reid method worsens stress, deteriorates resistance, and promotes confessions).

Notably, the Reid method provides no tactical modification between juveniles and adults.[37] Thus, consistent with Reid tactics, Brendan Dassey's interrogators isolated him, repeatedly asserted knowledge of "what happened," and claimed that they "had evidence" of Dassey's guilt.[38] The detectives minimized the significance and consequences of the crimes discussed.[39] Additionally, they repeatedly represented themselves as having Dassey's best interests in mind.[40]

The detectives questioned Dassey over many hours until he finally gave answers that satisfied them.[41] One particularly troubling part of the interrogation was the exchange that ensued when the detectives pressed Dassey on specifically what had happened to Halbach's head.[42] The detectives had not yet released evidence that indicated Halbach had been shot in the head.[43] Dassey guessed many answers that the detectives rejected: that Dassey or Avery cut her hair, punched her head, and cut her throat.[44] Finally, Detective Fassbender says, "All right, I'm just gonna come out and ask you. Who shot her in the

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[37] Feld, *Behind Closed Doors*, *supra* note 32, at 414–15 (noting that the Reid method provides the same instructions for interrogating juveniles as it does for adults).

[38] *See* Gallini, *supra* note 13, at 809 (pointing out that the interrogators' repeated emphasis of their knowledge of what had happened, their body positions, and their touching of Dassey placed them in a position of superiority over Dassey and enabled them to control him). As investigator Mark Wiegert testified at Dassey's trial, "[W]hen you use the quote, unquote, superior knowledge thing, it implies to them that you know more. That you can't fool me. We know all about it. You might as well just tell us." Transcript of Jury Trial Day 4 at 15, *Dassey Trial*, No. 06-CF-88.

[39] *See* Gallini, *supra* note 13, at 809–10 (noting that minimization techniques, such as repeated promises to support Dassey and assurances that it was okay if he helped Avery commit a crime, created the impression for Dassey that he would be better off telling the investigators what they wanted to hear); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 46 (2004) (noting both that modern interrogation employs isolation and that this environment is influential).

[40] Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 908 (2017) (citing Brief of Defendant-Appellant, *supra* note 19, at *10, *11, *15) (observing that interrogators assured Dassey that they were looking out for him and going to help him).

[41] *See Dassey III*, 877 F.3d at 335 n.20 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) (calling Dassey "almost frantic in his desire to find the story the investigators [sought]"); LaVigne & Miles, *supra* note 14, at 911–24 (concluding that Dassey's March 1 interrogation was "an abomination" because Brendan "would not [have been] able to follow or process [what was happening] *at all*," considering that detectives: asked Dassey 1,239 questions at an average rate of one question every nine to ten seconds; spoke about 2.5 times more than Dassey; and frequently introduced answers to their own often long-winded or compounded questions).

[42] *See, e.g.*, LaVigne & Miles, *supra* note 14, at 874 (singling out this episode as the "most memorable part of the interrogation").

[43] *See Making a Murderer, 1:3*, *supra* note 15 (discussing that police had kept this detail a secret).

[44] March 1 Interrogation Transcript, *supra* note 18, at 584–87; *see Making a Murderer, 1:3*, *supra* note 15 (showing relevant pieces of this exchange); *Making a Murderer: Season 1, Episode 4, Indefensible* 37:17–37:34 (Netflix 2015) (playing a recorded phone call from Dassey in jail after his March 1 confession to his mother in which he tells her that he "guessed" the details the police wanted to hear because "that's what [he] do[es] with [his] homework too").

head?"[45] Dassey's several attempts to answer this question included that Avery shot Halbach: in different parts of her body (in the head, in the heart, in the stomach); different numbers of times (twice, three times, ten times); and in different places (outside somewhere, by the side of the garage, in the garage, in a truck, on the garage floor).[46] That entire interrogation was recorded, and the end of the videotape shows Dassey's mother entering the room after the interrogation and Dassey remarking that the detectives "got to [his] head."[47] Dassey was arrested on site, and he remains incarcerated today.[48]

Interrogators largely fed Dassey his statements, which are rife with logical flaws and inconsistencies, and which the physical evidence in the case strongly contradicts.[49] Yet, prosecutors were able to put together a "confession" that survived a motion to suppress at Dassey's trial, led to his conviction, and survived multiple subsequent appeals.[50] Dassey's case lends credence to Justice Brennan's powerful remark in *Colorado v. Connelly* that "the real trial, for all practical purposes, occurs when the confession is obtained."[51]

Confession evidence, whether riddled with inaccuracies like Dassey's or not, is one of the most powerful and prejudicial forms of evidence because actors in the criminal justice system view it as inherently trustworthy.[52] In fact, juries appear to afford confessions unmerited weight even when defendants recant them, when confessions are possibly false or coerced, and when other

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[45] March 1 Interrogation Transcript, *supra* note 18, at 587; *Making a Murderer, 1:3*, *supra* note 15, at 55:19–55:37.

[46] March 1 Interrogation Transcript, *supra* note 18, at 587–97, 630.

[47] *Id.* at 672; *see* LaVigne & Miles, *supra* note 14, at 924 ("This interview would have been a challenge for anybody. What this interview would have done to Brendan is beyond imagining.").

[48] March 1 Interrogation Transcript, *supra* note 18, at 677; *see* Padilla, *supra* note 18 (reporting that, although the Wisconsin governor's pardon advisory board has said that Dassey is "ineligible for a pardon and that the governor would not consider any commutations," one of Dassey's lawyers insists commutation is within the governor's power).

[49] *See Dassey III*, 877 F.3d at 319 (Wood, C.J., joined by Rovner & Williams, JJ., dissenting) (concluding that "[Dassey's] confession was coerced" and "so riddled with input from the police that its use violates due process"); LaVigne & Miles, *supra* note 14, at 915 ("Yes/no questions, which have the highest amount of content and the highest risk of contamination, were the ones used most often [in Dassey's February 27 and March 1 interrogations], making up nearly half (47%) of [the detectives'] questions (674 total)." (footnote omitted)); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 769–71 (2013) [hereinafter Leo et al., *Promoting Accuracy*] (discussing the dangers of contaminated confessions).

[50] *See* LaVigne & Miles, *supra* note 14, at 874 (noting that Dassey's full statement is "filled with contradictions and physical impossibilities" but that law enforcement was able to "cobble[] together enough of a confession" to prosecute Dassey).

[51] Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 316 (Edward W. Cleary ed., 2d ed. 1972)).

[52] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 774 (discussing how jurors see false confessions as irrational and contrary to a popular general belief: that *they* would not falsely confess to a crime, even in the face of psychological pressure). Moreover, confessions create an undue bias toward guilt that extends beyond jurors to prosecutors, judges, and even defense attorneys. *Id.* at 772.

evidence strongly contradicts them.[53] Thus, false confessions heighten the risk of wrongful convictions.[54]

This is particularly troubling for juveniles and the developmentally disabled because they falsely confess at a significantly higher rate than adults without comparable disabilities.[55] Dassey fell into both risk categories on March 1, 2006,[56] and law enforcement exploited his weaknesses to elicit a problematic confession that led to his conviction, which a federal circuit court of appeals later upheld en banc.[57] Dassey's story is sadly not unique; many

[53] *See id.* at 773–75 (noting that, even when people see retracted confessions, evidence of involuntariness, and psychologically coercive techniques in interrogation, they do not similarly account for the corresponding risk of false confession or other circumstances that could further increase that risk); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCI. & L. 381, 397 (2009) ("Although at the general level potential jurors recognized that interrogation techniques may be coercive, they also perceived the techniques as helpful, in that they likely elicit true but not false confessions.").

[54] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 777 (recounting the author's two previous studies on the wrongful conviction rate of those with false confessions who took their cases to trial—73% in one study and 81% in the other).

[55] *See* Joshua A. Tepfer, Laura H. Nirider & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904 (2010) (reporting that 31.1% of individuals in the authors' study falsely confessed, and noting that this was about double the rate of false confessions that they and other researchers found in adult populations); *id.* (further noting that the makeup of the false confessor group in the study suggested that the younger a juvenile is, the more likely that he or she will falsely confess); Lapp, *supra* note 40, at 920 (noting that juveniles are consistenly overrepresented in false confession populations in comparison to the significantly smaller fraction of total arrests for which juveniles account).

[56] *See supra* notes 13–14 and accompanying text (showing that Dassey was sixteen during his interrogations and documenting his developmental disabilities).

[57] *See Dassey III*, 877 F.3d at 318. In 2017, in *Dassey v. Dittmann*, the U.S. Court of Appeals for the Seventh Circuit noted that many factors supported finding Dassey's confession involuntary, including his age, isolation, limited mental capability, inability to understand the consequences of his confession, and the detectives' questionable interrogation practices. *Id.* at 312. The counterbalancing facts that ultimately led the court to conclude that Dassey's confession was voluntary, however, were that he was not physically coerced or threatened, and that he was allowed access to food, drink, and a bathroom. *Id.* at 312–13. But "the essential point," the majority noted, is that the federal court was reviewing the voluntariness of Dassey's confession through his petition for habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 301–03 (discussing the procedural posture of Dassey's habeas corpus claim under AEDPA). Under AEDPA, a federal court can only overturn a state court decision if it is an unreasonable application of federal law or based upon an objectively unreasonable conclusion of fact. *See* 28 U.S.C. § 2254(d)(1)–(2) (2018); Brumfield v. Cain, 576 U.S. 305, 314–15 (2015) (noting that, under § 2254(d)(2), a federal court cannot determine that factual findings by state courts are unreasonable simply because it would have come to a different conclusion, but may only do so where reasonable minds could not differ); Panetti v. Quarterman, 551 U.S. 930, 953 (2007) (defining the § 2254(d)(1) unreasonableness standard as an inability to see a decision as reasonable in any way under Supreme Court precedent). Thus, because the Supreme Court has "not distilled the doctrine into a comprehensive set of hard rules," and because state courts have considerable room for judgment, a range of questionable state court decisions can escape meaningful federal review. *Dassey III*, 877 F.3d at 303; *see id.* at 301–03 (detailing habeas review under AEDPA and observing that "federal habeas relief from state convictions is rare"); *id.* at 330 (Wood, C.J., joined by Rovner & Williams, JJ., dissenting) (noting the restricted role of a federal court's review under AEDPA).

juveniles have faced wrongful convictions because of unreliable confessions and others are in danger of suffering a similar fate under the current law.[58] Because the continuing high risk of wrongful convictions from similarly problematic juvenile confessions disturbs notions of due process and constitutionally guaranteed protections against self-incrimination, this Note calls for major change in how our criminal justice system convicts minors based on their own words.[59]

Part I of this Note tracks the history of protections against self-incrimination in the United States and introduces the juvenile-specific issues that exist under the law governing confessions today.[60] Part II evaluates the flaws of the current self-incrimination protections for juveniles and surveys proposed solutions and state-level attempts to address these problems.[61] Part III suggests both that confession evidence from custodial interrogation should not be admissible against juveniles for due process reasons and that the enactment of such an evidentiary rule would be prudent.[62]

I. THE SELF-INCRIMINATION DOCTRINE: PROTECTIONS AND PROBLEMS

Generally speaking, the self-incrimination doctrine refers to an individual's legal right to refuse to give information that could make one criminally liable.[63] This Note focuses on the self-incrimination doctrine's best known form: the right not to be forced to make incriminating statements against oneself, whether admissions or confessions.[64] The dense history of protections

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[58] *See* LaVigne & Miles, *supra* note 14, at 879 (calling for justice for the "countless" juveniles like Dassey who have wrongly been placed in the criminal justice system). For reasons ranging from a lack of collected evidence, to an inability to randomly sample, the frequency or rate of false confessions is not known. Leo et al., *Promoting Accuracy*, *supra* note 49, at 820. "Nevertheless, false confessions, and wrongful convictions based on false confessions, occur with troubling frequency and regularity in the American criminal justice system." *Id.*

[59] *See Dassey III*, 877 F.3d at 331 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) (identifying an overdue need for an understanding of coercion and confessions in line with the lessons that the hard and social sciences teach about false confessions and why they occur); *infra* notes 291–344 and accompanying text.

[60] *See infra* notes 63–200 and accompanying text.

[61] *See infra* notes 201–290 and accompanying text.

[62] *See infra* notes 291–344 and accompanying text.

[63] *See Right Against Self-Incrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019). As the Fifth Amendment of the Constitution of the United States provides, this means not having to testify against oneself. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."). This is a privilege that applies to in-court proceedings as well as out-of-court, pretrial proceedings. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1996) (explaining that the privilege against self-incrimination extends all the way to when individuals are in custody, to correspond with the reach of criminal proceedings in the American adversarial system).

[64] *See* Kenworthey Bilz, *Self-Incrimination Doctrine Is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 808 n.1 (2008) (noting that an individual's rights to remain silent when being questioned in or out of court are "the most visible (and politically unpopular) forms of the privilege"); Richard J.

against self-incrimination in America is rife with disagreement about the doctrine's roots and original purpose(s).[65] For the purposes of this Note, an important historical takeaway is that the doctrine has closely related procedural

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Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 991 (1997) (noting that admissions and confessions are legally distinct). An admission is a statement wherein one declares either that someone (usually oneself) did something wrong or that something is true. *Admission*, BLACK'S LAW DICTIONARY, *supra* note 63. A confession is "[a] criminal suspect's oral or written acknowledgement of guilt." *Id.* at *Confession*. Because both admission and confession evidence that investigators seek to prove guilt and obtain convictions can be prejudicial to defendants, this Note uses the term confession to encapsulate both admissions and confessions. *See Miranda*, 384 U.S. at 476 (declaring that the privilege against self-incrimination draws no distinction between confessions and admissions because both can be incriminating); *cf.* Ofshe & Leo, *supra*, at 991–93 (explaining that law enforcement officers and suspects often conflate admissions with full confessions). Although the right not to be forced to confess and the privilege against self-incrimination "were historically—and remain conceptually—two different things," this Note's concern is an individual's general right today to remain silent in the face of police questioning or in court. Bilz, *supra*, at 808 n.1; *see id.* (considering the modern self-incrimination doctrine in the same scope); Patrick A. Malone, *"You Have the Right to Remain Silent": "*Miranda*" After Twenty Years*, 55 AM. SCHOLAR 367, 370 (1986) ("The full-blown, fantastic confession is only the tip of the problem. Far more common is the confession that is false only in particular details—but twisted enough to turn excusable behavior into a crime . . . ."). *See generally* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825 (1998) (breaking apart in great detail the different forms of this privilege as well as its earlier American history and constitutionalization). Moreover, the same rules apply to the admissibility of both admissions and confessions. *See Miranda*, 384 U.S. at 476 (noting that for purposes of self-incrimination protections, there is no difference between confessions that go to the heart of a crime and statements that are partial or complete criminal admissions); 2A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, Criminal § 413 (4th ed.) (explaining the need for consistency by pointing out that if a lower standard for admissibility governed admissions, then police could use improper methods to obtain the admissions instead of confessions).

[65] *Compare* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 329–32 (1968) (arguing that the privilege against self-incrimination arose in sixteenth-century England in response to "inquisitorial examinations, initially conducted by the Church, then by the State"), *and* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2250, at 267–95 (McNaughton rev. ed. 1961) (tracing the privilege's roots to "opposition to the ex officio oath of the ecclesiastical courts" in the thirteenth century and "opposition to the incriminating question in the common law courts" in the seventeenth century (emphases omitted)), *with* R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962, 963–64 (1990) (refuting Levy's theory and asserting that the privilege comes from the amalgamation of Roman and canon laws in European countries known as the *ius commune*), *and* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047, 1071–84 (1994) (arguing that the privilege stems from the rise of adversarial criminal procedure and refuting both Levy and Wigmore's theories by examining their sources and timelines in detail). This scholarly disagreement produced a spirited response from Leonard Levy defending his position to critics. *See generally* Leonard W. Levy, Origins of the Fifth Amendment *and Its Critics*, 19 CARDOZO L. REV. 821 (1997) (excoriating criticisms of his position and his critics' alternate timelines and theories). These debates and roots provide an understanding of the rationales behind, and original purposes of, the American self-incrimination doctrine, particularly as it concerns the Fifth Amendment. *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 315–20 (1998) (providing an overview of these different historical considerations and the rationales that each supports).

and evidentiary considerations.[66] This Part of the Note discusses the U.S. Supreme Court's constitutionalization of the self-incrimination doctrine as well as the doctrine's current efficacy and scope.[67] Further, this Part shows how the Supreme Court has divided the self-incrimination doctrine's procedural and evidentiary protections between constitutional law and the law of evidence.[68]

Section A of this Part explores the history and development of the constitutional standard of voluntariness that partly governs the admissibility of confession evidence.[69] Section B discusses further layers of constitutional protection against self-incrimination added by the Supreme Court in *Miranda v. Arizona* and preceding cases.[70] Section C then considers the *Miranda* doctrine's development as well as criticisms of the doctrine.[71] Next, Section D examines the history of protections against self-incrimination for juveniles and how the current doctrine treats them much the same as adults.[72] Section E then introduces the problems with the current protections against self-incrimination for juveniles.[73] Finally, Section F explores the law of evidence's role in ensuring the reliability of confession evidence in today's self-incrimination doctrine.[74]

A. The Self-Incrimination Doctrine in America: Birth of the Amphibian

In 1884, in *Hopt v. Utah*, the Supreme Court considered for the first time whether a confession was admissible by examining if it was "voluntary within the meaning of the law."[75] In that case, the Court considered two central requirements for legal voluntariness: first, the absence of external pressure that materially affects one's free will to choose whether to confess;[76] and second, reliability based on a presumption that innocent people do not willingly compromise their interests with false statements.[77] These considerations stem from

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[66] *See infra* notes 75–200 and accompanying text.

