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The Age of the Child: Interrogating Juveniles after Roper v. Simmons

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Abstract

With its recent decision in Roper v. Simmons*, invalidating the imposition of the death penalty on offenders who were younger than eighteen when their crimes were committed, the U.S. Supreme Court has heralded a major shift in the perspective of the legal system—and the culture at large—towards adolescents who commit crimes. Invoking social science research as well as a "common sense" understanding of the differences between teenagers and adults, the Court found that as a categorical matter, juveniles are not as culpable as adults and thus, cannot be classified among the "worst offenders," deserving of the most severe punishment. Yet, in writing for the majority, Justice Kennedy did not base the Court's decision solely on the developmental differences between juveniles and adults or on the arguably stereotyped and romantic notion of youth as immature, unpredictable works in progress. His emphasis was also on the grave difficulty—the impossibility, even—of maintaining confidence in a system that relies on human beings, with all their frailties and prejudices, to determine whether the ultimate punishment should be imposed upon society's most violent sixteen- and seventeen-year-olds.* Simmons *explicitly recognizes and draws a bright line to counteract the all too human tendency to objectify violent juvenile offenders, to consider their youth as an aggravating factor in the calculus, and to perceive and judge them through the lens of stereotype and bias.*

This Article argues that implicit bias—seeing the type or category of the person instead of the three-dimensional reality—relates not only to how capital

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jurors perceive juvenile offenders but also to how law enforcement views the juvenile suspect. It explains how Simmons *can inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescents experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime. It argues that the principal bases of* Simmons *be applied to the area of juvenile interrogation, and it proposes changing the culture behind the questioning of adolescents with reforms and strategies for legislators and judges as well as for police officers and community groups.*

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I. Introduction

During the past century, there have been several significant shifts in the legal system's approach towards juvenile crime.[1] By the 1890s, the emerging science of child development had been embraced by reformers and child welfare experts alike and along with it the concept that "adolescents were 'more like infants in their nature and needs than they were like adults' and should be treated like children."[2] The establishment in 1899 of the country's first juvenile court reflected this new understanding of the limitations of children and adolescents.[3] This innovative Chicago institution came to symbolize the shift from a system in which offenders as young as seven-years-old were tried and sentenced as adults to one which sought to protect juveniles during the "storms of adolescence" and which championed rehabilitation—not punishment—as its ultimate goal.[4]

Other swings of the pendulum were to follow, and by the 1950s, the system was under attack yet again, with critics asserting that juveniles were receiving neither effective rehabilitative treatment nor appropriate procedural safeguards under the *parens patriae* (surrogate parent) approach of the courts.[5] The lack of due process protections afforded to juveniles, combined with the concomitant failure of juvenile courts either to reduce crime or rehabilitate young offenders, led to the U.S. Supreme Court's 1967 landmark case, *In re Gault*,[6] which granted juveniles the right to counsel and the privilege against

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1. Elizabeth S. Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, *in* YOUTH ON TRIAL 291, 291 (Thomas Grisso & Robert G. Schwartz eds., 2000).

2. DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 6 (2004) (internal citations omitted).

3. *Id.* at 23

4. *Id.* at 9, 25.

5. Jessica R. Meyer, N. Dickon Reppucci & Jessica A. Owen, *Criminalizing Childhood: The Shifting Boundaries of Responsibility in the Justice and School Systems*, *in* THE CRISIS IN YOUTH MENTAL HEALTH: ISSUES FOR FAMILIES, SCHOOLS, AND COMMUNITIES 219, 231–32 (Kristine Freeark & William S. Davidson II eds., 2005).

