

JUVENILE JUSTICE IS NOT JUST KID STUFF: THE FORGOTTEN SIDE OF FAIRNESS AND DUE PROCESS

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Juveniles are not merely small adults, and the law should not treat them as such, especially when waivers of important rights are concerned. Juvenile justice constitutes a generally ignored side of modern American due process. Court and law-enforcement agencies deprive juveniles of basic fairness at various stages of the legal process, particularly during initial police interrogations conducted when the juvenile is alone and without the help of family or legal counsel. These situations place juveniles on a road to anti-social and marginalized or even criminal adulthood. Firm, clear, and fair tests for juveniles' waiver of important rights are necessary if a juvenile's ultimate day in court some weeks or months later is to have any real meaning. In addition, juveniles are uniquely susceptible to manipulation by law-enforcement agencies and police during interrogation. The police often assume juveniles' guilt and engage in a process of extracting "confessions from the guilty" rather than a neutral process of fact-finding. As a result, juveniles' false-confessions are a recurring problem and are indeed a violation of basic fairness and due process. The article explores the specific ways in which juveniles are denied fairness and due process and discusses how courts and law-enforcement agencies could. The article also suggests reforms to the juvenile justice system.

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I. INTRODUCTION

It is abhorrent to our sense of justice and fair play to countenance the possibility that someone innocent of a crime may be incarcerated or otherwise punished for a crime which he or she did not commit...¹

Martin “Marty” Tankleff’s “hell on earth” began during the early morning hours of September 7, 1988.² On that day, sixteen-year-old Marty was supposed to be attending the first day of his senior year of high school, but instead woke up to a catastrophe.³ He awoke to find both of his parents brutally bludgeoned in the family home.⁴ His mother was dead and his father was alive but unconscious.⁵ A hysterical and distraught Marty called 911 and began to perform first aid on his father.⁶

By the time that the police arrived at the Tankleff home, Marty was in shock from the horrible crime that had taken place while he slept.⁷ The police on the scene labeled his conduct as “suspicious” and took him in for questioning.⁸ He deeply wanted to help the police find his parents’ murderer,⁹ and told investigators that he believed that his father’s business partner, who owed his father half a million dollars, was a likely suspect.¹⁰

¹ *People v. Tankleff*, 49 App.Div.3d 160, 177, 848 N.Y.S.2d 286, 299 (2007) (vacating lower court denial of motion to set aside convictions). The National Association of Criminal Defense Lawyers appears to have heard the veritable drum-beat as to this overall issue and might be mustering its resources to focus on improving juvenile justice in America, possibly to enlist the American Bar Association in the challenge. Prof. Maureen Pacheco, *The Defense of Children—A Call to Arms*, *Champion* 49 (August 2010).

² *Tankleff*, *supra* n. 2, 848 N.Y.S.2d at 289.

³ Marty Tankleff: A True Story of a False Confession, <http://www.martytankleff.org/Gui/Content.aspx?Page=STORY> (last visited Oct. 7, 2010) [hereinafter *Marty Tankleff*].

⁴ *Tankleff*, *supra* n. 2, 848 N.Y.S.2d at 289.

⁵ *See Marty Tankleff*, *supra* n. 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Tankleff*, *supra* n. 1, 848 N.Y.S.2d at 289.

⁹ *See Marty Tankleff*, *supra* n. 4.

¹⁰ *Tankleff*, 848 N.Y.S.2d at 289.

Marty told the police that his father's business partner had previously threatened his parents with physical harm and was the last person to leave the Tankleff home the evening before the murders.¹¹ Despite this crucial information, the lead detective continued to intensely zero in on Marty and conducted a very hostile, intimidating, and psychologically brutal interrogation of Marty that spanned several hours.¹²

During the course of the interrogation, Marty remained steadfast in his denial of any involvement in his mother's murder and father's attack.¹³ After seeing that the interrogation was not progressing as he had intended, the lead detective falsely and maliciously told Marty that his father had awoken from his coma at the hospital to state in a dying declaration to the police that Marty had committed the crime.¹⁴ Believing that his father would never lie, Marty became distraught and began to wonder if he somehow could have possibly blacked out and committed the crimes in a state of unconsciousness?¹⁵ Marty's parents taught him that the police were inherently good and trustworthy, people who only wanted to help people in their time of need.¹⁶ After several hours of "psychological persecution," Marty was mentally and physically exhausted, defeated, confused, and ready for this nightmare to be over.¹⁷ He was read his rights and the "drafted" a confession at police insistence. He did not sign the confession and immediately and vehemently recanted.¹⁸

¹¹ *Id.*

¹² See Marty Tankleff, *supra* n. 4. "A week after the attacks, as Marty's father lay unconscious in the hospital, the business partner would fake his own death, disguise himself and flee to California under an alias." *Id.* "The Suffolk County DA refused to recuse himself from the hearing, despite clear conflicts of interest. Five years before the Tankleff murders, he had represented the business partner's son who was charged with selling cocaine. The DA also earlier represented the detective who would later take Marty's 'confession.' And the DA's longtime law partner had earlier represented the business partner himself. Among the new evidence produced at the hearing was eyewitness testimony that the business partner had been well acquainted with the lead detective since before the Tankleff murders. This contradicted the trial testimony of the detective, who had not been in line to handle the case on the morning of the Tankleff murders but arrived 19 minutes after the early morning call, and who ignored the business partner as a suspect."

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Tankleff, 848 N.Y.S.2d at 289.

¹⁶ Marty Tankleff, *supra* n. 4.

¹⁷ Marty Tankleff: A True Story of a False Confession, <http://www.martytankleff.org/GUI/Content.aspx?Page=Media20071223c> (last visited Oct. 7, 2010) [hereinafter M. Tankleff].

¹⁸ See Marty Tankleff, *supra* n. 4.

Marty's life could have ended there. His father died several weeks later from complications related to the attack.¹⁹ Though his "confession" was the only piece of evidence presented at trial, Marty was convicted in 1990 of the murders of both of his parents and sentenced from 50-years to life in prison.²⁰ Fortunately for Marty, he had the support of a strong and loving family, as well as many prominent attorneys who worked tirelessly on his behalf and firmly believed in his innocence.²¹ Marty's conviction was ultimately overturned in 2007, after 17-years of appeals and hearings.²² His attorneys presented the state appellate court with two-dozen witnesses who implicated his father's business partner in the crime and much testimony evidence that overwhelmingly pointed to Marty's innocence.²³

Despite being wrongfully convicted of murder, slandered, and forced to spend 17 formative years of his life in prison, Marty Tankleff remains a remarkably positive and whole person today. Marty is a student at Hofstra University and looks forward to getting married and attending law school in the future, so that he can work for those who, like him, have been wrongfully convicted of crimes that they did not commit.²⁴

Marty was one of the lucky few. Many children (and adults) are wrongly convicted and imprisoned every year for crimes that they did not commit. "The United States Department of Justice, Bureau of Justice Statistics, admits that statistically 8% to 12% of all state prisoners are either actually or factually innocent."²⁵ While wrongful convictions have the potential to occur at many points along the judicial process, beginning at arrest and ending with conviction, this article focuses on only two (of several) means that produce wrongful juvenile convictions: (a) late or delayed *Miranda* warnings given only after sometimes lengthy police interrogations in which the police have already targeted the person being interrogated and (b) coerced or false confessions extracted during or in the wake of unmonitored police interrogations of juveniles.

Part II of this article explores the history and development of the juvenile justice system, examining its development from a paternalistic system to the adversarial adult-style model that we have today. Part III

¹⁹ *See id.*

²⁰ Tankleff, *supra* n. 2, 848 N.Y.S.2d at 289.

²¹ M. Tankleff, *supra* n. 18.

²² *See generally* Tankleff, *supra* n. 2, 848 N.Y.S.2d at 303.

²³ *See id.* at 291-98.

²⁴ Marty Tankleff: A True Story of a False Confession,

<http://www.martytankleff.org/GUI/Content.aspx?Page=Media20080424c> (last visited Oct. 7, 2010).

²⁵ The Wrongful Conviction of Georgia Inmate Jerry Biggs, Jr.,

http://www.truthandjusticedenied.com/Wrongful_Conviction_Statist.html (last visited Oct. 7, 2010) [hereinafter Wrongful Conviction of Georgia Inmate].

discusses *Miranda* warnings given to juveniles and the history and current state of *Miranda* warnings. Part III also explores why juveniles so often waive their *Miranda* rights and how those waivers so often open the door to abusive police tactics and lead to false confessions and wrongful convictions. Part IV of this article discusses false confessions obtained through unfair police interrogations and considers why juveniles falsely confess and are particularly susceptible to making false confessions. Part IV also examines the long-term legal consequences of false confessions, even if a false confession is the product of police coercion and manipulation. Part V proposes how courts should change the rules regulating *Miranda* warnings to adequately protect juveniles' Fifth Amendment rights—and how court could prescribe how minors can be better protected from making false confessions during police interrogations. Lastly, Part VI concludes with a summary.

II. HISTORY OF THE JUVENILE JUSTICE SYSTEM

During the late 1800's, states began creating juvenile courts to deal with the unique legal problems and needs of children and youths, particularly juveniles who were neglected, delinquent, or dependent.²⁶ Prior to that period, children were generally treated in the same manner as adult perpetrators and criminals, often sharing the same courts, prisons, and punishments.²⁷ As part of the nineteenth century juvenile justice reform movement, courts began implementing a more benevolent, and paternalistic approach to dealing with minors, focusing on rehabilitation as opposed to punishment.²⁸ Under that approach, courts gave priority to the best interests of the child when adjudicating cases and determining appropriate reformatory programs.²⁹

This "paternalistic" juvenile judicial model remained largely intact until the 1960's and 1970's, when the "due process revolution" brought about a strong protest and resulted in close judicial scrutiny of the then-current system.³⁰ During the 1960's and 1970's, opponents of the "paternalistic" juvenile judicial model argued that children's procedural due process rights were being trampled by the legal system. Opponents

²⁶ Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 262 (2007) (noting that in 1899, Illinois was the first State to create, through legislation, a juvenile court system) [hereinafter Drizin].

