# OH, THE PLACES YOU'LL GO!—PRISON: HOW FALSE EVIDENCE IN JUVENILE INTERROGATIONS UNCONSTITUTIONALLY COERCES FALSE CONFESSIONS

*Andrew J. Greer**

ABSTRACT

*Since the 1970s, American law enforcement officers have almost exclusively employed the Reid Technique during custodial interrogations. While the interviewing strategies promulgated by John E. Reid & Associates, Inc. effectively elicit true confessions from the guilty, they often coerce false confessions from the innocent—especially among juvenile suspects. The Supreme Court has only marginally expanded the rights of juveniles in the context of custodial interrogations, holding inadmissible confessions obtained by lying about a confession's legal consequences—such as false promises of leniency. However, police may continue to make false assertions of evidence to juvenile detainees. Accordingly, to protect juveniles' Fifth Amendment rights to due process and against self-incrimination, law enforcement must be prohibited from falsely asserting evidence. Due to juveniles' immaturity in judgment, susceptibility to external pressures, and developing brains, the Supreme Court has already recognized children differ meaningfully from adults, and therefore require stronger constitutional safeguards in* Miranda*, death penalty, and mandatory life without parole sentencing jurisprudence. Conversely, the Court has neglected to apply the same research and reasoning supporting these holdings to the false confession doctrine. Eliminating false assertions of evidence from juvenile custodial interrogations is both a moral and constitutional obligation. Moreover, it is consistent with the PEACE approach, an investigative technique equally successful as the*

* J.D. Candidate, 2018, Drexel University, Thomas R. Kline School of Law; B.S. Secondary English Education, Temple University. I would like to thank my family, friends, and cat—Stormageddon: Dark Lord of All—for their love, support, and walks across my keyboard (respectively). I would also like to thank the editors of the *Drexel Law Review* for their diligence and commitment to excellence in all the publication's endeavors.

*Reid Method in obtaining true confessions, but with demonstrably lower false confession rates. This Note argues evidentiary deception during interrogations impermissibly elicits false confessions from children and should be replaced with less coercive tactics able to withstand constitutional scrutiny and effectively match the true criminal to the crime.*

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## INTRODUCTION

"Brendan, I want you . . . to relax."[1] Seventeen-year-old Brendan Dassey sits reclined on a couch in a small, albeit comfortable, interviewing room in the Manitowoc County Sheriff's Office. Investigator Mark Wiegert and Special Agent Tom Fassbender begin the interview with Brendan friendly enough, but their tactics following these pleasant introductions take a sinister and deceptive turn. Over the next three hours, Wiegert and Fassbender convince Brendan that the only reasonable means of maintaining his innocence in Teresa Halbach's murder is to "be honest" with them, refusing to accept any answers Brendan offers that conflict with their story.[2] "We have the evidence Brendan[;] we just need you [to] be honest with us,"[3] they implore. Prompted with the information the police have provided, trusting their promise that they are "in [his] corner,"[4] Brendan Dassey confesses to murdering Teresa Halbach at the command of his uncle, Steven Avery.

Although the tactics Wiegert and Fassbender used against Brendan—notably featured in the Netflix documentary series, *Making a Murderer*—may be shocking, they are nothing new for American juveniles unlucky enough to become acquainted with the American justice system. Police employ similarly coercive interrogation strategies across the country;[5] however, the confessions they elicit vary considerably in admissibility.[6] While

1. Interview by Mark Wiegert & Tom Fassbender with Brendan Dassey, Suspect, in Manitowoc Cty., Wis., at 539 (Mar. 1, 2006), [hereinafter Interview of Brendan Dassey] http://jenniferjslate.com/wp-content/uploads/2016/01/InterviewTranscript_3.1.06.pdf.

2. *Id.* at 547.

3. *Id.* at 584.

4. *Id.* at 540.

5. *See* Brian C. Jayne & Joseph P. Buckley, *The Investigator Anthology, Chapter One: The Reid Technique*, JOHN E. REID & ASSOCIATES, INC., https://www.reid.com/educational_info/criticteчnique.html (last visited Sept. 25, 2017) (boasting over 200 training seminars per year across the country).

6. *Compare* United States v. Sanchez, 614 F.3d 876, 888 (8th Cir. 2010) (holding the juvenile-appellee's confession admissible under the "totality of the circumstances" approach discussed later in this Note), *with In re* Elias V., 188 Cal. Rptr. 3d 202, 225–28 (Cal. Ct. App. 2015) (holding the juvenile appellant's confession inadmissible after considering different factors under the same "totality" framework).

the Supreme Court has held the suspect's age must be considered in determining whether a child must be read *Miranda* warnings,[7] police are nevertheless permitted to interrogate children using the same coercive tactics implemented during adult custodial interrogations once the child waives his right to remain silent. Presenting children with false assertions of evidence—such as DNA tests, witness statements, and co-defendant finger-pointing—is the least justifiable investigative strategy because it bears the highest risk of eliciting both unconstitutional[8] and false confessions.

This Note argues false assertions of evidence to child-suspects in custodial interrogations must be prohibited primarily because overwhelming psychological research indicates adolescents are unable to comprehend a confession's consequences under police pressure. This tactic's unconstitutionality is illustrated by the Supreme Court's reliance on the same psychological studies in cases protecting juveniles as a class with respect to *Miranda*[9] and Eighth Amendment rights.[10] Furthermore, falsely asserting evidence must be barred from juvenile custodial interrogations because it is the most coercive interrogation tactic currently permitted—increasing the likelihood interrogators will elicit false confessions. The Supreme Court has already addressed the counterarguments against implementing these protective measures in the *Miranda* warning context, making clear that both the utilitarian concern of hindering police investigations and the myth that the innocent never falsely confess are unfounded in fact and unable to withstand constitutional scrutiny.[11]

Part I of this Note reviews the history of police interrogation

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7. Abigail K. Kohlman, Note, *Kids Waive the Darndest Constitutional Rights: The Impact of* J.D.B. v. North Carolina *on Juvenile Interrogation*, 49 AM. CRIM. L. REV. 1623, 1623 (2012).

8. *See, e.g.*, State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989); State v. Kelekolio, 849 P.2d 58 (Haw. 1993); *Elias V.*, 188 Cal. Rptr. 3d 202.

9. *See* J.D.B. v. North Carolina, 564 U.S. 261, 274–75 (2011) (noting that considering a suspect's age in a custodial interrogation would not invalidate the objective nature of the custody analysis).

10. *See* Miller v. Alabama, 567 U.S. 460, 471–72 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 570 (2005).

11. *See* Miranda v. Arizona, 384 U.S. 436, 462 (1966).

tactics and the rise of the Reid Technique. Part II details analogous criminal law doctrine in which the Supreme Court has protected juveniles as a class. Part III discusses the research examining the susceptibility of juveniles, innocent or otherwise, to deceptive police practices and how those practices "contaminate" a suspect's perception of events—the methodological fallacy allowing false confessions to appear true. Part IV discusses the success of the PEACE approach—which explicitly prohibits law enforcement from presenting false evidence to suspects—in other jurisdictions, offers complimentary safeguards against false confessions, and responds to common arguments condemning a per se ban on false statements of evidence in juvenile interrogations.

## I. AMERICAN HISTORY: INTERROGATIONS

Before examining the effects of false assertions of evidence, it is worth tracing the evolution of American interrogation tactics from brute force to subtle coercion. This Part briefly examines the fall of the "third degree,"[12] then explains the rise of the Reid Technique and its tendency to elicit false confessions from suspects of all ages.

### *A. The Third Degree*

Throughout the late nineteenth and twentieth centuries, law enforcement implemented a variety of coercive and brutal interrogation tactics broadly referred to as the "third degree."[13] Ranging from prolonged psychological duress to physical torture,[14] these tactics included beating and threatening suspects, stripping them naked, and depriving them of food and water.[15] The 1940 Supreme Court case *Chambers v. Florida*[16] illuminates a

12. Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 270 (2007).

13. *Id.*

14. *Id.*

15. Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 531 (2010).

16. 309 U.S. 227, 231 (1940).

particularly evocative example of the scope of these repugnant interrogation "strategies."