[67] *See infra* notes 75–200 and accompanying text. For purposes of this Note, constitutionalization means giving a legal principle or right a basis in the Constitution of the United States. *See Constitutionalize*, BLACK'S LAW DICTIONARY, *supra* note 63.

[68] *See infra* notes 75–200 and accompanying text.

[69] *See infra* notes 75–104 and accompanying text.

[70] *See infra* notes 105–123 and accompanying text.

[71] *See infra* notes 124–149 and accompanying text.

[72] *See infra* notes 150–168 and accompanying text.

[73] *See infra* notes 169–181 and accompanying text.

[74] *See infra* notes 182–200 and accompanying text.

[75] Hopt v. Utah, 110 U.S. 574, 583–87 (1884). In *Hopt v. Utah*, a detective arrested the defendant and put a police officer in control of him for "two or three minutes" before returning, at which time the defendant confessed to a murder. *Id.* at 584. The Court admitted the confession because there was no evidence of action, threat, or inducement to negate "the presumption . . . that one who is innocent will not . . . prejudice his interests by an untrue statement." *Id.* at 585.

[76] *See id.* at 585 (noting that inducements by authorities impinge upon one's free will to make a voluntary confession).

[77] *Id.* ("[T]he presumption upon which weight is given to [confession] evidence [is], namely, that one who is innocent will not . . . prejudice his interests by an untrue statement . . . ."). There is techni-

common-law criminal procedure and evidence, which governed American confession law until its constitutionalization.[78] The first concern, that individuals not be forced to confess, is procedural because it focuses on the manner in which a confession is obtained.[79] The second concern, the reliability of a confession, is evidentiary because it considers the truthfulness of the confession.[80] The absence of any compulsion to confess and the reliability that accompanies that lack of compulsion are so inextricable that Justice Felix Frankfurter called "[t]he notion of 'voluntariness' . . . an amphibian."[81]

In the decades after *Hopt*, the Court gradually constitutionalized the voluntariness requirement.[82] First, in 1897, in *Bram v. United States*, the Court rooted this voluntariness requirement in the Fifth Amendment's Self-Incrimination Clause under both procedural and reliability rationales.[83] Then,

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cally a third component detectible in the case, whether an individual was exercising free will in making a confession separate from external impetus, but it is not a factor in current doctrine. *See id.* (discussing deprivation of free will or self-control as an element of voluntariness); Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 24 (2015) (noting that the two considerations of external interrogatory pressure and reliability have engulfed this third consideration).

[78] *See* Dickerson v. United States, 530 U.S. 428, 433 (2000) (noting that the origins of this voluntariness test lay in the common law); *Miranda*, 384 U.S. at 506 (Harlan, J., dissenting) ("The earliest confession cases in this Court . . . were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible." (first citing Pierce v. United States, 160 U.S. 355 (1896); then citing *Hopt*, 110 U.S. 574)); *Hopt*, 110 U.S. at 584–87 (citing King v. Warickshall, 1 Leach 262, 263, 168 Eng. Rep. 234, 235 (K.B. 1783)) (referencing a number of English authorities and cases that make no mention of any constitutional basis for a voluntariness requirement or its attendant concerns); *infra* notes 82–86 and accompanying text (discussing the constitutionalization of the self-incrimination doctrine).

[79] *See, e.g.*, Penney, *supra* note 65, at 319–20 (discussing procedural concerns in early Anglo-American criminal procedure); *id.* at 332–46 (showing how unease over interrogation practices animated some of the Supreme Court's rulings in the middle of the twentieth century).

[80] *See* Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 488–90 [hereinafter Leo et al., *Bringing Reliability Back in*] (explaining this reliability consideration as a common-law rule of evidence).

[81] Culombe v. Connecticut, 367 U.S. 568, 604–05 (1961). Justice Frankfurter's word choice reflects that the self-incrimination doctrine combines two characteristics: a procedural concern about compelled confessions and an evidentiary interest that realizes involuntary statements are less reliable. *See Amphibian*, OXFORD ENGLISH DICTIONARY (2d ed. 1989); Primus, *supra* note 77, at 23–24, 30–31 (explaining that a deontological focus on the interrogator's actions and the consequentialist focus of the effects of such actions on an interrogatee are simultaneously different and overlapping); *see also* CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 157 (1954) ("Can we not best understand the entire course of decisions in this field as an application to confessions both of a privilege against evidence illegally obtained . . . and of an overlapping rule of incompetency which excludes the confessions when untrustworthy?").

[82] *See* Witt, *supra* note 64, at 829 (arguing that, for decades after the enactment of the Fifth Amendment, the common law still defined the self-incrimination doctrine in the United States).

[83] *See* U.S. CONST. amend. V; Bram v. United States, 168 U.S. 532, 541–45 (1897); *see also* Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 492–93 (discussing the confusion that *Bram v. United States* created around its discussion of historical roots beyond reliability and the resulting criticism of the case).

in 1936, in *Brown v. Mississippi*, the Court held that the Fourteenth Amendment's Due Process Clause requires a voluntariness analysis to ensure that state action comports "with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[84] Multiple scholars have argued that reliability was the self-incrimination doctrine's primary focus in common law and early American jurisprudence.[85] Nevertheless, the twentieth century saw this focus shift to a due process-based voluntariness test that was procedural in nature.[86]

To determine voluntariness under a due process analysis, courts looked to the totality of the circumstances surrounding a confession.[87] At first, this test accounted for a number of issues, including whether an interrogation overbore the will of a suspect, whether obtaining a suspect's confession was fundamentally fair, and the likelihood that a confession was false or unreliable.[88] In 1986, in *Colorado v. Connelly*, however, the Court made it clear that involuntariness can stem only from police action that violates due process.[89]

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[84] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of the law . . . ."); Brown v. Mississippi, 297 U.S. 278, 286 (1936) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). Further, in 1964, in *Malloy v. Hogan*, the Court held that the Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's Self-Incrimination Clause, extending due process-based protection against self-incrimination to criminal defendants under state law as well as federal law. *See* 378 U.S. 1, 6–11 (1964).

[85] *See, e.g.*, Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 742–43 (1963) (arguing that the legal term voluntariness was originally synonymous with reliability or trustworthiness); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 494 (concluding from Supreme Court jurisprudence through the twentieth century that reliability was at first the prevailing and favored rationale underlying the self-incrimination doctrine).

[86] *See Dickerson*, 530 U.S. at 433 (noting that due process was the primary consideration in the twentieth century); *Miranda*, 384 U.S. at 506–07 (Harlan, J., dissenting) (noting that the Court moved away from Fifth Amendment analysis to a due process consideration under the Fourteenth Amendment, changing focus from reliability to concerns about "*how much* pressure" was being placed on interrogatees); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 494–96 (discussing the shift in the middle of the nineteenth century from concerns about reliability to a focus on the relationship between state actors and an individual's free will in speaking).

[87] *See* Primus, *supra* note 77, at 11 (noting that, instead of defining criteria, courts used a totality test that could include a variety of considerations). Consideration of all the circumstances surrounding a confession to determine its voluntariness appeared as early as 1897, in *Bram*. *See* 168 U.S. at 561 ("We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made.").

[88] *See* Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 497 (noting that the Supreme Court referred to *Miranda* as a case intended to keep out unreliable statements as late as 1993); Primus, *supra* note 77, at 11 (listing this mix of considerations and noting that they "are themselves question-begging").

[89] *See Connelly*, 479 U.S. at 163–67 (holding that coercive police conduct is the necessary element to finding a state violation of due process that renders a confession involuntary and examining previous Supreme Court cases as consistent with such a holding); Primus, *supra* note 77, at 25–27

In that case, Francis Connelly walked up to a uniformed, off-duty police officer in downtown Denver, Colorado and said that he had committed a murder.[90] Shortly thereafter, Connelly told a detective that he had travelled from Boston to Denver to confess to murdering a girl in Denver the previous year.[91] Police officers reported that Connelly was lucid during these interactions, but that, after being held overnight, he became noticeably confused and said that he had confessed because he was following voices.[92]

At a pretrial hearing for Connelly's motion to suppress his statements as involuntary, a state psychiatrist testified that Connelly was suffering from chronic schizophrenia and was in a state of psychosis that began the day before his confession, during which Connelly was following hallucinated commands from the "voice of God."[93] The doctor's expert opinion was that Connelly's condition both affected his ability to make rational or free choices and drove his confession.[94] As the Supreme Court later recognized, statements made by someone in Connelly's mental state may be unreliable.[95]

The Colorado trial court and the Colorado Supreme Court held that the confession was involuntary and consequently inadmissible because they concluded that Connelly's mental condition undermined his ability to exercise free will or rational intellect.[96] The U.S. Supreme Court, however, reversed the state decision, holding that a violation of due process voluntariness requires coercive action by police, which was absent in Connelly's case.[97] The Court further emphasized that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[98]

Thus, scholars have repeatedly called *Connelly* the end of a reliability rationale informing the due process voluntariness standard.[99] Indeed, *Connelly* clarified that the reliability of a confession is primarily an evidentiary concern

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(explaining and giving examples of the Court's focus on offensive police tactics as requisite to holding a confession involuntary).

[90] *Connelly*, 479 U.S. at 160.

[91] *Id.* at 161.

[92] *Id.*

[93] *Id.* (internal quotations omitted). Connelly was not deemed fit to proceed to trial until the year following his confession. *Id.*

[94] *Id.* at 161–62.

[95] *Id.* at 167.

[96] *Id.* at 162 (quoting People v. Connelly, 702 P.2d 722, 728 (Colo. 1985) (en banc), *rev'd*, *Connelly*, 479 U.S. 157).

[97] *Id.* at 167.

[98] *Id.* (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).

[99] *See, e.g.*, Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 498–99 (calling the decision the "[d]eath [k]nell" of the reliability rationale). *But see* Primus, *supra* note 77, at 31–34 (arguing that current due process analysis is concerned with reliability insofar as it disfavors police methods that reduce the reliability of the information they obtain).

under the law of evidence, rather than a constitutional issue.[100] This due process standard, the Court has reiterated, remains the test for determining a confession's voluntariness.[101] After *Connelly*, courts must assess due process voluntariness under a totality-of-the-circumstances test that balances the amount and severity of coercive police action against an individual's particular circumstances.[102] Yet, what amount of coercion is required for different defendants is often undefined, making this current test no clearer than its earlier form from its mid-twentieth century heyday.[103] Nevertheless, due process voluntariness is still a central issue in many criminal cases.[104]

B. Further Constitutional Protections Against Self-Incrimination

The shift in the Supreme Court's jurisprudence toward a self-incrimination doctrine focused on process was in many ways a response to its increasing anxiety about police action.[105] It is probably no coincidence that the Supreme Court heard its first confession case[106] when modern police forces were developing in the United States.[107] The twentieth century emergence of

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[100] *Connelly*, 479 U.S. at 167 ("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 and not by the Due Process Clause of the Fourteenth Amendment." (citation omitted)).

[101] *Dickerson*, 530 U.S. at 434 ("The due process test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' . . . We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily." (citations omitted) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973))).

[102] *See* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(c) (4th ed. 2019 Supp.). Of course, from the beginning, it has never been quite clear what it meant to overbear an individual's will. *See* Primus, *supra* note 77, at 11 (pointing out the lack of clarity regarding what truly concerns or determines voluntariness).

[103] *See* LAFAVE ET AL., *supra* note 102, § 6.2(c) (exploring Supreme Court precedent as well as federal and state cases to detail the different weights that courts afford to a range of police actions and suspect characteristics in a totality-of-the-circumstances voluntariness analysis, and examining where courts differ in the weight they attribute to the same or similar factors).

[104] *See* Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 605 & n.17 (2006) (concluding from the author's survey of every reported state and federal appeals decision on voluntariness over a twenty-year period—a group numbering in the thousands—that due process voluntariness is important in many cases).

[105] *See* Penney, *supra* note 65, at 335–37 (commenting on the Supreme Court's concern about, and response to, heinous interrogation practices by police following the Wickersham Commission Report in 1931); *id.* at 361–72 (noting the Supreme Court's disappointment that "swearing contests" between police and defendants always went the police's way and discussing the Court's focus on interrogation practices in the 1960s, particularly Chief Justice Warren's survey of police instruction manuals in *Miranda v. Arizona*).

[106] *See* Hopt v. Utah, 110 U.S. 574 (1884); *supra* notes 75–77 and accompanying text (introducing *Hopt* and the Court's first discussion of confessions and legal voluntariness).

[107] *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 102–06 (1989) (explaining that the public conducted the work of the police in seventeenth- and eighteenth-century England and America, and

police interrogation, with its physically and psychologically coercive practices, led the Court to create additional constitutional and procedural protections for individuals.[108] The Court implemented these safeguards *outside of* the existing voluntariness framework, finding constitutional grounds other than the Fourteenth Amendment's Due Process Clause.[109]

First, the Supreme Court expanded the Sixth Amendment's right to the assistance of counsel.[110] In 1963, in *Gideon v. Wainright*, the Court formally applied that right to the states.[111] Then, in 1964, in *Massiah v. United States*, the Court held that individuals possess the right to counsel in pretrial proceedings following indictment.[112] One month later, in *Escobedo v. Illinois*, the Court applied *Massiah*'s new rule to overturn a conviction after law enforcement denied an *unindicted* suspect's repeated requests for counsel during his

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thus interrogation resembling modern police practices was met with great suspicion and often resulted in exclusion by the courts); Penney, *supra* note 65, at 323–24 (discussing the rise of American police forces in criminal investigation over the nineteenth century).

[108] *See Miranda*, 384 U.S. at 445–58 (discussing physical and psychological coercion in police interrogation in detail); Kassin et al., *supra* note 12, at 6 (examining physical coercion, also known as third-degree practices, during the nineteenth century and the twentieth century through the 1960s); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 668–69 (1996) [hereinafter Leo, *The Impact of* Miranda *Revisited*] (commenting on the gradual decline, but persistence of, third-degree practices in certain parts of the country before the end of the 1960s); *id.* at 621–22 (discussing the Court's increased protections for individuals as a response to third-degree and other coercive practices in police interrogation); Jessica L. Powell, *Do You Understand Your Rights as I Have Read Them to You? Understanding the Warnings Fifty Years Post* Miranda, 43 N. KY. L. REV. 435, 436 (2016) (commenting on the Supreme Court's focus on physical and psychological coercion). It is worth noting, especially insofar as it reflects much of the popular thought at the time, that many members of the Court strongly disagreed with creating these new protections. *See, e.g.*, *Miranda*, 384 U.S. at 503 (Clark, J., dissenting) (commenting that it is inappropriate for the Court to establish any new rule or protection beyond the voluntariness standard); Massiah v. United States, 377 U.S. 201, 207–13 (1964) (White, J., dissenting) (considering the Court's establishment of a new "automatic rule" an unwise move that would endanger the public and exclude relevant evidence in criminal trials).

[109] *See* Primus, *supra* note 77, at 7 (noting that the Court's attempts to control police interrogation in the following cases were beyond the scope of its existing voluntariness doctrine). Perhaps this was because the voluntariness standard itself could not easily fix the issue. *See* Penney, *supra* note 65, at 362 (suggesting that the voluntariness standard "offered nothing to remedy the problem"). The voluntariness standard certainly had, even at this time, a variety of flaws beyond those mentioned thus far. *See* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–72 (1981) (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980)) (summarizing that the six major issues with the voluntariness standard were that it: (i) left police without guidance; (ii) hindered the validity of judicial review; (iii) turned into a "swearing contest" between interrogator and interogatee; (iv) permitted substantial pressure in interrogations; (v) took advantage of the weak, ignorant, and vulnerable; and (vi) failed to restrain police violence completely).

[110] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *infra* notes 111–115 and accompanying text.

[111] Gideon v. Wainright, 372 U.S. 335, 342 (1963).

[112] *Massiah*, 377 U.S. at 205–07; *see* Penney, *supra* note 65, at 362–63 (noting that the reasoning behind the holding in *Massiah v. United States* appeared to be unconnected to the traditional voluntariness test because the case did not involve custodial interrogation).

interrogation.[113] The Court limited its holding to *Escobedo*'s facts, but its extension of *Massiah*'s pretrial protections to an unindicted suspect was a sign of things to come.[114] Overall, the Court's expansion of the Sixth Amendment's right to counsel in these three cases largely relegated the voluntariness standard to cases in which charges had not been filed.[115]

Two years later, in 1966, in *Miranda v. Arizona*, the Supreme Court added another constitutional protection by requiring that police read the now famous *Miranda* warnings to suspects before interrogating them.[116] These warnings must inform individuals of their *Miranda* rights: the right to remain silent, the right to speak with a lawyer before interrogation, and the right to have a lawyer present during interrogation.[117] Thus, under the Fifth Amendment's Self-Incrimination Clause, the Court extended a constitutional protection against self-incrimination to any custodial interrogation, whether before indictment or not.[118] Further, the Court also found that a related right to counsel under the

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[113] Escobedo v. Illinois, 378 U.S. 478, 481–85, 492 (1964).

[114] *Id.* at 492; *infra* notes 116–119 and accompanying text; *see* Penney, *supra* note 65, at 363 (implying that this was not a surprising step by the Supreme Court from *Massiah* because *Massiah*'s rationale failed to distinguish why the right to counsel was necessary to protect indicted individuals from offensive police practices but not equally necessary to protect unindicted individuals from them).

[115] *See* Primus, *supra* note 77, at 12 (clarifying that once prosecution did begin, this new Sixth-Amendment protection would become the primary check on police interrogation).

