Journal of Criminal Law and Criminology

Volume 110
Issue 1 *Winter*

Article 3

Winter 2020

Defining "Special Care"

Ben Gifford

0091-4169/20/11001-0015
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 110, No. 1

Printed in U.S.A.

DEFINING "SPECIAL CARE"

BEN GIFFORD*

For the better part of the last century, the Supreme Court has held that courts must evaluate the voluntariness of juvenile confessions with "special care." This special care requirement cautions courts against judging juveniles "by the more exacting standards of maturity" or comparing a juvenile suspect "with an adult in full possession of his senses and knowledgeable of the consequences of his admissions." It also instructs courts to ensure that a juvenile's "admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."

Despite the force with which the Supreme Court has spoken on the issue, lower courts regularly fail to follow the special care mandate. Some overlook the standard altogether, while others only pay lip service to it, and still others misconstrue it and disregard it on mistaken grounds. The result in any of these cases is that lower courts assess the voluntariness of juvenile confessions in the same way they would evaluate confessions obtained from adults, not with the heightened degree of scrutiny that Supreme Court precedent requires.

In order to tether courts more firmly to the mast of special care, this Article highlights specific factors that courts should consider when evaluating the voluntariness of juvenile confessions. By framing their analyses in terms of these factors, courts can hopefully begin to evaluate juvenile confessions with the requisite level of care.

* Law Clerk to the Honorable Robert A. Katzmann, United States Court of Appeals for the Second Circuit. Harvard Law School, J.D. 2017.

INTRODUCTION

Roughly one million juveniles are arrested in the United States each year.[1] Many of these young individuals are interrogated by law enforcement officers, as are countless others who are subjected to questioning without formal arrest.[2] Unless specifically requested by the juvenile, most states do not require the presence of a parent, lawyer, or other interested adult during the interrogation.[3]

Unsurprisingly, juvenile interrogations raise a number of pressing concerns. Not only are youths less capable than adults of understanding and exercising their constitutional rights,[4] but they are also uniquely susceptible to "the inherent pressures of the interrogation atmosphere."[5] Coupled with the fact that interrogators often fail to tailor their techniques to account for the age of their suspect,[6] this susceptibility gives rise to a heightened risk of involuntary confessions in children.[7] The younger the child, the greater the risk.[8]

---

[1] U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK: JUVENILE ARRESTS (Oct. 22, 2018), https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp [perma.cc/7KKC-ESYX] [hereinafter OJJDP, JUVENILE ARRESTS].

[2] STUDY: FEW JUVENILE SUSPECTS EXERCISE CONSTITUTIONAL RIGHTS DURING INTERROGATIONS, AM. PSYCHOL. ASS'N (Aug. 8, 2014), http://www.apa.org/news/press/releases/2014/08/juvenile-suspects.aspx [perma.cc/32ST-KEXD].

[3] Joanna S. Markman, In re Gault: *A Retrospective in 2007: Is It Working? Can It Work?*, 9 BARRY L. REV. 123, 133 (2007).

[4] *See infra* notes 75–76 and accompanying text.

[5] Miranda v. Arizona, 384 U.S. 436, 468 (1966); *see infra* Section I.C.

[6] Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 222 (2006) ("Interrogation manuals recommend that police use the same techniques with children as with adults, despite developmental psychologists' doubts that juveniles possess the cognitive ability or judgment necessary to function on par with adults.").

[7] *See infra* Section I.C.

[8] *See infra* notes 84–86 and accompanying text.

Recognizing the heightened risk inherent in juvenile confessions, the Supreme Court has long held that courts must evaluate the voluntariness of these confessions with "special care" before admitting them in evidence.[9] The special care standard cautions courts against judging juveniles "by the more exacting standards of maturity"[10] or comparing a juvenile suspect "with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[11] It also instructs courts to ensure that a juvenile's "admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[12]

Despite the force with which the Supreme Court has spoken on the topic, lower courts regularly fail to adhere to the special care mandate.[13] Some overlook the standard altogether,[14] while others only pay lip service to it,[15] and still others misconstrue and incorrectly disregard it.[16] The result in any of these scenarios is that lower courts assess the voluntariness of juvenile confessions in the same way that they would evaluate confessions obtained from adults, instead of applying the heightened degree of scrutiny that Supreme Court precedent requires.

In order to tether courts more firmly to the mast of special care, this Article highlights specific factors that courts should consider when evaluating the voluntariness of juvenile confessions. Part I begins by providing a brief overview of the Supreme Court's voluntariness jurisprudence, before exploring both the history and importance of the special care requirement. Part II then highlights various ways in which lower courts have misapplied the special care standard, which range from ignoring it to misconstruing it. Part III concludes by offering a definition of special care that centers around interrogation tactics that are particularly likely to cause involuntary confessions in juveniles. By framing their analyses in terms of these tactics, courts can hopefully begin to evaluate juvenile confessions with the requisite level of care.

---

[9] Gallegos v. Colorado, 370 U.S. 49, 53 (1962) (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion)).

[10] *Haley*, 332 U.S. at 599 (plurality opinion).

[11] *Gallegos*, 370 U.S. at 54.

[12] *In re* Gault, 387 U.S. 1, 55 (1967).

[13] *See infra* Part II.

[14] *See infra* Section II.A.

[15] *See infra* Section II.B.

[16] *See infra* Section II.C.

I. THE "SPECIAL CARE" REQUIREMENT

A. A BRIEF HISTORY OF VOLUNTARINESS

For over a century, the Supreme Court has made clear that involuntary confessions are inadmissible as evidence against the accused. As early as 1884, the Court stated that "a confession made to one authority should not go to the jury unless it appears to the court to have been voluntary."[17] Fifteen years later, the Court issued several decisions in which it reaffirmed that "a confession, in order to be admissible, must be free and voluntary."[18] In these early cases, the Court understood itself to be continuing a tradition that had long been established at common law.[19] Its decisions were motivated in large part by concerns about the reliability of involuntary confessions:

> A confession, if freely and voluntarily made, is evidence of the most satisfactory character . . . . But the presumption upon which weight is given to such evidence . . . ceases when the confession appears to have been made either in consequence of inducements of a temporal nature . . . or because of a threat or promise . . . which, operating upon the fears or hopes of the accused, . . . deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.[20]

At the same time that the Court was situating its voluntariness analysis within common law traditions, it was also framing its inquiry in terms of constitutional rules. In 1897, the Court wrote in *Bram v. United States*[21] that for federal criminal cases, "where-ever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[22] Forty years later, in *Brown v. Mississippi*,[23] the

---

[17] Hopt v. Utah, 110 U.S. 574, 587 (1884).

[18] Bram v. United States, 168 U.S. 532, 542 (1897) (quoting 3 WILLIAM OLDNALL RUSSELL, RUSSELL ON CRIMES 478 (Horace Smith and A. P. P. Keep eds., 6th ed. 1896)); *see also* Wilson v. United States, 162 U.S. 613, 621–22 (1896); Pierce v. United States, 160 U.S. 355, 357 (1896); Sparf v. United States, 156 U.S. 51, 55 (1895).

[19] *Bram*, 168 U.S. at 545–46 (first quoting 1 LORD HALE, THE HISTORY OF THE PLEAS OF THE CROWN 304 (1st ed. 1736), for the proposition that "the confession before one of the privy council or a justice of the peace being voluntarily made, without torture, is sufficient as to the indictment on trial" in cases of treason; and then quoting LORD GILBERT, THE LAW OF EVIDENCE 139 (2d ed. 1760), for the proposition that a "confession must be voluntary, and without compulsion").

[20] *Hopt*, 110 U.S. at 584–85 (citations omitted).

[21] 168 U.S. 532.

[22] *Id.* at 542; *see* U.S. CONST. amend. V.

[23] 297 U.S. 278 (1936).