In response to a community enraged in the wake of the robbery and murder of a white man, Florida's Broward County police arrested several dozen African Americans without warrants in the twenty-four hours following the crime.[17] The police subjected all arrestees to a week-long interrogation during which the four petitioners were repeatedly questioned, prohibited from talking or meeting with attorneys and relatives,[18] and denied sleep and food.[19] The petitioners confessed on the seventh morning, following an "all night vigil" of questioning from which the sheriff abstained because questioning the suspects throughout the day had rendered even him "too tired" to continue his interrogation.[20]

A jury found the petitioners guilty, but the Supreme Court of the United States fortunately saved them from execution, reversing the lower courts' decisions and condemning the interrogators' tactics for violating the Due Process Clause of the Fourteenth Amendment.[21] Thereafter, the third degree waned in popularity, and modern interrogation tactics—such as lies and repeated refusals to accept innocence claims[22]—were hailed as, ostensibly, a dramatic improvement upon the outright inhumane techniques of old.

### *B. The Reid Technique*

Like the third degree, the Reid Technique's goal is to elicit a confession[23] rather than to facilitate fact-finding.[24] Its development began in 1933—the same year as the interrogations at issue in *Chambers*—when Fred Inbau commenced his work as a research assistant in Northwestern University's Scientific

17. *Id.* at 229.
18. *Id.* at 231.
19. Chambers v. State, 187 So. 156, 157 (Fla. 1939), *rev'd*, 309 U.S. 227 (1940).
20. *Chambers*, 309 U.S. at 230.
21. *Id.* at 240–42.
22. Jayne & Buckley, *supra* note 5.
23. *Id.*
24. Drizin & Luloff, *supra* note 12, at 271.

Crime Detection Laboratory after graduating from law school.[25] His tenure at Northwestern offered him experience administering polygraph tests and investigating crimes.[26] In 1940, the year the Supreme Court decided *Chambers*, John Reid joined the Northwestern laboratory, met Inbau, and the two men developed a professional relationship.[27] Amidst the third degree's diminishing popularity, Inbau published *Lie Detection and Criminal Interrogation* in 1942, advocating subtle psychological coercion over forceful confrontation during interrogations and earning Inbau credit for replacing the third degree.[28]

*Lie Detection and Criminal Interrogation* became the foundation for what would become the Reid Technique as later detailed in the book's third edition coauthored by Inbau and Reid in 1953.[29] Purportedly based on sound psychology, although actually founded only on the authors' experience administering polygraph tests and investigating criminal cases,[30] Inbau and Reid's practices quickly became the predominant method for police interrogation after John E. Reid & Associates, Inc. first began hosting public seminars to teach the technique in 1974.[31] However, the Reid Technique's primary objective remained consistent with that of the third degree: obtain a confession.[32] The technique includes three steps: (1) a factual analysis; (2) a behavioral analysis interview; and (3) an interrogation—with nine substeps.[33] The factual analysis properly directs investigators to collect and evaluate evidence before meeting with suspects,[34] but the latter two steps are far more susceptible to criticism.

Reid & Associates alleges the behavioral analysis interview (BAI) techniques are based on empirical scientific research proving deception is detectable by closely observing a suspect's

25. Gallini, *supra* note 15, at 544–45.
26. *Id.* at 545.
27. *Id.*
28. *Id.* at 546.
29. *Id.* at 547.
30. *Id.* at 552.
31. Jayne & Buckley, *supra* note 5.
32. *See* Drizin & Luloff, *supra* note 12, at 271.
33. Jayne & Buckley, *supra* note 5.
34. *Id.*

body language.[35] This claim derives from the founders' studies in polygraph administration methodology;[36] however, Inbau himself admitted in 1964 to a House Information Subcommittee on the federal government's use of lie detectors that polygraph results are "not susceptible to actual statistical analysis."[37] Furthermore, clinical trials conducted over the past few decades have demonstrated BAI techniques have a similar probability of accurately detecting lies to flipping a coin.[38] The Reid Technique next tasks investigators with identifying probable guilty suspects, premised on the validity of the junk science used during the preceding BAI, before initiating the third step: interrogation.[39] Therefore, by the time the interrogation starts, investigators are seeking only to confirm their guilty suspicions by eliciting confessions from suspects and are taught to refuse persistent denials of guilt with equal tenacity.[40]

To its credit, Reid & Associates only advocates lying to suspects about evidence on rare occasions.[41] However, this policy derives neither from a healthy skepticism of the strategy's accuracy in detecting a suspect's guilt nor from a recognition of the pressure to confess and accept a plea bargain that false evidence places on even innocent suspects. Rather, Reid & Associates bases its warning on the utilitarian concern that false assertions of evidence may provoke suspects to demand they see the evidence or to invoke their constitutional right to an attorney[42]—both fatal to Reid's interrogative process.

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35. *Id.*

36. Gallini, *supra* note 15, at 551–52.

37. John D. Morris, *House Unit Opens Polygraph Study*, N.Y. TIMES (Apr. 8, 1964), http://www.nytimes.com/1964/04/08/house-unit-opens-polygraph-study.html?_r=1.

38. *See* Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 414 n.101 (2013).

39. Jayne & Buckley, *supra* note 5.

40. *Id.*

41. *Id.*

42. *Id.*

## II. SHOW AND TELL: "KIDS ARE DIFFERENT" JURISPRUDENCE

A confession in the interrogation room is insignificant if inconsequential in the courtroom. This Part maps the legal landscape of confession admissibility throughout the United States. It continues by arguing the current doctrine improperly weighs police coercion in the confession analysis and by detailing analogous criminal law doctrines in which the Supreme Court has devised bright-line rules distinguishing children from adults.

### *A. How Courts Evaluate a Confession's Admissibility*

The law of confessions derives from the Due Process and Self-Incrimination Clauses in the Fifth Amendment—extended to the states through the Fourteenth Amendment—which provide that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property[] without due process of law."[43] In 1897, the Supreme Court held for the first time, in *Bram v. United States*, that a confession obtained involuntarily and used at trial violates this Fifth Amendment protection.[44] Despite this holding, however, the Court struggled through the better half of the twentieth century to outline the parameters of voluntary confessions and the permissible interrogation methods used to elicit them.[45]

In 1961, the Supreme Court distinguished a voluntary confession—"the product of an essentially free and unconstrained choice by its maker"—from an involuntary confession—one in which the confessor's "will has been overborne and his capacity for self-determination critically impaired."[46] The former is admissible; the latter violates the Due Process Clause.[47] In so dis-

43. U.S. CONST. amend. V.

44. 168 U.S. 532, 542–43 (1897); *see also* Malloy v. Hogan, 378 U.S. 1, 20–21 (1964) (extending the holding from *Bram*—nearly seventy years later—to state courts via the Fourteenth Amendment).

45. *See* Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 973–74, 997 (2005).

46. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

47. *Id.*

tinguishing, however, the Court explained that no single circumstance of an interrogation necessarily renders a coerced confession unconstitutional;[48] rather, courts must consider the "*totality* of the circumstances" when determining whether an incarceration results in a coerced confession.[49]

Accordingly, courts consider three broad categories of circumstances:[50] (1) the suspect's unique characteristics—including his age,[51] education, intelligence,[52] mental health,[53] and physical condition;[54] (2) the interrogation's circumstances—including its location[55] and duration;[56] and (3) the interrogators' conduct during the interrogation—such as depriving the suspect of food,[57] sleep,[58] or clothing.[59] The Court is exceptionally skeptical of the constitutionality of confessions obtained through physical abuse,[60] but has hesitated to provide suspects of crimes similar protection from the psychologically coercive and deceptive questioning methods promulgated by the Reid Technique. Interestingly, the Court has at least commented that such coercive practices "can induce a frighteningly high percentage of people" to confess falsely.[61]

Focusing on the third category of circumstances, police conduct, the Ninth Circuit has distinguished between two types of

48. *Id.* at 601 (characterizing the line separating a voluntary and involuntary confession as "that [point] at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession").

49. *Id.* at 606 (emphasis added).

50. *See* McMullen, *supra* note 45, at 978.

51. Haley v. Ohio, 322 U.S. 596, 598 (1948).

52. Fikes v. Alabama, 352 U.S. 191, 196 (1957).

53. *Id.*

54. Greenwald v. Wisconsin, 390 U.S. 519, 520–21 (1968).

55. United States v. Sanchez, 614 F.3d 876, 887 (8th Cir. 2010).

56. United States v. Preston, 751 F.3d 1008, 1016 (9th Cir. 2014).

57. Reck v. Pate, 367 U.S. 433, 441–43 (1961).

58. *See id.*

59. Bram v. United States, 168 U.S. 532, 561–62 (1897).

60. *See* Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

61. Corley v. United States, 556 U.S. 303, 321 (2009); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906–07 (2004) (offering empirical data based on four separate studies of false confessions present in 14–25% of proven wrongful convictions).

deception: intrinsic—which mischaracterizes the facts and investigation of the crime—and extrinsic—which mischaracterizes the consequences of a confession.[62] The Ninth Circuit reasoned inflating the amount of incriminating evidence against a suspect does not lead him "to consider anything beyond his own beliefs regarding his actual guilt or innocence, his moral sense of right and wrong, and his judgment regarding the likelihood that the police ha[ve] garnered enough valid evidence linking him to the crime."[63] Conversely, the Ninth Circuit perceives extrinsic falsehoods as "more likely to 'distort[] an otherwise rational choice of whether to confess or remain silent.'"[64] The court offered an important distinction between falsely asserting evidence (intrinsic deception) and falsely representing a confession's significance and/or promising leniency (extrinsic deception): the latter are more likely to be held unconstitutionally coercive than the former.[65] Although not explicitly prescribed by the Supreme Court, this dichotomy is fairly characteristic of the distinctions other federal circuits and state courts make.[66]

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62. United States v. Preston, 751 F.3d 1008, 1026–27 (9th Cir. 2014).