²⁷ *Id.*

²⁸ Stanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1229 (1969-70).

²⁹ Drizin, *supra* n. 27, at 263-4.

³⁰ *Id.* & n. 38 (citing several Supreme Court decisions extending procedural due process protections to juveniles).

viewed the legal and judicial process as arbitrary, with courts largely ignoring what little judicial procedure existed and with statutes and case-law providing no clear standards governing the adjudication of juvenile cases.³¹

About the same time as the “due process” revolution, a counter “law and order” force arose, demanding that states get “tough on crime” and “lock up offenders and throw away the key.” That law-and-order movement sought longer prison terms for guilty offenders of all stripes.³² In many areas, in order for prosecutors and legislators to win reelection, they had to run on “tough on crime” platforms, even with respect to juvenile offenders.³³ Many states have enacted legislative changes that include extending courts’ adult jurisdiction to cover minors and increasing the categories of offenses for which juveniles could be tried and punished as adults.³⁴

The federal government followed this trend by implementing similar policies regarding juveniles who were charged with or convicted of federal crimes.³⁵ Given the movements for juveniles’ due process rights and the seemingly stronger “tough on crime” advocates, the Supreme Court began rapidly reading the Constitution in a way that allowed states to create a more adversarial juvenile justice model based on the adult system—including longer sentences, mandatory minimum sentences, mandatory detention for serious crimes, and erosion of juvenile confidentiality.

In retrospect, the tough-on-crime approach seems not to be a viable method of offender correction and reform. The tough-on-crime approach overlooked the fact that adolescents were not merely “little adults” and that major psychological and other differences exist between adolescents and adults. To disregard those important differences in administering the juvenile justice system produces injustice.³⁶

³¹ *Id.* at 263 & n. 39 (citing Eric K. Klein, 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, 377-81 (1998)).

³² *Id.* at 265 & n. 56-9 (citing Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in *YOUTH on Trial* 9, 13-14 (Thomas Grisso & Robert G. Schwartz eds. 2000) (*Gault* caused an “adultification” of juvenile justice) & Kim Taylor-Thompson, States of Mind/States of Development, 14 *STAN. L. & POL’Y REV.* 143 (2003)).

³³ *Id.* & n. 57.

³⁴ *Id.*

³⁵ *Id.* & n. 58 (citing Kim Taylor-Thompson, *supra* n. 31, 14 *STAN. L. & POL’Y REV.* 143).

³⁶ Tamar R. Birckhead, The Age of the Child: Interrogating Juveniles After *Roper v. Simmons*, 65 *WASH. & LEE L. REV.* 385, 396-401 (Spring 2008) (also documenting issues discussed here and suggested reforms) & Christine S. Scott-Hayward, Explaining Juvenile False Confessions: Adolescent Development and Police Interrogations, 31 *LAW & PSYCH. REV.* 53 (Spring 2007) (noting approximate 25% rate of false confessions by juveniles).

Juveniles are clearly susceptible to police interrogation tactics, including the use of false or misleading “evidence,” in ways that adults simply are not.³⁷ Any justice system that ignores or is unwilling to accommodate that reality is, simply put, complicit in creating the very vicious cycle that seems to specialize in individual and societal failure and violent crime, while necessitating huge, virtually perpetual, public expenditures.

III. MIRANDA WARNINGS AND JUVENILES

A. *History of Miranda Warnings*

The Fifth Amendment of the Constitution grants individuals the right not to incriminate themselves by being forced to provide testimony that could serve to incriminate them.³⁸ To help individuals to better understand this seemingly elusive or ignored protection, the Supreme Court held in *Miranda v. Arizona*³⁹ that police may not proceed with interrogations, unless they inform persons of their right to remain silent and to legal counsel—and the target of the investigation waives that right.⁴⁰ In other words, the Constitution not only grants a right not to incriminate oneself but requires that persons who waive that right do so knowingly and voluntarily.⁴¹ The Court went a step further, stating that it would likely *presume* that a defendant is unaware of this right and will *not* accept into evidence statements made during interrogation, when and if the police is not adequately informed a defendant of his or her Fifth Amendment right to remain silent.⁴²

B. *Seminal Cases in the Application of Miranda Rights to Juveniles*

*In re Gault*⁴³ was a landmark case in which the Supreme Court ruled that due process protections extended to juveniles. In that case, Gerald Gault, a minor, was arrested and charged with making vulgar

³⁷ Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (Summer 2010). Dr. Allison holds a Ph.D. in Psychology and has worked at the State University of New York at Albany and the Stanford University School of Medicine.

³⁸ U.S. CONST. amend. V.

³⁹ 384 U.S. 436 (1966).

⁴⁰ *Id.* at 444.

⁴¹ *Id.* at 444-45.

⁴² *Id.* at 498.

⁴³ 387 U.S. 1 (1967).

comments of an “adolescent sexual variety” over the phone to a neighbor.⁴⁴ It was later shown that when the police took Gault into custody, his parents were not at home and were not promptly informed of his arrest.⁴⁵ Further, the police did not inform Gault of his right not to speak with police and that any statements that he made could and would be used against him in court.⁴⁶ At trial, the alleged victim failed to appear in court to testify, but the judge still allowed the hearing to proceed, “without swearing in any of the witnesses or making a transcript or recording of the hearing.”⁴⁷

Also, at trial, no legal counsel represented Gault and the judge conducted most of the questioning of Gault.⁴⁸ Outraged by the extreme procedural deficiencies of the case, and the complete lack of due process granted to Gault, the Supreme Court held that juveniles had a “right to counsel, notice of charges, confrontation and cross-examination, and to the privilege against self-incrimination.”⁴⁹

Several years after *Miranda* and *In re Gault* were decided, the Supreme Court addressed the applicability of *Miranda* to juvenile proceedings in *Fare v. Michael C.*⁵⁰ Michael C. was a 16-year old male who was under suspicion for murder, taken into police custody, and asked to see his probation officer, although he later confessed to murder during the police interrogation.⁵¹ The California Supreme Court viewed Michael C.’s request to meet with his probation officer as an assertion of his right to remain silent.⁵² However, the United States Supreme Court did not agree,⁵³ holding that the request for a probation officer did not necessarily invoke the Fifth Amendment right to remain silent.⁵⁴

The *Fare* Court held that the same standard that applies to adult criminal actions in determining whether a defendant has effectively waived his or her *Miranda* rights, applied to minors too.⁵⁵ In so ruling, the Court directed judges to inquire whether a minor’s admission was “knowing,

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 44.

⁴⁷ Drizin, *supra* n. 27, at 264 (discussing *In re Gault*, 387 U.S. 1 (1967) and noting that false confessions were a major rationale for the Supreme Court’s *Gault* decision). See also Birkhead & Scott-Hayward, *supra* n. 37.

⁴⁸ *In re Gault*, 387 U.S. at 29.

⁴⁹ *In re Gault*, 387 U.S. 1, 32-40 (1967). See also Drizin, *supra* n. 26, at 264 (discussing *Gault*).

⁵⁰ 442 U.S. 707 (1979).

⁵¹ *Id.* at 710.

⁵² *Id.* at 713-14.

⁵³ *Id.* at 721-22.

⁵⁴ *Id.*

⁵⁵ *Id.* at 725.

intelligent, and voluntary under the totality of the circumstances.”⁵⁶ The Court thus refused to accept the argument that there were meaningful psychological and mental differences between adults and children that warranted granting minors greater Fifth Amendment protection.⁵⁷ As a result of its “totality of the circumstances” rationale, the Court in effect permitted lower courts to apply the same discretionary standard that governed adult *Miranda* claims to juvenile proceedings—including the admissibility of juvenile confessions stemming from police interrogations.⁵⁸

C. *Current State of Miranda Warnings Applicable to Juveniles*

While *Miranda* warnings appear to be a “good thing” that provide juveniles with protection against self-incrimination, in practice, *Miranda* warnings are hardly a true “barrier” against police abuse—with the law-enforcement community largely considering *Miranda* to be merely an annoyance in gathering information in post-arrest interrogations.⁵⁹ The accuracy of police perceptions of *Miranda* as nothing more than an “annoyance” results from the high percentage of defendants’ and juveniles’ waivers, as reflected in statistical studies showing that “80-85 percent of criminal suspects waive their *Miranda* rights and that over 90 percent of juveniles waive their protection against self-incrimination.”⁶⁰ Currently, under Supreme Court case-law, trial courts have considerable leeway in determining whether or not a juvenile has made a valid waiver of his or her *Miranda* rights.⁶¹

⁵⁶ *Id.* at 718-24. According to the Supreme Court, “[t]his totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so.”

⁵⁷ *Id.* at 725. The arguably current lax approach of the Supreme Court as to this vital procedural due process point is reflected in its statement that: “There is no reason to assume that such courts -- especially juvenile courts, with their special expertise in this area -- will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved.”

⁵⁸ *Id.* For a comprehensive study of police interrogations methods and data as to types of juveniles by race and age, see Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. LAW & CRIMINOLOGY 219 (Fall 2006) [hereinafter Feld].

⁵⁹ Drizin, *supra* n. 27, at 266 (citing Rachel Kahn et al., *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCH. REV. 119, 221 (2006)).

⁶⁰ *Id.* n.s 60-1 (citing treatises and the Illinois Juvenile Competency Commission that a “a great deal of youth are actullay unfit to stand trial” for a range of reasons).