6. *See In re* Gault, 387 U.S. 1, 41 (1967) (holding that, in juvenile delinquency proceedings, due process requires providing written notice of the charge to the client and parents; notice of the child's right to counsel; the privilege against self-incrimination; and a determination of delinquency based on sworn testimony with the opportunity for cross-examination).

self-incrimination.[7] *Gault* opened the door for a second period of reform, as legislators and courts worked to craft a model of juvenile justice that provided adequate procedural protections while also emphasizing both personal accountability and rehabilitation.[8] By the 1980s, with the perceived increase in juvenile crime and the resulting public demand for harsher penalties for juveniles at increasingly younger ages, the political will to sustain a separate system for youth had all but disappeared.[9] Since that time, we have seen a third wave of juvenile justice reform that has brought us even further from the goal of rehabilitation, with states transferring more juveniles into the adult system, thereby increasing the severity and length of their prison terms.[10]

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7. *Id.*; *see also* Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, *Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science*, 57 HASTINGS L.J. 955, 964–67 (2006) (arguing that the Court's emphasis in *Gault* on providing juveniles with rights of "due process," rather than with those criminal trial rights guaranteed by the Sixth Amendment, affords more flexibility in constructing a procedural framework that is truly "context-dependent").

8. Scott, *supra* note 1, at 291.

9. *Id.* While the media has consistently asserted that juvenile crime has been on the rise since the 1980s, research studies suggest that this claim has little or no actual merit. *See, e.g.*, LORI DORFMAN & VINCENT SCHIRALDI, BUILDING BLOCKS FOR YOUTH INITIATIVE, OFF BALANCE: YOUTH, RACE AND CRIME IN THE NEWS 12–16 (2001), *available at* http://www.buildingblocksforyouth.org/media/media.pdf (last visited Mar. 6, 2008) (finding that the media unduly connects youth to crime and violence and that people of color are overrepresented as perpetrators and underrepresented as victims); *see also* MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 32 (1998) (discussing the media's mischaracterization of youth violence during the 1990s as "soaring," when it was actually falling); Elizabeth S. Scott, *Adolescence and the Regulation of Youth Crime*, 79 TEMP. L. REV. 337, 351–52 (2006) ("[The policy of treating juvenile offenders like adults] has had the hallmarks of a moral panic, in which politicians, the media, and the public have reinforced each other in a pattern of escalating alarm about the seriousness of the threat of youth violence and the urgent need to respond.").

10. *See, e.g.*, Kelly M. Angell, *The Regressive Movement: When Juvenile Offenders Are Treated As Adults, Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 127–34 (2004) (describing the shift from rehabilitative to punitive goals in the juvenile justice system); Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1549–52 (2002) (describing the shift of the juvenile justice system away from a system that focused on rehabilitation and towards one that emphasized punishment); *see also* Barry C. Feld, *The Juvenile Court Meets the Principal of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 821 (1988) (analyzing the changing sentencing practices of juvenile courts and finding an increasing focus on the offense committed, rather than on the "best interests" and needs of the juvenile). *But see* Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 952 (2006) (arguing that the situation is not as bad as critics of the juvenile justice system have asserted and that the rehabilitative purposes of the juvenile justice system are still being served in specialty courts for juvenile offenders, such as drug, gun, and mental health courts).

With its decision in *Roper v. Simmons*,[11] invalidating the imposition of the death penalty on offenders who were younger than eighteen when their crimes were committed,[12] the Court has, perhaps, heralded yet another shift in the perspective of the legal system—and the culture at large—towards adolescents who commit crimes. Invoking social science research[13] as well as a "common sense" understanding of the differences between teenagers and adults,[14] the majority found that as a categorical matter, juveniles are not as culpable as adults and thus, cannot be classified among the "worst offenders," deserving of the most severe punishment.[15] With its recognition of the evolving nature of juveniles' identity, character, and personality traits and their resulting capacity for emotional growth and maturation, *Simmons* found it morally "misguided" to equate the failings of minors with those of adults.[16] Overruling its 1989

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11. *See* Roper v. Simmons, 543 U.S. 551, 567–75 (2005) (affirming the decision of the Missouri Supreme Court to set aside Christopher Simmons's death sentence in favor of life imprisonment without parole and holding that the imposition of the death penalty on offenders who were younger than eighteen when their crimes were committed violates the Eighth Amendment).