[116] *Miranda*, 384 U.S. at 467–73 (holding that persons "held for interrogation must be clearly informed" that they have: the right "to consult with a lawyer and to have the lawyer with [them] during interrogation"; the right "to remain silent" and to warnings that any statements they give can be used against them as evidence in court; and that they will be provided counsel if they cannot afford to retain counsel themselves).

[117] *See id*. The Supreme Court has since made clear that the law does not require a specific form for *Miranda* warnings as long the warnings convey an individual's *Miranda* rights. California v. Prysock, 453 U.S. 355, 359 (1981) (per curiam). In 2010, in *Florida v. Powell*, the Court defined the standard as a reasonable conveyance of *Miranda* rights when it found that a standard form from the Tampa Police Department in Florida adequately conveyed *Miranda* warnings, despite the fact that the form, at best, did not explicitly communicate the right to counsel during questioning, and, at worst, completely overlooked that right. *See* 559 U.S. 50, 60 (2010) (explaining the reasonableness standard); *id.* at 72 (Stevens, J., dissenting) (taking issue with the approval of a warning that "entirely omitted an essential element of a suspect's rights," that is, the right to consult with a lawyer *during* questioning); *see also id.* at 54 (majority opinion) (showing that, regarding an individual's right to counsel before and during questioning, the standard form stated both (i) that an individual has the right to talk to a lawyer before questioning and (ii) that an individual can use any of the rights in the form at any time). *Compare id.* at 62 (majority opinion) (concluding that, taken together, these two representations "reasonably conveyed" that an individual had the right to have a lawyer present during questioning), *with id.* at 72–73 (Stevens, J., dissenting) (arguing that the combination of the two representations does not remedy the failure to explicitly inform individuals that they possess the right to have a lawyer present during questioning).

[118] *See Miranda*, 384 U.S. at 467–73 (discussing this privilege's roots in the Fifth Amendment and its scope with *Miranda*'s procedural protections); Primus, *supra* note 77, at 12 (noting the distinction of the step from *Massiah*'s post-indictment protection to *Miranda*'s pre-indictment protection).

Fifth Amendment, at such stage, was necessary to ensure the individual's right against self-incrimination.[119]

These protections, however, only apply to custodial interrogation, that is, when police interrogate a suspect who is "in custody."[120] If suspects are in custody, then police must obtain a knowing, intelligent, and voluntary waiver of their *Miranda* rights to interrogate them.[121] The *Miranda* Court stated that the government carries a "heavy burden" to prove that individuals have waived their *Miranda* rights.[122] Twenty years later in *Connelly*, the Court defined this burden as a preponderance of the evidence.[123]

C. Miranda*'s Aftermath*

Miranda permanently changed American criminal procedure.[124] Indeed, few other cases have spawned so much commentary and controversy.[125] At

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[119] *Miranda*, 384 U.S. at 469; *see* Edwards v. Arizona, 451 U.S. 477, 485–86 (1981) (noting that *Miranda* established a right to counsel during custodial interrogation under the Fifth Amendment).

[120] *Miranda*, 384 U.S. at 444. The *Miranda* Court explained, "By custodial interrogation, we mean 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." *Id.* This definition of custodial interrogation problematically failed to define exactly what constitutes either custody or interrogation. *See* Michael J. Zydney Mannheimer, *The Two* Miranda*s*, 43 N. KY. L. REV. 317, 317 (2016) (pointing out that *Miranda* left these questions open, among others). The Court explained in *Rhode Island v. Innis* that interrogation for *Miranda* purposes means subjecting a person in custody "to either express questioning or its functional equivalent." 446 U.S. 291, 300–01 (1980). For the standards concerning *Miranda* custody determinations, see *infra* notes 164–168 and accompanying text.

[121] *Miranda*, 384 U.S. at 444.

[122] *Id.* at 475. Scholars refer to the *Miranda* Court's establishment of this "heavy burden" to prove waiver, but it is noteworthy that the *Miranda* Court only specified that the government carries such a burden to demonstrate the knowing and intelligent prongs of waiver, which technically may have left what burden is necessary to prove voluntariness open to interpretation. *Compare, e.g.*, *Miranda*, 384 U.S. at 475 ("If the interrogation continues without the presence of an attorney and a statement is taken, 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." (emphasis added)), *with* Andrew Guthrie Ferguson & Richard A. Leo, *The* Miranda *App: Metaphor and Machine*, 97 B.U. L. REV. 935, 941 (2017) (noting that *Miranda* gave the government a heavy burden of showing that "[*Miranda*] waiver had been properly obtained").

[123] *Connelly*, 479 U.S. at 168.

[124] *See Dickerson*, 530 U.S. at 443–44 (reaffirming the constitutionality of *Miranda* and noting that its warnings have become fixed in American culture); Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 890 (2017) (opining that the chances of the Supreme Court reconsidering *Miranda* after affirming its constitutionality in *Dickerson v. United States* are "nonexistent"); Leo, *The Impact of* Miranda *Revisited*, *supra* note 108, at 627 (calling *Miranda* "the most significant development in the law of confessions and possibly the most famous court case in American history").

[125] *See* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1000 (2001) [hereinafter Leo, *Questioning the Relevance of* Miranda] ("*Miranda v. Arizona* is the most well-known criminal justice decision—arguably the most well-known legal decision—in American history." (footnote omitted)). A search of the most-cited cases on HeinOnline's database shows that *Miranda* is the only case that is top ten in citations by both articles and cases. Never-

first, many feared that *Miranda* rights would significantly hinder law enforcement's ability to prosecute criminals.[126] These concerns, however, did not materialize.[127] In fact, some argue that *Miranda* has worsened matters for defendants because police have since learned how to use its procedural requirements to their advantage to obtain *Miranda* waivers.[128]

Miranda is responsible, however, for some long-term benefits for defendants in the criminal justice system.[129] *Miranda* has raised general awareness of defendants' constitutional rights.[130] Additionally, *Miranda* has improved police professionalism by largely rooting out extreme interrogation methods meant to inflict suffering, known as "the third degree," which were commonplace during the early twentieth century.[131]

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theless, the Supreme Court did not cite any scholarship addressing "*Miranda*'s real world effects" in *Dickerson*. *See* Leo, *Questioning the Relevance of* Miranda, *supra*, at 1010–11 (pointing this out and remarking that this is especially peculiar because *Miranda* scholar Paul Cassell litigated *Dickerson*).

[126] *See, e.g.*, L.A. SCOT POWE, THE WARREN COURT AND AMERICAN POLITICS 399–400 (2000) (describing the strong, negative reaction to the *Miranda* decision from police and politicians); Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1016–17 (noting that police thought *Miranda* rights would "handcuff their investigative abilities" and saw this as a "virtual ban on interrogation"); Leo, *The Impact of* Miranda *Revisited*, *supra* note 108, at 622–23 (detailing the political controversy surrounding *Miranda*, including President Nixon publicly denouncing the decision and members of Congress calling for the impeachment of Chief Justice Warren, who authored the majority opinion in the case).

[127] *See* Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1016 (noting that these concerns did not come to pass). In fact, in the decades following *Miranda*, the incarceration rate in the United States rose approximately 500%. *See Incarceration Rate, 1925–2008*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/incarceration1925-2008.html [https://perma.cc/F3LD-AA6C].

[128] *See* Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1016 (explaining how police "'work *Miranda*' to their advantage" by finding ways to obtain legally acceptable waivers that still allow for abusive interrogation methods); *id.* at 1021–23 (noting that *Miranda* has aided, rather than hindered, law enforcement and detailing significant police support for the measure); Leo, *The Impact of* Miranda *Revisited*, *supra* note 108, at 665 (explaining that police are adept at obtaining *Miranda* waivers but employ negotiation tactics that "usually remain within the letter of *Miranda*, but frequently . . . straddle the ambiguous margins of legality"); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1523 (2008) (determining that "*Miranda* is now detrimental to our criminal justice system" for both failing to offer defendants protection and preventing reform).

[129] *See* Leo, *The Impact of* Miranda *Revisited*, *supra* note 108, at 668–72; *infra* notes 130–131 and accompanying text.

[130] Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1026.

[131] *See id.* (noting that *Miranda* seemingly disposed of remaining third-degree interrogation practices). Third-degree practices include a range of physically and psychologically coercive interrogation techniques that law enforcement personnel regularly employed until at least the early 1930s. LEO, *supra* note 31, at 46; *see id.* at 41–77 (exploring the history of third-degree interrogation practices in America and their resulting effects on the criminal justice system). In 1931, the Wickersham Commission Report showed the wide scope and extent of third-degree practices and marked the beginning of a rejection of these techniques by law enforcement. *See id.* at 70–74; Penney, *supra* note 65, at 335–37 (discussing the Wickersham Commission's findings). Now, third-degree practices are rare and rejected. *See* LEO, *supra* note 31, at 70–74 (discussing how attitudes toward, and uses of, the third-degree changed and trended in the direction of its eradication during the twentieth century); Penney, *supra* note 65, at 336–37 & n.149 (arguing that the Supreme Court played an important part in this change

Overall, however, *Miranda* has met widespread criticism for failing to effect its stated goals: to counteract compulsion inherent to interrogation and to allow individuals the opportunity to exercise their right to remain silent by meaningfully informing individuals of that right.[132] Scholars generally agree that *Miranda* warnings do not actually lessen the coercive pressures of interrogation.[133] *Miranda* has become largely ineffectual, especially considering that somewhere between 78% and 96% of suspects waive their *Miranda* rights.[134] Part of the doctrine's ineffectiveness may be due to subsequent decisions by the Burger, Rehnquist, and Roberts' Courts that significantly curtailed its reach and bite.[135] Many of the Court's post-*Miranda* decisions lessened its potency by giving narrow answers to the questions that *Miranda* itself left open, such as what exactly constitutes interrogation, custody, or waiver of *Miranda* rights, and whether there should be exceptions to the doctrine.[136]

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and showing that the Court repeatedly cited the Wickersham Commission Report in its decisions in the mid-twentieth century).

[132] *See* Chavez v. Martinez, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) ("The *Miranda* warning, as is now well settled, is a constitutional requirement adopted to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause." (first citing *Dickerson*, 530 U.S. at 444; then citing *Miranda*, 384 U.S. at 467)); *Miranda*, 384 U.S. at 467 (discussing the pressures inherent in custodial interrogation, the compelling effects of such pressures on individuals to speak when they may not otherwise, and the Court's procedures aimed "to combat these pressures and to permit a full opportunity" for individuals to understand and exercise their Fifth Amendment rights). One need not look far to find large amounts and various types of criticism concerning *Miranda*. *See, e.g.*, Ferguson & Leo, *supra* note 122, at 936–37 (providing an overview of the many problems with, and criticisms of, the *Miranda* doctrine).

[133] *See* Ferguson & Leo, *supra* note 122, at 936–37 (discussing *Miranda*'s general failure to cure custodial interrogation's inherent pressures); Scott W. Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 NW. U. L. REV. 905, 926–33 (2016) (cataloguing the general criticisms lodged against *Miranda* today as well as its original doctrinal flaws).

[134] *See* Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1012 (finding it "enormously significant" that such a large percentage of individuals waive their *Miranda* rights and that scholars on different sides of *Miranda* debates seem to agree upon these numbers).

[135] *See, e.g.*, Howe, *supra* note 133, at 926 (noting that each successive Court weakened *Miranda* and providing a virtual bibliography of criticism on the issue).

[136] *See* Mannheimer, *supra* note 120, at 317 (noting that *Miranda* left these questions open); *infra* notes 141–149 and accompanying text (discussing the development of what constitutes waiver and how to assess waiver under *Miranda*). This Note focuses on matters of waiver and custody that specifically concern juveniles. *See infra* notes 161–181 and accompanying text. Nevertheless, it is worth noting the general ways that the Court has further weakened *Miranda*, such as through finding a public safety exception to the doctrine. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655–56 (1984) (creating an exception to the requirement that police issue suspects in custody *Miranda* warnings before interrogating them if there is a reasonable concern for public safety). Additionally, although the Court's definition of interrogation—anything that constitutes "either express questioning or its functional equivalent," that is, "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from [a] suspect"—appears broad, cases show that it does not cover all relevant circumstances. *Innis*, 446 U.S. at 300–01 (formulating this definition of interrogation, but determining that two officers' discussion in front of a Mirandized suspect, who was in custody and in transport to a police station, about mentally handicapped children possibly finding the suspect's unlocated weapon and hurting themselves was not interrogation); *see*

Critically, *Miranda* did not technically change the traditional, due process voluntariness standard.[137] *Miranda* did, however, shift courts' focus from the traditional question of voluntariness to whether defendants' waivers of their *Miranda* rights were knowing, intelligent, and voluntary.[138] Today, courts often do not focus on the traditional voluntariness test because, as the Supreme Court has said, the finding of a valid *Miranda* waiver generally leads to the admissibility of subsequent statements.[139] Thus, in effect, *Miranda* has lessened the use and power of the traditional voluntariness standard.[140]

To make a valid waiver, the *Miranda* Court clearly stated that individuals must "voluntarily, knowingly and intelligently" waive their *Miranda* rights.[141] Courts apply a totality-of-the-circumstances test to determine whether individuals have validly waived their *Miranda* rights.[142] This test generally considers a suspect's characteristics, the police action, and the circumstances of interrogation.[143] Waivers are knowing and intelligent when individuals are aware of the rights that they are waiving and understand the consequences of waiving

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Illinois v. Perkins, 496 U.S. 292, 299–300 (1990) (concluding that an undercover agent sent to a murder suspect's prison to find out information was not the functional equivalent of interrogation because the suspect did not know that he was undergoing questioning); Arizona v. Mauro, 481 U.S. 520, 527–30 (1987) (holding that allowing a suspect's wife to talk to him while he was in custody at a police station for an investigation into the murder of their son, while in the presence of an officer electronically recording their conversation, was not interrogation).

[137] *See* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009 (1998) (arguing that the voluntariness standard's due process test has remained the same since *Miranda*).

[138] *See* Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1021, 1025–26 (discussing how *Miranda* shifted focus away from the traditional voluntariness standard to its procedures); Malone, *supra* note 64, at 377 (claiming that *Miranda* moved the focus from the voluntariness of a confession to the voluntariness of *Miranda* waiver); Penney, *supra* note 65, at 382 (commenting that, because the focus after *Miranda* shifted to waiver, the Court essentially "transposed the voluntariness standard to the waiver inquiry").

[139] *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) (noting that obtaining a waiver after giving *Miranda* warnings "has generally produced a virtual ticket of admissibility" and that courts generally find valid waivers in litigation over the voluntariness of statements following *Miranda* waivers); *Dickerson*, 530 U.S. at 444 ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))); Leo, *Questioning the Relevance of* Miranda, *supra* note 125, at 1025–26 (discussing the displacement of the traditional voluntariness standard and explaining how clear-cut *Miranda* warnings generally lead to admissibility without serious attention to the traditional voluntariness standard).

[140] *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219–21 (2001) (remarking that properly given *Miranda* warnings "often ha[ve] the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices").

[141] *Miranda*, 384 U.S. at 444–45.

[142] Fare v. Michael C., 442 U.S. 707, 724–25 (1979) (citing *Miranda*, 384 U.S. at 475–77).

[143] *See* 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, 417–19 (1999) (noting what considerations concern the finding of valid waiver and that courts cannot look at police action in a vacuum).

those rights.[144] Next, a waiver's voluntariness depends upon the absence of unlawful coercion and some positive confirmation of a suspect exercising free will.[145] Yet, the totality-of-the-circumstances test permits certain inducements for waiver by interrogators.[146] Further, individuals may either expressly state or imply a valid *Miranda* waiver, and the bar for implied waiver is quite low.[147] Thus, it is relatively easy for law enforcement officers to obtain valid *Miranda* waivers.[148] And because a valid *Miranda* waiver generally leads to the finding that subsequent statements are voluntary under the due process analysis, the *Miranda* doctrine has become a largely positive development for law enforcement agents, while failing to offer meaningful protection to suspects.[149]

D. The Self-Incrimination Doctrine and Juveniles

By the nineteenth century, at common law, defendants were divided into three categories by age, with corresponding degrees of culpability for criminal acts: those under the age of seven, who had an infancy defense of an inability

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[144] Moran v. Burbine, 475 U.S. 412, 421 (1986).

[145] *Id.* (noting that a *Miranda* waiver is voluntary as an exercise of "free and deliberate choice rather than intimidation, coercion, or deception"). The Court, however, has clarified that free choice exists only in relation to the absence of unlawful police coercion. *Connelly*, 479 U.S. at 170. And in the absence of unlawful action, free choice has included, for example, the decision to waive *Miranda* rights while in a psychotic state. *See id.* at 170–71.

[146] *See* Leo & White, *supra* note 143, at 417–19 (explaining that the totality-of-the-circumstances test now gives police "considerable freedom to obtain *Miranda* waivers through the use of inducements," despite firm language in *Miranda* to the contrary). A common inducement, for example, is telling suspects, sometimes even before administering *Miranda* warnings, that speaking to the police is a chance for them to tell their side of the story so that the police can "help" them. *See, e.g.*, LEO, *supra* note 31, at 151–52 (illustrating, with actual interrogation transcripts, law enforcement use of assistance- or opportunity-suggestive inducements to waive *Miranda* rights and noting that these can occur before *Miranda* warnings and throughout interrogation).

[147] *See* Berghuis v. Thompkins, 560 U.S. 370, 374–76, 388–89 (2010) (showing that remaining mostly silent for almost three hours is not enough to invoke one's right to silence); Davis v. United States, 512 U.S. 452, 461–62 (1994) (holding that invocations of *Miranda*'s right to counsel must be unambiguous).