63. *Id.* at 1027 (quoting Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992)).

64. *Id.* (quoting *Holland*, 963 F.2d at 1051–52).

65. *See id.* (explaining how a suspect's intellectual disability should be considered when determining the effect of promises to keep confessions confidential, but neglecting to address the effects of false statements of evidence on youth).

66. *See* United States *ex rel* Galloway v. Fogg, 403 F. Supp. 248, 250–53 (S.D.N.Y. 1975) (holding voluntary a confession obtained after police falsely told the suspect the co-defendants had told his fellow police officers "the entire story"); Moore v. Hopper, 389 F. Supp. 931, 935 (M.D. Ga. 1974) (holding voluntary a confession obtained after police falsely told the suspect they had found the murder weapon); State v. Kelekolio, 849 P.2d 58, 73–74 (Haw. 1993) (explicitly adopting the intrinsic/extrinsic dichotomy proffered by the Ninth Circuit in *Preston*); People v. Kashney 490 N.E.2d 688, 691 (Ill. 1986) (holding voluntary a confession obtained after police falsely told the suspect they found his fingerprints at the scene of the crime); Commonwealth v. Meehan, 387 N.E.2d 527, 534 (Mass. 1979) (holding involuntary a confession elicited after police falsely promised the suspect a confession would aid his defense at trial); People v. Sunset Bay, 430 N.Y.S.2d 601, 606 (N.Y. App. Div. 1980) (holding involuntary a confession elicited after police promised to help the suspect if he confessed); Young v. State, 670 P.2d 591, 595 (Okla. Crim. App. 1983) (holding involuntary a confession elicited after police falsely suggested to the suspect that a confession would generate sympathy with a jury, and after police threatened to "build up a case of cold-blooded murder" if he did not confess).

### *B. Distinguishing Juveniles from Adults in Related Criminal Contexts*

This section explores three criminal law doctrines in which the Supreme Court has explicitly distinguished the constitutional protections of children from those afforded to adults—*Miranda* warnings, the death penalty, and mandatory life-without-parole sentences. In each of the following decisions, the Court cites in its own reasoning the same scientific evidence supporting a ban on false assertions of evidence in custodial juvenile interrogations.

#### *1. Miranda warnings: NOT as seen on TV*

Any fan of the television shows *Cops* or *Law and Order* could likely recite from memory a version of the script police officers must read to arrestees, but significantly fewer would be able to explain the legal significance of those words.[67] The landmark case of *Miranda v. Arizona* provides suspects an important procedural safeguard, but its holding accounts neither for whether juveniles reasonably understand their rights to the same degree as adult suspects, nor for whether the deceptive police interrogation techniques alone may be unconstitutionally coercive.[68] In *Miranda*, the Court established guidelines for police and courts to determine whether an individual's Fifth Amendment right against self-incrimination was violated in an interrogation.[69] In the four cases subsumed by this decision, either law enforcement or prosecutors questioned the petitioners in isolated

67. *See* Richard Rogers, *Right to Remain Silent Not Understood by Many Suspects*, AM. PSYCHOL. ASS'N (Aug. 5, 2011), http://www.apa.org/news/press/releases/2011/08/remain-silent.aspx (surveying criminal defendants and laypersons alike, many of whom were unaware police can lie to suspects).

68. *See* Gallini, *supra* note 15, at 561–62. In response to the *Miranda* holding, Inbau and Reid published a new edition of *Criminal Interrogation and Confessions*. While the revised technique accommodated for the bare constitutional requirement to inform suspects of their rights before questioning, it did not curtail the coercive strategies the *Miranda* Court condemned. *Id.* at 562.

69. Miranda v. Arizona, 384 U.S. 436, 439–40 (1966). Although this case does not apply only to juveniles, it was significant in laying the foundation for subsequent decisions addressing the due process rights of children as a class. *See infra* Sections II.B.1–2.

rooms.[70] All petitioners offered some sort of confession later admitted during their trials, but their interrogators never read any of them a comprehensive warning of his rights before questioning.[71]

The Court noted the psychologically coercive tactics police use during interrogations could render the interrogation unconstitutional[72] and cited the Reid Technique as the leading interrogation method among law enforcement agencies.[73] The Court described the psychological tricks and intimidation methods law enforcement officers employ and noted how these methods risk eliciting inadmissible statements;[74] however, it ultimately held the Constitution only requires police officers adequately warn a suspect of his Fifth Amendment rights before initiating an interrogation to avoid violating his right against self-incrimination.[75]

Merely three years after the *Miranda* decision, the Supreme Court again evaluated the constitutionality of a police interrogation in *Frazier v. Cupp*.[76] There, the adult petitioner confessed to murder after deceptive questioning methods.[77] The interrogating officers read him only a partial description of his constitutional rights—that he could have an attorney present and that anything he said could be used against him in court. Unlike the interrogators in *Miranda*, however, these officers confronted Frazier with false evidence: his cousin, and soon-to-be co-defendant, had already confessed.[78] Frazier confessed shortly thereafter, but not before suggesting he "had better get a lawyer

70. *Miranda*, 384 U.S. at 445.

71. *Id.*

72. *See id.* at 448–49 (explaining further how the private nature of custodial interrogations "results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms").

73. *Id.* at 449 (specifically highlighting Inbau and Reid's emphasis on privacy, and how it is intended to deprive the suspect "of every psychological advantage").

74. *Id.* at 449–56.

75. *Id.* at 468–70 (describing the basic requirements of constitutional *Miranda* warnings).

76. 394 U.S. 731 (1969).

77. *Id.* at 737–38. After obtaining a partial confession, the interrogator encouraged the petitioner by saying, "You can't be in any more trouble than you are in now." *Id.* at 738.

78. *Id.* at 737.

before [he] talk anymore."[79] The Court upheld Frazier's conviction and, finding his confession freely and voluntarily given, emphasized Frazier had been provided an abbreviated warning of his constitutional rights, the questioning lasted only a short duration, and Frazier "was a *mature* individual of *normal* intelligence."[80] Under the totality of the circumstances, the fact that police misrepresented a witness's statement was alone insufficient to make an otherwise voluntary confession inadmissible.[81] However, the Court suggested by negative implication that if the petitioner was *immature* or of *below* normal intelligence, its holding may have differed.[82]

Finally, in 2011, the Supreme Court directly revisited *Miranda* jurisprudence as it pertains to child-suspects and addressed whether age is relevant to the custody analysis.[83] J.D.B. was thirteen years old when a uniformed police officer removed him from his seventh grade class, took him to a closed conference room, and questioned him for at least thirty minutes.[84] The officer neither warned J.D.B. of his constitutional rights nor informed him that he was free to leave the room.[85] Once the interrogating officer mentioned juvenile detention as a possible consequence, the child confessed to committing several breakins with a friend.[86]

Unlike the *Miranda* Court, this Court had over forty years of psychological research developments pointing to the risks associated with coercive interrogation methods in eliciting false confessions, especially among children.[87] Moreover, the *J.D.B.*

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79. *Id.* at 738.

80. *Id.* at 739 (emphasis added). It is also worth considering whether the interrogator's statements would qualify as "extrinsic falsehoods," and therefore make the confession inadmissible under the Ninth Circuit's analysis. *See* United States v. Preston, 751 F.3d 1008, 1026–27 (9th Cir. 2014).

81. *Id.*

82. *See id.*

83. J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011).

84. *Id.* at 265.

85. *Id.* at 266 (describing the interrogator's deceptive interviewing techniques, such as disguising the legal effect of J.D.B.'s statements by asserting "this thing is going to the court" regardless of whether he confessed).

86. *Id.* at 267.

87. *Id.* at 269.