Court held that involuntary confessions are similarly barred from admission in state courts by the Due Process Clause of the Fourteenth Amendment.[24]

In the decades following *Brown*, the Court fleshed out the contours of its voluntariness analysis. Its decisions echoed earlier cases' worries about the reliability of involuntary confessions,[25] but they also evinced less pragmatic concerns about the moral impropriety of abusive interrogation practices.[26] Most of the Court's voluntariness cases during this period were state court cases analyzed through the lens of the Due Process Clause,[27] and although the Court eventually incorporated the Fifth Amendment privilege against the states,[28] the two constitutional provisions have been interpreted to impose the same test[29]: for state and federal cases alike, a confession is admissible only if it is voluntary under "the totality of the circumstances."[30]

In guiding lower courts' evaluation of the totality of the circumstances, the Supreme Court has highlighted several issues to consider. Courts must first make a threshold finding of interrogator coercion before holding a confession involuntary,[31] and they then should review factors like "the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health."[32] Although the Supreme Court has "suggested that the use of physical violence or threats of physical violence or both are per se impermissible,"[33] it has also made clear that

---

[24] *Id.* at 287; *see* U.S. CONST. amend. XIV, § 1.

[25] *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

[26] *See, e.g.*, Spano v. New York, 360 U.S. 315, 320–21 (1959); *see also* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 9 (2015) ("[H]istorically and as a matter of current practice there are two strands of voluntariness analysis—one deontological and one consequentialist. The deontological branch is concerned with action that is bad in and of itself regardless of its effect on the suspect . . . . The consequentialist branch concerns police action that is bad *because* of its tendency to produce unreliable confessions . . . .").

[27] 2 JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE: VOLUME 1: INVESTIGATION 421 (7th ed. 2017).

[28] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[29] *See* DRESSLER ET AL., *supra* note 27, at 421–22.

[30] Although the Court had previously alluded to the importance of individualized circumstances in evaluating a confession's voluntariness, *see, e.g.*, Hopt v. Utah, 110 U.S. 574, 583 (1884) ("The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases."); Malinski v. New York, 324 U.S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant."), the first reference to the "totality of the circumstances" appears in Fikes v. Alabama, 352 U.S. 191, 197 (1957).

[31] Colorado v. Connelly, 479 U.S. 157, 163–64 (1986).

[32] Withrow v. Williams, 507 U.S. 680, 693 (1993) (citations omitted).

[33] Primus, *supra* note 26, at 26.

"coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."[34] Furthermore, the Court has held that the voluntariness of a confession is a legal question,[35] whose resolution depends on a subjective inquiry into "whether a defendant's will was overborne in a particular case."[36]

In addition to governing the voluntariness of a defendant's confession itself, the totality-of-the-circumstances test governs the voluntariness of a defendant's waiver of rights under *Miranda v. Arizona*.[37] Although *Miranda* "drastically changed the landscape of confession suppression jurisprudence and shifted much of the courts', litigants', and commentators' attention from the due process issue of involuntariness to issues concerning the application and waiver of *Miranda* rights,"[38] due process challenges "remain[] a vital and perplexing feature of the criminal justice system in the United States when considering the admissibility of confessions."[39] As a result, courts will often review the voluntariness of a defendant's initial *Miranda* waiver in light of the totality of the circumstances, before separately evaluating the voluntariness of the subsequent confession under the same standard.[40]

B. THE SPECIAL CARE STANDARD

At the same time that the Court was fleshing out its general voluntariness test, it was also articulating specific standards regarding the

---

[34] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[35] Miller v. Fenton, 474 U.S. 104, 115 (1985).

[36] Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); *see Miller*, 474 U.S. at 116 ("[T]he admissibility of a confession turns . . . on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means . . . .").

[37] 384 U.S. 436, 444 (1966) (holding that a suspect in custodial interrogation must be advised of various rights—including his right to remain silent and his right to an attorney—and that the suspect must "voluntarily, knowingly and intelligently" waive those rights in order for any subsequent confession to be admissible); *see* Moran v. Burbine, 475 U.S. 412, 421 (1986) ("Only if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.") (internal quotation marks omitted).

[38] Martin Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J. L. & POL'Y 109, 120 (2012).

[39] Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 642 (2006) ("*Miranda* applies to many cases and disposes of a good number of them. However, literally thousands of prosecutions can be found throughout the country where serious due process challenges are raised so that the government has to offer substantial evidence to rebut the claim of constitutional violations.").

[40] *See, e.g.*, State v. Goodwin, 774 N.W.2d 733 (Neb. 2009); *infra* text accompanying notes 120–123.

confessions of juvenile suspects. In *Haley v. Ohio*,[41] the Court considered the case of John Harvey Haley, a fifteen-year-old boy who was convicted of first-degree murder for acting as a lookout during a deadly robbery.[42] Five days after the crime took place, Haley was arrested at his home around midnight, brought to a police station, and held in isolation.[43] He was interrogated for several hours by a series of police officers, who "questioned him in relays of one or two each."[44] Finally, at five o'clock in the morning, Haley confessed after the officers showed him alleged confessions of the other two boys suspected of participating in the crime.[45]

At trial, Haley argued that his confession had been obtained through duress, and he objected to its admission in evidence.[46] The judge nevertheless submitted the question of voluntariness to the jury, which found against Haley and convicted him.[47] The intermediate appellate court affirmed with minimal elaboration on the question of voluntariness,[48] as did the state high court, which dismissed Haley's appeal "for the reason that no debatable constitutional question is involved."[49]

The Supreme Court granted certiorari and reversed.[50] Writing for a plurality, Justice Douglas began by recounting the details of Haley's case, before concluding, "We do not think the methods used in obtaining this confession can be squared with that due process of law which the Fourteenth Amendment commands."[51] Although Justice Douglas declined to answer whether the interrogators' tactics would have been permissible "if a mature man were involved," he explained that:

> [W]hen, as here, a mere child — an easy victim of the law — is before us, *special care* in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That

---

[41] 332 U.S. 596 (1948).

[42] *Id.* at 597–98 (plurality opinion).

[43] *Id.* at 598.

[44] *Id.*

[45] *Id.* There was also some evidence that Haley had been beaten by the police, but the Court held this evidence to the side for purposes of deciding whether Haley's confession was voluntary. *Id.* at 597–98.

[46] *Id.* at 599.

[47] *Id.*

[48] State v. Lowder, 72 N.E.2d 785, 788 (Ohio Ct. App. 1946).

[49] State v. Haley, 70 N.E.2d 905, 905 (Ohio 1947).

[50] *Haley*, 332 U.S. at 601 (plurality opinion); *id.* at 607 (Frankfurter, J., joining in reversal of judgment).

[51] *Id.* at 599 (plurality opinion).

> which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.[52]

This special care standard, which requires that juvenile confessions receive heightened scrutiny, has been repeated and reaffirmed in the Court's subsequent decisions. Over a decade after *Haley*, in *Gallegos v. Colorado*[53] the Court reviewed the murder conviction of Robert Gallegos, who was fourteen years old when he robbed and assaulted an elderly man who later died from his injuries.[54] Gallegos was arrested two weeks after the incident (while the victim was still alive), and he immediately admitted to the crimes.[55] He was then held in isolation for five days, after which he signed a confession that formed the basis of his subsequent conviction.[56]

As in *Haley*, the state courts held that Gallegos's confession was voluntary and admissible,[57] and as in *Haley*, the Supreme Court reversed.[58] Now writing for a majority, Justice Douglas emphasized that a suspect's youth is a "crucial factor" in assessing the voluntariness of a confession, and he quoted at length from his opinion in *Haley*.[59] While the government contended that Gallegos "was advised of his right to counsel, but . . . did not ask either for a lawyer or for his parents," the Court responded that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police."[60] Moreover, the Court explained, a child "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."[61] The Court even went so far as to suggest that, "[w]ithout some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had."[62]

Although the Court has not insisted on this suggestion that juvenile confessions *require* adult protection,[63] it has continued to reiterate the prized place that children occupy in its voluntariness jurisprudence. Not long after *Gallegos*, the Court held in *In re Gault*[64] that the privilege against self-