[148] *See* Leo, *The Impact of* Miranda *Revisited*, *supra* note 108, at 659–60 (explaining the mostly routine nature of *Miranda* waiver and showing that police control over the process can play a significant role in suspects waiving their *Miranda* rights).

[149] *See* LEO, *supra* note 31, at 281–82 (claiming that *Miranda* has ultimately left the advantage to law enforcement and noting that police control when and how they issue *Miranda* warnings as well as the factual circumstances surrounding waiver); Malone, *supra* note 64, at 377–78 (calling *Miranda* "a boon to police" for changing the focus from the voluntariness of statements to the voluntariness of *Miranda* waiver because suspects who waive their rights are generally unable to suppress their subsequent statements later); *see also supra* note 128 and accompanying text (detailing how law enforcement benefits from the *Miranda* doctrine); *supra* notes 132–134 and accompanying text (discussing how *Miranda* has largely failed in its attempts both to give individuals effective protection against the coercive pressures of police interrogation and to safeguard the Fifth Amendment's protections against self-incrimination).

to possess a requisite mental state for criminal liability; those aged seven to fourteen, to whom the law offered a rebuttable presumption of criminal incapacity; and those over the age of fourteen, whom the law treated as adults fully responsible for their criminal conduct.[150] At the end of the nineteenth century, progressive reformers sought to improve upon this common-law foundation by creating a juvenile justice system focused on rehabilitation rather than punishment.[151] The concept of *parens patriae*, the idea that the state has an ability or obligation to care for those who cannot care for themselves, underpinned this movement.[152] The juvenile courts that this movement created, however, were technically civil, and their judges could waive jurisdiction over juveniles to permit prosecution in criminal court.[153]

In the middle of the twentieth century, concern arose that this *parens patriae* system was failing to provide juveniles with meaningful rehabilitation, while at the same time depriving them of protections and liberties given to adults.[154] Thus, in 1967, in *In re Gault*, the Supreme Court extended the constitutional privilege against self-incrimination to all juveniles.[155] In that case, the Court was critical of the *parens patriae* model of juvenile justice and the disparity it created between the protections afforded to children and the rights of adults.[156] The Court expressed concern over "special problems" that could arise around juveniles waiving their *Miranda* rights, but initially offered no

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[150] WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 9.6(a) (3d ed. 2017) (tracing these groupings and their roots to earlier Canon Law and Roman Law); Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 375 (1998).

[151] Klein, *supra* note 150, at 376. Illinois created the first juvenile court in 1899. *Id.* The motives of these reformers, as one scholar argues, however, may have been less than altruistic in an attempt for the upper classes to restrain social mobility and retain social control. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694–95 (1991) [hereinafter Feld, *Transformation of the Juvenile Court*] (expressing the possibility of either an altruistic or a classist motive).

[152] *See Parens Patriae*, BLACK'S LAW DICTIONARY, *supra* note 63; Klein, *supra* note 150, at 376; *see also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1221–27 (1980) (tracing the history of *parens patriae* power in detail from England to America and explaining that the states and courts in America expanded *parens patriae* powers by widening state reach into the family to the extent that the doctrine came to evade meaningful constitutional review by conflating private and public interests until later in the twentieth century).

[153] *See In re* Gault, 387 U.S. 1, 15–17 (1967) (explaining that the philosophical underpinnings of *parens patriae* related to civil custody only and had no place in criminal procedure, then concluding that juvenile court proceedings were thus civil and—unlike criminal proceedings—could not deprive children of their liberty).

[154] *See* Kent v. United States, 383 U.S. 541, 556 (1966) (describing this predicament as "the worst of both worlds").

[155] *Gault*, 387 U.S. at 55.

[156] *Id.* at 47 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.").

solution besides noting that lawyers can aid police in communicating *Miranda* rights to suspects.[157]

Although *Gault* increased the constitutional protections available to juveniles, it was in some ways a step back from the Court's earlier calls for greater protection for juveniles beyond those available to adults.[158] *Gault* marks a large transition in the juvenile criminal justice system because its extension of adult protections to juveniles also expanded punitive aspects to the juvenile system.[159] Over the following decades, public desire for harsher punishments, media frenzy over juvenile crime, and the perception of increasing crime rates fostered a "tough on crime" political trend that pushed more juveniles into the punitive adult criminal justice system and further away from the juvenile justice system's rehabilitative foundation.[160]

Miranda's extension to juveniles has raised further concerns about how to evaluate juvenile waiver and custody issues.[161] In 1979, in *Fare v. Michael C.*, the Supreme Court clarified that the totality-of-the-circumstances test used to evaluate *Miranda* waivers for adults was also the appropriate test for minors.[162] This test considers a "juvenile's age, experience, education, background, and intelligence, and [looks] into whether he has the capacity to un-

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[157] *Id.* at 55.

[158] *See Fare*, 442 U.S. at 729 (Marshall, J., dissenting) (first citing Haley v. Ohio, 332 U.S. 695, 699 (1948); then citing Gallegos v. Colorado, 370 U.S. 49, 54 (1962); and then citing *Gault*, 387 U.S. at 55) (emphasizing the Court's tradition of "heightened concern" regarding juvenile interrogation); David T. Huang, Note, *"Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 441–44 (2001) (examining in detail the Court's language and rationale in *Haley v. Ohio* and *Gallegos v. Colorado* concerning protections for juveniles against interrogatory pressure, specifically where the Court had dismissed the idea that fourteen- or fifteen-year-olds could understand their constitutional rights or how to protect them).

[159] *See* Barry C. Feld, *Criminalizing the American Juvenile Court*, 17 CRIME & JUST. 197, 207–08 (1993) (showing that *In re Gault* was the beginning of "the criminalizing of the juvenile court" wherein juveniles met "an increased emphasis on punishment in sentencing delinquents" and/or entered the adult system itself); *cf.* Klein, *supra* note 150, at 377–78 (noting that punitive measures were already part of the juvenile justice system before *Gault*).

[160] *See* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 388 (2008) (noting these various catalysts and their creation of a more punitive juvenile justice system); Klein, *supra* note 150, at 382 (noting that this punitive philosophy for juvenile justice arrived with a focus on juvenile crime from the media and politicians). Further exploration of the juvenile court system today is beyond the scope of this Note, which will instead focus on how the criminal court system treats juveniles. *See generally, e.g.*, Feld, *Transformation of the Juvenile Court*, *supra* note 151 (discussing in more detail the differences and similarities between the two types of courts and concluding that there are no differences between the two systems in practice).

[161] *See generally* Paul Marcus, *The* Miranda *Custody Requirement and Juveniles*, 85 TENN. L. REV. 251 (2017) (discussing the difficulties of applying *Miranda* to juveniles in multiple contexts, but especially custody); *see also infra* notes 169–181 and accompanying text (introducing the problems associated with the *Miranda* doctrine's application to juveniles and the substantial criticism of its lack of protection for juveniles).

[162] *Fare*, 442 U.S. at 725.

derstand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights."[163]

In 2010, in *J.D.B. v. North Carolina*, the Supreme Court held that consideration of a suspect's age is a requirement for determining whether a juvenile is in custody for *Miranda* purposes.[164] Two distinct, objective analyses determine whether an individual is in custody under *Miranda*.[165] The first is an objective evaluation of whether there has been a restraint of movement akin to a formal arrest.[166] Taking the first assessment into account, the second inquiry is whether a suspect would reasonably feel free to leave under the totality of the circumstances.[167] In *J.D.B.*, the Court held that age is an objective characteristic and thus a part of the *Miranda* custody determination where officers know, or reasonably should know, a juvenile suspect's age.[168]

E. Problems with Constitutional Self-Incrimination Protections for Juveniles

There is general scholarly consensus that *Miranda* offers little to no protection to juveniles.[169] First, studies have shown that juveniles, especially those under the age of sixteen, cannot truly understand their *Miranda* rights.[170] Even if juveniles do have some understanding of the words in *Miranda* warnings, juveniles still may not be able to appreciate what "rights" are, how to use their

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[163] *Id.*

[164] J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011).

[165] *See* Thompson v. Keohane, 516 U.S. 99, 112 (1995) (explaining that the test to determine custody contains two separate considerations); *infra* notes 166–167 and accompanying text (outlining the two parts of the custody determination).

[166] *Thompson*, 516 U.S. at 112 ("The first inquiry, all agree, is distinctly factual.").

[167] *Id.* at 112–16.

[168] *J.D.B.*, 564 U.S. at 271–77. The four-Justice dissent criticized the majority's holding as jeopardizing the clarity of an objective *Miranda* custody analysis because it interpreted age as a personal characteristic that would receive consideration under the due process voluntariness test. *Id.* at 281–83 (Alito, J., dissenting).

[169] *See, e.g.*, Feld, *Behind Closed Doors*, *supra* note 32, at 408–10 (explaining that juveniles are unable to grasp the significance of their *Miranda* rights and do not know how to use them); Lapp, *supra* note 40, at 923–37 (explaining that *Miranda* and other constitutional protections fail to protect juveniles because "current Fifth Amendment doctrine largely ignores [their] youth").

[170] *See* Feld, *Behind Closed Doors*, *supra* note 32, at 408–10; Kassin et al., *supra* note 12, at 8 (noting the consistency across studies finding that juveniles fifteen and younger fail to comprehend their *Miranda* rights). For example, the original study on juvenile comprehension of *Miranda* rights found that 88% of ten- and eleven-year-olds, 73% of twelve-year-olds, 65% of thirteen-year-olds, and 54% of fourteen-year-olds failed to adequately understand at least one of their rights. Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1155 (1980). The comprehension of fifteen- and sixteen-year-olds in that study tracked that of fourteen-year-olds. *See id.* These conclusions remain valid, according to more recent studies. *See* Naomi E.S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of* Miranda *Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 31 (2018) (showing that recent studies have confirmed Thomas Grisso's numerical conclusions).

rights, or the consequences of waiving those rights.[171] For example, one study of twelve- to nineteen-year-olds found that 99% of them did not possess an adequate understanding of their right to silence and 94% lacked sufficient comprehension of the consequences of waiving their rights.[172] Thus, juveniles seemingly cannot meet the knowing and intelligent standard for valid waiver of *Miranda* rights because that standard requires them to understand consequences they inherently cannot.[173] Thus, cases like *In re Joseph H.*, in which the Supreme Court of California declined to review an appellate court's affirmation that a ten-year-old boy's *Miranda* waiver was knowing, intelligent, and voluntary, have left many observers perplexed.[174] Nevertheless, courts repeatedly come to such unbelievable conclusions that children like Joseph have made valid *Miranda* waivers.[175]

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[171] Feld, *Behind Closed Doors*, *supra* note 32, at 409–10 (noting that even where juveniles can understand the words in a *Miranda* warning they cannot understand the significance, use, or consequences of exercising those rights); Goldstein et al., *supra* note 170, at 49 (explaining that, despite simpler language, juveniles may still "prove incapable of grasping the complex concepts involved, as they may be developmentally unable to engage in the abstract reasoning, cost-benefit analysis, and weighing of short- versus long-term gains required to make a valid waiver"); Grisso, *supra* note 170, at 1160–61 (arguing that juveniles under the age of fifteen cannot meaningfully waive *Miranda* rights because this age group cannot understand them); *see* Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH & ADOLESCENCE 685, 689–90 (2008) (concluding from the authors' study that 70% of eleven- to thirteen-year-olds, 48% of fourteen- to fifteen-year-olds, and 26% of sixteen- to seventeen-year-olds possessed a compromised understanding of, at a minimum, one *Miranda* right). For example, a thirteen-year-old boy, raped during his previous stay in detention and scared of interrogators after seeing his friend emerge from interrogation with his lip split and shirt bloody, told police what he thought they wanted to hear so that they would let him go, thinking that he could take back his false confession later. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28–29 (2000). Of course, he could not simply retract his confession, so he faced twenty years of incarceration. *Id.* at 29.

[172] *See* Goldstein et al., *supra* note 170, at 31–32 (citing NAOMI E.S. GOLDSTEIN ET AL., MIRANDA RIGHTS COMPREHENSION INSTRUMENTS 103–04 (2014)).

[173] *J.D.B.*, 564 U.S. at 272 ("Children . . . 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them' . . . ." (citations omitted) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion))); *Burbine*, 475 U.S. at 421 ("[A *Miranda* waiver must be] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."); *Gallegos*, 370 U.S. at 54 (noting that a fourteen-year-old boy is likely unable: to realize what it means to speak alone with police without counsel; to understand the consequences of statements he gives police; or to know how to protect his own interests or to use his constitutional rights).

[174] *See* 367 P.3d 1, 1 (Cal. 2015) (Liu, J., dissenting) ("[I]t is doubtful that Joseph understood or was capable of understanding the nature of *Miranda* rights and the consequences of waiving those rights."), *aff'g* 188 Cal. Rptr. 3d 171, *cert. denied sub nom.* Joseph H. v. California, 137 S. Ct. 34 (2016); Lapp, *supra* note 40, at 909–10 (noting that Joseph explained his right to remain silent as the right to stay calm and that interrogators then explained that right as providing two options: to speak to interrogators with his mother present; or to speak to interrogators with his lawyer present).

[175] *See* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 43 (2013) ("[Judges] regularly find that children as young as ten or eleven years of age, with no prior law enforcement contact, with limited intelligence or significant mental disorders, and without parental

Several factors call into question the voluntariness both of juvenile *Miranda* waivers and of minors' post-waiver statements.[176] These risks include juveniles' focus on short-term relief, their desire to avoid conflict, their tendency to succumb to pressure and authority, and their increased susceptibility to interrogator inducements and other tactics that can lead to involuntary responses.[177] In theory, totality-of-the-circumstances tests should account for these factors (because they supposedly account for *everything*), but many question whether these tests can adequately evaluate the voluntariness of juvenile confessions or the validity of juvenile *Miranda* waivers.[178] Indeed, because the elements that affect juvenile action become lost among the numerous and varying factors that courts consider (with, by the way, no standard on how to balance such factors), the factors that determine the *de facto* voluntariness of juvenile action do not correspondingly determine the *de jure* voluntariness of juvenile waiver or confession.[179] With no guarantee that a judge will take into account the empirical vulnerability of juvenile experience and decision making that should influence these tests, and with many examples of judges not doing so, juveniles are particularly at risk.[180] Further, the inconsistent outcomes that result from this lack of clarity present serious problems themselves.[181]

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assistance made valid waivers."). Appellate courts have widely affirmed such decisions. *See* Lapp, *supra* note 40, at 928–29 (citing and discussing cases in which courts upheld *Miranda* waivers as valid for children as young as eight years old and listing a number of appellate cases affirming such decisions).

[176] *See infra* notes 177–181 and accompanying text.

[177] Birckhead, *supra* note 160, at 413–15 (detailing that research has shown that the vulnerability and suggestibility of juveniles in response to coercive questioning pose significant risks that juveniles will give unreliable or false statements to authorities during interrogation); Feld, *Behind Closed Doors*, *supra* note 32, at 411–12 (noting that similar characteristics can lead to problems for juveniles achieving voluntary waiver); Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1740–43 (2017) (noting a range of factors that make juveniles susceptible to pressure in interrogation, which can in turn lead to false confessions).

[178] *See* Huang, *supra* note 158, at 447–49 (calling the totality-of-the-circumstances test into question for prospective and retrospective failures to provide adequate protection for juveniles); Lapp, *supra* note 40, at 957–58 (noting that, although the totality-of-the-circumstances test claims to account for capacity in a variety of ways, the test does not invalidate waivers where interrogators clearly take advantage of a juvenile's limitations and weaknesses).

[179] *See* 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, 130 (G. Daniel Lassiter ed., 2004) ("[T]here are legions of cases in which judges have ignored or paid lip service to the unique vulnerabilities of children in the interrogation process . . . ."); Huang, *supra* note 158, at 448 (commenting that the lack of controlling factors in the totality-of-the-circumstances test lends complete discretion to the court in considering the circumstances surrounding juvenile *Miranda* waivers and observing that children are thus put in the same position as adults because their circumstances are not accounted for with any particularity).

[180] *See* Huang, *supra* note 158, at 448 n.76 (citing *In re* B.M.B., 955 P.2d 1302, 1306 (Kan. 1998)) (providing an example of how a trial judge loses sight of juvenile vulnerability when assessing so many factors); Lapp, *supra* note 40, at 928–29 (addressing cases where courts upheld *Miranda*

F. The Self-Incrimination Doctrine and the Law of Evidence

At common law, the voluntariness doctrine and rules of corroboration ensured the reliability of confessions.[182] In early American law, reliability had been a central, or even *the* central, part of the voluntariness doctrine.[183] But in *Colorado v. Connelly*, the U.S. Supreme Court made clear that the voluntariness doctrine was not concerned with reliability.[184] *Connelly* clarified that due process voluntariness allows the admission of true and false confession evidence because that doctrine only addresses whether police obtained such evidence unfairly through coercive activity.[185] Now, the law of evidence alone governs confession reliability.[186]

Without the voluntariness doctrine, only corroboration rules remain to shield juries from false and unreliable confessions.[187] There are two rules of corroboration: the *corpus delicti* rule and the trustworthiness standard.[188] The *corpus delicti* rule is a common-law rule of evidence designed to expose and exclude certain unreliable confessions.[189] That rule, however, simply requires

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waivers as valid despite circumstances suggesting those conclusions were severely misguided and incorrect).

[181] Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile* Miranda *Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1376 (2000) (noting that the totality-of-the-circumstances test can produce different results for juveniles in similar situtations and remarking that the admissibility of confessions that could lead to life-changing consequences should not turn on where a juvenile appears in court).

[182] Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 488; *see id.* at 488–99 (providing a history of the voluntariness rule from common law, through early American law, to the present); *id.* at 501–10 (discussing the development of current corroboration rules and their shortcomings); *see also supra* notes 75–104 and accompanying text (analyzing the voluntariness doctrine's origins and development in American law).