12. *Id.*

13. *See id.* at 569–70 (citing the work of psychologist Jeffrey Arnett in the area of adolescent development; Laurence Steinberg and Elizabeth Scott, professors of psychology and law respectively, in the areas of environmental and peer influences on juveniles; and Erik Erikson on the formation of juvenile identity); *see also* ERIK ERIKSON, IDENTITY: YOUTH AND CRISIS, 26–29 (1968) (discussing the formation of identity during adolescence); Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992) (finding that adolescents demonstrate reckless and thrill-seeking behavior as part of the development process); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AMER. PSYCHOL. 1009, 1009 (2003) (drawing on research and theory about adolescent development to argue that the developmental immaturity of juveniles mitigates their criminal culpability and, thus, calls for less severe punishment). Some scholars have found fault with the social science research that forms the basis for *Simmons*. *See, e.g.*, Deborah Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 381 (2006) (contending that some of the case law and social science research in *Simmons* is insufficient and outdated); Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397, 397–98 (2006) (exposing the limitations of brain research and warning against over-reliance on neuroscience to explain behavior and to lessen criminal responsibility).

14. *Simmons*, 543 U.S. at 572 (stating that the differences between juveniles and adults are so "marked and well understood" that they necessitate a categorical exemption of juveniles from the death penalty); *see also id.* at 569 ("[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.'" (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))).

15. *Id.* at 568–70 ("These differences [between juveniles and adults] render suspect any conclusion that a juvenile falls among the worst offenders.").

16. *See id.* at 570 ("From a moral standpoint, it would be misguided to equate the failings

decision in *Stanford v. Kentucky*,[17] which upheld the death penalty for sixteen- and seventeen-year-olds, and relying instead on its 1988 decision in *Thompson v. Oklahoma*,[18] which prohibited the death penalty for offenders fifteen-years-old and younger, the Court called for consistency between the rights that we deny to individuals under the age of eighteen and the responsibilities that we assign to them.[19] In many ways, the opinion implicitly harkened back to the approach of the country's first juvenile court when the judge's focus was not on the audacity or savagery of the crime, but on the potential for reforming young offenders.[20]

Yet, in writing for the majority, Justice Kennedy did not base the Court's decision solely on the developmental differences between juveniles and adults or on the arguably stereotyped and romantic notion of youth as immature, unpredictable works in progress. He also emphasized the grave difficulty—the impossibility, even—of maintaining confidence in a system that relies on human beings, with all their frailties and prejudices, to determine whether the ultimate punishment should be imposed upon society's most violent sixteen- and seventeen-year-olds.[21] If, as Justice Kennedy contended, even psychiatric experts are unable to differentiate between adolescent offenders who have acted out of "unfortunate yet transient immaturity" and those for whom the crime reflects "irreparable corruption," how can jurors reliably make such distinctions?[22] *Simmons* answers this question with a categorical rule

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of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

17. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

18. Thompson v. Oklahoma, 487 U.S. 815 (1988).

19. *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) ("[T]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." (citing *Thompson*, 487 U.S. at 835)); *see also id.* at 569 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent.").

20. *Id.* at 570; *see also* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 192–93 (1999) (describing the early juvenile justice system as one in which "the nature of the offense affected neither the degree nor the duration of intervention"); NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 94–96, *available at* http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf (last visited Feb. 24, 2008) (describing the early juvenile justice system as having a "focus on offenders and not offenses, on rehabilitation and not punishment," as well as "the express purpose to protect children").

21. *Simmons*, 543 U.S. at 572–74.

22. *See id.* at 573 ("If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having

prohibiting the imposition of the death penalty on offenders who committed their crimes when they were younger than eighteen.[23] The decision explicitly recognizes—and draws a bright line to counteract—the all-too-human tendency to objectify violent juvenile offenders, to consider their youth as an aggravating factor in the calculus, and to perceive and judge them through the lens of stereotype and bias.[24]

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antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty."). The *Simmons* dissenters and other critics have suggested that Justice Kennedy usurped the jury's role to decide on a case-by-case basis whether a defendant's youth should be mitigating with this decision. *See id.* at 616, 620–22 (Scalia, J., dissenting) ("The Court concludes, however, . . . that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system . . . ."). Justice O'Connor noted:

> [T]hese concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant's maturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth.

