THE IMPERMISSIBILITY OF POLICE DECEPTION IN JUVENILE INTERROGATIONS

*Gina Kim**

Although perjury is a criminal offense in all states and a felony in many, law enforcement may routinely lie to suspects during interrogations. This widespread, judicially authorized practice consists of interrogators making false promises of leniency that the suspect will receive a lighter sentence in exchange for a confession, and making misrepresentations about the evidence against the suspect. Police deception in interrogations becomes even more problematic when used against juvenile suspects because the psychological vulnerability of minors may lead them to succumb to deceptive pressures and even to falsely confess.

This Note explores the debate surrounding the use of police deception tactics in interrogations and suggests that, for juvenile suspects, the practice should be categorically barred through state legislation. The suggestibility and susceptibility of youth render them more likely to falsely confess than adults are. This Note argues that deceptive interrogation tactics inherently violate due process rights by allowing law enforcement to lie to youth who are more likely to believe them than adult suspects are. Because of these concerns, deception in juvenile interrogations should be prohibited per se through state legislation. Such legislation should categorically prohibit law enforcement from intentionally misrepresenting the evidence available against the juvenile suspect or from intentionally engaging in other deceptive practices that are fundamentally unfair and unjust.

* J.D. Candidate, 2023, Fordham University School of Law; M.A., 2019, Columbia University; B.A., 2015, Ewha Womans University. Thank you to Professor Bruce Green for his guidance and to the editors and staff of the *Fordham Law Review* for their editing expertise. I also want to thank my parents, siblings, and Junyeong for their consistent prayers, love, and support.

INTRODUCTION

Making a Murderer, a popular Netflix documentary series tracking the murder trials of Steven Avery and his nephew, Brendan Dassey, offers a rare glimpse into how police interrogations are conducted behind closed doors.[1] The videotaped interrogations depict how the police feigned sympathy, misrepresented the evidence they had, and deliberately asked leading questions to elicit a confession from Mr. Dassey, a sixteen-year-old with an intellectual disability.[2] Whether the police conduct violated Mr. Dassey's constitutional rights by forcing him to falsely confess quickly became a matter of public debate[3] and a legal battle in the courts.[4]

This popular documentary once again brought the issue of false confessions, and the ensuing miscarriage of justice, to the forefront of public and legal debate. False confessions are the most common contributing factor

1. *See* Adam Liptak, *Was It a False Confession in 'Making a Murderer'?: The Supreme Court May Decide*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/us/politics/supreme-court-making-a-murderer.html [https://perma.cc/9V38-AA25]; Jane Kelly, *UVA Expert: 'Making a Murderer' Proves Juvenile Interrogations Must Change*, UVA TODAY (June 13, 2018), https://news.virginia.edu/content/uva-expert-making-murderer-proves-juvenile-interrogations-must-change [https://perma.cc/5HT3-4ZUT] ("What makes the Dassey case unusual is that in Wisconsin, police must videotape an interrogation, so we do have that record.").

2. *See* Liptak, *supra* note 1.

3. *See* Douglas Starr, *In the "Making a Murderer" Case, the Supreme Court Could Help Address the Problem of False Confessions*, NEW YORKER (June 6, 2018), https://www.newyorker.com/news/news-desk/in-the-making-a-murderer-case-the-supreme-court-could-help-address-the-problem-of-false-confessions [https://perma.cc/H6J8-9TDJ] ("[H]undreds of thousands of viewers signed petitions calling for [Brendan Dassey's] pardon.").

4. Dassey v. Dittmann, 877 F.3d 297 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 2677 (2018).

to wrongful convictions in homicide-related cases.[5] To secure confessions from suspects during interrogations, police often engage in deceptive tactics by misrepresenting the facts about the evidence they possess or by making false promises of leniency.[6] Courts generally endorse these deceptive police tactics based on the assumption that an innocent person will not admit guilt to a crime that the person did not commit.[7] This conventional wisdom, however, has been disputed by subsequent studies, and the debate is far from settled.[8] And for juvenile defendants, studies show that suspects under the age of eighteen are between two to three times more likely to confess under the pressure of deception than are adults.[9]

This Note examines whether a per se bar against the use of police deception in juvenile interrogations is proper. This Note argues that a per se bar is necessary because of the psychological vulnerability of adolescents, critiques an Illinois statute regulating police deception in juvenile interrogations,[10] and outlines what types of police deception should be categorically barred by drawing insight from sample legislation.

Part I of this Note discusses the law of confessions and provides an overview of police deceptive tactics and the way in which those tactics interact with confession jurisprudence. Part II canvasses the defenses and criticisms of police use of deceptive tactics when interrogating adult suspects and highlights special considerations concerning juvenile suspects. Part III further narrows the scope of the debate to juvenile suspects, supports a per se bar on police deception in juvenile interrogations, and details what types of deception should be prohibited.

I. THE LAW OF CONFESSIONS AND POLICE DECEPTION

The use of police deception during interrogations may impact the voluntariness of the suspect's resulting confession.[11] If a suspect was

5. *See* Nigel Quiroz, *Five Facts About Police Deception and Youth You Should Know*, INNOCENCE PROJECT (May 13, 2022), https://innocenceproject.org/police-deception-lying-interrogations-youth-teenagers [https://perma.cc/4W3D-WRE4].

6. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1174 (2001) ("Interrogation typically requires at least some deception—from professing unfelt sympathy for the suspect, to exaggerating the strength of the evidence against the suspect, to falsely alleging that a witness has identified the suspect.").

7. *See* Hopt v. Utah, 110 U.S. 574, 585 (1884) ("[O]ne who is innocent will not imperil his safety or prejudice his interests by an untrue statement."); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 974 (2005).

8. *See generally* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997).

9. Megan Crane, Laura Nirider & Steven A. Drizin, *The Truth About Juvenile False Confessions*, 16 INSIGHTS ON L. & SOC'Y 10, 12 (2016).

10. 705 ILL. COMP. STAT. 405/5-401.6 (2022). This Note focuses on the Illinois statute because the state is the first in the country to effectively ban police deception in juvenile interrogations.

11. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (holding that whether a defendant's will was overborne is determined by the totality of the circumstances, including "the details of the interrogation").

deceived and coerced into making a confession, the incriminating statement was not a product of the suspect's "free and unconstrained choice."[12] The voluntariness of a suspect's confession, and whether the confession may be admitted at trial as a result, implicates various constitutional rights.[13]

Part I.A provides an overview of the constitutional concerns regarding involuntary confessions and the way in which courts determine whether a confession was made voluntarily. Part I.B describes the use of police deception in the context of interrogations and outlines the way in which courts and legislatures have responded to the use of such tactics.

A. The Law of Confessions

The constitutionality of admitting a defendant's confession at trial depends, in part, on whether the confession was made voluntarily.[14] The constitutional requirement that a confession only be used against a defendant if it was made voluntarily reflects a "complex of values implicated in police questioning,"[15] namely balancing the need for effective law enforcement and ensuring the fundamental fairness of criminal procedures.[16]

This focus on fairness is derived from a pair of constitutional guarantees. First, the Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[17] In *Bram v. United States*,[18] the U.S. Supreme Court held that the use of involuntary confessions against a defendant at trial violates their right against self-incrimination.[19]

Second, the Due Process Clause of the Fifth and Fourteenth Amendments also governs the determination of whether a confession was made voluntarily.[20] The due process inquiry examines whether the tactics used to elicit a confession are "compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," such as when a defendant is coerced to confess.[21]

In light of these constitutional protections, the Supreme Court has evaluated various techniques utilized by law enforcement to extract inculpatory statements. For example, the Court has considered the

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

13. *See, e.g.*, Bram v. United States, 168 U.S. 532, 542 (1897) (holding that admitting involuntary confessions at trial violates the Fifth Amendment right against self-incrimination); *Schneckloth*, 412 U.S. at 225–26 (holding that the "ultimate test" in determining whether admitting confessions into evidence at trial violates due process depends on whether the confession was made voluntarily).