[183] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 779–80 (stressing the centrality of reliability in common law and in nineteenth- and early twentieth-century American jurisprudence); Penney, *supra* note 65, at 322 (calling prevention of wrongful convictions from unreliable evidence the "sole purpose" of the voluntariness doctrine); *see also supra* note 85 and accompanying text.

[184] *See Connelly*, 479 U.S. at 167; Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 498–99 (concluding that *Colorado v. Connelly* put an end to a reliability rationale for due process voluntariness); *see also supra* notes 89–101 and accompanying text (discussing *Connelly* and its consequences for due process voluntariness).

[185] *Connelly*, 479 U.S. at 167 ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." (quoting *Lisenba*, 314 U.S. at 236)); Leo et al., *Promoting Accuracy*, *supra* note 49, at 784 ("The due process voluntariness test fails to ensure, *let alone even consider*, the reliability of confession evidence at trial.").

[186] *See Connelly*, 479 U.S. at 167.

[187] *See supra* notes 182–186 and accompanying text.

[188] *See infra* notes 189–200 and accompanying text.

[189] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 790 (explaining the history of the *corpus delicti* rule at common law and its adoption in the United States); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 501–06 (same).

proof that a crime occurred.[190] In other words, it requires corroboration of the crime, not the confession.[191] As a result, it provides little assurance that a confession is reliable because it focuses on whether a crime transpired rather than on the confession itself.[192] Thus, the rule has "an extremely limited function" and provides little protection against the admission of false confessions.[193] Nevertheless, by the time the Court decided *Connelly* in 1986, all fifty states had adopted some form of the *corpus delicti* rule.[194]

In 1954, in *Opper v. United States*, the Supreme Court announced a different confession corroboration rule known as the trustworthiness standard.[195] That standard requires a judge to find that "substantial independent evidence" renders a confession trustworthy by a preponderance of the evidence before admitting it into evidence.[196] Thus, the trustworthiness rule offers more protection than the *corpus delicti* rule because it requires corroboration of the confession itself.[197] But only federal courts and a small number of state courts follow the trustworthiness standard.[198] And even in such courts, the rule has not effectively screened false confessions for reasons such as confession contamination and low or discretionary standards for what constitutes sufficient "substantial independent" corroboration.[199] Ultimately, the almost complete ineffectiveness of the *corpus delicti* rule and the trustworthiness standard's narrow adoption

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[190] Leo et al., *Promoting Accuracy*, *supra* note 49, at 790–91; Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 501–02. The translation of the Latin *corpus delicti* is "body of the crime." Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 501.

[191] *See* Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 501.

[192] Leo et al., *Promoting Accuracy*, *supra* note 49, at 790–91 (calling the *corpus delicti* rule "meaningless as a safeguard against the admission of false confessions into evidence at trial because it does not require any corroboration of the contents of the confession"); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 506–07.

[193] *See* Smith v. United States, 348 U.S. 147, 153 (1954); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 506–07 (explaining in detail the weaknesses of the *corpus delicti* rule and asserting that versions of the rule "may make it easier for the prosecution to convict both the guilty and the innocent"). The *corpus delicti* rule is particularly ineffective because false confessions rarely concern crimes that never occurred. *See* Leo et al., *supra* note 80, at 506 (observing that the *corpus delicti* rule's initial purpose of protecting those who falsely confess to crimes that never transpired is out of touch with the rarity of such cases). *But see* Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 AM. CRIM. L. REV. 665, 665 (2018) (asserting that one-third of exonerations involve convictions for crimes that never happened).

[194] Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 505.

[195] *See* Opper v. United States, 348 U.S. 84, 93 (1954); Leo et al., *Promoting Accuracy*, *supra* note 49, at 791; Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 508–10.

[196] *See Opper*, 348 U.S. at 93; Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 508–10.

[197] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 791; *cf. Smith*, 348 U.S. at 154 (noting that "[o]nce the existence of the crime was established," the *corpus delicti* rule could allow "the guilt of the accused . . . [to] be based on his own otherwise uncorroborated confession").

[198] Leo et al., *Promoting Accuracy*, *supra* note 49, at 791; Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 510.

[199] Leo et al., *Promoting Accuracy*, *supra* note 49, at 791. For a discussion of confession contamination and the harm it causes, see *id.* at 769–71.

and mutable nature show that evidentiary laws currently fail to ensure the reliability of confessions admitted into evidence.[200]

II. Dissecting the Self-Incrimination Doctrine, a Split Amphibian

As described in Part I of this Note, the U.S. Supreme Court has split the original, "amphibi[ous]" self-incrimination doctrine, inextricably concerned with both the process of confession extraction and confession reliability, into two separate parts: a constitutional analysis of police coercion grounded in the Fifth and Fourteenth Amendments; and a separate reliability analysis under the law of evidence.[201] In response to concerns about the coercive pressures of police interrogation, the Supreme Court instituted procedural safeguards under the Fifth Amendment to protect individual rights against self-incrimination in 1966, in *Miranda v. Arizona*, but the Court has since significantly watered down the doctrine.[202] More recently, ground-breaking research has provided scholars with the understanding that people, and especially juveniles, falsely confess for rational reasons that often relate to extant psychologically coercive pressures in interrogation.[203] DNA evidence has exonerated some false confessors in the so-called "innocence revolution" that has swept the criminal justice system.[204] But DNA evidence is not available in every case, and thus science

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[200] *See supra* notes 187–199 and accompanying text.

[201] Culombe v. Connecticut, 367 U.S. 568, 604–05 (1961); *see supra* notes 75–104 and accompanying text.

[202] *Compare* Miranda v. Arizona, 384 U.S. 436, 467–75 (1966) (outlining seemingly strict standards for administering *Miranda* rights, obtaining *Miranda* waivers, and conducting interrogation, in part by placing a significant burden on the government where state action varies from these steps), *with* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 Geo. L.J. 1, 24 (2010) (observing that the Supreme Court has effectively overruled *Miranda v. Arizona* because subsequent decisions cumulatively let police officers ignore it), *and* Weisselberg, *supra* note 128, at 1521 ("[A]s a protective device, *Miranda* is largely dead."), *and supra* notes 105–123 and accompanying text (considering the circumstances that led to *Miranda* and the Court's attempts to combat the coercive pressures of police interrogation in that decision), *and supra* notes 124–149 and accompanying text (discussing the problems and cutbacks that followed *Miranda*). *See generally* Yale Kamisar, *The Rise, Decline, and Fall(?) of* Miranda, 87 Wash. L. Rev. 965 (2012) (discussing the tensions and shortcomings of the *Miranda* doctrine from its beginnings and exploring how they have played out in the decades since the *Miranda* decision).

[203] *See generally, e.g.*, Ofshe & Leo, *supra* note 64 (exploring in depth for the first time how false confessions, although seemingly irrational and rare, are quite regular and, in fact, the result of rational choices at the time of confession because of interrogation's often psychologically manipulative environment); Tepfer et al., *supra* note 55 (examining wrongful convictions of youths and adults and analyzing the variety of factors, including those surrounding confessions, that make juveniles particularly vulnerable to wrongful conviction).

[204] *See* Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 526 ("The innocence revolution has rocked the entire criminal justice system, causing the system to question the reliability of some of the sacred cows of proof, including . . . confession evidence . . . .").

cannot remedy the self-incrimination doctrine's twin concerns of due process and reliability.[205]

The self-incrimination doctrine's remaining parts cannot perform its original function, and this reality has severe repercussions for the hundreds of thousands of juveniles arrested each year.[206] In contrast to popular handwringing over increased crime reports in the 1980s, recent stories of juvenile false confessions and subsequent wrongful convictions that have flooded the media have generated significant public shock.[207] Today, there is general acceptance that most juveniles do not understand their *Miranda* rights, cannot validly waive those rights, and are particularly susceptible to false confessions after waiver.[208] Confessions, even if false or seriously flawed, then pose significant risks of conviction and incarceration.[209] Acknowledging this problem, scholars

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[205] *See* Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004) (asserting that DNA evidence is not a cure for the problem of false confessions in the criminal justice system); Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 538 (noting that DNA evidence only exonerates a minority of false confessors); *see also* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 454–55 (1998) (noting that it is rare for those who have falsely confessed to establish their innocence through matters as clear as scientific evidence).

[206] *See* FED. BUREAU OF INVESTIGATION, CRIME DATA EXPLORER, https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/arrest [https://perma.cc/S4SL-WWFF] (recording national arrests by age and showing that all age groups under eighteen include, once added together, a total of 594,906 arrests in 2018).

[207] *See* Leo et al., *Bringing Reliability Back in*, *supra* note 80, at 525–26 (noting that DNA exonerations only began to impact society at the very end of the twentieth century and that increased understanding and discovery of false confessions (which more than tripled within the decade before this article) have played a significant role in the "innocence revolution that has rocked the entire criminal justice system"). For example, the year 2019 saw significant media and cultural reckoning around the once infamous "Central Park Five," the now-exonerated five men who falsely confessed to attacking and raping a jogger in New York City in 1989. *See, e.g.*, *When They See Us* (Netflix 2019); Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html [https://perma.cc/2P67-TKTG] (discussing the coverage of the crime at the time it occurred in the wake of the recent *Netflix* series *When They See Us*); Shayla Harris, *An Artist's Work Revists the Racist Coverage of the Central Park Five*, NEW YORKER (Apr. 17, 2019), https://www.newyorker.com/culture/culture-desk/an-artist-revises-the-racist-news-coverage-of-the-central-park-five [https://perma.cc/9YXH-8E5U] (discussing Alexandra Bell's artwork, displayed at the 2019 Whitney Biennial, that explores reporting of the case).

[208] *See supra* notes 170–173 and accompanying text (noting issues with juveniles comprehending and utilizing their *Miranda* rights); *supra* notes 176–181 and accompanying text (detailing juvenile vulnerability and the current self-incrimination doctrine's inability to account for it).

[209] *See* Kassin et al., *supra* note 12, at 19 (noting that there is strong evidence for such a belief upon review of studies consistently showing that juveniles are overrepresented in false-confession groups); Lapp, *supra* note 40, at 919–20 (discussing how confessions lead to unjust convictions for juveniles especially).

and government actors have offered a number of solutions to achieve adequate protection for juveniles.[210]

This Part of the Note looks at proposed and attempted increased protections against self-incrimination for juveniles.[211] Section A of this Part evaluates the different types of reforms that scholars, practitioners, and states have suggested as well as their strengths and weaknesses.[212] Section B then surveys the additional safeguards states currently offer juveniles.[213]

A. Proposed Additional Protections Against Self-Incrimination for Juveniles

One group of protections aims to ensure that juveniles understand their legal rights to remain silent and access counsel, the meaning and consequences of waiving those rights, and the significance of statements they may subsequently give authorities.[214] Another group of measures aims to ensure that any confessions after waiver are voluntary, by providing increased protections for juveniles during custodial interrogation.[215] Some scholars also argue for a third group of protections that would require more steps to identify and exclude unreliable confessions to prevent wrongful convictions.[216]

1. *Miranda* Warnings and Waiver: Additional Pre-interrogation Protections

Because most juveniles cannot understand *Miranda* rights, scholars have suggested changing the content and/or form of *Miranda* warnings to promote juvenile comprehension of these legal options.[217] Some have argued for changing the language of *Miranda* warnings to words that juveniles are more likely to understand.[218] Aside from simplified language, others have suggested that requiring juveniles to read written *Miranda* warnings could promote understanding.[219] These proposed reforms are achievable because they are not ex-

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[210] *See* Goldstein et al., *supra* note 170, at 47 (noting increasing interest in finding ways to ensure greater protections for juveniles); *infra* notes 214–290 and accompanying text (surveying the different suggestions about how to increase protections for juveniles against self-incrimination).

[211] *See infra* notes 214–290 and accompanying text.

[212] *See infra* notes 214–274 and accompanying text.

[213] *See infra* notes 275–290 and accompanying text.

[214] *See infra* notes 217–245 and accompanying text.

[215] *See infra* notes 246–264 and accompanying text.

[216] *See infra* notes 265–274 and accompanying text.

[217] *See* Goldstein et al., *supra* note 170, at 47–48, 49 & n.269 (noting that some jurisdictions have attempted to simplify *Miranda* warnings and evaluating the effects of different language); *supra* notes 170–173 and accompanying text (discussing the problems with juveniles understanding and using their *Miranda* rights).

[218] Goldstein et al., *supra* note 170, at 47–49 (discussing different attempts at adjusting *Miranda* warnings to be more juvenile friendly).

[219] *See, e.g.*, W. VA. CODE ANN. § 49-4-705 (West 2019) (mandating that police give children written explanations of their *Miranda* rights).

pensive, controversial, nor difficult to implement.[220] Unfortunately, however, changing the language in *Miranda* warnings does not actually increase a juvenile's understanding of their rights.[221] Nevertheless, there are hundreds of different versions of *Miranda* warnings in use throughout the United States and standardization could be helpful.[222]

Because a large majority of juveniles do waive their *Miranda* rights,[223] the next group of proposed protections aims to ensure that any juvenile waiver is truly voluntary, knowing, and intelligent.[224] To waive their *Miranda* rights knowingly and intelligently, juveniles must understand those rights in the first place.[225] Yet most juveniles cannot, in fact, understand their *Miranda* rights.[226] Consequently, a large majority of juveniles also cannot understand the consequences of waiving those rights.[227]

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[220] *See, e.g.*, Powell, *supra* note 108, at 459 (calling changing the language of *Miranda* warnings "a cheap reform").

[221] *See* Goldstein et al., *supra* note 170, at 49 & n.269 (noting that simpler language does not improve a juvenile's ability to understand abstract concepts or to consider the cost-benefit analysis or short- and long-term effect of *Miranda* waiver); Grisso, *supra* note 170, at 1162 (noting that simpler language in *Miranda* warnings would still not combat the intimidation that police interaction creates for juveniles); Powell, *supra* note 108, at 459 (noting that attempts to simplify the language in *Miranda* warnings actually make the warnings more difficult for juveniles to understand in some cases).

[222] *See* Powell, *supra* note 108, at 438–39 (finding 532 differently worded versions of *Miranda* warnings in 448 jurisdictions with reading levels varying from below third-grade to post-graduate). *See generally* Ferguson & Leo, *supra* note 122 (exploring ideas about standardizing *Miranda* warnings to increase understanding). Standardization could at least ameliorate the ambiguity present in cases such as *Florida v. Powell*, where the Supreme Court decided that a standard form not explicitly stating each *Miranda* right still "reasonably conveyed" an individual's *Miranda* rights in their entirety. *See* 559 U.S. 50, 62 (2010); *supra* note 117 and accompanying text (detailing the controversy over the waiver in this case).

[223] *See, e.g.*, Feld, *Behind Closed Doors*, *supra* note 32, at 399, 429, 431 (finding that 285 out of 307 sixteen- and seventeen-year-olds—92.8%—waived their *Miranda* rights in recorded interrogations); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 255–56 (2006) (finding that 80% of fifty-three sixteen- and seventeen-year-old suspects waived their *Miranda* rights).

[224] *See supra* notes 121–123 and accompanying text (explaining this requirement and the government's burden to prove waiver); *supra* notes 141–149 and accompanying text (showing the ways in which individuals may waive their *Miranda* rights and introducing the problems associated with a low bar for waiver); *supra* notes 169–181 and accompanying text (discussing the difficulties surrounding valid *Miranda* waivers for juveniles); *infra* notes 225–239 and accompanying text (addressing issues surrounding juvenile waiver and discussing possible remedies).

[225] *See* Goldstein et al., *supra* note 170, at 61 (observing that knowledge about juvenile brain development clearly shows that juveniles do not uniformly share an ability to make voluntary, knowing, and intelligent waivers and that *Miranda* warnings themselves cannot *sua sponte* give juveniles that ability).

[226] *See supra* notes 170–173 and accompanying text (noting issues with juveniles comprehending and utilizing their *Miranda* rights).

[227] *See supra* note 172 and accompanying text (noting that one study of twelve- to nineteen-year-olds found that 99% of them lacked sufficient understanding of their right to silence and 94% did not comprehend the consequences of waiving their rights).

Thus, one idea to ensure waiver validity is to have parents or guardians available to assist juveniles before *Miranda* waiver and resulting custodial interrogation.[228] But parental presence does not address the juvenile's fundamental lack of understanding of *Miranda* rights and waiver.[229] A parent's presence may have no effect on a child's decision regarding waiver, or it may create an even more coercive environment that is less conducive to voluntary action.[230] Therefore, an alternative requirement that juveniles consult with an attorney before waiving their rights has become popular.[231] But juveniles may not understand what a lawyer can do for them, and a verbal explanation may be unsuccessful in imparting that knowledge.[232] Effectiveness aside, the cost alone of requiring counsel consultation for all juvenile waivers could prohibit its feasibility.[233] Further, requiring counsel consultation could hamper law enforcement investigations and impede legitimate prosecutions.[234]

Some take these ideas further and recommend requiring parent, guardian, or lawyer consent for valid juvenile waiver of *Miranda* rights.[235] The measure that would provide the most protection for juveniles, however, would be a rule

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[228] *See, e.g.*, McGuire, *supra* note 181, at 1380–86 (arguing that the presence of a parent during a juvenile's interrogation is desirable because parent verification of a child's understanding of *Miranda* warnings would remove doubt surrounding waiver and voluntariness).

[229] *See* Kassin et al., *supra* note 12, at 9 (concluding that a parent's presence does not help youth overcome their difficulties with understanding *Miranda* rights and waiver).