⁶¹ *Id.* at 267. Of course, once a self-incriminating “confession” or admission is made, practical

The majority of states have thus adopted the “totality of the circumstances” test for determining whether or not a juvenile gave a voluntary and knowing confession during police interrogation, in interpreting the protections afforded by their own State constitutions.⁶² In evaluating “totality of the circumstances,” courts consider multiple factors, including a juvenile’s age, education, IQ, and prior contact with the law, in determining whether a juvenile had the appropriate level of maturity, competence, and experience with the legal system to knowingly waive his or her rights.⁶³ Any State court that uses the totality of the circumstances test may also consider or exclude whatever factors of that test which it deems appropriate.⁶⁴

Thus, it should be no surprise that the “totality of the circumstances” test leads to upholding false or coerced confessions and wrongful convictions. As noted, the test allows too much judicial discretion.⁶⁵ Judges have little guidance in determining what factors to weigh and how to weigh them in deciding which one(s) might be controlling in specific cases.⁶⁶

This broad judicial discretion can, and has, led to the arbitrary application of the test and inadvertently or otherwise provides the procedural means or avenue by which a multitude of wrongful convictions accrue.⁶⁷ Second, courts have been notoriously overly strict in applying the test properly in a way that would result in suppressing confessions.⁶⁸ Courts seem to nearly always find that confessions were given voluntarily, even in

difficulties in convincing a court to suppress the statement seem overwhelming, short of clear and convincing evidence of a blatant *Miranda* violation which often hinges on the police themselves acknowledging the deprivation of rights.

⁶² Feld, *supra* n. 60, 97 J. CRIM. L. & CRIMINOLOGY at 225. In interpreting their own State constitutions, courts may interpret them as providing *greater* protections and freedoms than the United States Constitution.

⁶³ *Id.* & nn.25-28. See *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1986), *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) & *State v. Benoit*, 490 A.2d 295, 302 (N.H. 1985) (listing factors in determining if waivers are knowing and voluntary).

⁶⁴ Drizin, *supra* n. 27, at 268 n.71 (citing Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 1141, 176 (1984)).

⁶⁵ *See id.* & n.s 75-76.

⁶⁶ *Id.* at 276-8 & n.s 68-71. The problem with juvenile false confessions was a major reason for the *Gault* decision, since “authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by juveniles. *Gault*, 387 U.S. at 52 (cited in Drizin, *supra* n. 27, at 268 n.82).

⁶⁷ *Id.* at 267-9.

⁶⁸ Lawrence Schlam, *Police Interrogations of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 914 (1995) [hereinafter Schlam].

the face of a strong recantation or other overt mitigating or countervailing factors.⁶⁹

A minority of states have decided to comply with the Supreme Court's directive for fairness by adopting *per se* rules that require express procedural safeguards to be met and courts to make findings to that effect on the record, before a juvenile's confession can be deemed voluntary and admitted into evidence.⁷⁰ *Per se* rules expressly presume that a juvenile's confession was *not* freely given, unless the police followed the procedural safeguards and courts made the required findings to that effect.⁷¹

Twelve states presume that juveniles are not competent to waive their *Miranda* rights unless a parent or interested adult is present during interrogation.⁷² Many judges, attorneys and others have argued that having a parent or interested adult in a juvenile interrogation is extremely important, since they can potentially serve as witnesses to the fairness of the police interrogation and perhaps advise their children. By helping the juvenile assess his or her options (something which the police might not support) and by reducing possible police coercion, parents can prevent a juvenile from making untrustworthy or false statements.⁷³

While *per se* rules appear to better protect children's Fifth Amendment rights than the totality-of-the-circumstances test, they do have shortcomings. It has been argued that *per se* rules fail to further the state's legitimate duty to protect the public.⁷⁴ This claim centers on the idea that if police are required to have a parent or interested adult present before interrogating a juvenile, juveniles would "clam up," refuse to talk, and prevent the police from obtaining needed information about crimes in the community ("confessions")—all of which would result in freeing a criminal who could well inflict more crime on the public.⁷⁵

This anti-*per se* argument seems to underscore the apparent lack of evidence that police have in hand when they make arrests and that under modern police practice, relatively few convictions would ever result in the

⁶⁹ *Id.*

⁷⁰ Michael Wayne Brooks, *Kids Waiving Goodbye to Their Rights: An Argument Against Juveniles' Ability to Waive Their Right to Remain Silent During Police Interrogations*, 13 *Geo. Mason L. Rev.* 219, 226-27 (2004) [hereinafter, Brooks].

⁷¹ *Id.* See also Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 *WASH. & LEE L. REV.* 385 (Spring 2008) & Ryan Patterson, *Rn Re andre M>: Analyzing the Totality of the Circumstances When a Parent is Intentionally Excluded from a Juvenile Interrogation*, 46 *ARIZ L. REV.* 601 (2004).

⁷² Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 *MINN. L. REV.* 23, 36 (2006).

⁷³ *Id.* at 39.

⁷⁴ Schlam, *supra* n. 71, at 919.

⁷⁵ *Id.*

absence of confessions extracted from targets, usually very early in investigations. Further, this argument underscores a tacit admission of the police's heightened incentive to manipulate the manner and timing of *Miranda* warnings (perhaps after interrogations have already taken place and confessions occur) and extract "confessions," often on flimsy evidence and by too often fabricating "evidence" that does not exist.

This occurred in Marty Tankleff's case when the lead police investigator falsely claimed that Marty's father had made something in the nature of a dying declaration that Marty did the murder.⁷⁶ In that light, experience indicates that without confessions or admissions, police would be hard-put to have enough evidence to charge, let alone convict.

Opponents of the *per se* rule also argue that some parents may not be capable of protecting the best interests of their own children in police interrogations, and may even coerce their children into waiving their rights.⁷⁷ Still other opponents of *per se* argue that constitutional rights are "personal" to the juvenile, so that it is wrong to allow other individuals (even caring parents) to be in a position to make decisions have discretion on waiving those rights.⁷⁸

In such a situation, the police should be required to contact courts promptly for appointment of a guardian *ad litem* or legal counsel to represent the juvenile—and to forgo any and all questioning, even informal "chat," until that has been done and the attorney is present, perhaps along with the parents too.⁷⁹

D. *Why Do Juveniles Waive Their Miranda Rights?*

There are many reasons why juveniles waive their *Miranda* and Fifth Amendment self-incrimination rights. First, children possess poorer comprehension skills than adults⁸⁰ and do not generally comprehend the meaning of the right to be free from self-incrimination when police demand

⁷⁶ An interesting issue that is beyond the scope of this paper is why federal and State prosecutors do not bring criminal charges against police officers who lie to targets of investigations. Federal law has long allowed for criminal charges against State officers and others who violate the federal rights of others. See 18 U.S.C. §§ 241 to 242 & 245; 42 U.S.C. § 1981 et seq.; Mark D. Cohen, Civil Rights Criminal Prosecutions, 9 J. SUFFOLK ACADEMY OF LAW 53 (Spring 1994) (Rodney King police-beating case). See also Linda E. Fisher, Anatomy of an Affirmative Duty to Protect: 42 U.S.C. § 1986, 56 WASH & LEE L. REV. 461 (Spring 1999) (police duty to protect).

⁷⁷ Schlam, *supra* n. 71, at 922.

⁷⁸ *Id.* at 919.

⁷⁹ Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994).

⁸⁰ *Id.*

answers and now.⁸¹ “Research demonstrates that only 21 percent of children, as compared to 42.3 percent of adults, comprehend the meaning and significance of the Miranda warnings.”⁸² More importantly, this means that 79% of children had little-to-no comprehension of what *Miranda* really means.

Children under 14 are at an even higher risk.⁸³ At 15 years old, a child is more likely to understand the words associated with *Miranda* warnings, but often cannot truly grasp the purpose or significance of what those warnings mean--and especially cannot grasp the legal and practical consequences of waiving their rights.⁸⁴ Further, children frequently do not understand the concept of a “right” and the accompanying “right” to remain silent as a legal entitlement that allows them to end police interrogations on demand.⁸⁵ As one legal scholar pointed out, juveniles simply do not understand that the right against self-incrimination is an entitlement that cannot be taken away from them unless they give it up willingly.⁸⁶

Second, juveniles frequently waive *Miranda* rights because they are psychologically incapable of fully grasping the interest that is at stake and the likely and potential results of a waiver that opens the door to answering police officers’ many questions—and the necessity of juveniles being forced to deal with the sometimes deceptive or misleading claims of police investigators who are trying short-circuit an investigation by shaking loose a quick confession.⁸⁷

Much of this is explained by the readily observable fact that the adolescent brain differs from the adult brain in many ways. One such difference is counterfactual thought, and area in which children have a

⁸¹ Drizin, *supra* n. 27, at 268-9 (discussing Supreme Court cases on how juveniles succumb to pressure from authority figures and citing Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POLICY & LAW 3, 10-11 (1997)).

⁸² Kenneth King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waivers of Miranda Rights*, 2006 Wis. L. Rev. 431, 433 (2006) [hereinafter King].

⁸³ Drizin, *supra* n. 27, at 268 & n.73 (citing Kaban & Toby, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER FOR CHILDREN & COURTS 151, 153 (1999)).

⁸⁴ *Id.* at 268 n. 75 (citing Kimberly Larson, *Improving the “Kangaroo Courts”: A Proposal for Reform in Evaluating Juveniles’ Waiver of Miranda*, 48 VILL. L. REV. 629, 650 (2003)).

⁸⁵ *Id.* at 269 nn. 77-85. According to King, *supra*, n. 84 at 440, the slower or later-in-life natural development of the brain (the frontal cortex in particular) explains much as to how and why juveniles acting alone are handicapped in exercising rights during interrogations. The frontal cortex is the part of the brain that gathers information from various parts of the brain, sorts it all out, analyzes and determines what is important and what is not, and sends instructions on how to react and what to say.

⁸⁶ *Id.*, Drizin.