Id. at 603–04, 606–07 (O'Connor, J., dissenting); *see also, e.g.*, Mitchel Brim, *A Sneak Preview into How the Court Took Away a State's Right to Execute Sixteen and Seventeen Year Old Juveniles: The Threat of Execution Will No Longer Save an Innocent Victim's Life*, 82 DENV. U. L. REV. 739, 740 (2005) (asserting that the decision in *Simmons* inhibits justice as well as the states' ability to "properly administer the ultimate punishment in a rational and consistent manner for the worst of the worst on a case by case basis"); Benyomin Forer, *Juveniles and the Death Penalty: An Examination of* Roper v. Simmons *and the Future of Capital Punishment*, 35 SW. U. L. REV. 161, 178 (2006) (arguing that jurors should decide whether a crime warrants a death sentence); Moin A. Yahya, *Deterring* Roper*'s Juveniles: Using a Law and Economics Approach to Show That the Logic of* Roper *Implies That Juveniles Require the Death Penalty More Than Adults*, 111 PENN ST. L. REV. 53, 86 (2006) (arguing, inter alia, that juveniles react to punishment in rational ways that are similar to the ways in which adults react to punishment, and that by prohibiting the use of the death penalty against juveniles, the decision will further hinder states in their efforts to combat juvenile crime); Wayne Myers, Note, Roper v. Simmons*: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 949 (2006) (arguing that the *Simmons* Court chipped away at the role of states and juries in criminal sentencing proceedings by focusing Eighth Amendment jurisprudence on the Justices' subjective judgment regarding the bounds of acceptable punishment); Julie Rowe, Note, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of* Roper v. Simmons *and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287 (2006) (arguing that the *Simmons* Court interfered with the function of both state legislatures and sentencing juries in its abolition of the juvenile death penalty).

23. *Simmons*, 543 U.S. at 578–79.

24. *Id.* at 572–74. Terms such as "bias" and "stereotype" have distinct meanings and definitions in a number of specific areas, antidiscrimination law and the law of race among them. My conception of these terms—and use of them in this Article—shares something with the ways in which they have been used in these contexts, while also invoking the meanings utilized in social science literature. *See* Antony Page, Batson*'s Blind Spot: Unconscious*

This Article argues that bias—seeing the type or category of the person instead of the three-dimensional reality—not only affects how jurors have perceived juvenile offenders but also how law enforcement has viewed the juvenile suspect. Recent studies on investigator bias, for example, have established that preconceived attitudes and assumptions of police officers often result in suggestive questioning techniques that can then lead to inaccurate reports from witnesses and suspects.[25] Researchers have also found that juveniles and people who are intellectually impaired are especially vulnerable to false confessions, particularly when interrogated by police and other authority figures.[26] Social scientists have shown that many in the criminal justice system—from police officers and jurors to attorneys and judges—have biased perceptions of children and adolescents who are involved in legal proceedings, believing that child victims may have difficulty remembering events but are committed to telling the truth, while juvenile suspects can accurately recall events but are deliberately dishonest about their recollections.[27] With such entrenched a priori beliefs held by both those who

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Stereotyping and the Peremptory Challenge, 85 B.U. L. REV. 155, 221–36 (2005) (revealing the distinctions between the meaning of the terms "bias" and "stereotype" when used in the context of discussing deliberate race or gender discrimination and the meaning of these terms when used in the context of social psychological research). When law and the social sciences converge, as in a discussion, for instance, of the impact of unconscious bias on jury selection, ever more precise terms—such as "unconscious cognitive bias," "intergroup bias," and "attribution bias"—are needed. *Id.* at 227. While an extended discussion of the various connotations of these terms—and how they are utilized in different contexts—would be fruitful, it is beyond the scope of this Article.

25. *See, e.g.*, Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AMER. PSYCHOL. 215, 219–22 (2005) (finding that investigators who presume that the suspect is guilty are more likely to ask more guilt-presumptive questions and exert more pressure to get a confession, thereby increasing the risk of false confession); *see also infra* notes 89–106 and accompanying text (discussing interviewer bias and inaccurate reporting).

26. *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33, 51–53 (2004) (finding that juveniles are particularly susceptible to "interrogative pressure and negative feedback" from authority figures, while intellectually impaired individuals exhibit a high need for approval from those in positions of authority and are likely to comply with suggestive questioning); *see also infra* notes 107–29 and accompanying text (discussing the particular vulnerability of juveniles to suggestive questioning techniques).