[230] *See* Beyer, *supra* note 171, at 28 (surveying seventeen cases where police interrogated juveniles and finding that, in two cases where parents were present, parents instructed their children that the best thing to do was to tell the truth to police without speaking to a lawyer); Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 213–14 (1979) (noting that in a study of 390 interrogations with parental presence that only four percent of parents recommended to their children that they not waive their *Miranda* rights); Hana M. Sahdev, *Juvenile* Miranda *Waivers and Wrongful Convictions*, 20 U. PA. J. CONST. L. 1211, 1231–32 (2018) (noting that parental presence can in some instances be harmful to a child's cause).

[231] *See, e.g.*, Sahdev, *supra* note 230, at 1233–35. Alternatively, some have argued that the ability to consult with either a parent or an attorney would sufficiently ensure waiver validity. *See, e.g.*, Raneta Lawson Mack, *These Words May Not Mean What You Think They Mean: Toward a Modern Understanding of Children and* Miranda *Waivers*, 27 B.U. PUB. INT. L.J. 257, 290 (2018) (suggesting that waiver preclusion is appropriate until a juvenile has had the chance to talk with "an advocate or other trusted adult").

[232] *See* Emily Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1750–56 (1996) (explaining that even where children have the capacity to understand a lawyer's function, they require experience, familiarity, and context to grasp a lawyer's role). Despite this concern, one scholar has suggested that a counsel consultation requirement for juvenile waiver of *Miranda* rights could reduce the number of false confessions to zero. *See* Lapp, *supra* note 40, at 936. Still, that same scholar acknowledged barriers to enacting such a requirement. *See id.* at 936–37 (predicting that a mandatory counsel consultation for juveniles is unlikely because of various prohibitive implications, such as cost).

[233] *See, e.g.*, Powell, *supra* note 108, at 458–59 (observing the possibility of prohibitive costs and calculating that ensuring legal representation at each stationhouse for state police in Kentucky alone would cost approximately $620,000 in salary without accounting for benefits).

[234] Lapp, *supra* note 40, at 937.

[235] *See infra* note 283 and accompanying text (showing three states that employ such a rule).

completely preventing juveniles below a certain age from waiving some or all *Miranda* rights.[236] This solution limits juvenile autonomy and harkens back to the *parens patriae* model of the early twentieth century.[237] Nevertheless, it would be consistent with prohibitions against waiver already in place in some states, such as rules that bar juveniles from waiving their rights to counsel at trial.[238] Still, when considering eliminating juvenile *Miranda* waiver, decisionmakers must determine whether the harm of false and/or involuntary confessions outweighs the therapeutic and/or tangible benefits of plea bargains or the leniency that courts may show defendants who choose to confess.[239]

Most of these additional pre-interrogation protections would not have helped Brendan Dassey.[240] Because he was sixteen with an overall IQ of eighty and verbal IQ of sixty-five, changing the language of his *Miranda* warnings likely would not have helped increase Dassey's understanding of his rights or the consequences of waiving them.[241] One sign of Dassey's inability to grasp the consequence of speaking with interrogators was that Dassey asked if he could go back to school after giving his confession because he had a project due in sixth period.[242] The requirements of parental presence or consent for waiver also would not have helped Dassey because his mother consented to his waiver.[243] Lastly, a lawyer's presence or consent to waiver would not have helped Dassey because his counsel repeatedly arranged for Dassey to speak

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[236] *See, e.g.*, Goldstein et al., *supra* note 170, at 61–63 (arguing that research in the social sciences offers significant support for a rule that juveniles below the age of fifteen should not be able to waive the right to counsel because of that age group's inability to understand their rights or how to use them).

[237] *See* Lapp, *supra* note 40, at 938–39 (considering a ban on juvenile waiver as a restriction of autonomy that perhaps goes too far); *supra* note 152 and accompanying text (defining *parens patriae* and discussing its role in juvenile justice reform throughout the early and middle twentieth century).

[238] Lapp, *supra* note 40, at 938–39 (noting the example of states not allowing juveniles to waive counsel at trial as consistent with the idea of forbidding juvenile *Miranda* waiver because both involve precluding the waiver of constitutional rights).

[239] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 949–50 (2004) (discussing the harms, beyond lost liberty, that result from false confession: stigma, public and professional reputational harm, pecuniary harm, and emotional harm).

[240] *See supra* notes 13–20 and accompanying text (introducing Dassey's case and confession); *supra* notes 27–51 and accompanying text (detailing the tactics used in Dassey's interrogation); *infra* notes 241–245 and accompanying text (explaining that the majority of proposed additional pre-interrogation protections probably would not have helped Dassey).

[241] *See* LaVigne & Miles, *supra* note 14, at 925–26 (noting that Brendan Dassey's overall IQ score of 80 and his verbal IQ score of 65 are evidence that his deficits were mainly verbal and quite significant in all aspects of his life); *supra* notes 223–227 and accompanying text (describing the challenges facing juveniles in understanding their *Miranda* rights).

[242] *See* March 1 Interrogation Transcript, *supra* note 18, at 613–14.

[243] *See* Dassey v. Dittmann (*Dassey III*), 877 F.3d 297, 301 (7th Cir. 2017) (en banc) (noting that Dassey's mother consented to interrogators speaking with Brendan).

alone with a private investigator and detectives.[244] Thus, only banning waiver could have protected Dassey from giving the confession that made the prosecution's case against him.[245]

2. Additional Interrogation Protections

Once juveniles have waived their *Miranda* rights, a new concern arises: whether any resulting statements are voluntary under the due process analysis.[246] Scholarship in law and the social sciences indicates that juveniles lack adequate protection during interrogation for a number of reasons, including high *Miranda* waiver rates, developmental factors that disadvantage their decision making, and external factors, such as manipulative interrogation methods.[247] Increased awareness of juveniles' vulnerability during interrogation has led to strong appeals for increased protections to ensure juveniles' statements are voluntary.[248]

As discussed in the context of juvenile waiver, one suggestion to prevent due process violations during juvenile interrogations is to require the presence of a parent, guardian, or counsel during interrogation.[249] The advantages and disadvantages of this proposal track those previously mentioned regarding requirements for parental or legal representation at the time of waiver.[250]

Many have also advocated for a requirement that law enforcement electronically record custodial interrogations.[251] Although this idea has had proponents since the middle of the twentieth century, it has gained traction only recently.[252] Electronic recording is easy, affordable, and accessible.[253] It also en-

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[244] *See* Dassey v. Dittmann (*Dassey II*), 860 F.3d 933, 942–43 (7th Cir.), *rev'd en banc*, 877 F.3d 291 (7th Cir. 2017); *supra* note 19 and accompanying text (exhibiting the poor legal representation Dassey received at the beginning of his case).

[245] *See supra* note 236 and accompanying text.

[246] *See supra* notes 87–104 and accompanying text (discussing the due process analysis for assessing the voluntariness of confessions).

[247] *See generally* Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971 (2005) (calling for a ban on deceiving juveniles in interrogation "the only constitutionally and morally defensible rule"); *supra* notes 30–37 and accompanying text (discussing widely used interrogation methods and evidencing the coercive nature of those methods); *supra* note 177 and accompanying text (evidencing juveniles' tendencies and traits that render them particularly vulnerable to modern interrogation methods).

[248] *See* Goldstein et al., *supra* note 170, at 47 (noting increasing interest in finding ways to ensure greater protections for juveniles).

[249] *See* Lapp, *supra* note 40, at 933–37 (discussing adult and counsel presence during interrogation).

[250] *See supra* notes 229–234 and accompanying text.

[251] *See, e.g.*, LEO, *supra* note 31, at 291–305 (providing a history of electronic recording as a part of interrogation and considering the advantages and disadvantages of the practice).

[252] *See* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliabilty and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 639 (2004) (showing that recording requirements have arrived slowly and tracking movement in the direction of such practices).

sures accurate preservation of the events that transpire during interrogation with respect to both law enforcement and a suspect's behavior.[254] Thus, electronic recording can deter extreme police practices, but it can do little else to guarantee voluntariness.[255] Indeed, electronic recording does not prevent the taking, making, or eventual admission of false confessions.[256] Further, electronic recording does not cure any of the issues associated with identifying valid *Miranda* waivers.[257]

A final suggestion is to change the way law enforcement interrogates children.[258] Some have looked to police practices in other countries and argued that American law enforcement should abandon coercive practices for an investigative model of questioning.[259] In particular, many seek bans on psychologically manipulative interrogation models, such as the Reid method, in juvenile interrogations.[260]

Like the proposed pre-interrogation protections discussed in the previous subsection, almost all of these proposed additional interrogation protections did not help or would not have helped Brendan Dassey.[261] First, the presence of counsel certainly would not have helped Dassey, considering the fact that his lawyer at one point claimed he was working for the victim of the crime

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[253] LEO, *supra* note 31, at 292 (noting that electronic recording is an easy undertaking); Lapp, *supra* note 40, at 932 (noting that electronic recording is an inexpensive measure).

[254] *See* LEO, *supra* note 31, at 291–92 (exhibiting the value of electronic recording for its ability to create a more objective record); Leo et al., *Promoting Accuracy*, *supra* note 49, at 799–800 (asserting that electronic recording of interrogation from beginning to end "is essential to accurate fact finding about a confession's reliability" and consequently advocating for excluding unrecorded confession evidence on reliability grounds).

[255] Lapp, *supra* note 40, at 932–33 (asserting that, because electronic recording does not help a fact-finder determine a juvenile interogatee's understanding, the real advantage of electronic recording is preventing physical abuse by interrogators and false claims of abuse by interogatees).

[256] *See, e.g.*, Drizin & Colgan, *supra* note 179, at 156 (noting that even though all the confessions that the Central Park Five gave police were false, four out of the five confessions were admitted into evidence at trial).

[257] Goldstein et al., *supra* note 170, at 58.

[258] *See, e.g.*, Birckhead, *supra* note 160, at 447; Spierer, *supra* note 177, at 1743–50; Tepfer et al., *supra* note 55, at 920.

[259] *See, e.g.*, Richard A. Leo & Brian L. Culter, *False Confessions in the 21st Century*, THE CHAMPION, May 2016, at 50, 53 (discussing the interview-based PEACE method developed after England and Wales moved away from coercive investigation practices in the 1980s).

[260] *See, e.g.*, Hannah Brudney, Note, *Confessions of a Teenage Defendant: Why a New Legal Rule Is Necessary to Guide the Evaluation of Juvenile Confessions*, 92 S. CAL. L. REV. 1235, 1264 (2019) (arguing that juveniles need protection from coercive interrogation techniques such as the Reid method and thus their use in juvenile interrogation should automatically subject subsequent statements to a rebuttable presumption of involuntariness); Spierer, *supra* note 177, at 1743–50 (arguing that the Reid method is unconstitutional and advocating for use of the PEACE method as a constitutional alternative).

[261] *See supra* notes 13–20 and accompanying text (introducing Dassey's case and confession); *supra* notes 27–51 and accompanying text (describing the tactics used in Dassey's interrogation); *infra* notes 262–263 and accompanying text.

about which interrogators had questioned Dassey.[262] Next, Dassey's confession was videotaped, yet this documentation did not help him suppress his confession or ultimately provide enough evidence to render his confession legally involuntary on appeal.[263] Just as it seemed that only prohibiting waiver could have helped Dassey prior to questioning, here it likewise seems that only outlawing coercive interrogation methods could have protected him.[264]

3. Additional Post-interrogation Protections

Once juveniles confess, concerns about waiver, process, and reliability remain, but the battleground shifts to the courts, where law enforcement and the prosecution arguably maintain the upper hand.[265] Motions to suppress are so unlikely to succeed that they provide essentially no protection to defendants.[266] Further, the constitutional self-incrimination doctrine provides no protection against false confessions in the absence of legal coercion.[267] Thus, scholars have promoted other shields against the admission of unreliable and recanted juvenile confessions.[268]

One group of scholars has promoted pretrial hearings on confession evidence to ensure reliability.[269] In short, they encourage judges to rely on certain indicia of reliability.[270] The "substantive legal underpinning" for this test is Federal Rule of Evidence 403, which gives judges the discretion to exclude evidence where its prejudicial effect substantially outweighs its probative val-

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[262] *See* Oral Argument at 18:08–18:35, *Dassey III*, 877 F.3d 297 (7th Cir. 2017) (No. 16-3397), http://media.ca7.uscourts.gov/sound/2017/rs.16-3397.16-3397_09_26_2017.mp3 [https://perma.cc/DR7H-LTUV].

[263] *See supra* note 18 and accompanying text (including citations to videotaped portions of Dassey's confession available online). At Dassey's trial, jurors watched hours of closed-caption videotape of Dassey's March 1 interrogation. *See* Transcript of Jury Trial Day 5 at 20–24, *Dassey Trial*, No. 06-CF-88.

[264] *See supra* notes 27–51 and accompanying text (examining the coercive interrogation tactics that detectives employed to procure Dassey's confession); *supra* notes 240–245 and accompanying text (explaining that additional pre-interrogation protections probably would not have helped Dassey, except for a ban on juvenile *Miranda* waivers).

[265] *See supra* notes 169–181 and accompanying text (explaining how the totality-of-the-circumstances test that courts employ to review *Miranda* waiver and confession voluntariness fails to protect juveniles).

[266] *See* Malone, *supra* note 64, at 377–78 (noting that in a study of seven-thousand felony cases, 6.6% of cases made motions to suppress, but only 0.17% of those motions were successful, making the odds of a successful motion to suppress a confession around one in a thousand).

[267] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 784 (lamenting the due process voluntariness test's absence of concern with the reliability or truth of confession evidence).

[268] *See infra* notes 269–274 and accompanying text (introducing recommendations to increase protections against the use of unreliable confession to prosecute juveniles).

[269] *See generally* Leo et al., *Promoting Accuracy*, *supra* note 49 (the group's second, supplemental study); Leo et al., *Bringing Reliability Back in*, *supra* note 80 (the group's first study).

[270] *See* Leo & Ofshe, *supra* note 205, at 438–39.

ue.[271] These scholars, however, would like to reverse this balance and only let in confession evidence where probative value substantially outweighs any prejudicial effect, creating a rule that favors exclusion rather than admissibility.[272] Additionally, these scholars would change the burden of proof for exclusion by assigning the burden to prove reliability to the prosecution, if the defense can first introduce evidence of unreliability.[273] These authors view their suggestion as consistent with the role of judges as gatekeepers and the commonsense point that unreliable evidence has no place in front of a jury in the first place.[274]

B. Additional Protections Against Self-Incrimination for Juveniles Among the States

Thirty-one states and the District of Columbia assess juvenile *Miranda* waiver validity with a totality-of-the-circumstances test that either parallels or closely tracks the federal totality-of-the-circumstances test.[275] The other nine-

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[271] *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). Rule 403 instructs courts to balance "the probative value of and need for evidence against the harm likely to result from its admission." *Id.* advisory committee's note to 1972 proposed rules.

[272] *See* Leo et al., *Promoting Accuracy*, *supra* note 49, at 803–04 (looking to reverse balancing tests with Federal Rule of Evidence 609 as a model).

[273] *See id.* at 804–07. The prosecution would then have to show that a confession is reliable by a preponderance of the evidence. *Id.* at 807.

[274] *See id.* at 808–14. These authors also suggest, but do not similarly explore, the idea that rules of evidence "could be amended to create a specific rule for addressing the reliability of confession evidence in pretrial hearings." *Id.* at 801.

[275] These jurisdictions are Alabama, Alaska, Arizona, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Wisconsin, and Wyoming. *See Ex parte* Landrum, 57 So. 3d 77, 89 (Ala. 2010); State v. J.R.N., 861 P.2d 578, 580–81 (Alaska 1993); State v. Jimenez, 799 P.2d 785, 791 (Ariz. 1990) (en banc); Rambo v. State, 939 A.2d 1275, 1278–79 (Del. 2007); *In re* S.W., 124 A.3d 89, 101–02 (D.C. 2015); Ramirez v. State, 739 So. 2d 568, 575–76 (Fla. 1999) (per curiam); Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976); *In re* Doe, 978 P.2d 684, 691 (Haw. 1999); State v. Samuel, 452 P.3d 768, 786 (Idaho 2019); Taylor v. Commonwealth, 276 S.W.3d 800, 804, 808 (Ky. 2008); State v. Fernandez, 96-2719, p. 5 (La. 4/14/98), 712 So. 2d 485, 487; State v. Hopkins, 2018 ME 100, ¶¶ 39–40, 189 A.3d 741, 753; McIntyre v. State, 526 A.2d 30, 37 (Md. 1987); People v. Daoud, 614 N.W.2d 152, 158 (Mich. 2000); State v. Thompson, 788 N.W.2d 485, 492–93 (Minn. 2010); Dancer v. State, 96-KA-01025-SCT (¶ 19) (Miss. 1998), 721 So. 2d 583, 587; *In re* Miah S., 861 N.W.2d 406, 412–15 (Neb. 2015); Ayala v. State, 399 P.3d 328, 2017 WL 1944321, at *1 (Nev. 2017); State v. Benoit, 490 A.2d 295, 303 (N.H. 1985); *In re* A.A., 222 A.3d 681, 687 (N.J. 2020); *In re* Jimmy D., 938 N.E.2d 970, 973 (N.Y. 2010); State v. Barker, 2016-Ohio-2708, 149 Ohio St. 3d 1, 73 N.E.3d 365, ¶ 42; *In re* L.A.W., 226 P.3d 60, 64 (Or. Ct. App. 2010); Commonwealth v. Williams, 475 A.2d 1283, 1287–88 (Pa. 1984), *superseded by statute on other grounds*, Act of Dec. 11, 1986, P.L. 1521, No. 165, § 7, *as recognized in* Commonwealth v. Kocher, 602 A.2d 1308 (Pa. 1992); *In re* Frances G., 30 A.3d 630, 635 (R.I. 2011); State v. Pittman, 647 S.E.2d 144, 164 (S.C. 2007); State v. Diaz, 2014 SD 27, ¶ 23, 847 N.W.2d 144, 165; *id.* at 165 (Zinter, J., concurring); State v. Callahan, 979 S.W.2d 577, 578 (Tenn. 1998); State v. Dutchie, 969

teen states offer some kind of increased protection above the federal standard.[276] The efficacy of these protections varies because some states or state courts have restricted them to juvenile delinquency proceedings, which means that they do not affect the admissibility of statements by juveniles in criminal

P.2d 422, 427 (Utah 1998); Angel v. Commonwealth, 704 S.E.2d 386, 392–93 (Va. 2011); State v. Jones, 532 N.W.2d 79, 88 (Wis. 1995); Rubio v. State, 939 P.2d 238, 242 (Wyo. 1997).