---

[52] *Id.* (emphasis added).
[53] 370 U.S. 49 (1962).
[54] *See* Gallegos v. People, 358 P.2d 1028, 1030 (Colo. 1960) (en banc).
[55] *Gallegos*, 370 U.S. at 49–50.
[56] *Id.* at 50.
[57] *Gallegos*, 358 P.2d at 1034.
[58] *Gallegos*, 370 U.S. at 55.
[59] *Id.* at 53.
[60] *Id.* at 54.
[61] *Id.*
[62] *Id.*
[63] *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 727 (1979).
[64] 387 U.S. 1 (1967).

incrimination and other constitutional protections must be extended to juveniles in delinquency proceedings.[65] Again quoting extensively from *Haley*, the Court "emphasized that admissions and confessions of juveniles require special caution,"[66] and it noted "that the 'distrust of confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence."[67] Even if "counsel was not present for some permissible reason when an admission was obtained," the Court wrote, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[68]

The Court changed course somewhat in *Fare v. Michael C.*,[69] in which it held that a juvenile defendant had voluntarily waived his *Miranda* rights, notwithstanding the fact that he had requested and been denied the opportunity to speak with his probation officer.[70] But even in *Fare*, the Court made clear that "special concerns . . . are present when young persons, often with limited experience and education and with immature judgment, are involved."[71] The Court also cautioned that juvenile voluntariness assessments "mandate[] . . . evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his . . . rights, and the consequences of waiving those rights."[72]

Finally, the Court recently reaffirmed its commitment to the special care standard in *J.D.B. v. North Carolina*,[73] in which it held "that a child's age properly informs the *Miranda* custody analysis."[74] Drawing on cases from a range of areas, the Court explained "that children 'generally are less mature and responsible than adults,' . . . that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' . . . [and] that they 'are more vulnerable or susceptible

---

[65] *Id.* at 30–31.

[66] *Id.* at 45.

[67] *Id.* at 48 (quoting 3 JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 822 (3d ed. 1940)); *see also id.* at 52 ("[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children.").

[68] *Id.* at 55.

[69] 442 U.S. 707 (1979).

[70] *Id.* at 727.

[71] *Id.* at 725.

[72] *Id.*

[73] 564 U.S. 261 (2011).

[74] *Id.* at 265.

to . . . outside pressures' than adults."[75] Even the dissent, written by Justice Alito, took for granted that "the Court's precedents . . . make clear that 'special care' must be exercised in applying the voluntariness test where the confession of a 'mere child' is at issue."[76]

C. THE IMPORTANCE OF SPECIAL CARE

Taken together, the cases above stand for the proposition that juveniles are more vulnerable than adults, and that courts should hesitate longer before holding their confessions to be voluntary. This proposition is not just the product of armchair psychology, moreover, but is supported by a rich body of empirical scholarship.

As the Court recognized in *J.D.B.*, a wealth of social science research indicates that juveniles are uniquely susceptible to the pressures of interrogation.[77] Unsurprisingly, juveniles are much less likely than adults to understand[78] or exercise[79] their *Miranda* rights. Juveniles also exhibit numerous developmental differences from adults—including in "their cognitive abilities to encode, store, and retrieve memories," their proclivity "to mak[e] source misattributions," and their "forgetting, retention, and relearning curves"[80]—that jeopardize the reliability of their statements.

In addition, juveniles are significantly less "future oriented" than adults, both in terms of their ability to anticipate the consequences of their actions and in terms of their preference for smaller rewards now over larger rewards

---

[75] *Id.* at 272 (citations omitted) (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); then quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion); and then quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

[76] *Id.* at 297 (Alito, J., dissenting) (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion)).

[77] *See id.* at 269 (majority opinion) (citing Brief for Center on Wrongful Convictions of Youth, et al. as Amici Curiae Supporting Petitioner at 21–22, *J.D.B.*, 564 U.S. 261 (No. 09-11121)); *id.* at 273 n.5 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

[78] Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1157, 1155 tbl.4 (1980) (finding that "juveniles younger than fifteen manifest significantly poorer comprehension [of their *Miranda* rights] than adults of comparable intelligence" and that most juveniles misunderstood at least some of the *Miranda* warning statements).

[79] J. Thomas Grisso & Carolyn Pomicter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977) (finding that only about 10% of juveniles refused to waive their rights during interrogation, as compared with 40% of adults).

[80] Jessica Owen-Kostelnik et al., *Testimony & Interrogation of Minors: Assumptions about Maturity and Morality*, 61 AM. PSYCHOLOGIST 286, 292 (2006).

later.[81] This lack of future orientation creates a heightened risk that a juvenile will "falsely confess out of a desire to return home, believing that his innocence will be straightened out later."[82] And that risk is compounded by the fact that juveniles "are less capable of withstanding interpersonal stress and thus more likely to perceive aversive interrogation as intolerable."[83]

Finally, juveniles are "more suggestible if they are questioned by authority figures such as police, and if they believe that the interrogators are already knowledgeable about the subject of the interview."[84] Myriad studies have explored interviewers' ability to shape juveniles' responses.[85] Some of these studies suggest that interrogators can use positive and negative reinforcement to elicit responses from juveniles that are not only false, but also absurd.[86]

Juveniles' heightened susceptibility is not confined to the laboratory setting. To the contrary, research suggests that juvenile false confessions have been a major source of wrongful convictions over the past few decades. According to the National Registry of Exonerations, which "collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States, from 1989 to the present,"[87] roughly 12% of exonerated defendants of all ages confessed to crimes that they did not commit.[88] When only juvenile exonerees are considered, the percentage who falsely confessed jumps to 36%, and when those under age fourteen are separated out, it jumps again to 86%.[89]

---

[81] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 39 (2009).

[82] INT'L ASS'N OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE'S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION 9 (2012), https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf [perma.cc/73MP-9Z4V].

[83] RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 233–34 (2008).

[84] F. James Billings et al., *Can Reinforcement Induce Children to Falsely Incriminate Themselves?*, 31 LAW & HUM. BEHAV. 125, 126 (2007) (citations omitted).

[85] *See id.* (canvassing studies).

[86] *See, e.g.*, Sena Garven et al., *Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims*, 85 J. APPLIED PSYCHOL. 38, 42–43 (2000) (finding that, when subjected to positive and negative reinforcement, a majority of five to seven-year-olds agreed to a number of fantastical suggestions, including that they had been taken to a farm on a helicopter, were shown animals there, and were allowed to ride a horse).

[87] *Our Mission*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/mission.aspx [perma.cc/J97E-KJK7].

[88] *Age and Mental Status of Exonerated Defendants Who Confessed*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf [perma.cc/J9C2-9BT9].

[89] *Id.*

These statistics, moreover, radically understate the total number of juvenile false confessions that take place in the United States. First, the Registry data includes only individuals who were convicted of their crimes, and most false confessions do not result in a conviction.[90] Second, the data includes only individuals who were exonerated, and exoneration is incredibly difficult to achieve, particularly for defendants who have confessed to the crimes of which they are accused.[91] When one considers that roughly one million juveniles are arrested each year,[92] the total number of juvenile false confessions becomes potentially dramatic.

II. MISAPPLYING THE STANDARD

The Supreme Court has made clear that juvenile interrogations need to be evaluated with special care. And the research just discussed resoundingly confirms that need, particularly in light of juveniles' developmental deficits and disproportionate tendency to make false confessions. In recent decades, however, courts have failed "to take into account the unique vulnerability of children on a case-by-case basis."[93] Instead, research indicates that courts have "exclude[d] only the most egregiously obtained confessions and then only haphazardly."[94] The resulting state of affairs is one in which lower courts "have largely abdicated their responsibility to review a juvenile's waiver of rights during custodial interrogation with the 'special caution' required by due process."[95]

---

[90] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 900 (2004); Samuel Gross & Maurice Possley, *For 50 Years, You've Had "The Right to Remain Silent"*, MARSHALL PROJECT (June 12, 2006, 10:00 PM), https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent [perma.cc/9Z2S-GFLT].

[91] Gross & Possley, *supra* note 90.

[92] *See* OJJDP, JUVENILE ARRESTS, *supra* note 1.