14. *See Bram*, 168 U.S. at 542 (Fifth Amendment right against self-incrimination); *Schneckloth*, 412 U.S. at 225–26 (right to due process under the Fifth and Fourteenth Amendments).

15. *Schneckloth*, 412 U.S. at 224–25.

16. *See id.*

17. U.S. CONST. amend. V.

18. 168 U.S. 532 (1897).

19. *See id.* at 556.

20. *See* U.S. CONST. amend. V.; *id.* amend. XIV, § 1.

21. Miller v. Fenton, 474 U.S. 104, 116 (1985).

constitutionality of law enforcement's use of physical torture or psychological pressure in extracting confessions.[22] Although the Court did not explicitly rule that such practices are unconstitutional, the Court held that the use of physical torture in interrogations is coercive per se, rendering the resulting confession inadmissible at trial.[23] Other interrogation tactics involving physical isolation, such as subjecting the suspect to prolonged interrogations while incommunicado, renders the resulting confession inadmissible because of the coerciveness of the physical interrogational pressures.[24]

Although most interrogation tactics involving physical coercion are coercive per se, the permissibility of tactics involving more subtle psychological pressures is unclear. Rather than developing a per se rule against psychological interrogation techniques, courts instead determine the admissibility of confessions by assessing the "totality of all the surrounding circumstances" and whether those circumstances rendered the suspect's will to be overborne.[25] The totality of the circumstances analysis considers the suspect's potential vulnerabilities, such as their age,[26] level of education,[27] intelligence,[28] mental health,[29] and physical condition.[30] The analysis also discerns the manner in which the interrogation was conducted (such as the

22. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (applying the totality of the circumstances test and describing that the factors to be considered include "both the characteristics of the accused and the details of the interrogation").

23. *See* Stein v. New York, 346 U.S. 156, 182 (1952) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."), *overruled on other grounds sub nom.* Jackson v. Denno, 378 U.S. 368 (1964); Brown v. Mississippi, 297 U.S. 278, 280, 297 (1936) (holding that confessions procured by physical torture, brutality, and violence are inadmissible).

24. *See* Davis v. North Carolina, 384 U.S. 737, 752 (1966) (holding that the defendant's confessions were made involuntarily and were coerced by repeated interrogation and isolation from any outside communications for sixteen days).

25. *See, e.g.*, *Schneckloth*, 412 U.S. at 226 (listing the relevant factors and applying the totality of the circumstances test to determine whether a defendant was coerced into making a confession).

26. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 599 (1948) (finding that a fifteen-year-old suspect's "tender and difficult age" renders him "a ready victim of the inquisition").

27. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560, 561–62, 568 (1958) (holding that the defendant's confession was coerced and noting the adult defendant's fifth-grade education); *see also* Clewis v. Texas, 386 U.S. 707, 712 (1967) (considering the adult defendant's fifth-grade education as a factor in the totality of the circumstances test).

28. *See, e.g.*, Fikes v. Alabama, 352 U.S. 191, 193 (1957) (noting that the defendant "started school at age eight and left at 16 while still in the third grade"); *see also* Dassey v. Dittmann, 877 F.3d 297, 301 (7th Cir. 2017) (finding that the defendant's "limited intellectual ability" weighs in favor of the involuntariness of the defendant's confession).

29. *See, e.g.*, *Fikes*, 352 U.S. at 193 (noting the defendant's schizophrenic diagnosis in assessing the totality of the circumstances).

30. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944) (highlighting the defendant's deprivation of sleep due to thirty-six hours of consecutive questioning); Reck v. Pate, 367 U.S. 433, 443 (1961) (noting the defendant's weak condition and pain due to physical illness and lack of food).

length of detention or interrogation),[31] whether the defendant was informed of their constitutional rights,[32] and whether police utilized deceptive tactics.[33]

Courts utilize the totality of the circumstances analysis to evaluate whether the resulting confession was the byproduct of an "essentially free and unconstrained choice by its maker."[34] If the circumstances suggest that the suspect's will was overborne and their "capacity for self-determination critically impaired,"[35] the resulting due process violation renders the confession inadmissible at trial.[36] Although a single factor does not conclusively determine the voluntariness issue, certain factors such as the suspect's age and whether the suspect was informed of their constitutional rights are worth noting here.

First, in *Haley v. Ohio*,[37] the Supreme Court invalidated a minor's confession, holding that juvenile confessions should be judged by more exacting standards than are applied to adult confessions.[38] The *Haley* Court emphasized that confessions made by minors are different than those made by adults because minors' adolescent years are a "period of great instability which the crisis of adolescence produces."[39] Despite this, the Court still utilizes the same totality of the circumstances test in determining whether a juvenile suspect's confession was made involuntarily.[40] However, courts find that juvenile confessions are involuntary more often than they do for adult confessions.[41]

Second, the factor considering whether the suspect is informed of their constitutional rights was the focus of the Court's recognition of *Miranda*

31. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 739 (1966) (finding that, among other factors, a sixteen-day interrogation contributed to the defendant's involuntary confession).

32. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (establishing the well-known *Miranda* rights and holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination"); *see, e.g.*, *Davis*, 384 U.S. at 739 (noting that the defendant was not advised of his constitutional rights by the police before making a confession).

33. *See* Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (considering the fact that the police falsely informed defendant that a coconspirator had already confessed as one of the factors in the totality of the circumstances test).

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

35. *Id.*

36. *See id.*

37. 332 U.S. 596 (1948).

38. *See id.* at 600–01 ("The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police towards his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction.").

39. *Id.* at 599.

40. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 725 (1979) (listing the relevant factors in determining the admissibility of a juvenile suspect's confession, including, among other things, the juvenile's age, experience, education, background, and intelligence).

41. *See, e.g.*, *In re* A.L., 157 N.E.3d 350, 356–57 (Ohio Ct. App. 2020) (holding that the ten-year-old suspect's confession was made involuntarily); J.G. v. State, 883 So. 2d 915 (Fla. Dist. Ct. App. 2004) (holding that the thirteen-year-old defendant's confession was made involuntarily).

rights in *Miranda v. Arizona*.[42] The Court, partially in response to the widespread use of deception and other subtle psychological tactics in interrogations,[43] established the now ubiquitous *Miranda* warnings.[44] *Miranda* requires that, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney."[45] Due to law enforcement's consistent compliance with the Court's holding in *Miranda*, courts rarely invalidate confessions when an adult defendant was properly informed of their *Miranda* rights.[46]

Relatedly, in determining the voluntariness of a *Miranda* waiver,[47] courts also utilize the totality of the circumstances test to decide whether the waiver was made voluntarily.[48] The voluntariness of a *Miranda* waiver, though relevant in determining whether a confession was also made involuntarily, is a separate issue that is not the focus of this Note. In other words, this Note primarily discusses the voluntariness of a confession when police deception is utilized and sets aside the issue of the voluntariness of a *Miranda* waiver.

B. Police Deception in Interrogations

The use of police deception is also one of the factors examined by courts in assessing whether a confession was made involuntarily.[49] Part I.B.1 canvasses the various types of police deception utilized more broadly by law enforcement and specifically in the context of interrogations. Part I.B.2 examines how courts analyze the use of police deception in interrogations and discusses the circumstances in which courts are likely to find that a confession was involuntary. Part I.B.3 briefly notes the way in which state legislatures have responded to police deception in interrogations by passing or introducing legislation limiting the use of such tactics.

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42. 384 U.S. 436 (1966).

43. *See id.* at 448–55 (describing in granular detail the sophisticated and sometimes deceptive psychological stratagems utilized to induce a confession during interrogations); *see* McMullen, *supra* note 7, at 978–79 ("The [*Miranda*] decision . . . was motivated in part by the Court's frustration with police officers who continually upped the ante of interrogative pressure by replacing physical coercion with deception and other sophisticated psychological tactics.").

44. *See Miranda*, 384 U.S. at 444.

45. *Id.*

46. *See* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.").