Court possessed a wealth of its own past legal decisions distinguishing children from adults—detailing how children are less mature and responsible than adults, often lack the experience and judgment to make informed decisions for their own benefit, and are more susceptible to external pressures.[88] In addressing the "reasonable person" aspect of the *Miranda* test, the Court required police to consider whether a reasonable child of like age would have felt at liberty to terminate the interrogation.[89] "To hold . . . that a child's age is never relevant to whether a suspect has been taken into custody," said the Court, "would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults."[90] Importantly, the Court expanded its understanding of the relevant psychological and legal distinctions between adults and juveniles; however, it still failed to address the relevance of those distinctions beyond the moment in time when law enforcement officers must *warn* juveniles of their constitutional rights.[91] The Court also failed to address whether the standard language of those warnings is intellectually accessible by children.

### 2. *The death penalty and mandatory life without parole: kids' edition*

Nearly fifty years following the *Miranda* decision, the Supreme Court considered in *Roper v. Simmons* whether the Eighth and Fourteenth Amendments permit a state to execute a juvenile who is over fifteen years old and found guilty of a capital crime.[92] Unlike the *Miranda* warning cases, there was no doubt the petitioner was factually guilty, the police officers properly

88. *Id.* at 272 (explaining how a "reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go").

89. *See id.* at 274–77.

90. *Id.* at 281.

91. *But see id.* at 269 (quoting Dickerson v. United States, 530 U.S. 428, 435 (2000)) ("[r]ecognizing . . . the inherently coercive nature of custodial interrogation blur[ring] the line between voluntary and involuntary statements" as a factor informing this holding, however).

92. Roper v. Simmons, 543 U.S. 551, 555–56 (2005).

Mirandized him, and his confession was voluntarily.[93] In holding that the Eighth Amendment prohibits states from executing all offenders under the age of eighteen, however, the Court focused on three overarching differences between juveniles and adults: immaturity;[94] vulnerability to external pressures;[95] and transitory personality traits.[96]

The Court explained it is common sense that juveniles' "lack of maturity and . . . underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,"[97] adding that scientific and sociological studies confirm this notion.[98] It bolstered this distinction's legal significance by commenting that "almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent."[99] The Court also reasoned that juveniles' vulnerability to external pressures derives from the "prevailing circumstance that juveniles have less control . . . over their own environment."[100] While the Court applied this reasoning to explain juveniles' diminished culpability for criminal behavior, it has cited the same factors in cases alleging unconstitutionally elicited confessions; here, however, the Court has drawn a line at the age of eighteen under which no juvenile may be constitutionally executed, and explicitly declined to consider other circumstances.[101]

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93. *Id.* at 556–57 (recalling, however, that Simmons waived his rights upon being read *Miranda* warnings and confessed to the murder after a two-hour interrogation).

94. *Id.* at 569 (citing statistical research demonstrating how adolescents are overrepresented in nearly every category of reckless behavior).

95. *Id.*

96. *Id.* at 570 (explaining these three differences "render suspect any conclusion that a juvenile falls among the worst offenders").

97. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

98. *Id.* at 569–70 (explaining how scientific studies have shown that juveniles, in addition to lacking maturity and a sense of responsibility "are more . . . susceptible to outside pressures" due to the "prevailing circumstance that juveniles have less control . . . over their whole environment").

99. *Id.* at 569.

100. *Id.* (considering, again, scientific research and empirical studies supporting this conclusion).

101. *Id.* at 574; *see id.* at 572 (explaining the Court has insisted upon individualized consideration of the circumstances of the offense and characteristics of the offender as a central feature of death penalty sentencing).

Shortly after *Roper*, the Court extended its reasoning to prohibit life-without-parole sentences for juvenile offenders who commit non-homicide crimes.[102] In *Graham v. Florida*, the Court explained that no developments in scientific data in the five years since the *Roper* decision provided grounds to reconsider their reasoning; on the contrary, the Court asserted developments in psychology and neuroscience "continue to show fundamental differences between juvenile and adult minds."[103]

The Court expanded Eighth Amendment protection for juveniles even further in *Miller v. Alabama* when it prohibited all mandatory life-without-parole sentences for offenders under the age of eighteen, irrespective of the convicted offense.[104] In extending the reasoning applied in the preceding cases, the Court also highlighted a significant characteristic of the relevant factors distinguishing juveniles from adults: none are crime-specific.[105] Accordingly, the Court extended *Graham*'s reasoning to all juvenile mandatory life-without-parole cases, "even as its categorical bar relates only to non-homicide offenses."[106] This trend manifests the Supreme Court's willingness to extend this reasoning where conceptually consistent and constitutionally appropriate.

## III. INTERROGATIONS OF A FOURTH GRADE NOTHING: THE PECULIAR SUSCEPTIBILITY OF CHILDREN

The evolving constitutional protections afforded children in criminal law are not merely indicia of elevated sentimentality; rather, they are founded on empirical evidence. This Part surveys the scientific studies and accompanying data proving children are inherently more susceptible to deceptive interrogation practices than are their adult counterparts. It concludes with an example illustrating how deceptive interrogation tactics can

102. Graham v. Florida, 560 U.S. 48, 82 (2010).

103. *Id.* at 68.

104. Miller v. Alabama, 567 U.S. 460, 489 (2012).

105. *Id.* at 472–73 (explaining how the mandatory penalty schemes prevent courts from even considering the offender's youth and the proportionality of the punishment).

106. *Id.* at 473.

contaminate a child-suspect's perception of events and render false confessions detailed and believable.

### *A. Inside Out: Science, Studies, and Susceptibility*

As mentioned above, the Supreme Court has relied substantially on developmental psychologists' findings when evaluating the appropriateness of legal standards distinguishing children from adults.[107] Although research tracking juvenile false confessions is limited, a study of 125 proven false confessions found nearly one-third of confessors were under the age of eighteen and 63% were under the age of twenty-five.[108] Another study of 340 exonerations found that 42% of the juveniles in the study falsely confessed compared to only 13% of their adult counterparts.[109] These confessions proved to weigh substantially in the jurors' minds—81% of false confessors were convicted after going to trial; however, this figure does not account for false confessors who accepted guilty pleas before trial.[110] The psychological research indicating juveniles' susceptibilities can account for their overrepresentation in false confession cases.[111]

The same developmental characteristics the Court cites in its Eighth Amendment "kids are different" cases cause juveniles to be more vulnerable during interrogations.[112] Complimentary to their inexperience, impulsivity, and susceptibility to social influences, adolescents are distinguishable from adults in their maturity of judgment.[113] While developmental psychologists

107. *See supra* Sections II.B.1–2.

108. Megan Crane, Laura Nirider & Steven A. Drizin, *The Truth About Juvenile False Confessions*, INSIGHTS ON L. & SOC'Y, Winter 2016, at 10, 12, https://www.americanbar.org/content/dam/aba/images/public_education/insights/Juvenile_confessions.pdf.

109. *Id.* (emphasizing both the psychological coercion inherent in an interrogation by an adult authority figure and the neuroscientific research explaining juveniles' underdeveloped prefrontal cortex—the section of the brain controlling one's judgment and decision-making processes).

110. *Id.* at 15 (noting also the risk of confessions contaminating evidence, "encourag[ing] detectives to ignore exculpatory evidence and alternative suspects, and to end an investigation as soon as they have a confession").

111. *See* Drizin & Leo, *supra* note 61.

112. *See* Feld, *supra* note 38, at 404.

113. *Id.* (analogizing the Court's reasoning in *Roper* and *Graham* in support of expanding juvenile's rights in the interrogation room).

concede a child's cognitive abilities—which inform his ability to offer a knowing, intelligent waiver and to differentiate between right and wrong—are comparable to those of adults by mid-adolescence,[114] a child's "maturity of judgment"—which affects his susceptibility to coercive pressures and the voluntariness of his confessions—does not achieve adult competency until his twenties.[115] This immaturity of judgment also negatively impacts juveniles' risk assessment, self-regulation, and temporal orientation abilities.[116] Age, therefore, is less accurately categorized as a single, evenly weighted factor in the totality analysis than it is an amalgamation of various susceptibilities informing several factors of the analysis.

Adolescents' risk perception and ability to appreciate future consequences differs from adults due to their lacking knowledge, life experiences, and impulse control.[117] The totality of the circumstances approach presumes a linear relationship between a child's age and his maturity of judgment when, in fact, research shows that sixteen- and seventeen-year-olds perceive fewer risks than both their younger and older peers.[118] Neuroscientists attribute these judgmental differences between adolescents and adults to developmental gaps of the prefrontal cortex, which regulates impulse control, strategic planning, and abstract thinking.[119] In stressful situations, adults mostly rely on this logic-oriented section of the brain, while juveniles heavily rely on the amygdala, which controls emotional and instinctual responses.[120] These findings call into question whether any form

114. *Id.* at 405.