[93] Steven A. Drizin, *The Lee Arthur Hester Case and the Unfinished Business of the United States Supreme Court to Protect Juveniles During Police Interrogations*, 6 NW. J. L. & SOC. POL'Y 358, 398 (2011) [hereinafter *The Lee Arthur Hester Case*]; Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 130 (G. Daniel Lassiter ed., 2004) ("[T]here are legions of cases in which judges have ignored or paid lip service to the unique vulnerabilities of children in the interrogation process . . . .").

[94] BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 118 (1999); *see* Guggenheim & Hertz, *supra* note 38, at 161 ("[T]he lower courts have applied the doctrine in a haphazard manner, usually rejecting involuntariness claims in all but the most extreme sets of circumstances.").

[95] Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 434; *see* Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV.

In order to better understand lower courts' failures, this Part explores some of the most common ways in which these courts misapply the special care standard. The discussion below is not meant to be exhaustive, but it is instead intended to provide a framework for analyzing opinions and arguments that stray from established Supreme Court precedent. This Part is also not meant to imply that courts fail to apply special care whenever they hold that a juvenile confession is voluntary. To the contrary, many courts have held juvenile confessions to be voluntary without succumbing to the pitfalls described below,[96] and Part III offers lower courts guidance that will help them apply the special care standard even if they ultimately admit the confessions under review. Where courts have committed the errors discussed in this Part, however, their decisions should not be upheld.

A. FAILURE TO ACKNOWLEDGE

One of the most common ways in which lower courts misapply the special care standard is by failing to acknowledge the standard at all. Instead, these courts evaluate the voluntariness of juvenile confessions through the lens of the generic totality-of-the-circumstances test, without any indication that juvenile confessions raise unique concerns or require a different inquiry. The resulting analyses are identical to those that the courts would have conducted if they were evaluating confessions extracted from mature adults.

Although an exhaustive accounting of such opinions would be unwieldy, the following examples are illustrative of broader trends in the case

902, 927 (2017) ("[S]pecial solicitude for juvenile suspects . . . has faded from modern jurisprudence.").

[96] *See, e.g.*, *In re* Luis P., 74 N.Y.S.3d 221, 230–33 (N.Y. App. Div. 2018); People v. Murdock, 979 N.E.2d 74, 81–90 (Ill. 2012); Rodriguez v. Com., 578 S.E.2d 78, 83–87 (Va. Ct. App. 2003); State v. Presha, 748 A.2d 1108, 1113–18 (N.J. 2000).

law.[97] In *Vega v. State*,[98] the Court of Appeals of Texas reviewed the capital murder conviction of Marie Lisette Garcia Vega, who was sentenced to life in prison for crimes committed at sixteen years old.[99] Shortly after her arrest, Vega gave inculpatory statements to police officers, and the trial court denied her motion to suppress.[100] After several rounds of appeals,[101] the court held that Vega's confession had been properly admitted.[102] In evaluating the voluntariness of Vega's confession, the court made no reference to the heightened standard that applies to juveniles.[103] Instead, the court stated only that it was required to "examine the totality of the circumstances surrounding the interrogation to determine if a confession was voluntary and uncoerced."[104] After reciting the facts of Vega's interrogation, the court concluded that the totality-of-the-circumstances standard had been satisfied, again without mentioning Vega's age.[105]

Even more striking than *Vega* is *Hamwright v. State*,[106] in which the Court of Special Appeals of Maryland upheld the trial court's determination that the defendant's confession to carjacking and robbery had been voluntary.[107] Notwithstanding the defendant's undisputed contention that he

---

[97] *See, e.g.*, Dixon v. State, 588 So. 2d 903, 907–08 (Ala. 1991); J.W. v. State, 751 So. 2d 529, 532–33 (Ala. Crim. App. 1999); Surles v. State, 610 So. 2d 1254, 1255 (Ala. Crim. App. 1992); Rimpel v. State, 607 So. 2d 502, 503 (Fla. Dist. Ct. App. 1992); Martin v. State, 568 S.E.2d 754, 757–58 (Ga. Ct. App. 2002); S.G. v. State, 956 N.E.2d 668, 680–81 (Ind. Ct. App. 2011); Matter of Welfare of L.R.B., 373 N.W.2d 334, 337–38 (Minn. Ct. App. 1985); Morgan v. State, 681 So. 2d 82, 86–89 (Miss. 1996); State v. Clements, 789 S.W.2d 101, 105–07 (Mo. Ct. App. 1990); *In re* R.L.H., 116 P.3d 791, 798 (Mont. 2005); *In re* C.L., 87 P.3d 462, 465 (Mont. 2004); Matter of R. P. S., 623 P.2d 964, 969 (Mont. 1981); State v. Gaines, 483 S.E.2d 396, 406 (N.C. 1997); *In re* M.D., No. CA2003–12–038, 2004 WL 2505161, at *5–7 (Ohio Ct. App. Nov. 8, 2004); In Interest of Christopher W., 329 S.E.2d 769, 770 (S.C. Ct. App. 1985); State v. Watkins, No. 01C01-9701-CC-00004, 1997 WL 766462, at *8 (Tenn. Crim. App. Dec. 12, 1997); Meadoux v. State, 307 S.W.3d 401, 412–13 (Tex. App. 2009), *aff'd*, 325 S.W.3d 189 (Tex. Crim. App. 2010); *In re* J.A.B., 281 S.W.3d 62, 66 (Tex. App. 2008); Matthews v. State, 677 S.W.2d 282, 283 (Tex. App. 1984); In Interest of T.S.V., 607 P.2d 827, 828 (Utah 1980); State v. S.S., No. 55403–4–I, 2006 WL 1462784, at *2–3 (Wash. Ct. App. May 30, 2006).

[98] 255 S.W.3d 87 (Tex. App. 2007).

[99] *Id.* at 90.

[100] *Id.*

[101] *See* Vega v. State, 32 S.W.3d 897 (Tex. App. 2000); Vega v. State, 84 S.W.3d 613 (Tex. Crim. App. 2002).

[102] *Vega*, 255 S.W.3d at 97–101.

[103] *Id.* at 97–99.

[104] *Id.* at 97 (citation omitted).

[105] *Id.* at 99.

[106] 787 A.2d 824 (Md. App. 2001).

[107] *Id.* at 838.

was "fifteen years old and had a learning disability" and that he "was kept, chained and incommunicado, in an interrogation room from about 3 p.m. until about 1 a.m.,"[108] the court concluded with little analysis that it was not error to deny his motion to suppress.[109] In evaluating the defendant's argument that his confession was involuntary, the *Hamwright* court—like the *Vega* court—said only that it was required to "analyze the facts by considering the totality of the circumstances," and it added that "[t]he same is true even for a juvenile."[110] Its brief analysis made no other reference to the defendant's age.[111]

As a final example, in *State v. Gutierrez*,[112] the Supreme Court of New Mexico reviewed a sixteen-year-old defendant's conviction for murder and other charges.[113] The defendant confessed to the crimes after an aggressive interrogation in which the detective implied that a confession would lead to more lenient treatment.[114] The court nevertheless held that the confession was voluntary and that the district court had properly denied the defendant's motion to suppress.[115] In citing the relevant U.S. Supreme Court cases that guided its voluntariness analysis, the court made no mention of the special care requirement, and it referenced the defendant's age only as one factor of many in the totality-of-the-circumstances test.[116] When it came time to apply this legal standard, the court's evaluation of the defendant's age consisted entirely of citations to prior cases in which it had stated that defendants even younger than Gutierrez were capable of giving voluntary confessions.[117]

B. ACKNOWLEDGING WITHOUT APPLYING

Even where courts acknowledge the heightened standard that governs juvenile confessions, they often fail to apply it in any meaningful way. The resulting analyses in these cases are no different than those in the cases above or in cases involving adult suspects.

---

[108] *Id.* at 836.

[109] *Id.* at 838.

[110] *Id.*

[111] *Id.*

[112] 258 P.3d 1024 (N.M. 2011).

[113] *Id.* at 1030.