47. Individuals may waive their *Miranda* rights as long as the waiver is made "voluntarily, knowingly, and intelligently." *Miranda*, 384 U.S. at 444.

48. *See, e.g.*, J.G. v. State, 883 So. 2d 915, 926 (Fla. Dist. Ct. App. 2004) (weighing the totality of the circumstances and concluding that the defendant involuntarily waived his *Miranda* rights).

49. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (evaluating the use of police deceptive tactics as one of the factors in the totality of the circumstances test).

1. Categories of Police Deception

The police utilize deception in various stages of criminal investigations and law enforcement, and certain techniques are generally accepted by the courts.[50] For example, courts generally hold that the use of undercover agents is constitutional, out of a concern that excessive interference with law enforcement could "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest."[51] Law enforcement officers in plain uniform may also use deceptive tactics when conducting searches. For example, uniformed police officers may lead residents to believe that they are searching the residents' homes to assist them in a burglary report, when in fact the purpose of the search is to collect evidence of fraud committed by the residents.[52] Finally, as outlined above, after apprehending a suspect, officers often use deceptive techniques when interrogating that suspect to elicit confessions.[53]

This is not to say, however, that deceptive tactics are entirely immune from constitutional review.[54] Because deceptive tactics during interrogation, for example, may impact the voluntariness of a suspect's confession, there are some general limits on the types of tactics that may be used.[55] The types of deception often made during interrogations may be broadly divided into two categories: (1) false statements about the procedure or outcome of the suspect's case and (2) false representations about evidence.[56]

In the first bucket, false statements about the procedure or outcome of the case include false promises of leniency in sentencing, false statements about the nature of the current interrogation, and false statements about the maximum penalty the suspect may face if convicted. Interrogators may falsely promise the suspect leniency if the suspect cooperates or confesses.[57] Police officers may also make untrue statements about the current procedures of the interrogation to put the suspect at ease or to pressure the suspect into making a confession. For example, interrogators may falsely inform the

50. *See, e.g.*, Sorrells v. United States, 287 U.S. 435, 441 (1932) ("Artifice and stratagem may be employed to catch those engaged in criminal enterprises.").

51. Lewis v. United States, 385 U.S. 206, 210 (1966) (holding that undercover operations do not invalidate consent).

52. *See, e.g.*, United States v. Spivey, 861 F.3d 1207, 1210–12, 1215, 1218 (11th Cir. 2017) (holding that law enforcement's use of pretext to enter and search defendants' residence did not invalidate defendants' consent for them to enter, and therefore the search did not violate the defendants' Fourth Amendment rights against unreasonable search and seizure).

53. *See, e.g.*, Dassey v. Dittmann, 877 F.3d 297, 313 (7th Cir. 2017) (finding that interrogators misrepresenting to the suspect the extent of their knowledge of the alleged crime is a common interview technique).

54. *See Lewis*, 385 U.S. at 209 ("The various protections of the Bill of Rights, of course, provide checks upon such official deception for the protection of the individual.").

55. *See supra* Part I.A.

56. *See* McMullen, *supra* note 7, at 983.

57. *See, e.g.*, Bram v. United States, 168 U.S. 532, 565 (1897) (invalidating a confession made on the basis of a false promise suggesting a "benefit as to the crime and its punishment as arising from making a statement").

suspect that they are being questioned merely as a witness and not as a suspect,[58] or falsely inform a juvenile suspect that they would be considered an adult for the charges to be brought against them.[59] Interrogators may also falsely inform the suspect of the maximum sentence that they may face if convicted of the charge against them.[60] For example, in one case, interrogators falsely informed a seventeen-year-old suspect that he may face the death penalty[61] for his involvement in the alleged offense.[62]

The second bucket of deceptive tactics involves false representations of evidence. These deceptive tactics include verbal misrepresentations of evidence, such as falsely informing the suspect that a co-suspect admitted to the alleged offense.[63] Verbal misrepresentations may also include false statements that the victim of the offense directly identified the suspect as the assailant,[64] or that DNA evidence was found at the scene and matches the suspect's DNA.[65] Misrepresentations of evidence may also take the form of physically presenting false evidence. For example, in one case, interrogators presented to the suspect fabricated documents showing the suspect's guilt.[66]

In rare but notable cases, personal relationships between the interrogator and the suspect influence the use and effectiveness of deceptive tactics. For example, one suspect confessed to an alleged offense after his childhood friend, one of the police officers assisting in the interrogation, falsely told the suspect that the suspect had gotten him "in a lot of trouble" for committing the offense and not confessing.[67] In another case, an interrogator had "strong

58. *See, e.g.*, Commonwealth v. Lopez, 151 N.E.3d 367, 379–80 (Mass. 2020) (holding that the deceptive tactic used did not affect the voluntariness of the suspect's statement).

59. Robinson v. Commonwealth, 756 S.E.2d 924, 929–30 (Va. Ct. App. 2014) (holding that such "misrepresentation does not rise to the level of such deliberate deception or coercion" that would compel a suspect to involuntarily confess).

60. *See, e.g.*, *In re* D.F., 38 N.E.3d 1202, 1212 (Ohio Ct. App. 2015) (holding that falsely informing a thirteen-year-old suspect that he would be sentenced as an adult and receive a twenty-eight-year prison sentence is "intentionally misleading and constitutes deceptive conduct" that undermined the voluntariness of the suspect's resulting statements).

61. The Supreme Court struck down the juvenile death penalty as unconstitutional in 2005. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005).

62. *See* State v. Kerby, No. 03-CA-55, 2007 WL 127727, at *11–12 (Ohio Ct. App. Jan. 19, 2007) (holding that law enforcement falsely informing a juvenile suspect that they may be sentenced to death for the alleged offense rendered the juvenile suspect's confession involuntary).

63. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (false statement to a suspect that a co-suspect confessed to the alleged offense).

64. *See, e.g.*, Farmah v. State, 789 S.W.2d 665, 672 (Tex. App. 1990) (discussing police's false representation that the suspect had been identified by the victim).

65. *See, e.g.*, People v. Minniti, 867 N.E.2d 1237, 1250 (Ill. App. Ct. 2007) (interrogator's misrepresentation to the suspect that the suspect's DNA was found inside the victim), *abrogated on other grounds sub nom.* People v. Bailey, 4 N.E.3d 474 (Ill. 2014).

66. *See, e.g.*, State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989) (false documents indicating that a scientific test established that the semen stains found on victim's clothing came from suspect).

67. Spano v. New York, 360 U.S. 315, 319, 323 (1959) (deception by the suspect's childhood friend, who was the "one face visible to [the suspect] in which [the suspect] could put some trust").

personal motives to [use deceptive tactics to] elicit a confession"[68] from a juvenile suspect because the victim of the alleged offense was the daughter of the interrogator's life partner.[69]

2. Courts' Analysis of Police Deception in Interrogations

This section outlines how courts analyze the constitutionality of the various forms of police deception outlined above. Courts consider whether the interrogator's statement was actually untruthful or an immaterial misrepresentation, whether the deception actually caused the suspect's will to be overborne and confess involuntarily, and the extent to which the tactic used is more or less concerning than other types.

At the outset, courts often struggle to demarcate the line between immaterial misrepresentation and deception, either by gauging the falseness of the statement or by examining the purpose of the false statement. In the first instance, one court found that the police's statement to the suspect that there were "several" witnesses implicating the suspect in the alleged offense—when there were really only two—was insufficient to "transform the interrogation tactic into trickery."[70] In determining the purpose of the false statement by the police, courts tend to conclude that a false statement does not constitute deception rendering a confession involuntary if the purpose of the statement was to put the suspect at ease[71] or to induce the suspect to admit to their involvement in the offense.[72]

Another important aspect of police deception jurisprudence involves causation—that is, whether the suspect confessed because of the police's deceptive statements. In other words, the court examines whether the misrepresentation undermined the voluntariness of the suspect's statements.[73]

Based on this framework, courts examine whether false statements about procedure or the outcome of the suspect's case, or false representations about the evidence render a confession involuntary. First, the Supreme Court in *Bram v. United States* barred the use of false promises of leniency, holding that confessions obtained as a result of false promises of lenient punishment

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

69. *See id.*

70. *In re* Marvin M., 890 N.E.2d 984, 1006 (Ill. App. Ct. 2008).