[276] These jurisdictions are Arkansas, California, Colorado, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Missouri, Montana, New Mexico, North Carolina, North Dakota, Oklahoma, Texas, Vermont, Washington, and West Virginia. *See* ARK. CODE ANN. § 9-27-317 (West 2019) (restricting juvenile waiver of counsel in juvenile proceedings); CAL. WELF. & INST. CODE § 625.6 (West 2019) (forbidding waiver of any *Miranda* rights by juveniles younger than sixteen years old and mandating that failure to give juveniles such opportunity be considered in evaluating admissibility of statements); COLO. REV. STAT. ANN. § 19-2-511 (West 2019) (providing that statements by juveniles in custodial interrogation are inadmissible unless juveniles and their parents/guardians were present and informed of their rights, but allowing juveniles and their parents/guardians to *expressly* waive this requirement after advisement); CONN. GEN. STAT. ANN. § 46b-137 (West 2019) (disallowing waiver of any *Miranda* rights by juveniles less than sixteen years old in delinquency proceedings); 705 ILL. COMP. STAT. ANN. § 405/5-170 (West 2019) (requiring juveniles under the age of fifteen to have legal representation throughout custodial interrogations in delinquency proceedings for crimes that, if committed by an adult, would qualify as enumerated felonies); IND. CODE ANN. § 31-32-5-1 (West 2019) (requiring counsel or parental/guardian consent to a child's waiver of constitutional rights if the child is not emancipated); IOWA CODE ANN. § 232.11 (West 2019) (providing that juveniles less than sixteen years old cannot waive their right to counsel in custodial interrogation without the written consent of a parent/guardian); KAN. STAT. ANN. § 38-2333 (West 2019) (barring the admissibility of statements by juveniles less than fourteen years old not made after consultation with the juvenile's parent or counsel); MO. ANN. STAT. § 211.059 (West 2019) (adding the right to have a parent/guardian present during any custodial interrogation to the warnings due to a juvenile prior to such proceedings); MONT. CODE ANN. § 41-5-331 (West 2019) (mandating that juveniles less than sixteen years old have a parent/guardian or counsel's consent to waive the right to counsel in custodial interrogation); N.M. STAT. ANN. § 32A-2-14 (West 2019) (providing that any statements by juveniles less than thirteen years old are inadmissible and that a rebuttable presumption of inadmissibility attaches to statements given by a thirteen- or fourteen-year-old juvenile to any person in a position of authority); N.C. GEN. STAT. ANN. § 7B-2101 (West 2019) (requiring the presence of a parent/guardian or counsel for any statements by juveniles less than sixteen years old in custodial interrogation to be admissible); N.D. CENT. CODE § 27-20-26 (West 2019) (requiring a parent's presence for all juveniles to waive right to counsel); OKLA. STAT. ANN. tit. 10A, § 2-2-301 (West 2019) (providing that a parent/guardian or counsel must be present for any statements by those less than sixteen years old in custodial interrogation to be admissible); TEX. FAM. CODE ANN. §§ 51.09–51.10 (West 2019) (requiring that waivers of constitutional rights by juveniles be in writing and made by both juveniles and their counsel); WASH. REV. CODE ANN. § 13.40.140 (West 2019) (requiring a parent's consent for waivers of juveniles under twelve); W. VA. CODE ANN. § 49-4-701(l) (West 2019) (providing that statements, other than res gestae, made to law enforcement or in custody by juveniles are inadmissible if: made by those thirteen years old and younger and not made in the presence of a juvenile's counsel; or made by those fourteen to sixteen years old and not made in the presence of counsel or parents/custodians informed of the juvenile's rights); Commonwealth v. Smith, 28 N.E.3d 385, 388–90 (Mass. 2015) (mandating that children under the age of fourteen require parental presence to waive, and those between fourteen and eighteen are exempt from this requirement only if there is a particular finding of intelligent understanding on behalf of the juvenile); *In re* E.T.C., 449 A.2d 937, 939–40 (Vt. 1982) (requiring that juveniles have the opportunity to consult with an interested adult who is independent from the prosecution and understands the juvenile's rights before juveniles can waive their *Miranda* rights).

proceedings.[277] Most of these protections are codified, but Massachusetts and Vermont still have judicial rules.[278] Some state supreme courts adopted increased measures, but have since overturned them, in part due to a belief that they allowed guilty offenders an unmerited advantage over law enforcement.[279]

The increased protections that the nineteen other states have adopted fall into a few categories.[280] Six states require parental or counsel presence and consultation before juveniles may waive their *Miranda* rights.[281] The ages to which these protections apply range from all juveniles younger than eighteen years old to only those below the age of fourteen.[282] Three states require that

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[277] *Compare* B.A. v. State, 100 N.E.3d 225, 231 (Ind. 2018) ("When *Miranda* applies to [juveniles], [IND. CODE ANN. § 31-32-5-1] does too . . . . If the statute is not followed, the State cannot use any statements as evidence." (citation omitted)), *and* Evans v. Mont. Eleventh Jud. Dist. Ct., 2000 MT 38, ¶¶ 18–21, 995 P.2d 455, 458–59 (showing that the protections afforded to juveniles in MONT. CODE ANN. § 41-5-331 extend to prosecutions in criminal court), *and* Breding v. State, 1998 ND 170, ¶ 10, 584 N.W.2d 493, 497 (clarifying that the protections provided for juveniles in N.D. CENT. CODE § 27-20-26 extend to custodial interrogation), *with* State v. Griffin, 2017 Ark. 67, at 4–7, 513 S.W.3d 828, 830–32 (acknowledging the Supreme Court of Arkansas's repeated understanding of ARK. CODE ANN. § 9-27-317 as applicable only to juvenile proceedings), *and In re* Anthony L., 43 Cal. Rptr. 3d 688, 697–99 (Ct. App. 2019) (reflecting on the lack of clarity in how to weigh failure to conform to CAL. WELF. & INST. CODE § 625.6 and concluding that the federal constitutional maximums control unless the California state legislature more clearly chooses to raise that bar), *and* State v. Canady, 998 A.2d 1135, 1141–43 (Conn. 2010) (refusing to apply CONN. GEN. STAT. ANN. § 46b-137 to juveniles prosecuted as adults in criminal court).

[278] *See Smith*, 28 N.E.3d at 389; *E.T.C.*, 449 A.2d at 939–40.

[279] *See* Freeman v. Wilcox, 167 S.E.2d 163 (Ga. Ct. App. 1969), *overruled by Riley*, S.E.2d at 925–26; *In re* Dino, 359 So. 2d 586 (La. 1978), *overruled by Fernandez*, 96-2719, p. 5, 712 So. 2d at 487 (explaining that "[t]he Louisiana Constitution requires no more" than the federal totality-of-the-circumstances rule that the Supreme Court announced in *Fare v. Michael C.*); Commonwealth v. Christmas, 465 A.2d 989 (Pa. 1983) (adopting a *per se* rule to presume that waivers by juveniles are invalid), *abrogated by Williams*, 475 A.2d at 1287–88; *see also* Huang, *supra* note 158, at 456–64 (discussing the overturning of *per se* rules in Georgia, Louisiana, and Pennsylvania and the rationales of those states' courts).

[280] *See infra* notes 281–286 and accompanying text.

[281] *See* IND. CODE ANN. § 31-32-5-1 (requiring parent or counsel presence for waiver by all juveniles except those emancipated by marriage or in accordance with laws of another state or jurisdiction); KAN. STAT. ANN. § 38-2333 (providing that statements by juveniles less than fourteen years old not made after consultation with a parent or counsel are inadmissible); N.D. CENT. CODE § 27-20-26 (requiring a parent's presence for all juveniles to waive their right to counsel); TEX. FAM. CODE ANN. § 51.09 (mandating that waivers of constitutional rights by juveniles be in writing and made by both juveniles and their counsel); *Smith*, 28 N.E.3d at 388–90 (mandating that children under the age of fourteen require parental presence to waive, and those between fourteen and eighteen are exempt from this requirement only if there is a particular finding of intelligent understanding on behalf of the juvenile); *E.T.C.*, 449 A.2d at 939–40 (requiring that juveniles have the opportunity to consult with an interested adult who understands the juvenile's rights and is independent from the prosecution before juveniles can waive their *Miranda* rights).

[282] *Compare, e.g.*, IND. CODE ANN. § 31-32-5-1 (mandating parent or counsel presence for waiver by all juveniles not exempt by marriage), *with Smith*, 28 N.E.3d at 388–90 (requiring that juveniles less than fourteen years old have parental presence to waive their *Miranda* rights).

juveniles have parental or counsel consent to waive their rights.[283] Six states require that a parent or counsel be present during the custodial interrogation of a juvenile.[284] Two states hold that juveniles cannot waive the right to the assistance of counsel.[285] Only one state, New Mexico, deems all statements by juveniles inadmissible, but that rule only applies to those under the age of thirteen.[286]

At least twenty-five states and the District of Columbia require electronic recording of certain types of interrogations, usually those concerning serious felonies and homicides.[287] The consequences of not following these requirements vary greatly, from *per se* exclusion of confession evidence, to jury instructions concerning the credibility of statements.[288] Eight states and the District of Columbia have specific electronic recording rules concerning juvenile interrogation.[289] Only four of those jurisdictions, California, Illinois, North Carolina, and Texas, also offer increased protections beyond the federal totality test for juveniles.[290]

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[283] *See* IOWA CODE ANN. § 232.11 (requiring written consent of a parent or guardian for juveniles under the age of sixteen to waive their to counsel in custodial interrogations); MONT. CODE ANN. § 41-5-331 (requiring that juveniles less than sixteen years old have a parent's/guardian's or counsel's consent to waive the right to counsel in custodial interrogation); WASH. REV. CODE ANN. § 13.40.140 (requiring a parent's consent for waiver by juveniles under twelve).

[284] *See* COLO. REV. STAT. § 19-2-51 (applying to any juvenile); CONN. GEN. STAT. ANN. § 46b-137 (making statements of those under sixteen inadmissible in delinquency proceedings unless they were made in the presence of parent or guardian); 705 ILL. COMP. STAT. ANN. § 405/5-170 (requiring presence of counsel in delinquency proceedings for juveniles less than fifteen years old at time of the alleged act committed, if the alleged act is a crime enumerated in the statute); N.C. GEN. STAT. ANN. § 7B-2101 (requiring the presence of parent, guardian, custodian, or counsel for any statements by juveniles less than sixteen years old in custodial interrogation to be admissible); OKLA. STAT. ANN. tit. 10A, § 2-2-301 (providing that a parent/guardian or counsel must be present for any statements by those less than sixteen years old in custodial interrogation to be admissible); W. VA. CODE ANN. § 49-4-701 (requiring attorney presence for statements by those under age fourteen to be admissible, and for juveniles of ages fourteen to sixteen to be made in the presence of counsel or a parent where either consents to the child's statements and is appraised of the child's rights).

[285] *See* CAL. WELF. & INST. CODE § 625.6 (prohibiting juveniles from waiving counsel if less than sixteen years old); 705 ILL. COMP. STAT. ANN. § 405/5-170 (disallowing waiver of the assistance of counsel for juveniles less than fifteen years old in juvenile proceedings where alleged crimes would qualify as enumerated felonies if committed by adults).

[286] *See* N.M. STAT. ANN. § 32A-2-14 (providing that any statements by juveniles less than thirteen years old are inadmissible and that a rebuttable presumption of inadmissibility attaches to any statements given by a thirteen- or fourteen-year-old juvenile to any person in a position of authority).

[287] *See* Goldstein et al., *supra* note 170, at 55–60 (cataloguing and analyzing some state rules related to the electronic recording of custodial interrogation); Lapp, *supra* note 40, at 932 (same).

[288] *See* Goldstein et al., *supra* note 170, at 56–57 (commenting that various consequences for failing to record interrogations range from barring a confession's admission to submitting that failure to a fact-finder for consideration).

[289] *See id.* at 55–56 & n.295 (cataloguing eight state rules); Lapp, *supra* note 40, at 932 (noting the District of Columbia's policy).

[290] *See supra* note 276 and accompanying text.

III. TOWARD A JUVENILE SELF-INCRIMINATION DOCTRINE

The two concerns surrounding confession evidence—the circumstances under which confessions are made and whether those confessions are trustworthy—remain as inextricable as ever.[291] Yet, the American self-incrimination doctrine has divided them: constitutional law governs confession-making and the law of evidence governs confession trustworthiness.[292] Meanwhile, interrogation methods have become more sophisticated and manipulative.[293] Research has proven both that modern interrogation has significantly coercive effects on juveniles and that this external pressure, combined with developmental challenges juveniles face, can lead to false confessions.[294] But as this Note has shown, despite these significant scientific advances, the law governing confession evidence is not similarly sophisticated to protect juveniles from such pressure or to exclude unreliable confessions.[295] Indeed, neither *Miranda v. Arizona* and the due process voluntariness test nor the law of evidence fulfills their intended objectives of ensuring juvenile confession voluntariness and trustworthiness, respectively.[296] As a result, the self-incrimination doctrine leaves juveniles exposed to gross injustice by recognizing as legally voluntary and admissible confessions of dubious *actual* volition that are at best unreliable.[297]

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[291] *See supra* notes 75–200 and accompanying text (showing how these twin concerns are central to evaluating confession evidence both before and after the constitutionalization of the self-incrimination doctrine).

[292] *See supra* notes 75–200 and accompanying text (tracking the U.S. Supreme Court's separation of these concerns into constitutional doctrine and evidentiary law).

[293] *See* LEO, *supra* note 31, at 77, 113 (pointing out that modern, psychologically manipulative interrogation methods stem from physically coercive practices in the early twentieth century and have evolved into only more manipulative forms); *supra* notes 30–37 and accompanying text (discussing commonly used modern interrogation techniques).

[294] *See supra* notes 169–209, 223–227 and accompanying text (discussing the lack of protection against self-incrimination for juveniles and their vulnerability under current law); *see also supra* notes 51–54 and accompanying text (explaining the power and highly prejudicial effects of confession evidence).

[295] *See* Dassey v. Dittmann (*Dassey III*), 877 F.3d 297, 331 (7th Cir. 2017) (en banc) (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) (discussing "the chasm between how courts have historically understood the nature of coercion and confessions and what we now know about coercion with the advent of DNA profiling and current social science research").

[296] *See supra* notes 169–181 and accompanying text (explaining that the *Miranda* doctrine and due process voluntariness fail to offer meaningful protection to juveniles because neither properly accounts for their vulnerabilities in practice or theory to ensure that their rights are protected and statements are voluntary); *supra* notes 182–200 and accompanying text (showing that the law of evidence does not consistently or effectively root out false confessions); *supra* notes 201–209 and accompanying text (detailing the significant risk of false confessions for juvenile suspects and the resulting danger of wrongful conviction that follows them).

[297] *See Dassey III*, 877 F.3d at 331–37 (questioning the justice of current interrogation practices and the legal standards for evaluating confessions and noting that developments in science and psychology provide an understanding of confession making that radically differs from the now-outdated beliefs that created the current confession doctrine).

Part II of this Note showed that although over one-third of states provide some form of increased protection against self-incrimination for juveniles, such safeguards often do not apply or do not extend to criminal proceedings.[298] Using Brendan Dassey's tragic conviction as a case study, that Part also illustrated how only a ban on juvenile waiver or interrogation could have prevented detectives from extracting a highly unreliable confession from Dassey.[299]

Thus, this Note concludes that bold measures are necessary to create meaningful protections against self-incrimination for juveniles.[300] Part III of this Note recognizes that, with the self-incrimination doctrine split between the two, both constitutional and evidentiary law could provide solutions.[301] Section A of this Part suggests that, because *Miranda* and the federal due process test fail juveniles in practice and in theory, using juveniles' confessions against them in criminal prosecutions violates due process.[302] Section B suggests that jurisdictions should amend evidentiary rules to make juvenile confessions inadmissible on reliability grounds.[303]

A. The Use of Juvenile Confessions in Criminal Prosecutions Violates Due Process

For a confession from a custodial interrogation to be admissible, it must follow a valid *Miranda* waiver and be voluntary.[304] Yet most juveniles, especially those below the age of fifteen, cannot understand either their rights or the consequences of waiving them and giving statements to law enforcement.[305] Considering that juveniles with less education and intellectual capaci-

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[298] *See supra* notes 275–290 and accompanying text.

[299] *See supra* notes 240–245 and accompanying text (explaining why suggested increased pre-interrogation protections other than a ban on *Miranda* waiver would have failed to help Brendan Dassey); *supra* notes 261–264 and accompanying text (discussing how only prohibiting interrogation methods completely could have protected Dassey from confession during his interrogation); *see also supra* notes 13–20 and accompanying text (introducing Dassey's case and confession); *supra* notes 27–51 and accompanying text (detailing the tactics used in Dassey's interrogation and showing the unreliability of his statements).