⁸⁷ King, *supra* n. 85, at 440.

much more difficult time engaging in than adults.⁸⁸ Counterfactual thought is the ability to weight “pros and cons” or to mold various hypotheticals or ideas into a working mental synthesis, while sifting and evaluating the possibilities of other courses of actions, so that the mind grasps the range of results and consequences involved and analyzes them adequately.⁸⁹ When a child is asked to effectively waive his or her *Miranda* rights, he or she must be able to engage in fairly complex counterfactual thinking, something that is more suited to mature adults.⁹⁰

Thus, if a juvenile is to truly waive his or her rights, he or she must have the competency to understand the right that is at stake *and* the resulting consequences for each of the various choices available.⁹¹ Further, counterfactual thinking also requires the individual to have a well-developed pre-frontal cortex,⁹² which becomes fully developed later in life, generally during late adolescence or early adulthood.⁹³ These findings indicate that juveniles tend to think and act more impulsively and to make decisions more rashly and ill-advisedly than adults—frequently giving little thought to the short-term and longer-term consequences.⁹⁴

Lastly, children often waive their *Miranda* rights because they do not understand the importance of effective legal counsel.⁹⁵ Thus, it should be difficult-to-virtually-impossible for law-enforcement agencies and courts to arrive at a broad-based sweeping conclusion that juveniles as an entire class can intelligently and voluntarily waive their rights. As noted, approximately 80-to-90 percent of juveniles waive their right to counsel in police interrogation settings.⁹⁶ One can only imagine the almost certain decline in wrongful convictions if attorneys were consistently called to help juveniles before police questioning or interrogations could begin.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 440-41.

⁹¹ *Id.* at 441.

⁹² *Id.*

⁹³ *Id.* at 441-42.

⁹⁴ *Id.* at 435.

⁹⁵ Drizin, *supra* n. 27, at 284 nn. 228-242 (citing Adele Bernhard, *Effective Assistant of Counsel in Wrongly Convicted: Perspectives on Failed Justice* 220, 220 (Saundra D. Westervelt & John A. Humphrey eds. 2001), Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. LAW 783, 791-2, Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waivers in the Juvenile Courts*, 54 FLA. L. REV. 577, 601 (2002), and Judith B. Jones, *Access to Counsel*, U.S. Dep't of Justice Office of Juvenile Justice & Delinquency Prevention, Juvenile Justice Bulletin (June 2004)).

⁹⁶ *Id.* at 285. Experience indicates that police will often play on adolescents' fear of their parents “finding out” and thus tacitly or expressly indicate that they, the police, might somehow be able to help out juveniles in that regard.

The police might claim that it is imperative that targets waive their rights and questioning begin promptly, lest the police be hindered in concluding that a target is innocent (or was working with co-conspirators)—so that the public would be placed at greater risk as “the real criminals” or other dangerous persons roamed the streets “out there.” As discussed later, one solution is to have an established system in place with attorneys on call to advise newly-arrested or detained juveniles. Another would simply recognize that the current police practice leads to false confessions and is not worthy or perpetuating. In a truly serious situation, of course, heightened police searches and neighborhood watches should keep the truly dangerous off the street and/or alert the public through various means, such as electronic notices to the public and plain old-fashioned foot-work.

IV. FALSE CONFESSIONS

A. Overview

Why would a person confess to a crime that he or she did not commit? This question is hardly an unusual and often is voiced by mature adults who have little-to-no real interface with law-enforcement involving anything like serious crimes. Yet, it has been documented that innocent people often *do* falsely confess to crimes that they did not commit⁹⁷ and that false confessions are alarmingly common. According to the “Innocence Project”: “In about 25% of DNA exoneration cases, innocent defendants [had previously] made incriminating statements, delivered outright confessions or pled guilty,”⁹⁸ despite unassailable DNA evidence that they were not guilty. Even more disturbing, juveniles tend to falsely confess at higher rates than adults, begging the obvious question why juveniles are more likely than adults to wrongly confess to a crime that they did not commit.⁹⁹

⁹⁷ See Innocence Project: Understand the Causes,

<http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Oct. 7, 2010).

⁹⁸ *Id.* The professional literature is rich with good analysis of the reasons why people make false confessions, ranging from the those who do so to grab the limelight or to protect another to those who “confess” to end the interrogation to those who may come to believe that they no longer trust their own mental faculties and memory, and the list does not end there. Andrea Kapardis, “Psychology and the Police,” *Psychology and Law: A Critical Introduction* 354, 386-90 (Cambridge U. Press 3rd ed. 2010) & Jennifer M. Brown & Elizabeth A. Campbell, “Interrogative suggestibility and false confessions,” *The Cambridge Handbook of Forensic Psychology* § 2.8 (Cambridge U. Press 2010).

⁹⁹ Drizin, *supra* n. 27, at 273 nn.117 & 119 (citing Leo & Ofshe, *The Consequences of False confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological*

In general, the legal community has accepted the proposition that when false confessions occur, they are often the result of brutal police interrogations.¹⁰⁰ Although police once utilized physical torture and violence during criminal questioning, most interrogators now exploit “sophisticated psychological tactics to manipulate, confuse, deceive, or gain confessions from a suspect,”¹⁰¹ perhaps as well as physical methods that do not scar or leave cuts, bruises, or other marks. While the asserted goal of police interrogations is be fact-finding and truth-seeking, most interrogators are taught only how to elicit confessions from an uncooperative suspect¹⁰² and apparently not taught how to recognize a potential false confession or, more importantly, how to prevent one.¹⁰³

Instead, the judicial system, as a whole, has rested on its proverbial laurels by accepting the apparent age-old belief that the psychological methods employed during police interrogations protect the public and will generally not produce false confessions (perhaps since the innocent will not confess to crimes not committed)—with courts believing that statements made as a result of an interrogation are presumptively reliable and thus admissible as evidence against a juvenile.¹⁰⁴

B. *How and Why Do False Confessions Occur?*

1. Coercive Interrogation Techniques

As noted, many people have considerable difficulty understanding why an innocent person would ever confess to a crime that he or she did not commit. But less known to the general public is the fact that most law-enforcement academies teach police interrogators the range of manipulative or coercive interrogation tactics and “how and why they [those techniques]

Interrogation, 88 J. CRIM. LAW & CRIMINOLOGY 429, 490-6 (1997-9) & Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1329-30 (1996-7)).

¹⁰⁰ *Id.* at 270 nn.88-91 (citing Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in *Interrogations, Confessions, and Entrapment* 37, 42 (G. Daniel Lassiter ed. 2004) & Fred E. Inbau et al., *Criminal Interrogation and Confessions* (3rd ed. 1986)).

¹⁰¹ *Id.* at 270 & n.92 (citing Richard A. Leo, *The Third Degree*, supra n. 104).

¹⁰² Nashiba F. Boyd, “*I Didn’t Do It, I Was Forced to Say That I Did*”: *The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 HOW. L. J. 395, 400 (2004) [hereinafter Boyd].

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 400-01 & n. 40 (citing 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, 431-2 (1998)).

are designed to manipulate the perceptions, reasoning, and decision-making of the custodial suspect and thus lead to the decision to confess.”¹⁰⁵ One of these psychological methods used to extract confessions is the ever-popular “Reid Technique.”¹⁰⁶

The Reid Technique is a 9-step method used to induce uncooperative suspects to confess.¹⁰⁷ The technique is initiated when a suspect is accused or suspected of a crime.¹⁰⁸ The interrogator “plays dumb” and expresses a general reaction of disbelief as to why the interrogation is even necessary.¹⁰⁹ Next, the officer minimizes the culpability or seriousness of the suspect’s alleged behavior and generates less damning or judgmental theories as to how the crime might have occurred, trying to motivate the suspect to admit to the crime on that basis.¹¹⁰ Then, the interrogator interrupts the suspect’s denials of guilt, to instill a sense of hopelessness by persuading the suspect that denials is futile.¹¹¹ After that, the interrogating officer counters all objections that the juvenile raises, including moral, emotional, and factual objections—and continues to force the “theme” of the interrogation, the suspect’s undeniable guilt, into the suspect’s mind.¹¹² If still unsuccessful, the Reid Technique instructs the officer to act confused and withdrawn, in an attempt to further incite feelings of helplessness and isolation in the suspect.¹¹³ Once again, the interrogating officer narrows the theme of the interrogation by focusing on a single theory or scenario of the suspect’s guilt.¹¹⁴

The officer will then pose two moral questions to the suspect and asks him or her to answer. One of the questions expresses no condemnation

¹⁰⁵ *Id.* Many of the practical legal and factual issues involved with police interrogations generally are discussed in N., *Cooper v. Dupnik: Civil Liability for Unconstitutional Interrogations*, 50 WASH. & LEE L. REV. 1191 (Summer 1993). For an unvarnished look at police operations and procedure in the context of public police rulemaking which is still timely today, see Kenneth Culp Davis, *Observation: An Approach to Legal Control of the Police*, 52 TEXAS L. REV. 703 (April 1973).

¹⁰⁶ Drizin, *supra* n. 27, at 270 n.94 (citing Fred E. Inbau et al., *Criminal Interrogation and Confessions* (3rd ed. 1986)). Company employees who write police interrogation manuals and give training to police rarely allows the public access to those manuals. Nashiba F. Boyd, “I Didn’t Do It, I was Forced to Say that I Did”: The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them, 47 HOW. L. J. 395, 401 & n.52 (2004).

¹⁰⁷ *Id.* at n.95 (citing Fred E. Inbau).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 270-1 & n.96.

¹¹³ *Id.* at 271 n.98.