71. *See, e.g.*, Commonwealth v. Lopez, 151 N.E.3d 367, 379–80 (Mass. 2020) ("Although we do not condone deception designed to give a defendant a false sense of security, particularly a defendant who is a minor, here, given the other factors present, the officers' deception cannot be said to have affected the voluntariness of his statement.").

72. *See, e.g.*, Farmah v. State, 789 S.W.2d 665, 672 (Tex. App. 1990) ("[The interrogator] testified that the purpose of his false representation to appellant was to get him to admit his involvement in the offense . . . . We hold that the trial court . . . did not abuse its discretion in concluding that the confession was voluntary.").

73. *See, e.g.*, *In re* D.F., 38 N.E.3d 1202, 1212 (Ohio 2015) (finding that police deception regarding the maximum sentence that the thirteen-year-old suspect may face undermined the voluntariness of the juvenile suspect's statements).

were involuntary.[74] In *Bram*, the promise was directly related to the defendant's sentence and "was calculated to produce on the mind of the accused . . . a suggestion of some benefit as to the crime and its punishment as arising from making a statement."[75]

Lower courts, however, have not interpreted *Bram* as creating a categorical bar on the police's use of false promises of leniency. The U.S. Court of Appeals for the Third Circuit, for example, distinguishes false promises of leniency pertaining to imminent criminal proceedings from those related to collateral matters, holding that the latter does not render confessions involuntary per se.[76] The U.S. Court of Appeals for the Eighth Circuit also distinguishes between a *direct promise* of nonprosecution and a deceptive tactic *resulting* in a suspect's mistaken belief that they may possibly not be prosecuted, holding that the latter does not render a confession involuntary.[77] The Eighth Circuit has also declined to extend *Bram* in holding that, as long as a suspect knew the risks of confessing, false promises of leniency do not necessarily render the confession involuntary.[78]

Second, courts have generally authorized the use of *verbal* misrepresentations of evidence to pressure the suspect to confess[79] but have proscribed the use of fabricated *physical* evidence.[80] Therefore, the use of verbal deceptive tactics—such as falsely informing the suspect that a co-suspect already confessed,[81] that the victim of the offense directly identified the suspect as the assailant,[82] or that DNA evidence was found at the scene and matches the suspect's DNA[83]—are not grounds to invalidate

74. 168 U.S. 532, 542–43 (1897) ("But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." (quoting 3 WILLIAM O. RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS 478 (Horace Smith & A.P. Perceval Keep eds., 6th ed. 1896) (1819))).

75. *Id.* at 564–65.

76. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 608–10 (3d Cir. 1986) (holding that a detective telling a suspect that his mental illness rendered him not responsible for his actions, promising psychiatric help, and implying that the suspect would not be prosecuted, is a promise related to a collateral matter and thus does not render a confession involuntary).

77. *See, e.g.*, United States v. LeBrun, 363 F.3d 715, 725 (8th Cir. 2004) (finding that the police did not make a direct promise of leniency despite the recorded statement "[i]f [the killing of the victim was] spontaneous and that's the truth, you will not be prosecuted").

78. *See* United States v. Astello, 241 F.3d 965, 967–68 (8th Cir. 2001).

79. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that the police's false statement to a suspect that a co-suspect confessed to the alleged offenses did not render the suspect's subsequent confession involuntary).

80. *See, e.g.*, State v. Cayward, 552 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 1989) (holding that showing the suspect false documents to pressure him to confess "offends our traditional notions of due process of law" and renders the confession involuntary).

81. *See, e.g.*, *Frazier*, 394 U.S. at 739.

82. *See, e.g.*, Farmah v. State, 789 S.W.2d 665, 672 (Tex. App. 1990) (holding that the police's false representation that the suspect had been identified by the victim did not render the resulting confession involuntary).

83. *See, e.g.*, People v. Minniti, 867 N.E.2d 1237, 1250 (Ill. App. Ct. 2007) (holding that the interrogator's lie to the suspect that his DNA was found inside the victim does not render the suspect's confession involuntary), *abrogated on other grounds sub nom.* People v. Bailey, 4 N.E.3d 474 (Ill. 2014).

resulting confessions. In contrast, showing deliberately fabricated documents to a suspect during an interrogation crosses the line and partially results in the inadmissibility of a resulting confession.[84]

Although the use of deception during interrogation is one of the factors weighed in the totality of the circumstances test,[85] the presence or absence of deception does not conclusively determine the admissibility of a resulting confession.[86] In *Moran v. Burbine*,[87] although the Supreme Court stated that some instances of police deception may be so "egregious . . . [so as to] rise to a level of a due process violation,"[88] the Court did not specify the types of police deception that may undermine due process and its fundamental idea of fairness.[89] Since *Moran*, the Court has repeatedly declined to draw specific limits on police use of deceptive tactics during interrogations.[90] Because *Moran* provides little guidance for understanding whether law enforcement's deception violates due process, courts continue to apply the totality of the circumstances test where the presence of deception is but one factor in determining whether the suspect's will was overborne.[91]

At least one state, however, follows a separate test to determine whether the use of police deception renders a confession involuntary. In Texas, police deception renders a resulting confession involuntary if the tactic was "*calculated* to produce an untruthful confession or was offensive to due process."[92] For example, the court in *Harty v. State*[93] used this test to hold that a deceptive statement that a defendant's polygraph evaluation would

84. *See Cayward*, 552 So. 2d at 973–74 (false documents indicating that a scientific test established that semen stains found on victim's clothing came from suspect).

85. *See supra* Part I.B.2.

86. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("The significant fact about all of these decisions [on the admissibility of confessions] is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.").

87. 475 U.S. 412 (1986).

88. *Id.* at 432.

89. *See id.* at 433–34 (holding that police lying to the suspect's attorney that they would not be questioning the suspect and failing to inform the attorney that her client was also being questioned as a murder suspect "falls short of the kind of misbehavior that so shocks the sensibilities of civilized society," but declining to specify what factors may rise to that level). *But see id.* at 468 (Stevens, J., dissenting) ("Police [deception and] interference with communications between an attorney and his client violates the due process requirement of fundamental fairness.").

90. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 607–08 (3d Cir. 1985) (lying to the suspect that the victim had not yet died when she already had, and lying again several hours later that she had just died to produce an emotional response in the suspect and induce him to confess), *cert. denied*, 479 U.S. 989 (1986); United States v. Velasquez, 885 F.2d 1076, 1089 (3d Cir. 1989) (deception in making the suspect think that the evidence against her was stronger than it actually was), *cert. denied*, 494 U.S. 1017 (1990); Dassey v. Dittmann, 877 F.3d 297, 313 (7th Cir. 2017) (deception in making the juvenile suspect think that the police already knew what had happened when in fact they did not), *cert. denied*, 138 S. Ct. 2677 (2018).

91. *See supra* Part I.B.2.

92. Creager v. State, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997) (en banc) (emphasis added); *see also In re* A.M., 333 S.W.3d 411 (Tex. App. 2011) (emphasis added) (applying the *Creager* test and rejecting the suspect's claim that the police's false promise not to disclose his polygraph examination results to the prosecutor was offensive to due process).