[114] *Id.* at 1036.

[115] *Id.* at 1037.

[116] *See id.* at 1035 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

[117] *Id.* at 1037 (citing State v. Martinez, 979 P.2d 718 (N.M. 1999); State v. Jonathan M., 791 P.2d 64 (N.M. 1990)). Ironically, the *Gutierrez* court's reference to *Martinez* appears to be inaccurate, as the defendant in that case was nearly eighteen years old at the time of his questioning. 979 P.2d at 724. Similarly, the referenced statement in *Jonathan M.* was dictum, as the court in that case held that the defendant's statement was inadmissible. 791 P.2d at 66.

To offer just a couple examples,[118] in *State v. Goodwin*[119] the Supreme Court of Nebraska considered the second-degree murder conviction of Jordan M. Goodwin, who admitted at fourteen years old to firing shots that killed a six-year-old girl.[120] The trial court denied Goodwin's motion to suppress his confession as involuntary, and the Supreme Court of Nebraska affirmed.[121] In holding that Goodwin's confession was voluntary, the court considered both the voluntariness of Goodwin's waiver of his *Miranda* rights and the voluntariness of his confession.[122] It quoted the U.S. Supreme Court's admonitions in *Gault* that "admissions and confessions of juveniles require special caution,"[123] and that "the greatest care must be taken to assure that the admission was voluntary,"[124] although it rejected Goodwin's request for the imposition of a per se bar that would have prevented juveniles from waiving their *Miranda* rights without a lawyer.[125]

When it came to actually evaluating the voluntariness of Goodwin's waiver and confession, however, the court made no reference to the fact of Goodwin's age or to the role that Goodwin's age played in the court's analysis.[126] Instead, the court reasoned—as it would have in any adult confession case—that Goodwin had voluntarily waived his *Miranda* rights because he had been read those rights, had acknowledged that he understood them, and had failed to state unambiguously that he wished to speak to an attorney.[127] The court also concluded that Goodwin's confession itself was

---

[118] For additional examples, see, e.g., Quick v. State, 599 P.2d 712, 719–20 (Alaska 1979); *In re* Joseph H., 188 Cal. Rptr. 3d 171, 185–87 (Cal. Ct. App. 2015); People v. Thorpe, 641 P.2d 935, 941–42 (Colo. 1982); Harris v. State, 979 So. 2d 372, 375–77 (Fla. Dist. Ct. App. 2008); J.P. v. State, 895 So. 2d 1202, 1203–04 (Fla. Dist. Ct. App. 2005); Swain v. State, 647 S.E.2d 88, 91–92 (Ga. Ct. App. 2007); People v. Baker, 28 N.E.3d 836, 851–53 (Ill. App. Ct. 2015); People v. Jenkins, 776 N.E.2d 755, 759–60 (Ill. App. Ct. 2002); People v. Golden, 753 N.E.2d 475, 482–83 (Ill. App. Ct. 2001); State v. Ramos, 24 P.3d 95, 98–100 (Kan. 2001); People v. Walker, No. 284233, 2008 WL 4724265, at *1–3 (Mich. Ct. App. Oct. 28, 2008); *In re* SLL, 631 N.W.2d 775, 778–79 (Mich. Ct. App. 2001); *In re* Kenneth S., No. A-01-350, 2002 WL 337760, at *3–5 (Neb. Ct. App. Mar. 5, 2002); State *ex rel.* A.W., 51 A.3d 793, 806–07 (N.J. 2012); *In re* M.B., No. 22537, 2005 WL 2995113, at *3–4 (Ohio Ct. App. Nov. 9, 2005); State v. Atkins, No. W2001–02427–CCA–R3–CD, 2003 WL 21339263, at *2–3 (Tenn. Crim. App. May 16, 2003); Robinson v. Commonwealth, 756 S.E.2d 924, 928–30 (Va. Ct. App. 2014).

[119] 774 N.W.2d 733 (Neb. 2009).

[120] *Id.* at 737.

[121] *Id.* at 742–46.

[122] *Id.*

[123] *Id.* at 743 (quoting *In re* Gault, 387 U.S. 1, 45 (1967)).

[124] *Id.* (quoting *Gault*, 387 U.S. at 55).

[125] *See id.* at 743–44; *see also infra* note 161 and accompanying text.

[126] *See Goodwin*, 774 N.W.2d at 744–46.

[127] *See id.*

voluntary, even though the interrogating officers employed textbook minimization tactics,[128] because the officers made no promises of leniency to Goodwin.[129]

In a similar case, *People v. Jones*,[130] the California Court of Appeal reviewed the murder and attempted murder convictions of Tramel Ray Jones, who was sentenced to eighty years to life in prison, based in part on a confession he gave when he was sixteen.[131] The trial court denied Jones's motion to suppress the confession, despite the fact that the interrogating officer relied heavily on deception tactics.[132] For example, the officer showed Jones false lineups with his picture circled and falsely told Jones that the ballistics from the crime scene matched a gun found in Jones's father's home.[133] The officer also falsely told Jones that his fingerprints were found on the gun, and he misleadingly suggested that Jones's father might be charged with the crimes if Jones remained silent.[134] Finally, the officer told Jones that he would only "do a little time in [a juvenile] camp" if he confessed.[135]

In reciting the applicable legal standard governing Jones's voluntariness arguments, the Court of Appeal acknowledged that "courts must use special care in scrutinizing the record to evaluate a claim that a juvenile's custodial confession was not voluntarily given."[136] It nevertheless reasoned, as the *Goodwin* court did, that Jones's *Miranda* waiver was voluntary, because he was advised of his rights, said that he understood those rights, and implicitly waived his rights by answering the officer's questions.[137] Similarly, when evaluating the voluntariness of Jones's subsequent confession, the court made no mention of Jones's age,[138] and it dispensed with his objections to the interrogating officer's tactics in the same way that it would have if Jones

---

[128] *See id.* at 745. For example, "[b]oth officers characterized the event as a 'tragic accident,'" and one of the officers stated that "[n]o one means to kill an innocent kid." *Id.* The other officer further speculated that "there was a 'good chance' that the shooter did not know there was a child in the car and that he did not intend to kill her." *Id.*; *see also infra* Section III.B.

[129] *See Goodwin*, 774 N.W.2d at 745–46.

[130] 213 Cal. Rptr. 3d 167 (Cal. Ct. App. 2017), *review denied*, No. S240364, 2017 LEXIS 3951, at *1 (Cal. May 10, 2017).

[131] *Id.* at 171.

[132] *Id.* at 184.

[133] *Id.*

[134] *Id.* at 183–84.

[135] *Id.* at 183.

[136] *Id.* at 185 (citation omitted).

[137] *Id.* at 186–87.

[138] *Id.* at 187–89.

had been an adult. Namely, the court explained that "the use of deceptive comments does not necessarily render a statement involuntary,"[139] and it cited prior cases—none of which involved juveniles—in which the Supreme Court of California had permitted the use of deceptive interrogation tactics.[140]

C. THE STRAW MAN OF PER SE INADMISSIBILITY

A final way in which courts misapply the special care standard is by misconstruing arguments in favor of heightened scrutiny as arguments in favor of a per se bar against the admissibility of juvenile confessions. With the arguments so construed, courts readily dismiss them, as Supreme Court precedent makes clear that juvenile confessions are admissible under at least some circumstances.[141]

Examples are again helpful.[142] In *State in Interest of P.G.*,[143] the Court of Appeals of Utah reviewed a seventeen-year-old defendant's delinquency adjudication for aggravated sexual abuse of a child.[144] P.G. was arrested after his five-year-old sister alleged that he had sexually abused her.[145] He then confessed during an interrogation in which "the detective repeatedly told P.G. that he already knew that P.G. sexually assaulted" his sister, and in which the detective "refused to accept P.G.'s denials, and . . . shouted once at P.G. to 'stop lying.'"[146] P.G.'s motion to suppress his confession was denied, and he argued on appeal that the lower court's voluntariness analysis

---

[139] *Id.* at 188 (citation omitted).