¹¹⁴ *Id.* at 271 n.98.

or judgment of the suspect, while also simultaneously “justifying” the crime—as the second moral question is tinged with blame and moral condemnation of the suspect.¹¹⁵ Finally, the interrogator begins to insist that the suspect reveal details of the crime in his or her own words and pressures the suspect to make both a written and oral confession.¹¹⁶

The Reid Technique is just one of many improper or questionable psychological methods that the police use to coerce confessions from presumptively guilty suspects. Other police techniques have the same approach for extracting false confessions.¹¹⁷ For example, the first step involves convincing the suspect that his or her situation is hopeless, that the evidence of guilt is strong, and that he or she will likely not “survive interrogation” unless he or she complies with the demands of the investigators.¹¹⁸ Once hopelessness, doubt, isolation, and fear are instilled in the suspect, the interrogator will offer reasons for the suspect to take responsibility for the crime and will attempt to persuade the suspect that it is somehow in his or her best interest to confess.¹¹⁹

Part of the process involves the interrogator’s convincing the suspect that the evidence is so strong, that the suspect is the only possible person who could have committed the crime.¹²⁰ In less common cases, the officer may even advance a theory that the suspect somehow acted unconsciously in committing the crime and may even provide seemingly rational explanations for the suspect’s sudden bout of amnesia or lack of consciousness.¹²¹

Unfortunately, most Americans and criminal suspects do not know that interrogators are legally allowed to fabricate “evidence” and even generate outright lies, during interrogations, all in an attempt to compel a confession—as the police did with Marty Tankleff when they claimed that

¹¹⁵ *Id.* at 271 nn.99-100.

¹¹⁶ *Id.* at 271 n.102.

¹¹⁷ See Drizin & Leo, *supra* n. 103, at 914.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 914.

¹²⁰ *Id.* at 918.

¹²¹ *Oregon v. Mathiason*, 429 U.S. 492, 495-6 (1977) & *Frazier v. Cup*, 394 U.S. 731, 737-9 (1969) (holding admissible confessions after police lied about evidence). See also N., *Honesty is the Best Policy: A Case for the limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT’L LAW 1029, 1030-2 (May 2009) (discussing a plethora of legal, societal and practical evils arising from police falsehoods); Maark A. Godsey, *Shining the Bright Light on Police Interrogation in America*, 6 OHIO ST. J. CRIM. LAW 711, 723 (2009) (chart of studies of false confession and resulting wrongful convictions); Deborah A. Davis & Richard A. Leo, *From False Confession to Wrongful Conviction: Seven Psychological Processes*, 38 J. OF PSYCHIATRY & L. 9 (2009), available at http://web.me.com/gregdeclue/Site/Volume_1__2009_files/2009-excerpt-Leo.pdf (last visited May 24, 2011).

his father made a dying declaration identifying Marty as the murderer.¹²² The public's general lack of knowledge of police interrogation methods, and the psychological tactics the police use can, and has, led many innocent people to "confess" and undergo real prison time—while the *real* criminals were at liberty endangering the public and committing more violent and other crimes, perhaps for many years or even decades.

2. Juveniles Are Uniquely and Particularly Susceptible to Giving False Confessions

Determined and lengthy-enough police interrogations often render all but the strongest-willed innocent person susceptible and seemingly willing to make a false confession. But this is all the more so when dealing with juveniles. Compared with the adult population, juveniles are unique in their vulnerability and susceptibility to erroneous or false confessions by virtue of their age and the development of their brains.¹²³

First, juveniles are particularly susceptible to yielding to the authority of police officers and to their interrogation techniques.¹²⁴ That is compounded by the fact that from an early age, most children are taught to believe that police officers are the "good guys" or people to whom they can turn to in times of trouble or need.¹²⁵ As a result, many children have difficulty believing that police officers would prejudge or misjudge guilt, let alone lie to them.¹²⁶ Children do not necessarily perceive that the interests of police officers might be contrary or adverse to their own, even in the police interrogation context.¹²⁷

Second, most children have a general desire to please authority figures.¹²⁸ Children will go as far as changing their answers to police questioning in an attempt to be "good" by ratifying or placating an

¹²² *Id.*, Oregon v. Mathiason, 429 U.S. at 495-6 & Frazier v. Cup, 394 U.S. at 737-9. See also Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111, 148 (1997) (prohibiting police from presenting false forensic evidence in support of false confessions).

¹²³ Boyd, *supra* n. 106, at 402.

¹²⁴ *Id.*

¹²⁵ *Id.* These officer-friendly attitudes are often promoted in primary schools through "Officer Friendly" programs which teach children that law enforcement officers are kind and friendly people who will help them in times of trouble. *Id.* at 402-03.

¹²⁶ *Id.* at 402.

¹²⁷ *Id.* Police officers and department can, of course, be subject to community and political pressure to increase the number of "solved" crimes. Extracting "confessions" from adult and juvenile suspects alike can boost those numbers and please their constituencies (sometimes leading to increased funding and salaries), even if the public is not significantly safer.

¹²⁸ *Id.* at 403.

officer.¹²⁹ Given this youthful vulnerability springing from not-yet-fully developed juvenile brains, it is easy to see how “[t]actics like aggressive questioning, presenting false evidence, and insinuating questions may create unique dangers when employed with youths.”¹³⁰

As should be judicially noticed by courts, juveniles possess considerably less life experiences and mental and emotional resources than adults, placing them on a clearly uneven playing-field vis-à-vis police interrogations.¹³¹ As mentioned earlier, minors are prone to not understanding or misunderstanding their legal rights and the consequences of decisions that suspects typically make during police examinations, rendering them more likely to make erroneous or fictitious confessions.¹³² This is compounded by the fact that minors are typically handicapped brain and thought patterns that are impulsive, immature, and tend to place more weight on short-term, as opposed to the long-term, consequences of their decisions.¹³³

Simply put, juveniles are not capable of thinking as strategically or maturely, let alone as competently, as adults.¹³⁴ The decision-making mental process or lack thereof of suspects continues to be a crucial factor in the ongoing “success” of police interrogations, since the consequences of decisions that juveniles are induced to make within seconds could and do have life-long consequences for a child’s entire future, as we should readily recognize.¹³⁵ In addition, juveniles are prone to take responsibility (perhaps from a “friends forever” sense of misplaced loyalty) for the actions of others than do adults—due to unique adolescent social and familial pressures that augment incidents of erroneous or false confessions.¹³⁶ In sum, there appear to be a number of good reasons for questioning the legal and psychological competency of juveniles to waive their rights without meaningful legal and adult guidance.¹³⁷

¹²⁹ *Id.*

¹³⁰ Feld, *supra* n. 60, at 245.

¹³¹ *Id.* at 244.

¹³² *See id.*

¹³³ Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 62 (2007) [hereinafter Scott-Hayward]. For an example of a motion to suppress a confession with federal and State case-law citations, see McCormack, Blackwell & Blackwell, Texas Practice Series, Criminal Forms and Trial Manual § 54.4 Motion to suppress confession (11th ed. 2011) (available on Westlaw).

¹³⁴ Feld, *supra* n. 62, at 244.

¹³⁵ *See id.*

¹³⁶ *Id.* See also Saul Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. J. 221 (1997) & Nashiba F. Boyd, “*I Didn’t Do It, I Was Forced to Say That I Did*”: *The Problem of Coerced Juvenile Confessions, and Proposed Federal Legislation to Prevent Them*, 47 HOW. L. J. 395 (Winter 2004).

¹³⁷ Michael Wayne Brooks, *Kids Waiving Goodbye to Their Rights: An Argument Against*

3. Problems Associated with Making a False Confession

Juveniles who “break” under the pressure of police interrogations and falsely confess, often do so out of a strong desire and a survival instinct to free themselves of the grueling interrogation.¹³⁸ These youth truly believe that once the interrogation ends, they can undo the damage of their false confessions.¹³⁹ Unfortunately, they fail to understand that courts and the general public view any and all confessions as devastating to a defendant’s case and claim of innocence, no matter how compelling the factual evidence might be—with the result that a court will usually give a confession overwhelming weight at trial and with defense counsel advising juveniles to enter guilty pleas, given current legal realities.¹⁴⁰ A confession is typically the single *most* damning piece of evidence in supporting a criminal conviction, trumping even exculpatory physical evidence to the contrary.¹⁴¹

When a confession is introduced into evidence, whether or not a recantation took place immediately or later, juries tend to overwhelmingly convict defendants.¹⁴² Further, law-enforcement invariably takes pains to ensure that it appears as if it did not make a mistake or act hastily during the interrogation process or the time leading up to it, in order to maintain optimal law-enforcement authority, credibility, and officer job-performance ratings.¹⁴³ Worse, judges rarely suppress recanted confessions.¹⁴⁴ Because of that state of affairs, defense attorneys usually strongly encourage defendants, who have made a confession, false or not, to enter into pretrial plea bargains—“thus making the false confession nearly impossible to expose” or present to a trial or appeals court, since a plea-bargain effectively ends the judicial process and renders underlying issues moot and non-appealable.¹⁴⁵

Juveniles’ Ability to Waive Their Right to Remain silent During Police Interrogations, 13 GEO. MASON L. REV. 219 (Fall 2004).

¹³⁸ See Drizin, *supra* n. 27, at 272.

¹³⁹ *Id.* at 272-3 & nn.115-120 (citing treatises).

¹⁴⁰ *Id.* at 273 n.119.

¹⁴¹ *Id.* at 272-3 nn.116 & 117 (citing Leo & 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, 490-96 (1997-1998)).

¹⁴² *Id.* Drizin at 272-3 n.117.

¹⁴³ *Id.* at 273 & n.119 (citing Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS . REV. 1317, 1329-30 (1997-1998)).

¹⁴⁴ *Id.* at 273 n.119.