115. *Id.* ("[T]he ability to make good choices with complete information in a laboratory differs from the ability to make adult-like decisions under stressful conditions with incomplete information.").

116. *Id.*

117. *Id.* at 406.

118. *Id.* (citing research observing how "the appetite for risk peaks at sixteen or seventeen years of age" before declining).

119. *Id.* at 406–07 (citing the *Graham* decision again, which recognized "impaired judgment, risk-calculus, and short-term perspective adversely affected youths' ability to exercise rights and impaired defense representation").

120. *See id.* at 407.

of reasonable child inquiry is practical under stressful circumstances or whether developmental differences simply render children too susceptible to emotional responses.

### *B. The Iron Giant: Cops v. Kids*

The inherent power disparity between police officers and children further exacerbates juveniles' susceptibility to coercive interrogation strategies. Children are taught from a young age to respect adult authority and learn punishment usually follows for those who do not acquiesce to parents' and teachers' directions[121]—one need only reflect upon his or her own childhood to envision dozens of examples. Compared to adults, children have a heightened eagerness to appease adult authority figures.[122] When questioned by them, juveniles tend to seek their approval[123] and will often comply with adults' requests merely to please them.[124] Combined with their susceptibility to external pressure, particularly negative reinforcement,[125] children of all ages are less likely to challenge an adult's misinterpretation of their words.[126] Moreover, the sheer stress an interrogation causes has been shown to alter a child's perception of events,[127] increasing the likelihood he accepts responsibility for crimes he never actually committed.[128] Even innocent children, subjected to repetitive questions, may believe they gave the "wrong," less desirable answer and feel coerced into providing the "right" an-

121. Joshua A. Tepfer, Laura H. Nirider & Steven A. Drizin, *Scrutinizing Confessions in a New Age of Juvenile Jurisprudence*, 50 CT. REV. 4, 6 (2014) (speculating that unless a child clearly understands his rights under such circumstances, "it is difficult to imagine any juvenile would ever comprehend that he could choose to simply ignore an officer's wishes to speak to him and unilaterally end the encounter").

122. Feld, *supra* note 38, at 412 (noting the tension between *Miranda*'s requirement that suspects invoke their rights unambiguously and evidence suggesting juveniles often "speak indirectly or assert rights tentatively to avoid conflict with those in power").

123. *Id.* at 411.

124. McMullen, *supra* note 45, at 997.

125. Feld, *supra* note 38, at 405.

126. McMullen, *supra* note 45, at 997.

127. Drizin & Luloff, *supra* note 12, at 275.

128. *See* McMullen, *supra* note 45, at 997.

swer—that which they perceive as the response the adult authority figure wants to hear.[129]

Authoritarian pressures play no small role in false confessions among children. One adolescent suspect from South Carolina falsely confessed after police confronted him with DNA "evidence" that had "never been beaten before in court" and a statement from his mother that "it's time for [him] to tell the truth."[130] When asked during an interview whether he ever considered the officers may have been lying to him intentionally,[131] the young man responded that his "Mom and Dad always told [him], 'You trust a cop,' you know, 'They're not going to lie to you.'"[132] The very goal of the interrogator who presents false evidence is to induce hopelessness in the suspect: responding to persistent denials by repeatedly presenting "evidence" functions to demonstrate the futility of resistance—implying denials will convince neither a judge nor jury the suspect is innocent.[133] What reasonable child would not be resolved to appease his captor when the adult authority figure purports to base his accusations on fact?[134]

### *C. Hocus Pocus: The Magic of Contamination*

Even recognizing juveniles' neurological, psychological, and physical weaknesses relative to adult suspects, and accepting many factually innocent juveniles have falsely admitted guilt,

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129. Drizin & Luloff, *supra* note 12, at 275.

130. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. L. REV. 979, 1009–10 (1997).

131. *See id.*

132. *Id.* at 1009.

133. *Id.* at 1013–14 (noting that while investigators use evidence ploys to gauge the reaction of suspects, "[i]nvestigators are not trained to realize that hunch-based interrogations will often bring them into contact with an innocent, perhaps vulnerable, suspect who will show distress at being confronted with an accusation of murder and the possibility of life in prison or a death sentence"). Notably, the burden of proof rests not with the defendant to prove innocence, but with the state to prove guilt. Children, however, are unlikely be familiar with this procedural requirement.

134. *See id.* at 1018–19 (explaining the risk associated with presenting suspects with co-perpetrator evidence: if the interrogators' initial hunch is wrong, they can allow the actual perpetrator an opportunity to blame an innocent witness who is, in turn, made to feel hopeless by the accusations against him and encouraged to confess falsely).

skepticism remains regarding how an innocent child, under so much stress and pressure, could concoct a detailed enough confession to be believable. After all, the "evidence" prompting the confession is admittedly imaginary, and therefore could not be entered into evidence at trial to establish the elements of the crime. "Contamination" bridges this conceptual gap and refers broadly to "the disclosure of crime scene facts to the suspect before the confession."[135] While contamination may occur through gossip and media reports, it most commonly originates with the interrogators.[136] Accordingly, asking suspects leading and forced-choice questions[137] can offer suspects all the information necessary to craft convincing stories.[138]

Reflect upon the confirmation bias embedded in the Reid Technique: investigators enter the interrogation room presuming the suspect is factually guilty.[139] The interrogation begins by accusing the suspect of guilt, followed by offering speculative explanations that minimize or excuse the suspect's behavior.[140] The interrogators next refuse to acknowledge the suspect's denials of guilt and follow their refusals with forced-choice questions that offer one *morally* inferior and one *morally* superior explanation for the suspect's alleged behavior.[141] For example, one may ask, "Did you steal the food *for the thrill of shoplifting*, or was it *because you were hungry*?" By the final steps of the interrogation—demanding details of the crime and drafting a written confession[142]—the interrogator has often left a trail of details the child-suspect can piece together after being negatively reinforced against denying evidence and conditioned to accept the interrogator's speculations. In fact, one study found 95% of a group of confessions proved false by DNA evidence "included

135. Tepfer, Nirider & Drizin, *supra* note 121, at 9–10.

136. *Id.* at 10.

137. Drizin & Luloff, *supra* note 12, at 271.

138. *See* Ofshe & Leo, *supra* note 130, at 1018 (suggesting that presenting suspects with false "co-perpetrator" statements can also provide innocent suspects convincing details).

139. *See supra* Section I.B.

140. Jayne & Buckley, *supra* note 5.

141. *Id.* (providing examples of forced-choice answer questions in which both options are incriminating, but one appears more morally exculpatory than the other).

142. *Id.*

descriptive facts that seemingly only the true perpetrator would know."[143] Suspects, especially children, gradually learn which answers result in positive and negative responses from interrogators, and the written confessions that follow the interrogation read much more coherently than their fragmented oral responses throughout the interrogation transcript.[144]

Seventeen-year-old Brendan Dassey's three-hour interrogation serves as an alarming spectacle illustrating the tendency of leading questions to contaminate a suspect's perception and responses.[145] Brendan begins the interrogation rarely responding to a question with more than a single sentence or fragment,[146] but he admits to raping a woman at the command of his uncle, Steven Avery, after an hour of questioning.[147] Throughout the intervening time, the interrogators respond to nearly all of his answers with some form of the phrase, "Don't lie to us now"[148]—when his answer does not conform to their narrative—or, "Then what happened?"—when his response satisfies the interrogators.[149] Eventually, the questioning officers grow frustrated with the tedious pace of Brendan's terse responses to open-ended "what happened next" questions and denials of unsatisfactory answers—possibly because Brendan is merely guessing what responses will satisfy his interrogators rather than reciting facts from memory. The interview proceeds:

> Wiegert: All right, I'm just gonna come out and ask you. Who shot her in the head?
> Brendan: He did.
> Fassbender: Then why didn't you tell us that?
> Brendan: Cuz I couldn't think of it.
> Fassbender: Now you remember it?

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143. *See* Tepfer, Nirider & Drizin, *supra* note 121, at 9.

144. *See id.* at 8–10.

145. *See generally* Interview of Brendan Dassey, *supra* note 1 (illustrating how leading questions contaminate a suspect's perception and responses).

146. *See id.* at 539–47.

147. *See id.* at 574–75.

148. *See id.* at 578.