[140] *See id.* at 188–89 (citing People v. Williams, 233 P.3d 1000, 1029–30 (Cal. 2010); People v. Richardson, 183 P.3d 1146, 1168 (Cal. 2008), *modified* (July 16, 2008); People v. Farnam, 47 P.3d 988, 1042 (Cal. 2002), *modified* (July 31, 2002)).

[141] *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 727 (1979).

[142] For other examples, see, e.g., United States v. Juvenile Male, 968 F. Supp. 2d 490, 511 (E.D.N.Y. 2013); Vance v. Bordenkircher, 505 F. Supp. 135, 138 (N.D.W. Va. 1981), *aff'd*, 692 F.2d 978 (4th Cir. 1982); Ingram v. State, 918 S.W.2d 724, 728 (Ark. Ct. App. 1996); *In re* Jessie L., 182 Cal. Rptr. 396, 404 (Cal. Ct. App. 1982); Marshall v. State, 282 S.E.2d 301, 303 (Ga. 1981); State v. Terrick, 857 So. 2d 1153, 1160–61 (La. Ct. App. 2003), *writ denied*, 871 So. 2d 346 (La. 2004); State v. Hance, 233 A.2d 326, 330 (Md. Ct. Spec. App. 1967); Woodham v. State, 779 So. 2d 158, 161 (Miss. 2001); State v. Harris, 781 S.W.2d 137, 143 (Mo. Ct. App. 1989); State v. Garner, 614 N.W.2d 319, 327 (Neb. 2000); People v. De Flumer, 251 N.Y.S.2d 814, 817 (N.Y. App. Div. 1964), *aff'd*, 209 N.E.2d 93 (N.Y. 1965); State v. McKinney, 570 S.E.2d 238, 243 (N.C. Ct. App. 2002); *In re* Mellott, 217 S.E.2d 745, 746–47 (N.C. Ct. App. 1975); State v. Smith, No. C-75588, 1977 WL 199638, at *3 (Ohio Ct. App. Feb. 16, 1977); State v. Pittman, 647 S.E.2d 144, 164–66 (S.C. 2007); R.G. v. State, 416 P.3d 478, 484 (Utah 2017); State v. Unga, 196 P.3d 645, 652 (Wash. 2008).

[143] 343 P.3d 297 (Utah Ct. App. 2015).

[144] *Id.* at 300.

[145] *Id.* at 299.

[146] *Id.* at 301–02; *see infra* Section III.B (discussing maximization techniques); Section III.D (discussing leading questions).

had failed to assign appropriate weight to P.G.'s age, among other factors.[147] Instead of evaluating whether P.G.'s age made him vulnerable to the detective's concededly "aggressive" techniques,[148] however, the Court of Appeals rejected P.G.'s challenge on the simple grounds that "P.G.'s age does not render his confession involuntary"[149]—a per se argument that P.G. never advanced. The court then noted in two brief sentences that P.G. was nearly eighteen years old at the time of his confession and that "the Utah Supreme Court has found juveniles younger than P.G. to have voluntarily confessed," before concluding that P.G.'s confession was not clearly involuntary.[150]

Similarly, in *State v. Fisher*,[151] the Court of Appeal of Louisiana affirmed a lower court judgment denying the suppression of a sixteen-year-old defendant's confession to armed robbery.[152] In reviewing the defendant's challenge to the voluntariness of his confession, the court recited the relevant legal standards—including that the evaluation of a juvenile confession should be conducted "under the totality of the circumstances standard applicable to adults, supplemented by consideration of other very significant factors relevant to the juvenile status of the accused"[153]—before briefly reviewing the defendant's interrogation. The court noted that the defendant's mother was present, that both of them were advised of and waived their rights, that the defendant said he understood his rights, and that the defendant affirmed that "no promises, threats, or pressure [were] used against him."[154] The court concluded based on this cursory analysis that the defendant's confession was voluntary; it rejected the suggestion that the defendant's age weighed against admission of his confession, writing that "there is no federal or state constitutional basis for invalidating an otherwise valid confession simply because the defendant has not quite reached the age of 17 and achieved non-juvenile status."[155]

III. DEFINING SPECIAL CARE

As the foregoing cases make clear, lower courts regularly fail to apply special care when evaluating juvenile confessions. This failure may owe in

147 *P.G.*, 343 P.3d at 301.
148 *Id.*
149 *Id.* at 302.
150 *Id.*
151 87 So. 3d 189 (La. Ct. App. 2012).
152 *Id.* at 196.
153 *Id.* at 195 (quoting State v. Fernandez, 712 So. 2d 485, 489 (La. 1998)).
154 *Id.*
155 *Id.* at 196.

part to basic oversight by the courts, but it is also attributable to the malleable nature of the special care standard itself.[156] When compounded with the fact that the Supreme Court has not decided a juvenile voluntariness case in decades,[157] this malleability has allowed courts to stray from the principles first announced in *Haley*, *Gallegos*, and *Gault*.[158] In order to tether courts more closely to these principles, this Part tries to define special care by delineating the factors that courts should consider when evaluating juvenile confessions.

In defining special care, this Part does not advance proposals that would create new procedural protections for juveniles or that would expand existing ones. This Part does not propose, for example, that all juvenile interrogations be recorded,[159] that the provision of counsel be mandatory in juvenile interrogations,[160] or that courts adopt other per se rules whose violation would trigger the exclusion of juvenile confessions.[161] While such proposals are certainly worth considering, they have been defended at length in the existing literature, and their adoption would likely require innovation by legislatures and courts.

Instead, this Part offers guidance on the proper application of current Supreme Court precedent. Specifically, this Part maintains that special care

---

[156] *See* Yekaterina Berkovich, Note, *Ensuring Protection of Juveniles' Rights: A Better Way of Obtaining a Voluntary* Miranda *Waiver*, 88 ST. JOHN'S L. REV. 561, 577–81 (2014); Drizin, *The Lee Arthur Hester Case*, *supra* note 93.

[157] Fare v. Michael C., 442 U.S. 707 (1979). Although the Court reaffirmed the special care requirement in *J.D.B.*, it did not rule on the voluntariness of the defendant's confession in that case. *See* J.D.B. v. North Carolina, 564 U.S. 261, 268 n.3 (2011).

[158] *See supra* Section I.B.

[159] *See, e.g.*, Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 444 (2008); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L. J. 337, 340 (2001); Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 902–03 (1995); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L. & PSYCHOL. REV. 53, 73 (2007).

[160] *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 87 (1967), https://www.ncjrs.gov/pdffiles1/nij/42.pdf [perma.cc/KPU4-MGXZ]; Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 149 (2007); Guggenheim & Hertz, *supra* note 38, at 170.

[161] *See, e.g.*, Michael Wayne Brooks, Comment, *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, 245 (2004); David T. Huang, Note, *"Less Unequal Footing": State Courts' Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation*, 86 CORNELL L. REV. 437, 438 (2001).

requires courts to evaluate whether interrogators have used tactics that are disproportionately coercive when applied to juveniles. Special care, after all, is nothing more than a recognition of juveniles' heightened susceptibility to the pressures of interrogation. It stands to reason that courts should focus on those pressures that are known to exacerbate juveniles' unique vulnerabilities.

When reading the discussion below, it is important to note that the list of tactics is not exhaustive. Although this Part aims to highlight those methods that are most concerning when used in juvenile interrogations, there are almost certainly additional factors that courts should consider when applying special care. Furthermore, this Part does not suggest that the use of the tactics below should result in the automatic invalidation of juvenile confessions, as courts must always engage in a subjective inquiry about whether interrogation techniques were coercive "as applied to the unique characteristics of a particular suspect."[162] These tactics should nevertheless be considered, and they should weigh against the conclusion in any given case that a juvenile's confession was voluntary. The more of these tactics that were used, the greater the weight should be.