¹⁴⁵ *Id.* at 273 n.115

V. PROPOSED REFORMS TO THE EXISTING JUVENILE JUDICIAL MODEL

A. Overview

Before discussing possible reforms of the juvenile justice system, please note that this article does not argue or advocate that the current juvenile judicial model should be abolished in its entirety. As many scholars have stated, the current juvenile justice model is better than what preceded it.¹⁴⁶ Most minors who are adjudicated delinquent are not repeat offenders.¹⁴⁷ Further, regardless of criticism of the current model, the goal of juvenile justice remains rehabilitation of minors, consistent with public safety.¹⁴⁸

That said, it has been shown repeatedly that youths typically do not truly comprehend *Miranda* warnings and their Fifth Amendment right not to incriminate themselves—nor do they understand the legal and practical consequences of waiving those rights.¹⁴⁹ To help remedy this, Congress and state legislatures should draft “juvenile friendly” *Miranda* warnings. If our changed culture and modern history show that large percentages of juveniles do not really understand the legal and practical consequences of waiving rights, it seems to follow that the standard “adult” *Miranda* warning used since the mid-1960’s hardly satisfies the letter and spirit of the Constitution and of the *Miranda* decision itself. If a waiver requires at least reasonable knowledge and understanding of what is involved, then it would seem that an appropriate juvenile-friendly *Miranda* warning is needed, for starters, to be read slowly, repeated as needed (asking juveniles if they really understood what is being told to them, perhaps with follow-up specific questions), and given in the primary language of the juvenile.¹⁵⁰

¹⁴⁶ See generally *id.* at 262 & nn.23 & 24 (citing treatises).

¹⁴⁷ *Id.* at 261 nn.23 & 24.

¹⁴⁸ *Id.* at 265-6.

¹⁴⁹ See *id.* at 268. See also Rachel Kahn et al., *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCHOL. REV. 119, 221 (2006); Mark Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 792 (2005-06); J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 337, 333-34 (1977).

¹⁵⁰ See generally U.S. Const. amend. V. Given the multitude of cultures and even languages and dialects in the United States, this matter should receive prompt legislative attention. Otherwise, as in the past, as the situation festers and even metastasizes, courts will eventually step in (as has happened many times over the past 60 or so years in the civil rights area) and the executive and legislative branches will have to scramble and perhaps act in haste to “catch up” with the courts.

Interrogators should be encouraged, perhaps required, to stress to children that they have an actual choice as to whether or not to continue with the interrogation, and emphasize to them that they are entirely free to choose to stop the interrogation immediately and have an attorney present before any questioning begins or resumes. Incorporating these changes into police academy and police department “continuing education” interrogation training should readily implement this proposed reform. Police department memos and Fraternal Order of Police and other publications would almost certainly disseminate information directly to police officers.

Similar notices in legal publications and seminars at legal and public-defender conferences would tend to give the momentum needed for acceptable follow-through by judges, police agencies, and attorneys to make this a reality. Also, courts should be aware that the failure of police investigators to follow these “best practices” (assuming that they were not required by law) should result in excluding any confession or admission from evidence and possibly even referring a police investigator to law-enforcement agencies for discipline and to the State attorney general and the United States Attorney for possible prosecution in serious cases for deprivation of rights under State and federal law.

*B. Eliminate “Totality of the Circumstances” Test and
Replace with “Per Se” Rule*

State courts and legislatures should also eliminate the totality-of-the-circumstances test for determining whether or not a juvenile had knowingly and voluntarily waived his or her *Miranda* rights. Juveniles are not little adults and thus courts should not apply adult criminal procedural rules to them, perhaps much as courts hold minors and juveniles to different standards when it comes to contracts and the like. Applying adult criminal rules to juveniles seriously undermines and even eviscerates all or most of the non-criminal rehabilitative nature of juvenile proceedings.

As noted, the totality-of-the-circumstances test lacks adequate standards and thus leads to or tends to lead to unfair judicial rulings which often appear to “rubber-stamp” or summarily affirm police action, with no real consideration or sifting of facts that might support juveniles’ claims. In that light, the courts have not been an adequate constitutional check on law-enforcement encroachment on juveniles’ rights.¹⁵¹ If legislatures stepped up and addressed this properly, law-enforcement agencies would be required to comply with *per se* rules as to the procedural steps that police must take

¹⁵¹ Lisa M. Krzewinski, *But I didn't do it: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 371 (2002) [hereinafter Krzewinski].

before a court would hear police claims that a minor did or did not knowingly and voluntarily waive his or *Miranda* rights.

Per se rules have the salutary effect of being a “bright line” for both the police and courts. *Per se* would also eliminating much subjectivity and minimize unfair or arbitrary judicial determinations.¹⁵² Of the types of *per se* rules that states or Congress could implement, the most important would require that an attorney be appointed to and meet with a juvenile before any right was waived, *Miranda* or otherwise. To implement this, states should have 24/7 “on call” attorneys whose job would be to meet with minors in custody before any formal or informal police interrogation or “chat” begins. “On call” attorneys need not represent juveniles through the entire course of the investigation, let alone the court hearing on the merits, but could be there to explain to children their rights, the consequences of waiving them, and assist in juveniles’ requesting “permanent” attorneys to represent them—perhaps with the “on call” attorney continuing in place until a permanent attorney were appointed by the court.¹⁵³ Magistrates or other judicial-like officials housed at or near law-enforcement offices and detention centers could also greatly assist in the process.¹⁵⁴

While requiring consultation with an attorney prior to the start of a police interrogation might not be likely due to limited state financial resources and purported hindrances that this would be said to pose to law enforcement, this safeguard is quite arguably absolutely necessary. After all, Fifth Amendment rights are non-negotiable *entitlements* of all United States citizens, regardless of the “annoyance” that this might impose on law enforcement agencies. Further, if innocent suspects are encouraged to cooperate with police investigations, with the help and guidance of defense attorneys, investigators would still be able to perform their role of fact-finding and crime-solving, while better ensuring that innocent people remain innocent.¹⁵⁵

¹⁵² See *id.* at 368-69.

¹⁵³ “[I]n April 2000, Illinois lawmakers passed a measure requiring anyone younger than age thirteen to have a lawyer before facing police questioning in homicide and sexual assault cases. The statute requires that the police, at the very least, allow the juvenile to speak with an attorney over the phone before the police can begin their interrogation.... The original proposal for the legislation took this into consideration and mandated that statements taken without a lawyer present would be strictly inadmissible. It also required a lawyer for any criminal suspect younger than eighteen. However, law enforcement groups decried these strict proposals, maintaining that such restrictions would make it difficult for them to perform their jobs.” *Id.* at 375-76.

¹⁵⁴ Many federal and State law-enforcement organizations already have judicial or quasi-judicial officers in-house who could also appoint attorneys to represent juveniles.

¹⁵⁵ In difficult times of economic distress, avoiding placing innocent persons in prison not only is or should be a major fairness and even moral issue, but would also save considerable public funds

If states are not willing to mandate that juveniles consult with a defense attorney before police interrogations begin, then states should mandate that a parent or interested adult be present before a child is allowed to waive any right and that the interested adult have a right to be present and involved at each police interrogation session.¹⁵⁶ As of 2006, roughly a dozen states had implemented this proposed recommendation, requiring the presence of an attorney or parent/adult before a court would consider that a child's purported waiver was knowing and voluntary,¹⁵⁷ given the clear tendency of having an attorney or parent/adult present to reduce police coercion or false/misleading inducements.¹⁵⁸ Further, a parent can serve as a potential witness in court as to any police misconduct, while also counseling the child in regards to self-incriminating statements and helping assure that any waiver of rights by a youth be knowing and voluntary, among other matters.¹⁵⁹

Not all scholars concur, however, as to the claimed beneficial effects of requiring a parent's or interested adult's presence before and during interrogation or as to their role as a guardian of the child's rights. Professor Steven Drizin notes arguments that the presence of a parent during interrogation of a child can actually be detrimental to the child's *Miranda* rights and the child's ultimate decision on waiver.¹⁶⁰ Professor Drizin points out that parents of juvenile suspects may themselves fail to understand the *Miranda* warnings, as well as the consequences of waivers.¹⁶¹ Also, the adult's motives might be adverse to the child's interests for a variety of reasons—and the adult might not wish to incur the

in the process. Doing so would also avoid embittering innocent persons who were unjustly imprisoned and preventing them from engaging in lives of crime after release from prison, due in part to their limited employment opportunities as "ex-cons."

¹⁵⁶ In addition, States should counsel police to schedule such interrogation sessions at times that allow working parents or adults to be present. Police investigators that proceed without parents or adults present, should be required to document the situation and proceed only for good cause shown. In those situations, appointment of temporary counsel should be required.

¹⁵⁷ Feld, *supra* n. 60, at 226. "Colorado, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Montana, North Carolina, Oklahoma, and West Virginia are among the states that employ some version of the per se approach." Hilary B. Farber, *The Role of Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, n. 64 (2004) [hereinafter Farber]. See also Ryan Patterson, *In re Andre M.: Analyzing the Totality of the Circumstances When a Parent is Intentionally Excluded from a Juvenile Interrogation*, 46 ARIZ. L. REV. 601 (Fall 2004).

¹⁵⁸ Boyd, *supra* n. 106, at 417.

¹⁵⁹ Barry Feld, *supra* n. , at 39.

¹⁶⁰ Drizin, *supra* n. 27, at 313 & nn.445-451 (citing findings of State juvenile commissions and *Little v. Arkansas*, 554 S.W.2d 312, 314-5 (Ark. 1977) (example where parent was actual perpetrator of crime).

¹⁶¹ *Id.* at 313.

expense of hiring an attorney or risk angering the police or cause the police to begin focusing on the parent.¹⁶² Professor Drizin also notes that a parent or adult might turn out to be the true perpetrator of the crime or of a related or unrelated crime, thus pitting the adult's interests against the "best interests" of the child.¹⁶³

On balance, though, it typically is in a juvenile's best interests to have a parent or interested adult present and involved in all post-arrest contact between a juvenile and police, including and especially discussion on waiver of rights and interrogations. If the police have meaningful reasons to doubt the fairness or propriety of a particular parent's or adult's presence or involvement, the police should make that point on the record—and seek alternative representation for a juvenile, perhaps by a court-appointed guardian *ad litem* or the like. Simply put, given decades of experience in this area, the police cannot be uniformly and completely trusted to act fairly with juveniles in eliciting waivers of rights and extracting confessions from interrogations. Courts have, as noted, tacitly or unknowingly encouraged that by acquiescing in law-enforcement officers' use of false and misleading statements and claims to extract waivers and confessions from persons being interrogated—as happened with Marty Tankleff and others.