149. *See id.*

(Brendan nods 'yes') . . . .[150]

The interrogators initiate this exchange by begging the question,[151] and rather than justifying his silence thus far by saying he could not *remember* who "shot her in the head," Brendan responds he "couldn't *think* of it"—suggesting he provided answers he guessed the police wanted to hear rather than facts he knew to be true.[152] Albeit an extreme example, this exchange illustrates how significant and specific facts can originate in interrogators' leading questions, contaminating a child-suspect's perception. At trial, Brendan's defense counsel did not overlook these fallacies in Brendan's "admissions"[153] but ultimately failed to mitigate the confession's probative value to the jury.[154]

### *D. The Boy in the Striped Pajamas*

As of this Note's latest revision, Brendan Dassey's fate hangs in the balance. In the wake of *Making a Murderer*, Brendan experienced a moment of solace when a Seventh Circuit panel granted him habeas relief in a two-to-one decision, determining his confession was obtained involuntarily.[155] Six months later, however, an en banc Seventh Circuit Court of Appeals issued a four-three decision reversing its prior grant and reinstating his confession.[156] Measuring his confession against the totality of

150. *Id.* at 587.

151. *Begging the Question (Fallacy)*, GRAMMARIST, http://grammarist.com/rhetoric/begging-the-question-fallacy/ (last visited Oct. 6, 2017) (defining "begging the question" as asking a question that presumes the very conclusion it seeks to prove).

152. *See* Interview of Brendan Dassey, *supra* note 1, at 587 (emphasis added). After admitting to several felonies, Brendan displays his complete lack of understanding of the gravity of the situation by asking whether he will make it back to school before class ends. *Id.* at 667.

153. *See Trial Exhibit 36: Defense Chart of 03-01-06 Dassey Confession*, STEVEN AVERY TRIAL TRANSCRIPTS & DOCUMENTS, http://www.stevenaverycase.org/wp-content/uploads/2016/01/Trial-Exhibit-36-Defense-Chart-of-03-01-06-Dassey-Confession.pdf (last visited Oct. 6, 2017) (explicitly graphing when and where the interrogators' questions contaminated Brendan's perception by offering key facts he later incorporates into his "confession").

154. *See* State v. Dassey, 827 N.W.2d 928, 931 (Wis. Ct. App. 2013) ("The truth of the confession remained for the jury to determine.").

155. *See* Dassey v. Dittmann, 860 F.3d 933, 982–83 (7th Cir. 2017).

156. *See* Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017).

the circumstances, the majority supported its holding by focusing on outdated, but widely accepted, circumstantial evidence of voluntariness discussed throughout this Note: Brendan was given *Miranda* warnings; he "understood them sufficiently;" he manifested "no signs of physical distress;" he was not physically coerced or threatened; he was provided "food, drinks, and restroom breaks;" and the interrogation occurred "in a comfortable setting."[157] The majority did, however, concede "a number of significant factors" tending to prove involuntariness: Brendan was young; he had intellectual disabilities; he ostensibly "did not grasp the gravity of his confession;" he was subjected to "leading and suggestive questions;" he seemed to guess when "investigators were not satisfied with" his answers; and he gave confusing and contradictory answers to some questions.[158] Finally focusing on the interrogators' false assertions of evidence, the court simply noted that "this has not led courts . . . to find that a subject's incriminating answers were involuntary."[159] Evidently, because Brendan did not simply cave to his interrogators' will at *every* suggestive question, the court did not consider his will overborne or the questioning methods coercive.[160]

The blistering dissent characterized this decision as "a profound miscarriage of justice," citing "at least three principles that the Supreme Court has clearly established," and which "the Wisconsin Court of Appeals failed reasonably to apply:" "(1) special care for juvenile confessions, (2) consideration of the totality of the circumstances, and, most importantly, (3) prohibition of psychologically coercive tactics."[161] The dissent weighed more heavily Brendan's age, sophistication, and intellectual disabilities[162] and openly criticized the interrogators' use of tactics drawn from the Reid Technique, which "heavily relies

157. *Id.* at 312–13.
158. *Id.* at 312.
159. *Id.* at 313.
160. *See id.*
161. *Id.* at 330, 337 (Wood, Rovner & Williams, JJ., dissenting).
162. *Id.* at 319.

on false evidence ploys and other forms of deceit."[163] Contradicting the majority's characterization of these tactics, the dissent cited a long history of courts questioning these techniques, including the Supreme Court in *Miranda* over fifty years prior.[164] The minority opinion even went so far as to provide a long table documenting admissions the majority deemed "critical" to Brendan's confession, and showing how they were often contaminated by the interrogators' leading questions.[165] Significantly, the dissent explained that its conclusion was *not* dependent "on any change in law," but rather current Supreme Court precedent."[166] Arguing that "most courts' evaluations of coercion are still based largely on outdated ideas about human psychology and rational decision-making,"[167] the dissent ended with a detailed discussion of juvenile psychological research and false confession studies across recent decades supporting its conclusion that, "no reasonable state court, knowing what we now know about coercive interrogation techniques and viewing Dassey's interrogation in light of his age, intellectual deficits, and manipulability, could possibly have concluded that Dassey's confession was voluntarily given."[168]

On February 20, 2018, Brendan's counsel filed a petition for a writ of certiorari with the Supreme Court of the United States.[169] If the Supreme Court grants certiorari, it can finally clarify the constitutional principles of juvenile confessions and address the significance of decades of research in juvenile psychology, psychologically coercive interrogation tactics, and false confession statistics. In the absence of Supreme Court action, however, state actors must implement systematic safeguards against juvenile false confessions that subject innocent youth to decades,

163. *Id.* at 320–21.

164. *Id.* at 321 (citing Miranda v. Arizona, 438 U.S. 436 (1966).

165. *Id.* at 324–28. Of note, the first such example cited by the dissent was discussed in Section III.C, *supra*.

166. *Id.* at 331.

167. *Id.* at 332.

168. *Id.* at 336.

169. Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017), *petition for cert. filed*, 2018 WL 1028071 (U.S. Feb. 20, 2018) (No. 17-1172).

or lifetimes, of wrongful imprisonment.

## IV. HOW TO TRAIN YOUR POLICE: PEACEFUL SOLUTIONS

Although proponents of the Reid Technique believe banning deceptive interrogation practices will excessively hinder criminal investigations, several solutions have contradicted this phobia and proved themselves effective. This Part explores the "totality of the circumstances" approach's inherent incompatibility with juvenile confession admissibility evaluations. Moreover, it offers a means of replacing the entire Reid Technique while recognizing the impracticality of an instantaneous, nationwide switch. Accordingly, it offers solutions complimentary to barring false assertions of evidence. This Part concludes by addressing common counterarguments to the proposed solutions and looking to recent developments in interrogation practices.

### *A. Where the Sidewalk Ends: Cracks in the Legal Landscape*

The Reid Technique has an inexcusable tendency to elicit false confessions,[170] and despite its facially suggestive name, the "totality of the circumstances" approach to determining whether child-suspects properly waived their *Miranda* rights and freely and voluntarily confessed does not accurately weigh the manipulative effects of deceptive interrogation methods—especially on children.[171] As a result, "confessions are generally found inadmissible only when they arise [through] many coercive circumstances."[172] Lacking direction, judges are left to balance several factors and determine which are relevant, significant, and controlling.[173]

The broad judicial discretion embedded in the "totality of the

170. *See supra* Section III.C.

171. *See* Drizin & Luloff, *supra* note 12, at 268 (explaining the inability of children to understand their right against self-incrimination); *see also* Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 518–19 (2002) (explaining a child's inability to give a fully-informed waiver, even when a parent is present).

172. Walters, *supra* note 171, at 500.

173. *See* Drizin & Luloff, *supra* note 12, at 267 (citing factors such as "age, maturity, intelligence, experience, sophistication, and comprehension level").

circumstances" approach renders the test highly subjective and logically flawed: after considering and balancing all of the perceived coercive circumstances, a judge need only determine a confession is one shade off involuntary for the entire confession to be admissible.[174] A more accurate totality approach might evaluate the circumstances as they present themselves throughout the interrogation. For instance, when Brendan Dassey's interrogators are acting amicably, his initial responses are more reliable than those after hours of the officers repeatedly asserting a false body of evidence against him.[175] Courts instead continue to insist on evaluating confessions holistically.[176] Even controlling for this fallacy, the "totality of the circumstances" approach fails to consider properly the accepted psychology with respect to juvenile susceptibilities to external pressures,[177] such as false assertions of evidence.[178] Continuing to weigh false assertions of evidence merely as a factor in the confession-admissibility analysis will effectively abridge innocent child-suspects' constitutional rights in the interrogation room.