A. ISOLATION

The first factor that courts should consider is the isolation of juvenile suspects from attorneys, parents, or other interested adults. This section mentions the factor only briefly, as its inclusion in the special care analysis (when that analysis is applied) is already commonplace. The Supreme Court put particular weight on isolation in both *Haley*[163] and *Gallegos*,[164] and lower courts and legislatures have emphasized that the absence of a friendly adult weighs heavily against the admission of a juvenile's confession.[165]

---

[162] Miller v. Fenton, 474 U.S. 104, 109 (1985).

[163] Haley v. Ohio, 332 U.S. 596, 599–600 (1948) (plurality opinion) ("[A] lad of tender years . . . needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.").

[164] Gallegos v. Colorado, 370 U.S. 49, 54 (1962) ("A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not . . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.").

[165] *See, e.g.*, N.M. STAT. ANN. § 32A-2-14(E)(8) (West 2009) ("In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider . . . whether the respondent had the counsel of an attorney, friends or relatives at the time of being questioned."); Grogg v. Com., 371 S.E.2d 549, 557 (Va. Ct. App. 1988) ("The absence of a parent or counsel is 'a circumstance that weigh[s] against the admissibility of the confession.'" (quoting Miller v. Maryland, 577 F.2d 1158, 1159 (4th Cir. 1978))).

The fact that isolation from friendly adults puts disproportionate pressure on juveniles is intuitive, and it is supported generally by the research discussed in Section I.C. regarding youths' immaturity and heighted susceptibility to outside pressures.[166] Courts should note, however, that children will not always be helped by the presence of an untrained advocate, as studies suggest that "these adults, often passive, frequently urge their youths to cooperate with police."[167] As a result, courts should place particular weight on isolation from attorneys and other professional advocates, whose absence should militate unequivocally against the admission of a juvenile confession.[168]

B. MAXIMIZATION AND MINIMIZATION

In addition to isolation, two of the most commonly used classes of interrogation techniques are those involving "maximization" and "minimization."[169] The former refers to a category of "'hard-sell' technique[s] in which the interrogator tries to scare and intimidate the suspect into confessing by making false claims about evidence (e.g., staging an eyewitness identification or a fraudulent lie-detector test) and exaggerating the seriousness of the offense and the magnitude of the charges."[170] The latter describes "'soft-sell' technique[s] in which the police interrogator tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and even moral justification, by blaming a victim or accomplice, by citing extenuating circumstances, or by playing down the seriousness of the charges."[171] Together, interrogators use these kinds of

---

[166] *See supra* notes 81–83 and accompanying text.

[167] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 30 (2010); *see* Grisso & Pomicter, *supra* note 79, at 340 (finding "that the presence of parents does not mitigate the coercive circumstances [inherent in police interrogation of juveniles] and that parents are unlikely to urge juveniles to assert their rights against self-incrimination"); Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 218 (1979) (finding that "50%-60% of the parents [surveyed] believed that juveniles should not be allowed to withhold information from police or courts when they are suspected of a crime").

[168] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 262 (2003); Kassin et al., *supra* note 167, at 30; King, *supra* note 95, at 475.

[169] Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 234–35 (1991); *see* Barry C. Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 L. & SOC'Y REV. 1, 5 (2013).

[170] Kassin & McNall, *supra* note 169, at 234–35.

[171] *Id.* at 235.

tactics "to manipulate a suspect into thinking that it is in his or her best interest to confess."[172]

Although empirical studies have suggested that maximization and minimization techniques give rise to false confessions for suspects of all ages,[173] the Supreme Court has generally allowed these techniques in cases involving adults.[174] With juveniles, however, these tactics carry unique risks. Not only do maximization techniques play on juveniles' unique susceptibilities, but the use of false evidence of guilt is also "especially convincing to youth, who are very susceptible to influence exerted by authority figures and may be reluctant to correct misinformation presented by such figures."[175] Likewise, minimization techniques have a greater influence on juveniles than they do on adults, as juveniles more often "lack the requisite capacity and savviness to resist subtle pressures exerted through a minimization narrative."[176] Minimization techniques are also "tailored by police to be especially persuasive to children and adolescents, creating narratives more likely to be compelling to youth."[177]

Given the disproportionate effect that maximization and minimization strategies have on children, courts should consider them carefully when evaluating juvenile confessions. Courts should be particularly vigilant with respect to minimization techniques, as these techniques "generally involve[] a gentle, friendly approach in which the interrogator attempts to gain the suspect's trust."[178] As a result, minimization tactics might look benign, or even preferable, when applied to juveniles, when in fact they are especially pernicious.

---

[172] Kassin et al., *supra* note 167, at 12.

[173] *See* Allyson J. Horgan et al., *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCHOL., CRIME & L. 65, 66 (2012); Kassin & McNall, *supra* note 169, at 248.

[174] Kassin et al., *supra* note 167, at 12.

[175] Naomi E. S. Goldstein et al., *Waving Good-Bye to Waiver: A Developmental Argument Against Youths' Waiver of* Miranda *Rights*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 40 (2018) (citing Owen-Kostelnik et al., *supra* note 80, at 295).

[176] Owen-Kostelnik et al., *supra* note 80, at 295 ("As adolescents are frequently more susceptible to authority figures, they may also be more open than adults to the rationale that detectives express through the minimization process. Moreover, adolescents' truncated future orientation and risk perception/appreciation could make . . . the minimized 'themes' that much more tempting to endorse.").

[177] Goldstein et al., *supra* note 175, at 41 (citing Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J. L. & PUB. POL'Y 395, 438–40 (2013)).

[178] Horgan et al., *supra* note 173, at 66.

C. DECEPTION

As discussed above, maximization and minimization strategies often rely on the use of deception in order to pressure suspects into confessing. Deception tactics warrant a broader discussion of their own, however, as they are not coextensive with maximization and minimization,[179] and they are both commonplace and particularly likely to be coercive when applied to juveniles.

As a general matter, the Supreme Court has sanctioned deception in police interrogation of adults,[180] even though deceptive tactics can lead to false confessions.[181] As with maximization and minimization, however, deception raises unique concerns in the context of juvenile interrogations.[182] Where interrogators present suspects with false evidence of guilt, for example, juveniles are made particularly vulnerable by their "reliance on gut instincts and emotional impulses . . . because such tactics force suspects either to confess or rationally to rebut the alleged proof against them."[183] Juveniles are also more suggestible than adults, and "when placed in high pressure interrogations, . . . are much more likely to change their stories and even to confess to crimes they did not commit."[184]

Juveniles' susceptibility to false evidence has been studied in the laboratory setting, with striking results. In one of the better-known experiments on the topic, researchers instructed subjects to type letters on a computer keyboard, but not to touch the ALT key, as doing so would cause the computer to crash.[185] The researchers then caused the computer to crash during the typing exercise, and they asked the (factually innocent) subjects

---

[179] For example, if a police officer obtains a confession by posing as a suspect's cellmate, *see, e.g.*, Illinois v. Perkins, 496 U.S. 292, 294 (1990), then he will have deceived the suspect, even if he does not attempt to exaggerate or downplay the suspect's culpability.

[180] *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492, 495–96 (1977) (per curiam) (reversing state supreme court decision that confession should be suppressed where suspect was falsely told that his fingerprints were found at the crime scene); Frazier v. Cupp, 394 U.S. 731, 737–39 (1969) (upholding admission of confession where suspect was falsely told that his cousin had confessed).

[181] Irina Khasin, Note, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1033 (2009).

[182] *See generally* Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971 (2005).

[183] *Id.* at 996.

[184] *Id.* at 998 (citing G. Richardson et al., *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 J. ADOLESCENCE 211, 211–16 (1995)).