While voluntary police rule-making and the like seem to be the best way of addressing the issues discussed here, legislative and judicial mandates and oversight might be needed in some states, given existing case-law in those jurisdictions that might uphold these abusive practices. California, for example, has held that there was no constitutional duty to inform a 15-year old juvenile that his parents were at the police station and asking to see him.¹⁶⁴ The Supreme Court stated in *In re Gault*¹⁶⁵ that courts

¹⁶² *Id.* at 313.

¹⁶³ *Id.*

¹⁶⁴ *People v. Maestas*, 194 Cal. App.3d 1499, 240 Cal. Rptr. 360 (1987) (court relied on fact that murder-suspect juvenile was familiar with police procedure from prior cases) & *In re Aven S.*, 1 Cal. App.4th 69, 76, 1 Cal. Rptr.2d 655, 660 (1985) (police had no duty to advise minor of right to speak with parent or have them present at questioning). But see *In re Partick W.*, 104 Cal. App.3d 615, 163 Cal. Rptr 848 (1980) (court rejected confessions of 13-year old shooting suspect who made equivocal *Miranda* waiver not informed that parents were at police station and wanted to see him). One California federal appeals court had held that there is an implicit federal statutory right for juveniles and parent to speak to each other before questioning. *United States v. Doe*, 219 F.3d 1009, 1017 (9th Cir. 2003). The Supreme Court in *Fare v. Michael C.*, 442 U.S. 707 (1979) held that a 16-year-old murder suspect with a lengthy juvenile record who asked for his probation officer to be present and was denied that request, was not denied his rights since *Miranda* applied only to requests for attorneys and not other persons. Requests for other persons are reviewed under a "totality of circumstances" test.

¹⁶⁵ 387 U.S. 1, 55. See also *In re Michael B.*, 149 Cal. App.3d 1073, 1083, 197 Cal. Rptr. 379, 384 (1983).

should emphasize the need to closely scrutinize purported waivers by juveniles, especially by those who are very young or otherwise susceptible to the pressures of police interrogation—although that principle seems to be honored more in the breach than in the observance.

C. *Police Interrogations*

Under current practice, written police reports are still the primary method used to capture and preserve what occurred during interrogations.¹⁶⁶ Unfortunately, police reports are often biased or the product of prejudice and generally are not a fully accurate summation of what occurred.¹⁶⁷ Thus, the single most important reform of this aspect of juvenile police interrogations is to require police to videotape (including audio) juvenile interrogations.¹⁶⁸ Recording an interrogation has a number of benefits. First, and probably most obvious, videotaping the interrogation allows the court, prosecutor, defense attorney, and others to see and hear what actually occurred during the questioning.¹⁶⁹ Second, videotaping interrogations bolsters the reliability of admissions, confessions, and other statements purported to have been made during interrogations.¹⁷⁰ Third, videotaping ensures the accuracy of other testimony and evidence regarding the interrogation that is presented to the court.¹⁷¹ And fourth, videotaping confessions help considerably in determining if a juvenile's waiver of *Miranda* rights was knowing and voluntary, while also alleviating and perhaps resolving legal and factual issues associated with juvenile waivers.¹⁷²

¹⁶⁶ Barry Feld, *supra* n. 60, at 97.

¹⁶⁷ *See id.*

¹⁶⁸ *See generally* Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199 (2007) [hereinafter Lewis]. “Recently, nineteen states have enacted or introduced laws that mandate the electronic recording of custodial confessions. However, the statutes provide no formidable sanctions for what has been shown to be the inevitable *Miranda* violation. For example, the District of Columbia limits electronic recording to ‘custodial interrogations of persons suspected of committing a crime of violence.’ The recording requirement is further limited in that, while police are required to capture the *Miranda* warnings and the suspect's response, no sanction is imposed for failing to do so. Indeed, the statute permits police officers to “cure” the absence of the warnings by having the suspect state on tape that the warnings were previously given and waived.” *Id.* at 222-23. “To date, no state or federal court has found that the Due Process Clause of the Fourteenth Amendment requires police officers to electronically record interrogations. Alaska is the only state that has found that the recording requirement is necessary to protect the due process rights of suspects under its state constitution.” *Id.* at 223.

¹⁶⁹ Barry Feld, *supra* n. 60, at 93.

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 92.

Beyond providing additional safeguards to help assure the integrity of the juvenile justice system, videotaping interrogations also protects the police, the district attorney, and interrogators from potential civil rights suits¹⁷³ and from potential career-ending accusations of misconduct, coercion, and abuse.¹⁷⁴ “A 1992 survey by the National Institute of Justice found that about one-third of all police departments in communities of 50,000 or more were already videotaping at least some interrogations, and that of the ones that did, 97 percent reported they found it useful.”¹⁷⁵ Of course, in order for these benefits to be fully realized, states must require that the entire interrogation process be taped, beginning with arrest and including the administration of *Miranda* warnings and any waiver of rights.

Opponents of videotaping argue that taping somehow hinders a suspect’s ability to speak freely, fearing that the tape could be played in court or for others to see and hear.¹⁷⁶ Of course, juvenile proceedings are typically not public. Further, the National Institute of Justice (NIJ) studied 2,400 law enforcement agencies and found that 60 percent noted no noteworthy difference as to a suspect’s willingness to confess, whether taped or not.¹⁷⁷ Other opponents of videotaping, usually police detectives, argue that taping confessions could create a presumption of unfairness as to non-taped statements and an resulting increase in courts’ suppressing non-taped statements—and that videotaping might also tend to make written confessions less believable than confessions on tape.¹⁷⁸

Opponents of videotaping also assert that taping confessions is a “wasted” expense¹⁷⁹ since the vast majority of cases never go to trial.¹⁸⁰ But the available evidence indicates that videotaping is both cost-effective and

¹⁷³ See 42 U.S.C. § 1983 (civil liability of persons acting under color of State law who violate the federal rights of others) & *Kerr v. City of Chicago*, 424 F.2d 1134 (7th Cir. 1970) (reinstating juvenile’s claim in connection with coerced confession where police promised 17-year old juvenile bread and water if he confessed), *cert. den.*, 400 U.S. 833 (1970). See also Bodensteiner & Levinson, 1 State and Local Government Civil Rights Liability Constitutional § 1:12 coerced confessions (Westlaw database updated April 2011) (listing leading federal case-law); Coerced Confessions – Post-Verdict Relief: Remedies for Coerced Confessions – 1983 Suits, 3 No. 7 Criminal Practice Guide 12 (Sept. 2002).

¹⁷⁴ *Id.* at 94.

¹⁷⁵ Robert Leonard, *Police Interrogation Needs Videotape*, *Newsday*, Apr. 28, 2005 (quoting William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices*, Nat. Inst. Of Just. (1992)).

¹⁷⁶ William A. Geller, *Videotaping Interrogations and Confessions*, Natl. Inst. of Just. (1993).

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *Police Questions Caught on Video*, *Lawrence J. World & News*, Feb. 20, 2007, http://www2.ljworld.com/news/2007/feb/20/police_questions_caught_video/?more_like_this (last visited Oct. 7, 2010).

¹⁸⁰ See *id.*

simple, given the advancement of recording technologies and relative ease with which taping can be done.¹⁸¹ Perhaps most important, videotaping apparently *does* minimize false confessions and the manipulative police tactics that seem to go hand-in-hand with false confessions.¹⁸²

Police departments should thus reevaluate the effectiveness of current interrogation tactics. While detectives may be skilled and successful at securing confessions, current police practices do not seem to distinguish between guilty and innocent suspects since interrogations appear to be confrontational and to presume guilt.¹⁸³ As part of a comprehensive study of the Police and Criminal Evidence (PACE) Act of 1984 in the United Kingdom, which moved away from confrontational police interrogation tactics, researchers found that the frequency of confessions did not decrease when detectives used fairer and less psychologically manipulative approaches.¹⁸⁴

Lastly, as noted, one of the most bothersome aspects of police interrogation tactics is the seemingly routine use of deception that courts allow police to inject into interrogations in an attempt to shake-loose “confessions”—as when a police officer falsely and deliberately told Marty Tankleff of his father’s dying declaration that Marty had committed the murders.

While some State courts have held that outright fabrication of evidence (whatever that might mean) by police is not permitted, the Supreme Court has yet to define the parameters of “acceptable deception” by the police behind closed doors in the interrogation room with juveniles cut off from family help.¹⁸⁵ Allowing the police to fabricate or greatly exaggerate evidence or claims during interrogations is a very dangerous practice. When police present fictitious evidence to suspects, suspects are more likely to make a false confession.¹⁸⁶

Again, the only clear way out of this mess is for courts and legislatures to adopt a *per se* rule that invalidates any and all juvenile confessions if police make false, misleading, or exaggerated claims or assertions evidence during interrogations.¹⁸⁷ That, of course, also underscores the need that all statements be videotaped for later court review, not only as to the language used, but the overall circumstances,

¹⁸¹ See Saul M. Kassin et al., *Police-induced confessions: Risk factors and recommendations*. Retrieved Jan. 20, 2009, from <http://www.ap-ls.org/links/confessions.pdf> [hereinafter Kassin].

¹⁸² See *id.*

¹⁸³ See *id.* at 22.

¹⁸⁴ *Id.* at 24-25.

¹⁸⁵ See *id.* 25.

¹⁸⁶ *Id.* “[T]here is a strong support for the proposition that outright lies can put innocents at risk to confess by leading them to feel trapped by the inevitability of evidence against them.” *Id.*

¹⁸⁷ See *id.* at 26.

tone, and other indications of abuse or good-faith as well. While some might assert that videotaping might be harsh in some cases, it would certainly send the much-needed, salutary, and overdue message to law enforcement agencies to be above-board and eminently fair in conducting juvenile interrogations.