### *B. The Little Technique That Could*

Despite the insistence by its supporters that the Reid Technique is the optimal interrogation technique, an alternative investigative process has existed for over thirty years that simultaneously reduces juvenile false confession rates while preserving the integrity of the investigative process.[179] Significantly, it also prohibits presenting suspects with false assertions of evidence.[180] Following a series of high-profile false confessions, the British Parliament sought to filter out psychologically

174. *See* Culombe v. Connecticut, 367 U.S. 568, 601–02 (1961); *see, e.g.*, Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017).

175. *See, e.g.*, Interview of Brendan Dassey, *supra* note 1, at 584 ("We have the evidence Brendan[;] we just need you [to] be honest with us.").

176. *See supra* note 63 and accompanying text; *see also Culombe*, 367 U.S. at 601–02.

177. *See supra* Section III.A.

178. *See supra* Section III.B.

179. *See* Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 43 W. ST. U. L. REV. 29, 54 (2013).

180. Feld, *supra* note 38, at 415 n.108.

coercive interrogation tactics.[181] Effectuated by the Police and Criminal Evidence Act of 1984 (PACE), law enforcement officers in England and Wales transitioned from traditional confrontational interrogation tactics to "investigative interviewing"[182]—intended to elicit factual information rather than to obtain a confession.[183] A 1989 study found that while the use of such psychologically coercive tactics dramatically declined after PACE's enactment, there was no corresponding decline in confession rates.[184] In fact, a similar study conducted in 2003 found the post-PACE confession rate in the UK to be slightly higher than in the United States.[185]

Accordingly, in 1993, the Royal Commission on Criminal Justice formally reformed custodial interrogation practices by proposing the mnemonic PEACE approach,[186] which stands for (1) Preparation and Planning; (2) Engage and Explain; (3) Account; (4) Closure; and (5) Evaluate.[187] Investigators conduct a custodial interview in the following manner: first, they encourage suspects to offer a narrative account of events rather than asking closed-ended questions or presenting false evidence;[188] next, they offer suspects an opportunity to explain any internal narrative discrepancies;[189] finally, they compare the suspects' narratives to the existing evidence.[190] Since its implementation, no evidence suggests a decline in confession rates,[191] and research

181. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 13–14 (2010); *see also* Dassey v. Dittmann, 877 F.3d 297, 336 (7th Cir. 2017) (Wood, Rovner & Williams, JJ., dissenting) (citing the success of Great Britain's change in interrogation policy to criticize the arguments favoring the Reid Technique's deceptive practices).

182. *Id.*

183. Feld, *supra* note 38, at 415 n.108.

184. Kassin et. al., *supra* note 181, at 27.

185. *Id.* at 27–28.

186. *Id.* at 28.

187. Feld, *supra* note 38, at 415.

188. LaMontagne, *supra* note 179.

189. *Id.*

190. *Id.*

191. Kassin et. al, *supra* note 181, at 27.

supports the argument that such methods lower false confession rates.[192] PEACE-trained investigators never present false evidence to suspects, regardless their age,[193] and unlike the Reid Technique, this approach recognizes children's peculiar vulnerabilities to adult authoritarian pressure and affords them adapted protections accordingly.[194]

If adopted in its entirety, the PEACE approach could achieve thorough and accurate police investigations while consistently protecting all suspects' constitutional rights. Barring false assertions of evidence in juvenile custodial interrogations, however, is the necessary first step to protecting juveniles' constitutional rights as a class. Although some contend deception is a necessary tool for interrogators to elicit information from suspects when reliable evidence suggests their guilt,[195] law enforcement officers must also act carefully to adapt techniques to children's suggestibility, minimize contamination, and independently evaluate discrepancies between admissions and actual evidence.[196]

### *C. Through the Looking Glass: Finding Complimentary Solutions*

Recognizing the differences between the United States and United Kingdom in both policing and politics, swiftly replacing the Reid Technique with the PEACE approach is, perhaps, wishful thinking. Alternatively, this section critiques courts' traditional inclination to sever constitutional safeguards the moment *Miranda* warnings are given and evaluates practices complimentary to barring false assertions of evidence.

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192. LaMontagne, *supra* note 179. *But see PEACE Article*, JOHN E. REID & ASSOCIATES, INC., http://www.reid.com/pdfs/peacearticle.pdf (last visited Aug. 9, 2017) (noting that (1) contrary to United States law, UK law permits interviewers to advise suspects that their silence during questioning can be used against them at trial, pursuant to PACE, and (2) a suspect may be offered a sentence reduced by up to one-third by agreeing to plead guilty early in the proceedings).

193. *See* LaMontagne, *supra* note 179.

194. Feld, *supra* note 38, at 415–16.

195. *See* McMullen, *supra* note 45, at 986.

196. *See* LaMontagne, *supra* note 179, at 54–55.

*Miranda* warnings theoretically protect children from interrogation room coercion by offering them an opportunity to invoke their right to remain silent and to obtain legal assistance.[197] But the vocabulary, reading level, and understanding of related concepts necessary to make a knowing and intelligent waiver of those rights exceed the abilities of many adolescents.[198] Juveniles tend to conceptualize "rights" more as privileges offered by adults—which can be withdrawn at any time—rather than as entitlements.[199]

Committed to *Miranda* warnings as the most appropriate vehicle for securing juveniles' rights in the interrogation room, some states require parental presence for a waiver to be legal.[200] However, a study examining over 400 juvenile interrogations conducted in the presence of parents found two-thirds of parents provided no advice at all, and the parents who did provide advice were more likely to encourage their child to waive his or her rights than to invoke them.[201] This suggests parents misunderstand *Miranda*, believing cooperation and honesty with police will result in leniency.[202] Therefore, rather than providing additional protection, parental presence may actually add to the coercive nature of the interrogation setting.[203]

For the skeptics of false confessions who seek to focus on *Miranda* warnings, a more appropriate solution might include (1) a mandatory, non-waivable right to counsel for juveniles;[204] and/or (2) rewritten *Miranda* warnings with language and concepts more accessible to children of different ages.[205] A non-wai-

197. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

198. Feld, *supra* note 38, at 408.

199. McMullen, *supra* note 45, at 1002.

200. *See* Walters, *supra* note 171, at 503.

201. McMullen, *supra* note 45, at 1003 (noting only 4 percent of parents who were present during interrogations requested an attorney also be present).

202. Walters, *supra* note 171, at 518–19.

203. McMullen, *supra* note 45, at 1003.

204. Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1, 24 (2013).

205. LaMontagne, *supra* note 179, at 53 (suggesting the following variation of *Miranda* warnings spoken at a third-grade reading level: "The police want to ask you some questions. You do not have to talk with them. You do not have to answer their questions. They can use anything

vable right to counsel would surely provide juveniles useful armor in the interrogation room, and may discourage police from falsely asserting evidence,[206] but the representation is only as useful as the attorney's advice.[207] Moreover, it depends upon the nature of the relationship with the attorney: most children grow up recognizing the authority of law enforcement officers;[208] fewer understand the scope of protection offered by an attorney. Where advice is absent, juveniles may accordingly interpret silence as a weakness in their case: if their own lawyers appear to doubt their innocence, so too may a judge and jury.[209] And while rewriting *Miranda* warnings to be more developmentally appropriate could improve the concepts' intellectual accessibility to children, it would not resolve the fundamental issue of allowing children to waive their rights at all.[210] As the Supreme Court noted in *Roper*, "almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."[211] If minors are prohibited from modifying their rights in these fairly routine practices of life, how can we allow them to waive their most fundamental constitutional protections in a concededly coercive environment?[212]

Others propose mandatory electronic recordings of juvenile interrogations as the appropriate solution.[213] Although insufficient alone, mandatory electronic recordings are a necessary

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you say in trying to figure out if you did something that was against the law. If you do not want to talk with the police, you will not get in trouble for being quiet. If you would like an adult to help you decide what to do, you can have your parents here. You can also have a lawyer. A lawyer is someone who is trained in helping you make the best decision for you. This will not cost you any money. If you want to talk to the police, you can stop answering their questions whenever you want. Do you understand what I have just told you? What would you like to do?").

206. McMullen, *supra* note 45, at 1005.

207. *Id.*

208. *See* Tepfer, Nirider & Drizin, *supra* note 121, at 6.

209. *See* Ofshe & Leo, *supra* note 130, at 1013.

210. *See* Feld, *supra* note 38, at 427–30.

211. Roper v. Simmons, 543 U.S. 551, 569 (2005).

212. *See* Benjamin E. Friedman, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In re Gault, 58 UCLA L. REV. DISC. 165, 185 (2011) (highlighting, as a practical matter, a non-waivable right to counsel is unlikely to be politically feasible).