93. 229 S.W.3d 849 (Tex. App. 2007).

only be provided to the defendant's therapist was not likely to induce an involuntary confession because the defendant did "not have anything to gain by making false statements, regardless of whether the statements were disclosed to his therapist alone."[94] The *Harty* court also held that the same misrepresentation was not offensive to due process because it was insufficient "to cause [the defendant's] will to be overborne."[95]

3. Statutes Regulating Police Deception in Interrogations

Only two states have passed legislation barring police deception in interrogations. In 2021, Illinois governor J.B. Pritzker signed into law a historic statute prohibiting police deception in juvenile interrogations.[96] Under the Illinois law, the use of police deception creates a presumption that a resulting statement by a juvenile suspect is inadmissible as evidence, but that the presumption may be overcome by "a preponderance of the evidence that the statement was voluntarily given, based on the totality of the circumstances."[97]

That same year, Oregon governor Kate Brown also signed into law legislation prohibiting law enforcement from using deception when interrogating suspects under the age of eighteen.[98] Like the Illinois law, the Oregon statute creates a rebuttable presumption that a juvenile's confession is inadmissible if police use deception to elicit it.[99]

Also in 2021, New York state senator Zellnor Myrie proposed a more comprehensive bill that would render any adult or juvenile suspect's

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94. *Id.* at 856–57 ("If the admissions were disclosed only to his therapist, false admissions would have given the therapist incorrect information in formulating [the defendant]'s treatment and thus would likely decrease any benefit [the defendant] was receiving from the treatment. If the admissions were disclosed to authorities, false admissions of violations would clearly be against [defendant]'s interest. So, in either event, [the defendant] was not influenced to speak untruthfully.").

95. *Id.* at 856.

96. 705 ILL. COMP. STAT. 405/5-401.6 (2022); *see Illinois Becomes the First State to Ban Police from Lying to Juveniles During Interrogations*, INNOCENCE PROJECT (July 15, 2021), https://innocenceproject.org/illinois-first-state-to-ban-police-lying/ [https://perma.cc/3HLU-BMW5].

97. 705 ILL. COMP. STAT. 405/5-401.6 (2022).

98. 2012 Or. Laws 487; *Oregon Deception Bill Is Signed into Law, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (July 14, 2021), https://innocenceproject.org/deception-bill-passes-oregon-legislature-banning-police-from-lying-to-youth-during-interrogations/ [https://perma.cc/2CFX-KUF4].

99. The Oregon statute reads:

> A statement made by a person during a custodial interview conducted by a peace officer is presumed to be involuntary if the person is under 18 years of age and the statement is made in connection with an investigation into a misdemeanor or a felony, or an allegation that the person being interviewed committed an act that, if committed by an adult would constitute a misdemeanor or a felony, and the court determines that the peace officer intentionally used information known by the officer to be false to elicit the statement. This presumption may be overcome if the state proves by clear and convincing evidence that the statement was voluntary and not made in response to the false information used by the peace officer to elicit the statement.

2012 Or. Laws 487.

confession inadmissible if it resulted from false representations of evidence or from a statement that undermines the reliability of the defendant's confession.[100] At the time of this Note's publication, however, this bill is still in committee and faces many obstacles before potential enactment.[101]

II. CRITICISMS AND DEFENSES OF POLICE DECEPTION IN INTERROGATIONS

The debate regarding the propriety of deceptive tactics used by police during interrogations traditionally focuses on the interrogations of adult suspects.[102] The psychological and neurobiological vulnerabilities of minors, however, create additional concerns when evaluating whether a per se bar of police deception is necessary.[103] Part II.A and Part II.B canvass the criticisms and defenses of deceptive tactics used in interrogating adult suspects. Part II.C then discusses the debate in the context of juvenile suspects.

A. Criticisms

Opponents of deceptive tactics in interrogations first emphasize that the long-held assumption that "suspects will not confess to crimes they did not commit" is a myth.[104] In fact, a suspect may falsely confess for a multitude of reasons. A suspect may engage in (rational) decision-making and confess "*whenever* the costs of confession as he perceives them are outweighed by the benefits of confession, regardless of his culpability."[105] The suspect may also succumb to the psychological pressure generated by sophisticated and,

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100. S.B. S324A, 2021–2022, Reg. Sess. (N.Y. 2021). The proposed bill states that a defendant's statement is involuntarily made when it is obtained:

> (a) By any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his or her ability to make a choice whether or not to make a statement; or
>
> (b) By a public servant engaged in law enforcement activity or by a person then acting under his or her direction or in cooperation with him or her . . . .

Id. § 1.

101. *See* Rocco Parascandola, *Proposed N.Y. Legislation Would Ban Police Tactic of Lying to Suspects to Get a Confession*, N.Y. DAILY NEWS (Mar. 8, 2021, 6:03 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-ny-bill-ban-police-lying-interrogation-20210308-jxcppdatdvcgtkneng2uxirp6i-story.html [https://perma.cc/N5LA-XQX2] ("Myrie's bill has 13 sponsors but is still awaiting legislative action and is a long way from passage.").

102. *See infra* Parts II.A–B.

103. *See infra* Part II.C.

104. *See* 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, 492 (1998) ("The sixty false confessions described in this article dispel the myth promoted by interrogation manual authors and police trainers that the psychological interrogation methods they advocate do not cause suspects to confess to crimes they did not commit. In fact, the opposite is true.").

105. Miriam S. Gohara, *A Lie for A Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 817 (2006).

at times, coercive interrogation tactics.[106] In particular, minors and suspects with mental health issues are more likely to falsely confess than the average adult suspect due to these psychologically coercive pressures.[107]

Furthermore, the use of deceptive tactics may generate an unreliable confession coerced from a suspect and may even result in a false confession. Confessions "substantially bias[] the trier of fact's evaluation of the case in favor of prosecution and conviction, even when the defendant's uncorroborated confession was elicited by coercive methods and other case evidence strongly supports his innocence."[108] The risk of false confessions as a result of deceptive interrogation tactics hampers the jury's ability to administer justice and threatens the integrity of the legal system at large.[109]

In determining whether police trickery violates due process, Professor Welsh S. White proposed the prohibition of interrogation practices that are "substantially likely to produce untrustworthy statements."[110] Professor White argued that empirical data supports prohibiting interrogators from using threats or promises or misrepresenting the evidence against the suspect.[111]

Commentators who favor prohibiting or limiting the use of police deception suggest that such prohibitions will also enhance effective law enforcement because such regulations may result in "an increase in law-abiding behavior by community-members stemming from a perception of a fair system . . . [and] an increased ability of law enforcement to combat crime because of new cooperation between citizens and their government."[112] This conclusion stems from the idea that deceptive interrogation practices in turn breed distrust in law enforcement and hinder

106. *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1231 (2001) ("In many cases, the pressure generated by an interrogation technique and the likelihood that the technique will produce untrustworthy statements will be substantially equivalent.").

107. Although the debate on whether and how frequently adult suspects will admit to crimes they did not commit is far from settled, commentators generally agree that minors are more likely to falsely confess. For example, Professor Laurie Magid, the leading proponent of police deceptive tactics, acknowledged that "juveniles . . . appear somewhat more likely than the average suspect to give a false confession." Magid, *supra* note 6, at 1192.

108. Leo & Ofshe, *supra* note 104, at 491–92.

109. *See id.* at 496 ("The sixty cases [of false confessions] discussed in this article illustrate that when there is no independent evidence against a defendant and only a factually inaccurate confession, the risk of justice miscarrying is so great that the case should never be allowed to proceed to trial.").

110. White, *supra* note 106, at 1247.

111. *See id.* at 1243 ("Misrepresentations relating to forensic or scientific evidence are particularly likely to convince suspects that further resistance is futile. Most people believe that evidence obtained through accepted scientific procedures—fingerprints, ballistic reports, or DNA evidence, for example—is not only reliable, but irrefutable. Empirical data support this conclusion.").

112. Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 1039–40 (2017); *see also* Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 9 (1992); Julia Simon-Kerr, *Public Trust and Police Deception*, 11 NE. U. L. REV. 625, 677 (2019) ("More salient, however, is the possibility that deceptive interrogation will remain an impediment to trust in the police in the communities that could most benefit from such trust.").

effective interactions between citizens and the police.[113] Therefore, clear limits on the use of police deception will reduce the "likelihood that the suspect will be reluctant to trust the interrogator's assurances."[114] The concerns that deceptive interrogation practices generate distrust in law enforcement are amplified by the already high levels of public distrust in police.[115]

B. Defenses

In contrast, defenders of deceptive police tactics during interrogations maintain that an innocent person will not confess to a crime that they did not commit.[116] Proponents of police deceptive tactics argue that even if an innocent person falsely confesses, the proportion of wrongful convictions resulting from false confessions are relatively low.[117] In addition, proponents point out that police deception by itself rarely causes false confessions.[118] Rather, "deception must be combined with a lengthy interrogation during which the police convince the suspect that a confession is the only way to escape an intolerably stressful situation."[119] Therefore, proponents argue that it is unnecessary to categorically bar deceptive tactics based on false confession concerns.