[300] *See infra* notes 304–344 and accompanying text.

[301] *See infra* notes 304–344 and accompanying text.

[302] *See infra* notes 304–327 and accompanying text.

[303] *See infra* notes 328–344 and accompanying text.

[304] *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (noting that *Miranda* warnings, as well as the due process voluntariness inquiry, are requirements).

[305] *See* Feld, *Behind Closed Doors*, *supra* note 32, at 409–10 (discussing juveniles' inability to comprehend the meaning or consequences of exercising their *Miranda* rights or not exercising them); Goldstein et al., *supra* note 170, at 31 (surveying multiple studies on juvenile comprehension of *Miranda* rights across different juvenile age groups as all reporting significant lack of understanding); Grisso, *supra* note 170, at 1160–61 (concluding that waivers by juveniles aged fourteen and under are meaningless because that age group cannot understand those rights and asserting that "to hold otherwise would render ineffective the juveniles' right to remain silent and to counsel by giving effect to waivers unknowingly made"); Woolard et al., *supra* note 171, at 690–94 (reporting that only 30%

ty are at a higher risk of coming into contact with the criminal justice system, it is highly probable that a significant number of juvenile interogatees between the ages of fifteen and seventeen are as incapable of understanding *Miranda* rights as the average juvenile in the below-fifteen group.[306] Further, the totality-of-the-circumstances test cannot adequately assess and distinguish actual waiver and voluntariness in the few juvenile cases where it may be valid.[307] This is especially true considering the pervasive impact of (legal) deceptive and manipulative interrogation practices.[308] In theory, one can add nothing to a totality-of-the-circumstances test; it necessarily already accounts for everything.[309] But something is missing, because research uniformly suggests that a significant majority of juvenile waivers are invalid and involuntary while courts generally hold the opposite.[310]

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of eleven- to thirteen-year-olds, 52% of fourteen- to fifteen-year-olds, and 74% of sixteen- to seventeen-year-olds understood their *Miranda* rights in a study). *See generally* Beyer, *supra* note 171 (detailing heartbreaking stories of juveniles' inability to understand their *Miranda* rights).

[306] *See* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 44–45 (2006) (observing that this risk is likely higher both because populations used in studies do not include representative samples of the youth who actually come into contact with police and possess a poorer understanding of *Miranda* rights, and because during actual interrogation juveniles will be more submissive); Lapp, *supra* note 40, at 918 (predicting that rates of lack of understanding are probably higher because many experiments are in controlled environments due to ethical obligations that preclude researchers from putting juvenile participants under the stress of interrogation which would reduce individuals' capacities to understand). When considering disparate impact, it is important to note that those from poor and minority communities, and especially Black children, disproportionately suffer from misconceptions about their rights because racialization only compounds a child's comprehension issues when facing interrogation. *See* Donna M. Bishop, *The Role of Race and Ethnicity in Juvenile Justice Processing*, *in* OUR CHILDREN, THEIR CHILDREN: CONFRONTING RACIAL AND ETHNIC DIFFERENCES IN AMERICAN JUVENILE JUSTICE 23, 45 (Darnell F. Hawkins & Kimberly Kempf-Leonard eds., 2005) (concluding that research shows that "minority youths are more likely than whites to be arrested, referred to court, and detained by police"); Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 412–27 (2017) (discussing how racialization has created a reality where "when Black youths have interactions with police, they are more likely than white youths to give up a legal right"); Lapp, *supra* note 40, at 918 (noting that studies suggest those from minority and impoverished backgrounds are more likely to have a misconception that asserting rights will lead to punishment from the police).

[307] *See supra* notes 178–181 and accompanying text (calling into question the ability of the totality-of-the-circumstances test to adequately assess a juvenile's ability to validly waive *Miranda* rights or voluntarily make statements in custodial interrogation).

[308] *See Dassey III*, 877 F.3d at 336 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) (remarking that the Supreme Court's rulings allow "for significantly deceptive and manipulative interrogation techniques"); LEO, *supra* note 31, at 121–62 (illustrating a number of adversarial interrogation tactics, including ploys and psychological coercion); *supra* notes 30–37 and accompanying text (discussing the Reid method's tactics and showing their emphasis on psychological control and manipulation).

[309] *See* Lapp, *supra* note 40, at 958 (noting that the totality-of-the-circumstances test *should* protect juveniles where interrogators take advantage of their weaknesses but does not).

[310] *See Dassey III*, 877 F.3d at 333 ("[O]ur 'modern constitutional standards' come from a fifty-year-old understanding of human behavior, and when what we once thought we know about the psy-

Thus, because most juveniles cannot validly waive their *Miranda* rights, and because custodial interrogation severely compromises their ability to act voluntarily, instituting two new constitutional requirements under the Fifth and Fourteenth Amendments is appropriate.[311] First, juveniles should not be able to waive their right to counsel in custodial interrogations.[312] Second, juveniles should be able to waive their right to remain silent, but not their right against self-incrimination.[313] This means that juveniles could talk to police, but that their statements would not be admissible against them in court.[314]

These rules would eliminate the risk of false confessions harming juveniles as well as fix the shortcomings of *Miranda* and the due process voluntariness test for juveniles.[315] Further, requiring counsel in juvenile custodial interrogation would ensure that those least equipped to navigate police interrogation and the justice system receive professional support as early as possible.[316] Although critics fear such safeguards would inhibit police investigation and remove persuasive evidence, this solution does not seek to encumber police.[317] This rule still allows police to obtain useful information from individuals who wish to cooperate; it encourages police to investigate thoroughly and find evidence, rather than manufacture it in the interrogation room.[318]

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chology of confessions we now know not to be true?"); Huang, *supra* note 158, at 448 n.76 (citing *In re* B.M.B., 955 P.2d 1302, 1306 (Kan. 1998)) (evidencing a trial judge losing sight of juvenile vulnerability in the midst of assessing multiple factors); Lapp, *supra* note 40, at 928–29 (discussing instances where courts affirmed *Miranda* waivers as valid even though many factors pointed against such a conclusion under the totality-of-the-circumstances test).

[311] *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of the law . . . ."); *infra* notes 312–326 and accompanying text.

[312] *See* CAL. WELF. & INST. CODE § 625.6 (West 2019) (prohibiting juveniles from waiving counsel if they are less than sixteen years old); 705 ILL. COMP. STAT. ANN. § 405/5-170 (West 2019) (disallowing waiver of the assistance of counsel for juveniles less than fifteen years old in juvenile proceedings where alleged crimes qualify as enumerated felonies if committed by adults).

[313] *Cf.* N.M. STAT. ANN. § 32A-2-14 (West 2019) (providing that any statements by juveniles less than thirteen years old are inadmissible and that a rebuttable presumption of inadmissibility attaches to any statements given by a thirteen- or fourteen-year-old juvenile to any person in a position of authority).

[314] Proper consideration of how police could or could not use such statements by juveniles against other suspects and defendants is outside the scope of this Note because its primary concern is the protection of juveniles against self-incrimination.

[315] *See supra* notes 169–181 and accompanying text (evidencing these failures and their significant consequences).

[316] *See generally* McMullen, *supra* note 247 (considering juveniles as a highly vulnerable group and arguing that protections against manipulative interrogation is constitutionally and morally imperative).

[317] *See* Lapp, *supra* note 40, at 951–58 (noting objections to removing juvenile confessions from evidence as having serious consequences on criminal prosecution and a cost to society that must be recognized).

[318] *See id.* at 955 (observing that fewer admissible juvenile confessions would cause police to put more effort into fact development and spend more time pursuing higher-risk offenders); *supra* notes 313–314 and accompanying text.

This rule also does not require juveniles to relinquish the so-called benefits of waiver: leniency for cooperation or the therapeutic benefits of confession.[319] Juveniles still retain autonomy to plead however they may choose and make any statement of confession in court.[320] Further, police could testify regarding a defendant's cooperation or submit affidavits through probationary officers or counsel at sentencing hearings.[321]

It is true, and often repeated, that *Miranda* does not require a lawyer at every police station.[322] To the extent that enforcement of this rule would require otherwise, it would not put a strain on the system equivalent to ensuring counsel for all suspects because juveniles represent only a small percentage of arrests each year.[323] This rule would incur costs, but they would be costs spent toward fixing the criminal justice system, rather than costs that the system currently wastes on motions to suppress, trials, and the immeasurable social and economic costs of incarcerating youth suffering from the consequences of legally invalid waivers, involuntary statements, and false confessions.[324]

In banning the death penalty for juveniles under the Eighth and Fourteenth Amendments, the U.S. Supreme Court relied on scientific studies that described the developmental limitations of juveniles.[325] The Court or Congress should consider doing the same to reform the self-incrimination doctrine and provide juveniles with meaningful protections against self-incrimination.[326] Whichever path to reform the Court or Congress deems appropriate, this coun-

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[319] *See* Lapp, *supra* note 40, at 959–61 (discussing the supposed benefits of confession and noting that the Supreme Court recognized the therapeutic rationale for confession as a dangerous line of reasoning that could lead to others unduly influencing a juvenile's decision to confess).

[320] *See id.* (considering reasons why defendants may want to confess and how that decision can offer them some benefits).

[321] *See id.* at 959 (noting that confessions enable plea deals and lower sentences).

[322] *See* Miranda v. Arizona, 384 U.S. 436, 474 (1966) ("This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners.").

[323] *See* CRIME DATA EXPLORER, *supra* note 206 (showing that only seven percent of arrests in 2018 were arrests of juveniles).

[324] *See, e.g.*, Children & Family Justice Ctr., 3 *Community Safety & the Future of Illinois' Youth Prisons*, Mar. 2018, at 1, 2–3, https://www.law.northwestern.edu/legalclinic/cfjc/documents/communitysafetymarch.pdf [https://perma.cc/JT93-W9DL] (estimating a cost of $120,000,000 for the direct costs of incarcerating youth in Illinois alone and remarking that direct costs are a tiny portion of the total economic impact of juvenile incarceration).

[325] *See generally* Roper v. Simmons, 543 U.S. 551 (2005). In fact, the Court has already made many conclusions to this end. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 68 (2010) ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."); *Roper*, 543 U.S. at 569 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures . . . .").

[326] *See generally* Birckhead, *supra* note 160 (discussing how the Supreme Court's jurisprudence evolved in *Roper v. Simmons* and accordingly analyzing how that rationale can extend to the self-incrimination doctrine).

try must be better than one that sanctions children making *de facto involuntary* confessions at the hands of its adults only to convict them solely on that basis.[327]

B. Rules of Evidence Should Make Juvenile Confessions Inadmissible

Although the Supreme Court has tasked the law of evidence with determining the reliability of confessions, it routinely fails to keep out unreliable and false confessions as well as prevent subsequent wrongful convictions.[328] In fact, courts generally do not review confession evidence for reliability.[329] Of course, this a serious problem because both false evidence and unreliable evidence have no proper use against a defendant in the courtroom.[330] Research shows that judges and jurors have great difficulty identifying false confessions.[331] The inability of most juries to evaluate confession evidence in a neutral manner does not help this process.[332]

Suggestions to ferret out unreliable or false confessions, such as the reliability tests discussed above, are complicated and would be difficult to implement, even though judges already have experience assessing reliability.[333] A simpler and more administrable solution thus far unexplored would be an evidentiary rule dealing with juvenile confessions specifically.[334] Two elements drive the adoption of new evidentiary rules: ensuring reliability and advancing

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[327] *See Dassey III*, 877 F.3d at 333 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting). "[E]ven one coerced false confession is 'very troubling.' Indeed any coerced false confession is an affront to due process and cannot stand." *Id.* (citation omitted) (quoting *id.* at 318 n.8 (majority opinion)). The subject of the case quoted in the previous sentence, Brendan Dassey, remains incarcerated solely because of his retracted and highly problematic confession. *See id.* at 319 (Wood, C.J., joined by Rovner & Williams, JJ., dissenting); *supra* notes 13–20 and accompanying text (introducing Dassey's case and confession); *supra* notes 27–51 and accompanying text (exploring Dassey's interrogation, the tactics used against him, and the unreliability of his statements).

[328] *See supra* notes 52–54 and accompanying text.

[329] Leo et al., *Promoting Accuracy*, *supra* note 49, at 777. Confessions come into evidence through Federal Rule of Evidence 801(d)(2)(A) or a state-equivalent rule. *See* FED. R. EVID. 801(d)(2)(A). Rule 801(d)(2)(A) provides both that statements offered against an opposing party that were made by that party in an individual capacity are not hearsay and that prosecutors do not need to introduce any evidence of trustworthiness for such admissions. *See id.* advisory committee's note.

[330] *See, e.g.*, Leo et al., *Promoting Accuracy*, *supra* note 49, at 793 (noting that false evidence inherently lacks any probative value).

[331] *Id.* at 775 (noting that people generally cannot tell the difference between a false and true confession because they often "rely on behavioral clues" that have no relation to truth or deception).

[332] *Id.* at 774 (explaining that people see false confessions as irrational and thus have trouble discounting evidence for reasons beyond their understanding); *id.* at 775 (noting that many people still believe they would be able to spot a false confession).

[333] *See supra* notes 269–274 and accompanying text (laying out a detailed proposal of pretrial screening measures for unreliable confessions under the law of evidence).

[334] *Cf.* FED. R. EVID. 609(d) (showing that the Federal Rules of Evidence offer greater protection to juveniles regarding the use of criminal convictions as impeachment evidence); *see infra* notes 335–344 and accompanying text (discussing why adopting an evidentiary rule concerning juvenile confessions is sensible).

social policy.[335] Juvenile confessions are particularly unreliable because juveniles falsely confess at a rate double to that of adults.[336] The percentage of admitted confessions that are false may be even higher than the number ever recanted and asserted as false by defense counsel.[337] Thus, on reliability grounds, a rule excluding juvenile confessions is reasonable and advisable.[338]

Good social policy further bolsters this reform.[339] There is no specific statistical marker at which the law of evidence should or should not consider something to be relevant.[340] It is society's choice to continue to admit juvenile confession evidence in light of the established, significant chance that it is false.[341] Entrenched in the national conscience, however, is the idea that it is better to have ten guilty persons go free than one innocent person wrongly imprisoned.[342] Furthermore, protecting children where possible is a strong societal interest that deserves recognition.[343] Thus, as long as the law permits the

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[335] *See generally* H. CONF. REP. NO. 93-1597 (1974) (detailing concerns of policy and reliability in the adoption of the Federal Rules of Evidence); S. REP. NO. 93-1277 (1974) (same); H. REP. NO. 93-650 (1973) (same).

[336] *See supra* note 55 and accompanying text (showing that that juveniles confess at an alarming rate and that the younger an individual is, the more likely interrogation of that individual will result in a false confession).

[337] *Cf. supra* note 306 and accompanying text (explaining that scholars predict increased rates of false confession in data pools from which they cannot collect data).

[338] *See supra* notes 333–337 and accompanying text.

[339] *See* Lapp, *supra* note 40, at 958 (suggesting that the price of a legal rule that removes juvenile confessions from the criminal justice system is worth paying to preserve the dignity and constitutional rights of juveniles).

[340] *See* FED. R. EVID. 402 ("Irrelevant evidence is not admissible."). Relevance, of course, depends upon reliability. *See id.* R. 401 advisory committee's note (showing that relevancy is concerned with logic, experience, and science).

[341] *See Dassey III*, 877 F.3d at 333 (Rovner, J., joined by Wood, C.J., & Williams, J., dissenting) ("Innocent people do in fact confess, and they do so with shocking regularity."); *supra* note 55 and accompanying text (showing that that juveniles confess at a high rate and double that of adults).

[342] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring); United States v. Doyle, 130 F.3d 523, 538 (2d Cir. 1997) ("[U]nder the American system of justice, it is preferable to let ten guilty men go free than to convict one innocent man . . . .").

[343] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 794 (2011). "No doubt a State possesses legitimate power to protect children from harm . . . ." *Id.* The Supreme Court has repeatedly stressed that juveniles are particularly at risk when it comes to police interrogation, and thus require special protection in the criminal justice system. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011) ("A child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class." (citations omitted) (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); then quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting))); Fare v. Michael C., 442 U.S. 707, 732 (1979) (Powell, J., dissenting) ("This Court repeatedly has recognized that 'the greatest care' must be taken to assure that an alleged confession of a juvenile was voluntary." (quoting *In re* Gault, 387 U.S. 1, 55 (1967))); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (noting that when the justice system considers children's interactions with law enforcement, it "deal[s] with 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"); Haley v. Ohio, 332 U.S. 596, 599–600 (1948) (plurality opinion) ("[W]e

coercive interrogation of juveniles, jurisdictions should ensure the reliability of evidence by which they convict juveniles by adopting a rule of evidence that precludes the use of juvenile confessions in criminal cases.[344]

CONCLUSION

The constitutionalization of the self-incrimination doctrine in the United States divided the doctrine's two main concerns, the voluntariness and trustworthiness of confessions, into constitutional law and the law of evidence, respectively. Yet these two concerns surrounding confessions remain inextricable. Because it is widely agreed upon both that constitutional law fails to ensure that juvenile confessions are truly voluntary and that the law of evidence does not root out unreliable and false confessions, neither half of this divided self-incrimination doctrine is fulfilling its purpose. Either area of law could provide juveniles with meaningful protection against self-incrimination if it incorporated what researchers, scholars, and jurists now know: that false confessions happen; that those in the courtroom cannot identify false confessions; and that juveniles are at a particularly high risk for making involuntary confessions that can put them behind bars. Change is overdue and necessary to avoid further injustice.

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cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.").

[344] *See supra* notes 328–343 and accompanying text.