Police deception (“lying for a greater good”?) is not tolerated in any other aspect of life and government operations (with the possible exception of dealings with foreign hostile nations and forces), and it should not be tolerated in juvenile interrogations.¹⁸⁸ Any judicial or legislative action must not be half-hearted or posturing since the police have an incentive to send-run any rule or restriction laid down¹⁸⁹—and any court or legislative rule must not involve legal slight-of-hand that takes as much or more than is given.¹⁹⁰

D. Other Possible Reforms

Those who have studied the phenomenon of false confessions make specific suggestions as to how false confessions can be prevented or greatly reduced:

¹⁸⁸ The need for a thorough “house-cleaning” in this area is underscored by a recent North Carolina case in which police circumvented a State law expressly giving juveniles a right to have a parent or other involved adult present during questioning. Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile’s Right to a Parent, Guardian, or Custodian During a Police Interrogation After State v. Oglesby*, 86 N. C. L. REV. 1685 (Sept. 2008) (murder suspect). See also Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. L. REV. 971 (Winter 2005) & Thomas J. Von Wald, *No questions Asked! State v. Horse: A Proposition for a Per Se Rule When Interrogating Juveniles*, 48 S. D. L. REV. 143 (2002-2003).

¹⁸⁹ Jennifer J. Walters, *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 (Winter 2002); David T. Huang, “*Less Unequal Footing*”: *State Courts’ Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437 (January 2001); Robert E. Mcguire, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355 (May 2000). An example of the harshness and arguable “games-playing” that can and does go on in juvenile interrogations is found in Charles Nye, *Admissibility of Juvenile Confessions*, 26 J. JUV. L. 159 (2006) (police refusal to temporarily halt questioning to allow parent a short break, statement made in parent’s absence admissible against juvenile).

¹⁹⁰ Krista M. Gieske, *They Don’t Make ‘Em Like They Used to: When the 5th Amendment Plays Dodgeball with Juvenile Confessions*, 31 N. KY. L. REV. 1 (2004) (also discussing the various psychological principles involved in courts’ applying the totality-of-circumstances rule as to knowing and voluntary juvenile waivers) & Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 LA. L. REV. 345 (Fall 2010).

- Adopt standards such as the United Kingdom's PACE legislation and Codes of Practice to assure an impartial investigation and minimize presumptions of guilt.
- Place the burden of proof on the prosecution to show that there is no indication that a suspect's statement was unreliable.
- Require audio or video tape recordings of interviews of all suspects and witnesses.
- Provide suspects free legal assistance immediately following arrests.
- Create a national training program for all law-enforcement personnel and police officers.
- Mandate ready and unsolicited disclosure by the prosecution of all records gathered during police investigations.
- Establish criminal review commissions with authority to review all claims of police misconduct and refer to the courts those cases in which the commission finds serious police misconduct or miscarriages of justice, and require that a significant portion of the membership of the commission be chosen from the criminal defense community.¹⁹¹

VI. CONCLUSION

Necessary reforms of the juvenile justice system do not require huge infusions of public funds or major legislative enactments. Many, probably most, of the current shortcomings noted here have likely arisen from seemingly lax or indifferent police and court practices or attitudes. In that light, the police and courts can and should make needed changes and corrections on their own through appropriate police rule-making and judicial decisions that invalidate convictions when warranted, and provide a road-map for future police action and court procedures and standards—with or without new congressional or State legislation.

¹⁹¹ Andreas Kapardis, *Psychology and the Police – False Confessions, Psychology and Law: A Critical Introduction* pp. 382-3 (Cambridge U. Press 3rd ed. 2010). This work also contains a good overview of the psychological elements that can lead to false confessions. *Id.* at 385-92. See also Brown & Campbell, *The Cambridge Handbook of Forensic Psychology* §§ 2.5 through 2.9 (Cambridge U. Press 2010) (eyewitness testimony, false memory, interrogative suggestibility and false confessions, and investigative interviewing).

Further, the numerous ways that false confessions and wrongful convictions can and do occur in the juvenile justice system, especially when *Miranda* warnings are not given or are given improperly or too late in the process and when police interrogation oversteps, should be ample warnings as to the clear need for reform. Wrongful convictions can occur at almost any and every stage in the legal process, such as through mistaken witness identifications that might be induced by various police practices, untimely access to counsel by juveniles after false or erroneous or false “confessions” have already been extracted or induced, court appointment of incompetent counsel, police and judicial pre-judgment of the merits, coerced or false admissions and guilty pleas, and limited avenues for post-conviction relief, to name a few.¹⁹²

The current practice of giving *Miranda* warnings to juveniles in settings where juveniles are especially susceptible to being “good” by cooperating and admitting whatever the police want, virtually guarantees false confessions and wrongful convictions. As has been shown scientifically and recognized by courts, children, by virtue of their psychological make-up and limitations, are particularly vulnerable to not understanding the meaning and significance of *Miranda* warnings and the consequences associated with waiving those rights and agreeing to talk with police without legal counsel present.¹⁹³ Children, like some adults, fail to understand that *Miranda* rights are not just a “procedural nicety” but rather are an entitlement guaranteed by the United States Constitution that cannot be taken away from them involuntarily by law enforcement officers and criminal interrogators—and that waivers typically, perhaps nearly always, have profound adverse consequences for juveniles.¹⁹⁴

Second, wrongful convictions are very often the product of police interrogations in which defendants are quizzed by police without knowing what evidence the police actually have in hand—a situation that encourages police to “stretch the truth” as with Marty Tankleff and engage in reckless or deliberate deceit. Most Americans remain unaware of the extent that police use powerful psychologically manipulative tactics and deception during criminal interrogations of suspects at all levels. Many people are also unaware that law enforcement officers, in most jurisdictions, are not taught how to conduct true investigative examinations, but rather how to extract confessions from uncooperative suspects, regardless of actual guilt or innocence.¹⁹⁵

¹⁹² See generally Drizin, *supra* n. 27.

¹⁹³ See King, *supra* n. 85, at 440; see also Drizin, *supra* n. 27, at 268.

¹⁹⁴ See Drizin, *supra* n. 27, at 269.

¹⁹⁵ *Id.* at 270.

As noted, juveniles are particularly susceptible to giving false confession for a number of reasons. Juveniles: (A) tend to have a desire to please authority figures, (B) possess less mental resources and life experiences than adults to deal with coercive pressures of police interrogation, (C) are unable to analyze situations as effectively as adults, and (D) typically fail to understand the longer-term implications of false confessions.¹⁹⁶ Further, juveniles simply fail to understand the considerable difficulties in trying to recant a confession and how prosecutors and courts react to recantations, as to both the weight given a recantation and the impact of a recantation on the crucial issues of a defendant's credibility.¹⁹⁷

Among the many proposed juvenile justice reforms that are intended to limit the incidents of wrongful convictions, perhaps the most important proposal would encourage states to establish juvenile-advocate attorney positions (akin to public defenders) and require police to have the attorney meet with each juvenile defendant before any formal or informal police interrogation can occur. This alone should help ensure that a juvenile understands his or her rights and had legal counsel to minimize false confessions and the like—and also tend to reduce the incentive for police coercion or overzealousness. In addition to or in the alternative, states should at a minimum be encouraged to adopt a “child-friendly” version of *Miranda* warnings, approved by each State's highest court with public notice and comment.

Other proposals include mandating police to videotape police interrogations of juveniles. Available research indicates that videotaping not only reduces the incidents of false confessions, but bolsters the likelihood that false confessions would be excluded from evidence at trial. Videotaping also protects criminal investigators and police from claims of misconduct, overreaching, and violation of constitutional rights.¹⁹⁸ In that light, law-enforcement agencies should on their own motion consider revising interrogation strategies by adopting models used in other nations and some United States jurisdictions, by focusing on fact-finding as opposed to confronting defendants and juveniles who are presumed to be guilty.

Whatever one might think of the typical American juvenile judicial process, we can no longer turn a blind eye to false confessions and wrongful convictions. After all, we have ample legal and scientific documentation that innocent people are often found guilty and that

¹⁹⁶ See Feld, *supra* n. 60, at 244; see also Boyd, *supra* n. 102, at 402-03.

¹⁹⁷ See Drizin, *supra* n. 27, at 272-73.

¹⁹⁸ See Kassir, *supra* n. 188.

innocent people are driven or led to confess to crimes that they did not commit.¹⁹⁹

While no proposed reform would be absolutely certain to end the possibility of innocent juveniles going to prison, we can and must do much better in the future. There is, of course, the simple but profound aspect of the repeatedly inhumane and wasteful results of continuing on as we are presently. As noted in one study: "I didn't like to think about what that could do to the soul of a human being, to have to sit in a prison cell day after day for a crime you had not committed. And nothing to look forward to at the end of a day but the knowledge of hundreds more days like the one you just endured."²⁰⁰

We, as members of a mature advanced society, must stop averting our individual and collective vision for this tragic situation in which countless lives are destroyed at a young age. Again, the courts and law-enforcement agencies have the ability to implement these needed reforms without additional large infusions of public funds or landmark legislative enactments. Use of volunteer and *pro bono* efforts of attorneys and others could, standing alone, make many reforms a reality and establish the record needed to gain legislative support and funding.²⁰¹ Denying rights to one segment of society inevitably has very negative repercussions for us all, collectively and individually.

¹⁹⁹ The duty of the judiciary to fairly and impartially administer justice in juvenile settings is clear, especially since juveniles typically represent the poorest or most powerless segment of our society. Michelle Benedetto Neitz, *A Unique Bench, A Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97 (Winter 2011).

²⁰⁰ The Wrongful Conviction of Georgia Inmate Jerry Biggs, Jr., http://www.truthandjusticedenied.com/Home_Page.php (last visited Oct. 7, 2010).

²⁰¹ Lisa R. Pruitt, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (Summer 2010).