Furthermore, proponents argue that the risk of eliciting a false confession from a suspect is less weighty than the risks of "losing" a truthful confession by restricting routine police interrogation tactics.[120] Existing research that documents the harm of false confessions is also "entirely anecdotal and focuses on the causes, not the scope, of the problem."[121] Because of the lack of statistically significant evidence documenting the overall frequency of false confessions,[122] proscribing the use of deceptive tactics during

113. *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 458–59 (1996) ("As knowledge of police lying spreads, trust of police will decrease and citizens will be less likely to come forward and talk honestly with police. Critical evidence may remain undiscovered or undisclosed."); Simon-Kerr, *supra* note 112, at 677.

114. Margaret L. Paris, *Trust, Lies and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 63 (1995).

115. *See* Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html [https://perma.cc/3LCS-SW82]; Skolnick & Leo, *supra* note 112.

116. *See* Hopt v. People, 110 U.S. 574, 585 (1884) ("[O]ne who is innocent will not imperil his safety or prejudice his interests by an untrue statement.").

117. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 502 (1998) (estimating that the number of wrongful convictions due to false confessions lies somewhere between 1 in 2,400 convictions and 1 in 90,000 convictions).

118. *See* Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1290 (2007).

119. *Id.*

120. Cassell, *supra* note 117, at 502 (arguing that restricting routine police interrogation tactics increases the risks of failing to gather truthful confessions to uncover crimes and "releasing dangerous criminals to commit other crimes").

121. Magid, *supra* note 6, at 1190.

122. The lack of reliable statistics exists because "(1) no organization collects statistics on the annual number of interrogations and confessions or evaluates the reliability of confession

interrogations may only create more risks to the innocent public[123] and would unjustifiably overturn "long-standing, traditional common law rules."[124]

Finally, proponents of the use of police deception in interrogations also highlight the significance of interrogations as an effective information-gathering tool for collecting evidence and for solving the factual uncertainties of a crime.[125] At the interrogation stage, law enforcement particularly values eliciting a confession from the suspect because of a confession's insurmountable utility in securing a conviction.[126] Proponents therefore argue that, to induce a desired confession, interrogations often involve and require at least some form of deception.[127] Deceptive tactics are also necessary in interrogations because the "inherent pressures of custodial interrogation usually are insufficient by themselves to produce the desired confession."[128] Furthermore, deceptive practices allow the interrogator to build a rapport with the suspect[129] and to put the suspect at ease to facilitate questioning and therefore promote effective law enforcement.[130]

C. Special Considerations for Juveniles

Whether law enforcement's use of deceptive tactics in interrogations of juvenile suspects should be subject to any limitations also raises related but contextually unique questions when compared to interrogations of adult suspects. This section canvasses the debate regarding the constitutionality of police deception in juvenile interrogations, whether juvenile suspects are more likely to falsely confess because of police deception, and the other public policy concerns that arise in that context.

Like in police deception cases involving adult suspects,[131] courts analyze police deception cases involving juvenile suspects by evaluating whether a resulting confession was made involuntarily rather than whether the use of

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statements; (2) most interrogations leading to disputed confessions are not recorded; and (3) the ground truth (what really happened) may remain in genuine dispute." Leo & Ofshe, *supra* note 104, at 431–32.

123. *See* Cassell, *supra* note 117.

124. Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 69 (2014).

125. *See, e.g.*, Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 72 (2016) (arguing that prohibiting or restricting police deception would "massively impact many forms of vital police investigation").

126. *See* Leo & Ofshe, *supra* note 104, at 429 ("Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant.").

127. *See* Magid, *supra* note 6, at 1174.

128. Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 674–75 (1986) (reviewing FRED E. INBAU, JOHN E. REID & JOSEPH P. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986)).

129. *See* Magid, *supra* note 6, at 1168.

130. *See* Commonwealth v. Lopez, 151 N.E.3d 367, 379 (Mass. 2020) (holding that the police deception in that case did not affect the voluntariness of the suspect's statement because the purpose of the deception was to put the suspect at ease "rather than ratcheting up the pressure of the conversation").

131. *See supra* Part II.A.

police deception itself is constitutionally suspect.[132] In determining the voluntariness of a juvenile suspect's confession, courts apply the same standard used for adults by examining whether the totality of the circumstances caused the suspect's will to be overborne.[133] In addition, law enforcement's use of deception is only one of the factors weighed in the totality of the circumstances test[134] and is not dispositive of the due process question.[135]

Texas state courts, however, have ruled that "[t]rickery or deception may render a statement involuntary if 'the method was calculated to produce an untruthful confession or was offensive to due process.'"[136] Although this standard theoretically allows for the fact of calculated police deception itself to render a confession involuntary, in practice, courts still tend to focus on how the deception impacts the confession (rather than on the deception itself) in evaluating due process violations.

Absent clear federal or state court precedent holding that the use of police deception is unconstitutional, commentators advocate for a legislative, per se bar on deception in juvenile interrogations rooted in the Fifth Amendment right against self-incrimination.[137] The concern about false confessions resulting from deceptive tactics is bolstered in the context of juvenile interrogations. Neurobiological and psychological studies repeatedly cited by the Supreme Court highlight the way in which minors are less competent decision-makers and are "more vulnerable . . . to the influence of coercive circumstances . . . such as provocation, duress, or threat."[138]

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132. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 710–11, 724–25 (1979) (examining whether the sixteen-year-old suspect confessed involuntarily); *see also* People v. Murdock, 979 N.E.2d 74, 76, 86 (Ill. 2012) (holding that "[t]he absence of [police] trickery weighs in favor of voluntariness" of the sixteen-year-old suspect's confession); *Lopez*, 151 N.E.3d at 379–80 (holding that law enforcement's deception did not adversely affect the voluntariness of the seventeen-year-old suspect's confessions).

133. *See, e.g.*, Haley v. Ohio, 332 U.S. 596, 600–01 (1948) (considering the fifteen-year-old suspect's age, the duration of the interrogation, the lack of counsel, and the police's callous attitude, and holding that the suspect's confession was made involuntarily).

134. *See, e.g.*, *Michael C.*, 442 U.S. at 726–27 (noting that the absence of police trickery or deceit weighed in favor of voluntariness).

135. *See, e.g.*, *In re* Marvin M., 890 N.E.2d 984, 1006 (Ill. App. Ct. 2008) ("[P]olice trickery or deception will not invalidate a minor's statement as a matter of law, but is only one factor to consider in the totality of the circumstances.").

136. *In re* A.M., 333 S.W.3d 411, 417–18 (Tex. App. 2011) (considering whether leading the juvenile suspect to believe that his polygraph examination results would not be disclosed to the prosecutor was offensive to due process (citing Creager v. State, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997) (en banc))).

137. *See, e.g.*, McMullen, *supra* note 7, at 1005 ("A system of investigation which takes advantage of the weaknesses inherent in youth and inexperience is completely at odds with this fundamental right."); *see also* Ariel Spierer, Note, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1743 (2017) (arguing that the Supreme Court should hold that the Reid Technique, which utilizes deceptive tactics, violates juvenile defendants' Fifth Amendment right against self-incrimination).

138. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1011 (2003); *see* Miller v. Alabama, 567 U.S. 460, 471 (2012) (citing the study

Such psychological vulnerabilities are linked to the early stage of adolescent neurobiological development.[139] Minors are particularly sensitive to negative feedback from authority figures and are likely to "alter[] their answers merely to agree with the interviewer" and therefore may change their accounts to match those that the police provide.[140] Such eagerness to please authority figures partially results from the firm trust that minors place on people in authority[141] and "[their] belie[f] that they should never disobey authority."[142] Coupled with this desire to please authority is the tendency of youth to weigh immediate consequences heavier than long-term consequences.[143] A desire to immediately avoid the pressure of the interrogation may therefore lead a juvenile suspect to falsely confess to a crime.[144] Accordingly, research suggests that minors are two to three times more likely to falsely confess than adults are.[145] Even one of the strongest proponents of police deceptive tactics concedes that juveniles appear "more likely than the average suspect to give a false confession."[146]

Categorically barring the use of police deception in juvenile interrogation raises line-drawing concerns as well because the conventional age differentiating a juvenile defendant from an adult defendant, eighteen, is often perceived as arbitrary and not reflective of neurobiological maturity.[147] Some neurobiological evidence suggests that twenty-one or twenty-two is closer to the biological age of maturity.[148]

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by Professors Steinberg and Scott in holding that mandatory juvenile life without parole sentences are unconstitutional); Roper v. Simmons, 543 U.S. 551, 569 (2005) (also citing the Steinberg & Scott study to highlight youth's vulnerability and susceptibility to negative influences in holding that the juvenile death penalty is unconstitutional).

139. *See* Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 323 (2006) ("The frontal cortex has been shown to play a major role in the performance of executive functions including short term or working memory, motor set and planning, attention, inhibitory control and decision making.").

140. G. Richardson, G.H. Gudjonsson & T.P. Kelly, *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 J. ADOLESCENCE 211, 215 (1995).

141. *See* Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 764 (2007).

142. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8 (2010).

143. *See id.* ("Studies have also shown that [the youth] are more likely to decide . . . on the basis of the potential for immediate negative consequences—for example, whether they will be permitted to go home if they waive their rights—rather than considering the longer-range consequences associated with penalties for a delinquency adjudication.").

144. *See id.* at 9.

145. *See* Crane et al., *supra* note 9, at 12.

146. *See* Magid, *supra* note 6, at 1192.

147. *See, e.g.*, David E. Arredondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 15 (2003) ("[C]hronological age is a poor index of neurobiological and emotional maturity.").

148. *See* ADAM ORTIZ, JUV. JUST. CTR., AM. BAR ASS'N, ADOLESCENCE, BRAIN DEVELOPMENT AND LEGAL CULPABILITY 2 (2004), https://capitalpunishmentincontext.org/files/resources/juveniles/adolescencecopy.pdf [https://perma.cc/YL4E-XTBB].

III. STATE LEGISLATION CATEGORICALLY BARRING THE USE OF POLICE DECEPTION IN JUVENILE INTERROGATIONS

Police deception should be categorically barred in juvenile interrogations through state legislation, regardless of whether the deception produced an involuntary or even false confession. Part III.A discusses the Supreme Court's recognition of the psychological vulnerability of minors through its juvenile protection jurisprudence and argues that the same rationale should extend to bar police deception in juvenile interrogations. Part III.B then explains why state legislation should be used as the mode for reform and describes how model legislation may look.

A. Extending the Juvenile-Protection Rationale to the Prohibition of Police Deception

The psychological immaturity of minors heavily factored into the Supreme Court's Eighth Amendment jurisprudence on cruel and unusual punishment, which bars capital punishment[149] and mandatory life without parole sentences for juvenile offenders.[150] In other words, the highest court of the land consistently recognizes that "children are different" from adults and should be subject to less harsh punishment; youth are immature and reckless, more susceptible to outside influences, and still forming their characters.[151]

Similarly, the psychological susceptibility and suggestibility of minors put them in vulnerable positions when faced with lies told by the police, undermining the fundamental fairness afforded by due process.[152] Minors are more susceptible to negative feedback and are more likely to alter their accounts simply to please authority.[153] The inability to accurately weigh long-term consequences and make rational choices "can lead to poor

149. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.").

150. *See* Miller v. Alabama, 567 U.S. 460, 465 (2012) ("We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'").

151. *See, e.g.*, *id.* at 479 ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment."); Graham v. Florida, 560 U.S. 48, 78 (2010) ("Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel, seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense."); *Simmons*, 543 U.S. at 569–70 ("[S]usceptibility of juveniles to immature and irresponsible behavior . . . [and their] vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."). These cases and many like them constitute what is often called the Court's "children are different" jurisprudence. *See, e.g.*, Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71 (2013); Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019 (2013).

152. *See supra* Part II.C.

153. *See* Jessica Owen-Kostelnik, N. Dickon Reppucci & Jessica R. Meyer, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCH. 286, 292 (2006).

decisions by one charged with a juvenile offense."[154] Such poor decisions too often include the choice to falsely confess.[155]

Although the exact frequency of false confessions made by adult suspects and the scope of their harms are unclear,[156] there is a consensus that, at the very least, juvenile suspects are more likely than adults to falsely confess.[157] Therefore, at least in the context of juvenile interrogations, the police's use of deceptive tactics substantially increases the risk that juveniles confess to crimes they did not commit, resulting in a miscarriage of justice.[158]

Some argue against an absolute bar on police deception because other factors surrounding the interrogation, such as the length of detention or interrogation, may still result in involuntary or false confessions.[159] Indeed, the procedural protections in place for juvenile interrogations limit the length of interrogation to reduce some pressures by providing a more "comfortable" questioning environment.[160] Some states require the interrogation to be videotaped.[161] These protections, however, do not incentivize the police to refrain from deceiving a minor in the interrogation room. In fact, as portrayed in *Making a Murderer*, even with the protections afforded to sixteen-year-old Brendan Dassey, the interrogators still engaged in deceptive questioning that arguably led Dassey to falsely confess.[162] Although Dassey's interrogation "took place in a comfortable setting, without any physical coercion or intimidation, without even raised voices, and over a relatively brief time," the investigators nonetheless asked deceptive, leading questions to steer Dassey into confessing.[163]

Even if a juvenile suspect does not falsely confess, the use of deceptive tactics against psychologically vulnerable minors in and of itself undermines the fundamental fairness of the juvenile justice system and violates the Due Process Clause. The fact that a police officer—an authority figure whom minors trust and seek to appease[164]—may lie to a minor to conveniently elicit a confession offends the traditional notions of due process, which guarantees the fundamental fairness of criminal procedures as prescribed by the U.S. Constitution.[165] To prevent injustice, the courts' "children are different" jurisprudence should extend to the sphere of interrogations and invalidate the use of police deception in juvenile interrogations.

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154. *Graham*, 560 U.S. at 78.

155. *See generally* Crane et al., *supra* note 9.

156. *See supra* note 122.

157. One of the most prominent supporters of police deception, Professor Magid admits that juveniles are "more likely than the average suspect to give a false confession." *See* Magid, *supra* note 6, at 1192.

158. *See* Leo & Ofshe, *supra* note 104, at 493–94.

159. *See generally supra* Part I.A.

160. *See* Dassey v. Dittmann, 877 F.3d 297, 301, 314 (7th Cir. 2017) (noting that the interrogation of the juvenile lasted a relatively brief time and that the juvenile was physically comfortable as "he sat on a sofa and was offered food, drink, and restroom breaks").

161. *See* Kelly, *supra* note 1.

162. *See Dassey*, 877 F.3d at 301; Liptak, *supra* note 1.

163. *Dassey*, 877 F.3d at 301, 323.

164. *See* Meyer & Reppucci, *supra* note 141.

165. *See* Moran v. Burbine, 475 U.S. 412, 432 (1986).