27. *See* Jessica Owen-Kostelnik, N. Dickon Reppucci & Jessica R. Meyer, *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AMER. PSYCHOL. 286, 294 (2006) (citing NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 52–54 (1991)); Kassin, *supra* note 25, at 215–28 (finding that police officers and others in the criminal justice system recognize the developmental differences between adolescents and adults in some contexts but not others); *see also infra* notes 160–68 and accompanying text (discussing the bias that many in law enforcement have towards alleged

investigate the crime and those who sit in ultimate judgment of the accused, it is all the more important for police departments as well as the bench and bar to be made conscious and aware of systemic bias against juvenile suspects, to understand its impact and consequences, and to take steps to counter it.

While recent scholarship on *Simmons* has focused on such topics as the significance of the Court's reliance upon international law,[28] the meaning of the holding for Eighth Amendment jurisprudence,[29] or the implications of scientific research on adolescent brain development for the legal concepts of juvenile culpability and mens rea,[30] little attention has been given to the potential ramifications of *Simmons* for the functioning of the juvenile justice system at

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child victims and against alleged child suspects).

28. *See, e.g.*, Roger P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1, 26 (2005) (arguing that the Court's reliance on international values may take it down a "dangerous path"); Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 748 (2005) (examining the Court's historical practice of citing foreign law); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 112 (describing three models of considering international law and determining that the *Simmons* court properly considered international law); Greta Proctor, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 219–34 (2007) (advocating the abolition of the death penalty and discussing the Court's analysis of international law in *Roper v. Simmons*); Jacob J. Zehnder, Comment, *Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker*, 41 VAL. U. L. REV. 1739, 1761 (2007) (discussing constitutional comparative law and characterizing *Roper v. Simmons* as one of "[t]he three most significant death penalty cases invoking the Courts' comparative reasoning").

29. *See, e.g.*, Wayne Myers, Roper v. Simmons*: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. LAW & CRIMINOLOGY 947, 949 (2006) (arguing that *Simmons* has resulted in a "fundamental alteration of Eighth Amendment jurisprudence," with its focus now on subjective determinations regarding the bounds of acceptable punishment); Ronald Turner, *The Juvenile Death Penalty and the Court's Consensus-Plus Eighth Amendment*, 17 GEO. MASON U. CIV. RTS. L.J. 157, 159 (2006) (analyzing *Simmons*'s construction and application of the Eighth Amendment in the specific context of juvenile death penalty); Daniel R. Williams, Roper v. Simmons *and the Limits of the Adjudicatory Process*, 2005 MICH. ST. L. REV. 1113, 1116 (2005) (discussing the meaning and significance of the Court's reasoning in *Simmons* in the context of its Eighth Amendment jurisprudence); Jason Mazingo, Student Article, Roper v. Simmons*: The Height of Hubris*, 29 LAW & PSYCHOL. 261, 283 (2005) (examining the Court's Eighth Amendment jurisprudence and calling for the abolition of the national consensus standard in light of the "capricious" decision in *Simmons*).

30. *See, e.g.*, Denno, *supra* note 13, at 383–85 (criticizing the Supreme Court's reliance on scientific amici briefs in *Simmons*); Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 332 (2006) (arguing that brain development should be carefully considered in criminal cases involving juvenile offenders); *see also* Aliya Haider, Roper v. Simmons*: The Role of the Science Brief*, 3 OHIO ST. J. CRIM. L. 369, 370 (2006) (discussing the approach of the authors of an amicus brief submitted in *Simmons* on behalf of the scientific community).

large—specifically in the area of criminal procedure.[31] While there are many directions that one could go when importing *Simmons*'s holding to other areas of theory or doctrine, this Article considers the implications of the majority's recognition that age matters not only for juveniles already in the system but for juveniles not yet charged—for those under suspicion, identified as suspects, and questioned by law enforcement. It explores how *Simmons* might inform a new approach by both law enforcement and the courts to the questioning of juvenile suspects, one that is consistent with what recent studies have revealed about the ways in which adolescents experience interrogation and is also consistent with the law's approach to the questioning of minors who are witnesses or alleged victims of crime.