[185] Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141, 146 (2003).

to sign a statement admitting to hitting the ALT key.[186] Some subjects were presented with a false printout indicating that they had hit the ALT key, and, of those subjects, juveniles were significantly more likely than young adults to sign the admission statement.[187] Most notably, 88% of fifteen and sixteen-year-olds presented with the false printout signed the statement admitting to hitting the ALT key.[188]

Clearly, laboratory settings differ in important ways from interrogation rooms, but they nevertheless provide support for the proposition that juveniles are disproportionately susceptible to deception. In addition to the presentation of false evidence, interrogators use deception to operate on juveniles' susceptibility by falsely downplaying suspects' culpability.[189] While subtle, this form of deception has been found to communicate expectations of lenient sentencing "as effectively as . . . an explicit promise" of leniency.[190] The Supreme Court has held that promises of leniency can render even an adult confession involuntary,[191] and courts must be particularly vigilant when such promises are not only made to juveniles, but also implied through the false downplaying of juveniles' culpability. For example, where interrogators (falsely) tell a juvenile suspect that "everything [i]s going to be O.K.,"[192] that his role in the crime "was not his fault,"[193] and that his actions "were completely 'understandable,'"[194] courts should be hesitant in concluding that any subsequent confession was voluntarily given. Although such tactics may be permissible when used with adults, they are disproportionately likely to cause juveniles to "confess merely as a way to escape the isolation and anxiety that permeates the interrogation room."[195]

---

[186] *Id.*

[187] *Id.* at 148.

[188] *Id.*

[189] *See* Feld, *supra* note 169, at 13; Feld, *supra* note 6, at 277–84, 277 tbl.4; Goldstein et al., *supra* note 175, at 41–42; Owen-Kostelnik et al., *supra* note 80, at 295; Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1720, 1728 (2017).

[190] Kassin & McNall, *supra* note 169, at 241.

[191] *See* Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Leyra v. Denno, 347 U.S. 556, 560–61 (1954).

[192] J.G. v. State, 883 So. 2d 915, 926 (Fla. Dist. Ct. App. 2004).

[193] Dassey v. Dittmann, 201 F. Supp. 3d 963, 983 (E.D. Wis. 2016) (subsequent history omitted).

[194] *In re* Elias V., 188 Cal. Rptr. 3d 202, 215 (Cal. Ct. App. 2015), *modified* (June 24, 2015).

[195] Spierer, *supra* note 189, at 1728 (citing Feld, *supra* note 6, at 243–44).

D. LEADING AND FACT-FEEDING

Even where interrogators refrain from using deception, they may unintentionally coerce juveniles through the use of leading questions and fact-feeding. In any interrogation, these tactics make for bad practice, as they risk contaminating the suspect's confession, thereby undermining law enforcement's confidence that obtained information truly originated with the suspect. For this reason, "[p]olice have long been trained not to contaminate a confession by feeding or leaking crucial facts,"[196] and interrogation training manuals have made clear that "[l]eading questions are not to be asked, at least not as to crucial corroborated details concerning the crime."[197]

When applied to juveniles, leading questions and fact-feeding are even more dangerous. Research has shown that juveniles are more likely to adopt false narratives when subjected to repeated questioning and other forms of pressure.[198] And juveniles are particularly susceptible to such pressures when the individual questioning them is an adult.[199] Moreover, when leading questions are repeated, juveniles "may assume they gave the 'wrong' answer the first time, and feel pressure to provide the 'right' answer."[200] As a result, when it comes to minors, some research suggests that "leading questions based on the actual evidence . . . are as likely as fraudulent tactics to cause a false confession."[201]

Juveniles' susceptibility to leading questions and fact-feeding has been demonstrated in numerous high-profile false confession cases in which suspects were alleged to know facts that were available only to the perpetrator and the police. In the case of Jeffrey Deskovic,[202] for example, a sixteen-year-old boy was arrested for the rape and murder of his classmate, based on accurate diagrams that he drew of the crime scene and other

---

196 Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1066 (2010).

197 *Id.* at 1067; *see* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 315 (5th ed. 2013); *see also* Spano v. New York, 360 U.S. 315, 322 (1959) (holding confession involuntary where suspect, among other things, "did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession").

198 Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 52 (2004).

199 DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 82 (2d ed. 2002).

200 John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 23 (1996).

201 Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1291 (2007).

202 *See generally* LESLIE CROCKER SNYDER ET AL., REPORT ON THE CONVICTION OF JEFFREY DESKOVIC (June 2007), http://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf [perma.cc/WAH8-JRT7].

information he provided "about the crime that only the killer would know," such as the existence of a handwritten note that was found with the victim's body.[203] Even though Deskovic was excluded at the outset of the investigation as the source of DNA found at the crime scene, he was nevertheless tried and convicted, and he spent sixteen years in prison before the DNA was matched to another man who confessed to the crime.[204]

A postmortem of the conviction prepared at the request of the district attorney's office concluded that there were two possible ways in which Deskovic could have obtained his inside information: "either the police (deliberately or inadvertently) communicated this information directly to Deskovic or their questioning at the high school and elsewhere caused this supposedly secret information to be widely known throughout the community."[205] While we cannot prove which of these possibilities occurred, "[g]iven the level of specificity reportedly provided by Deskovic, the second and more troubling possibility, that the officers disclosed facts to him, seems far more likely."[206]

Even more disturbing than the Deskovic case is the story of Ryan Harris. Harris was an eleven-year-old girl who was raped and murdered in 1998.[207] Not long after her body was found, two boys, one seven and one eight, were charged with "striking [Harris] with a rock, sexually molesting her and suffocating her with her own underwear."[208] After being questioned by the police, the two boys "independently described how they knocked the girl off her bike, hit her in the head with a brick, dragged her into weeds, and sexually molested her, leaving her to die—*facts that matched the crime*."[209] While the police initially maintained that "the boys gave statements that contained details of the crime that only the true killers would have known," the prosecution dropped the charges against the boys after semen was found on Harris's underpants, and a perfect DNA match was later made with a man who had previously been charged with sexually assaulting young girls.[210] To

---

[203] *Id.* at 2, 6.

[204] *Id.* at 2, 31.

[205] *Id.* at 6.

[206] Garrett, *supra* note 196, at 1056.

[207] Lisa M. Krzewinski, Note, *But I Didn't Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 357 (2002).

[208] Pam Belluck, *Chicago Boys, 7 and 8, Charged in the Brutal Killing of a Girl, 11*, N.Y. TIMES (Aug. 11, 1998), https://www.nytimes.com/1998/08/11/us/chicago-boys-7-and-8-charged-in-the-brutal-killing-of-a-girl-11.html [perma.cc/H7P9-XCJ5].

[209] Kassin & Gudjonsson, *supra* note 198, at 52 (emphasis added).

[210] David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 677 n.150 (2002).

the extent that the boys did in fact provide details that "only the true killers would have known," these details were almost certainly fed to them (whether intentionally or unintentionally) by the interrogating officers.

***

The interrogation tactics discussed in this Part—isolation, maximization and minimization, deception, and leading and fact-feeding—present unique risks when applied to juvenile suspects. Each one plays on a range of vulnerabilities that are common in children, but that are not present, or are present only to a lesser extent, in adults. Given the Supreme Court's admonition that juveniles not "be judged by the more exacting standards of maturity,"[211] review of these tactics is a natural starting point for courts conducting a special care analysis.

Of course, courts should not automatically suppress a confession if some or all of the tactics discussed in this Part have been used. And courts should make sure to consider arguments regarding other kinds of tactics that are not discussed here. This Part nevertheless provides a framework for the proper application of the special care standard: where interrogators use tactics that are particularly coercive for juveniles, the use of these tactics should weigh against the admission of the confession.

CONCLUSION

For the better part of the last century, the Supreme Court has recognized that juvenile suspects are uniquely vulnerable to the pressures of police interrogation. In order to mitigate the constitutional risks created by this vulnerability, the Court has consistently reaffirmed the importance of applying special care when evaluating juvenile confessions. Unfortunately, lower courts have often failed to recognize the importance of this standard, and they have strayed from the principles first announced by the Court in *Haley*, *Gallegos*, and *Gault*. At the same time, social science and false confession studies have confirmed the need for special care, and they have even made that need more pronounced.

This Article does not purport to solve the problem of involuntary confessions or to provide an exhaustive accounting of the relevant case law or empirical literature. Instead, it aims to highlight the importance of the special care requirement and to provide guidance regarding its application. My hope is that litigants, judges, and other legal actors will use the discussion above to frame their analyses and ensure that juvenile confessions receive the special care that they demand.

---

[211] Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality opinion).