B. State Legislation Categorically Barring Police Deception

The judicial totality of the circumstances test in evaluating the admissibility of confessions fails to adequately protect juvenile suspects from the due process harms of police deception.[166] The Supreme Court's traditional analysis only weeds out the most egregious cases arising out of rare circumstances, such as when the juvenile suspect is particularly young. For example, a ten-year-old suspect's confession was invalidated after the police deceived him into believing that his father consented to his interrogation and that he would be released if he confessed.[167] In *J.G. v. State*,[168] the court invalidated a thirteen-year-old suspect's confession resulting from an interrogator's lie that law enforcement had videotapes of the suspect inappropriately touching the victim.[169] In addition, the court noted that the interrogator had "strong personal motives to elicit a confession" from the suspect because the interrogator "considered the victim to be like a daughter."[170] In *People v. Bentley*,[171] the court invalidated a fourteen-year-old suspect's confession because the police deception limited the suspect's access to his parents and infringed on the suspect's right to counsel.[172] In contrast, courts have rarely invalidated confessions made by older juvenile suspects.[173]

Given the inadequacy of the totality of the circumstances test,[174] and the reality that juvenile criminal proceedings are largely state matters, state legislatures should pass laws categorically prohibiting the use of police deception in juvenile interrogations.[175]

Although the laws recently passed in Illinois[176] and in Oregon[177] represent a historic moment as the first state legislation to limit police deception, neither law categorically bars the use of police deception in juvenile

166. *See supra* Part II.C.

167. *See In re* A.L., 157 N.E.3d 350, 356–57 (Ohio Ct. App. 2020).

168. 883 So. 2d 915 (Fla. Dist. Ct. App. 2004).

169. *See id.* at 925–26.

170. *Id.* at 926.

171. 587 N.Y.S.2d 540 (1992).

172. *See id.* at 543–44 ("[If] . . . the effect of the police conduct through trickery is to insure that a juvenile offender's parent with the information necessary for an informed decision whether to obtain a lawyer is kept from access to the child . . . the police conduct crosses the line.").

173. *See, e.g.*, Commonwealth v. Lopez, 151 N.E.3d 367, 379 n.12, 380 (Mass. 2020) (holding that a seventeen-year-old suspect's statements were voluntarily made).

174. *See supra* Part I.B.2.

175. Professor Tonja Jacobi also suggests that it is "inappropriate for the [c]ourt[s] to be the arbiter of acceptable practices . . . but it is one that is appropriate for broad-based reform of police manuals and training . . . [with] legislative or administrative oversight." Jacobi, *supra* note 125, at 73. In contrast, Professor Welsh S. White suggested that courts should limit the use of police deception by replacing the due process voluntariness test with a test that prohibits deception that is "substantially likely to produce untrustworthy statements." White, *supra* note 106, at 1237.

176. 705 ILL. COMP. STAT. 405/5-401.6 (2022).

177. 2012 Or. Laws 487.

interrogations.[178] Instead, Illinois's law states that the use of police deception creates a presumption that a resulting statement by the juvenile suspect is inadmissible as evidence, but that the presumption may be overcome by "a preponderance of the evidence that the confession was voluntarily given, based on the totality of the circumstances."[179] Similarly, Oregon's statute creates a rebuttable presumption that "may be overcome if the state proves by clear and convincing evidence that the statement was voluntary and not made in response to the false information used by the peace officer to elicit the statement."[180] Because both laws were passed in 2021, however, it is too early to conclude whether the laws' rebuttable presumptions function as a true bar that effectively incentivizes interrogators to refrain from using deceptive tactics.

Nonetheless, the Illinois statute essentially utilizes the judicial totality of the circumstances test to evaluate whether a statement was voluntarily given. Therefore, the statute runs the risk of failing to provide juvenile suspects with adequate protections.[181] Although Oregon's statute does not explicitly call for the totality of the circumstances test in determining whether the presumption may be overcome, the fact that the statute still establishes only a rebuttable presumption of inadmissibility may not adequately protect juvenile suspects from the harms of police deceptive tactics.[182] Therefore, state legislation should instead categorically bar the use of police deception rather than creating a rebuttable presumption that the use of deception renders a resulting confession involuntary.

Even if a consensus arises that police deception should be categorically barred, further questions may arise concerning the line between a negligible misrepresentation and a material misrepresentation that should be prohibited.[183] By the same token, should interrogators be prohibited from expressing false sympathy toward the suspect to create a rapport with them?[184] In response to these concerns, Professor Phillip E. Johnson drafted a hypothetical statute which would prohibit police deception intended to misrepresent certain information without prohibiting interrogators from expressing sympathy, among other things.[185]

Professor Johnson's hypothetical statute is a helpful model for states to reference while drafting legislation that categorically bars the use of police

178. *See Illinois Becomes the First State to Ban Police from Lying to Juveniles During Interrogations*, *supra* note 96; *Oregon Deception Bill is Signed into Law, Banning Police from Lying to Youth During Interrogations*, *supra* note 98.

179. 705 ILL. COMP. STAT. 405/5-401.6(c) (2022).

180. 2012 Or. Laws 487.

181. 705 ILL. COMP. STAT. 405/5-401.6 (2022).

182. 2012 Or. Laws 487.

183. *See, e.g.*, *In re* Marvin M., 890 N.E.2d 984, 1006 (Ill. App. Ct. 2008) ("The difference between 'two' and 'several' is not sufficient to transform the interrogation tactic into trickery.").

184. *See* Magid, *supra* note 6, at 1174–75.

185. *See* Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303, 305 (1986).

deception in juvenile interrogations.[186] State legislation should categorically bar the police from intentionally misrepresenting evidence or from intentionally engaging in other deceptive practices that are "fundamentally unfair."[187] Meanwhile, allowing certain conduct, such as expressing feigned sympathy, would maintain effective law enforcement and preserve the need to create a rapport with the suspect, while providing adequate protections for juvenile suspects.[188]

CONCLUSION

The courts' focus on involuntary confessions as due process violations and their consideration of police deception as only one factor of that evaluation inadequately protects minors from the severe harms of police deceptive tactics. Psychological and neurobiological studies repeatedly confirm the vulnerabilities of youth, including their susceptibility to outside pressures and willingness to alter their accounts of prior events to please authority. Such vulnerabilities may cause a minor to falsely confess more frequently than an adult.

Police deception in juvenile interrogations not only runs the risk of resulting in false confessions, but also undermines the fundamental fairness of the criminal justice system. Because adolescents place their trust in and try to please authority figures, the fact that the police and interrogators may lie to them to conveniently elicit a confession offends the traditional notions of due process. Therefore, the courts' "children are different" jurisprudence should extend to the sphere of interrogations and invalidate the use of police deception in juvenile interrogations.

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186. Section 3 of Professor Johnson's hypothetical legislation provides helpful guidance for states to address the line-drawing problems:

> (a) In the custodial interrogation of a suspect, an officer shall not:
>
> (1) Employ force or threats;
>
> (2) Make any statement which is intended to imply or may reasonably be understood as implying that the suspect will not be prosecuted or punished;
>
> (3) Intentionally misrepresent the amount of evidence available against the suspect, or the nature or seriousness of the anticipated charges; or
>
> (4) Intentionally misrepresent his identity or employ any other deceptive stratagem not authorized by this Act which, in the circumstances, is fundamentally unfair; or
>
> (5) Deny the suspect reasonable opportunity for food and rest.
>
> (b) It does not violate this Act for an officer to:
>
> (1) Express sympathy of compassion for the offender, whether real or feigned;
>
> (2) Suggest that the crime may be morally understandable or excusable, whether or not the suggestion is sincere;
>
> (3) Appeal to the suspect's conscience or values, religious or otherwise;
>
> (4) Appeal to the suspect's sympathy for the victim or other affected persons;
>
> (5) Inform the suspect honestly about the state of the evidence; or
>
> (6) Inform the suspect that a voluntary admission of guilt and sincere repentance may be given favorable consideration at the time of sentence.

Id.

187. *Id.*

188. *See* Magid, *supra* note 6, at 1168.

Because the totality of the circumstances test simply considers police deception to be merely one factor, courts are unable to adequately place limits on the use of police deception. Instead, state legislatures should pass legislation that would create a categorical bar on the use of police deception, regardless of whether the deception results in an involuntary or false confession. Such legislation should categorically bar law enforcement from intentionally misrepresenting evidence or from intentionally engaging in other deceptive practices that are fundamentally unfair.