As Part II explains, the majority's decision in *Roper v. Simmons* was based not only on the significance of the differences between adolescents and adults but also on the reality that, despite explicit statutory and case law, the state may characterize an adolescent offender's youth—and the jury may perceive it—as an aggravating factor, not a mitigating one. Part III discusses the phenomenon of interviewer bias and argues that because juveniles are particularly vulnerable to its effects—similar to the way in which they are vulnerable to the effects of juror bias in cases such as *Simmons*—appropriate procedural protections must be provided during questioning, whether the

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31. A Lexis search of law reviews and journals located only a couple of articles and several student notes that have focused on the potential impact of *Simmons* on the juvenile justice system at large, with few, if any, focused specifically on criminal procedure. *See, e.g.*, Ellen Marrus & Irene Merker Rosenberg, *After* Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1182 (2005) (arguing that *Simmons* supports extending juvenile court jurisdiction to all those under age eighteen and prohibiting the imposition of life imprisonment without parole on juveniles); Lisa McNaughton, *Extending* Roper*'s Reasoning to Minnesota's Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1063, 1071–72 (2006) (relying on *Simmons* to argue that Minnesota's automatic certification of juveniles to adult court for certain charges and laws requiring juveniles to register as sex offenders are unconstitutional); Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After* Roper, 47 B.C. L. REV. 1083, 1086–87 (2006) (exploring the impact of *Simmons* on sentencing juveniles to life without parole); Enrico Pagnanelli, Note, *Children As Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 186–94 (2007) (discussing the implications of *Simmons* on the transfer of juveniles to criminal court); Rowe, *supra* note 22, at 287 (criticizing *Simmons* and suggesting that other forms of punishment imposed on juvenile offenders may also be struck down prematurely as a result of the decision). As noted above, scholarship has been produced on other aspects of *Simmons*. *See, e.g.*, Elizabeth F. Emens, *Aggravating Youth:* Roper v. Simmons *and Age Discrimination*, 2005 SUP. CT. REV. 51, 54–55 (2005) (exploring the connection between age discrimination law and the Court's preference in *Simmons* for an age-based rule that exempts minors from the death penalty over a standard that allows juries to determine whether and to what extent to consider age as mitigating).

juvenile is a victim, witness, or suspect. Part IV argues that courts reinforce interviewer bias when they fail to hold that a juvenile suspect's youth is determinative in evaluating whether the police have overstepped their bounds during interrogation through its analysis of recent cases both prior to and since *Simmons*. Part V proposes measures aimed at changing the culture of police interrogation of adolescents with proposals and strategies for legislators and judges as well as for law enforcement and community groups. Part VI concludes.

II. Roper v. Simmons*: Drawing the Line at Eighteen*

On its face, *Roper v. Simmons* appears to have followed traditional lines of analysis in arriving at its principal holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were younger than eighteen when their crimes were committed. In its majority opinion, the Court moved from a discussion of "evolving standards of decency," to a numeric analysis of whether "national consensus" exists on the issue, to the conclusion that the Eighth Amendment requires a categorical exemption for juveniles.[32] The symmetry of its rejection of *Stanford v. Kentucky*[33] and *Penry v. Lynaugh*,[34] cases that upheld the constitutionality of the death penalty as applied to sixteen- and seventeen-year-old offenders and the mentally retarded respectively, and its reliance on *Thompson v. Oklahoma*[35] and *Atkins v. Virginia*,[36] cases that found the death penalty unconstitutional when applied to offenders under the age of sixteen and the mentally retarded respectively, holds no real surprise.

What is striking about *Simmons*—and most relevant to the area of juvenile interrogation—is the Court's emphasis upon the differences between adolescents and adults in the areas of psychosocial and brain development and

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32. Roper v. Simmons, 543 U.S. 551, 564, 568, 578–79 (2005).

33. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

34. *See* Penry v. Lynaugh, 492 U.S. 302, 330–35 (1989) (holding that the execution of mentally retarded people is not categorically prohibited by the Eighth Amendment), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

35. *See* Thompson v. Oklahoma, 487 U.S. 815, 815 (1988) (holding that the execution of offenders aged fifteen and younger is unconstitutional).