213. LaMontagne, *supra* note 179, at 50–52 (noting that even Reid & Associates supports

means of enforcing a prohibition against false assertions of evidence in interrogation rooms.[214] A proper system of recording interrogations would mandate recording the entire interview, not merely the fragments containing the confession—which can occur after hours of deceptive questioning.[215] One commenter advocates initiating recordings prior to the administration of *Miranda* warnings to ensure any waiver is also subject to closer scrutiny.[216] In addition to capturing the suspects, the recordings must also capture the interrogators on camera to assist accurate evaluations of their conduct and body language.[217] For those skeptical of the extent of coercion in Brendan Dassey's interrogation after reading the transcript, the video recordings demonstrate how tone and body language can intensify the coercive nature of words.[218] Even mandating recordings would still neglect to address directly the weight of coercion or the effect of judicial discretion in admitting confessions under the totality approach: if the judge already believes false assertions of evidence are generally permissible, recording specific instances of deception will not substantively protect juveniles at trial.[219]

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mandatory recordings, explaining: "[T]he overall benefit of electronic recording in custodial cases is not only feasible, but may have an overall benefit to the criminal justice system. In an era where academicians generalize from laboratory studies and use anecdotal accounts to support claims that police routinely elicit false confessions, electronic recordings may be the most effective means to dispel these unsupported notions.") (quoting BRIAN C. JAYNE, EMPIRICAL EXPERIENCES OF REQUIRED ELECTRONIC RECORDING OF INTERVIEWS AND INTERROGATIONS ON INVESTIGATORS' PRACTICES AND CASE OUTCOMES (2004), https://www.reid.com/pdfs/Videotaping_study.pdf).

214. *See* McMullen, *supra* note 45, at 1003–04; Kassin et al., *supra* note 181, at 16–17, 25–26 (describing how PACE in the United Kingdom requires custodial interviews be recorded); Feld, *supra* note 38, at 419 (noting that "just over a dozen states require police to record interrogations").

215. *See* McMullen, *supra* note 45, at 1004–05.

216. *See* Drizin & Luloff, *supra* note 12, at 314.

217. *See* McMullen, *supra* note 45, at 1004.

218. *Compare* Interview of Brendan Dassey, *supra* note 1, *with* Steven Avery & Brendan Dassey cases, *Brendan Dassey Police Interview/Interrogation Part #1 (*Making a Murderer *Steven Avery Case)*, YOUTUBE (Dec. 28, 2015), https://www.youtube.com/watch?v=NYOaIDxirHE, *and* Steven Avery & Brendan Dassey cases, *Brendan Dassey Police Interview/Interrogation Part 2 (*Making a Murderer *Steven Avery Case)*, YOUTUBE (Dec. 28, 2015), https://www.youtube.com/watch?v=rJt6j5E1y_s.

219. *See* McMullen, *supra* note 45, at 1005; *see, e.g.*, Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017).

### *D. Deception and the Terrible, Horrible, No Good, Very Bad Counterarguments*

Any and all of these measures are likely to be met with staunch opposition. Many police officers and judges believe a certain degree of deception is necessary to elicit confessions from guilty suspects; without this tool, greater resources would need to be expounded to investigate crimes independently.[220] However, the utility of the third degree, which undoubtedly led to rightful convictions of guilty individuals, did not dissuade the Supreme Court from holding such practices unconstitutional.[221] The death penalty, when permitted as punishment for those under eighteen years old, likely caused the execution of potential recidivists and therefore effectively achieved its intended goal. But again, the Court readily prohibited this punishment and instituted a per se ban on the death penalty for offenders under eighteen years old because of constitutional considerations.[222] Just as law enforcement officers must adapt to changing technology, funding, and political motivations, so too must they adapt their interrogation practices to evolving constitutional standards. Other opponents believe the innocent will generally not confess to crimes they have not committed, regardless of the coercive pressure applied; the few who do, they contend, represent a statistically insignificant fraction of the whole.[223] But "the tendency of certain interrogation methods to coerce false confessions out of even a small number of innocent suspects makes those methods constitutionally illegitimate."[224]

The Court in *Miranda* faced the same opposition—law enforcement contending that warning suspects of their constitutional rights would effectively impede the entire investigative process.[225] There, the Court recognized how unpersuasive the

220. *See id.* at 987.

221. *See* Chambers v. Florida, 309 U.S. 227, 240–41 (1940); *see also* McMullen, *supra* note 45, at 987.

222. *See* Roper v. Simmons, 543 U.S. 551, 572–74 (2005).

223. *See* McMullen, *supra* note 45, at 987.

224. *Id.*

225. *See* Miranda v. Arizona, 384 U.S. 436, 479–81 (1966) ("Although confessions may play

utilitarian argument is when individuals' constitutional rights are jeopardized.[226] Just as a waiver cannot be intelligently made absent knowledge of the rights one is waiving, a confession cannot be "freely and voluntarily given" if the information prompting the confession is falsified. Furthermore, the claim that no innocent person would ever falsely confess is fundamentally at odds with the utilitarian argument: if the Reid Technique's deceptive practices are so effective at inciting hopelessness—when admittedly founded on little corroborating evidence—then they surely can induce the innocent to cooperate with police in the hope of receiving a reduced sentence. Requiring some additional training in the PEACE approach, a system proven to achieve similar confession rates, is a small price considering the innocent lives that can be saved. Presuming accurate law enforcement to be the goal of interrogations—that is, deducing and charging the actual perpetrator of a crime—adopting a more effective approach to achieve that end is also in the best interests of police.

Legal scholars are not the only ones recognizing the need for change. Wicklander-Zulawski & Associates, Inc. (W-Z), a worldwide leader in Reid Technique training over the past three decades, has recently discontinued its Reid Technique training program.[227] In a press report released in March 2017, W-Z cited the Reid Technique's susceptibility to elicit false confessions as the primary reason for the curriculum change.[228] In fact, W-Z President and CEO, Shane Sturman, stated the move to end Reid Technique training was inspired by W-Z's law enforcement clients who have begun asking W-Z "to remove [the Reid Technique] from their training based on all the academic research showing other interrogation styles to be much less

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an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions.").

226. *See id.* at 439–40.

227. *See* Shane G. Sturman, *Wicklander-Zulawski Discontinues Reid Method Instruction After More Than 30 Years*, CISION PRWEB (Mar. 6, 2017), http://www.prweb.com/releases/2017/03/prweb14123356.htm [hereinafter *Wicklander-Zulawski*]; *see also* Dassey v. Dittmann, 877 F.3d 297, 336 (7th Cir. 2017) (Wood, Rovner & Williams, JJ., dissenting) (citing this same change in policy to support its criticism of the coercive Reid Technique tactics).

228. *Id.*

risky."[229] One unnamed U.S. city has already contracted W-Z to instruct its law enforcement officers on non-confrontational methods for interviewing suspects.[230] Hopefully, others will follow suit.

## CONCLUSION

Protecting juvenile suspects from coercive false evidence ploys during custodial interrogations is consistent with other constitutional protections afforded to juveniles in the criminal context.[231] Both morally sound and consistent with the culture of teaching children to trust police officers, barring police officers from making false assertions of evidence has also been proven to reduce false confession rates while increasing the reliability of information garnered from child suspects during interviews—ultimately aiding the presumed goal of bringing actual perpetrators to justice rather than the first suspects to fold under pressure. Naturally, a per se ban on false assertions of evidence would be most effective if paired with other protective measures, such as simplified and explained *Miranda* warnings, mandatory electronic recordings of all interrogations, and a non-waivable right to counsel.

Undoubtedly, these changes in methodology will continue to be met with skepticism and political opposition incited by the fear that law enforcement will be unable to elicit true confessions from actual criminals. However, should the Supreme Court apply the neuroscientific and psychological evidence supporting its Eighth Amendment "kids are different" jurisprudence to the law of false confessions, the unfounded utilitarian fear of impeding criminal investigations can no longer survive constitutional scrutiny. Furthermore, thirty years of successfully implementing the PEACE approach—and its growing

229. Eli Hager, *The Seismic Change in Police Interrogations*, MARSHALL PROJECT (Mar. 7, 2017, 10:00 PM), https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations#.SVAKD90jv.

230. *See Wicklander-Zulawski*, *supra* note 227.

231. *See supra* Sections II.B.1–2.

popularity throughout the western world—demonstrably negates this phobia. And while a transition from the Reid Technique to the PEACE approach will not occur overnight, prohibiting evidentiary misrepresentations to juveniles is a meaningful step toward protecting all innocent persons from the damning false confession.