36. *See* Atkins v. Virginia, 536 U.S. 304, 317–21 (2002) (holding that the execution of mentally retarded individuals violates the Eighth Amendment).

its determination that a categorical rule is necessary to protect juvenile offenders from the biases of decisionmakers.[37] This Part analyzes the decision, explores its reasoning, and then sets the stage for the Article's subsequent discussion of how *Simmons* might inform a new understanding of and approach to the interrogation of juveniles. It examines the Court's characterization of youth as immature, unpredictable, and impressionable to argue for and ultimately embrace the view that capital punishment cannot be applied to the oldest adolescents, sixteen- and seventeen-year-olds.[38] It then discusses the Court's holding that allowing capital jurors, who may be overcome by the particularly brutal nature of the crime, to decide whether a young offender should be put to death challenges the bounds of morality.[39]

A. The Profound Differences Between Adolescents and Adults

Before discussing the Court's delineation of the differences between adolescents and adults in *Simmons*, it is necessary to review *Thompson v. Oklahoma*, as it plays a critical role in the Court's opinion. To begin, it is important to recognize that the majority in *Thompson*, which set sixteen as the minimum age for which capital punishment could be imposed, had an easier hurdle to overcome than that confronted by the Court in *Simmons*, for its focus was on younger teenagers, a group that state legislatures and juries had, in large part, already determined to be in a different, "less culpable" category than older adolescents and adults.[40] In concluding that the imposition of the death penalty on a fifteen-year-old offender was "generally abhorrent to the conscience of the community,"[41] *Thompson* relied principally upon three areas: rights-granting legislation that set the line between childhood and adulthood either at sixteen or

37. *See Simmons*, 543 U.S. at 569–75 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

38. Roper v. Simmons, 543 U.S. 551, 572–74 (2005). *See* discussion *infra* Part II.A.

39. *Id.* at 572–74; *see* discussion *infra* Part II.B.

40. *Thompson*, 487 U.S. at 823–33 (discussing legislation that sets sixteen as the age for which a number of different rights accrue); *see also* Elizabeth S. Scott et al., *Public Attitudes About the Culpability and Punishment of Young Offenders*, 24 BEHAV. SCI. & L. 815, 827 (2006) (describing a study examining society's perception of the punishments that adolescents should receive for adult crimes, and concluding that few of the adults surveyed supported the adult prosecution of twelve-year-olds—even for murder—and that the mean minimum age recommended for transferring juveniles to adult court was sixteen).

41. Thompson v. Oklahoma, 487 U.S. 815, 832 (1988).

above;[42] the infrequency with which offenders under sixteen had been executed in the United States;[43] and the behavior of juries, which in recent years had voted to execute only 0.3% of those under sixteen who had been charged with willful criminal homicide.[44] Although *Thompson* also found that adolescents, particularly those in their early and middle teens, were "less mature and responsible than adults," citing experts in the areas of adolescent psychology and neuropsychiatry to support its view, this emphasis was less central to its final conclusion than the previously stated bases.[45]

In *Simmons*, Justice Kennedy relied heavily on the precedent and language of *Thompson* but took the reasoning of the 1988 decision one step further, as the exemption of *all* juveniles under the age of eighteen required bolder claims to support its more far-reaching conclusion.[46] Kennedy began with a discussion of society's "'evolving standards of decency' . . . to determine which punishments are so disproportionate so as to be cruel and unusual."[47] He analyzed "objective [indicia] of national consensus" on the issue, which included a tabulation of how many states have proscribed the death penalty for juveniles and at what pace,[48] an analytic process comparable to that followed in

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42. *See id.* at 823–25 (acknowledging that while "[t]he line between childhood and adulthood is drawn in different ways by various States," almost all the states treat those under sixteen as minors for such important purposes as voting, serving on a jury, driving without parental consent, and marrying without parental consent).

43. *See id.* at 832 (noting that there have been no executions for crimes committed by offenders under the age of sixteen since 1948).

44. *Id.* at 832–33, 833 n.39 (citing Department of Justice statistics to show that this percentage means that five of the 1861 people "under [sixteen] who were arrested for willful criminal homicide received the death penalty").

45. *Id.* at 834–35 (stating that because of the "special mitigating force of youth," the conclusion that "less culpability should attach to a crime committed by a juvenile than . . . by an adult . . . is too obvious to require extended explanation").

46. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) ("The logic of *Thompson* extends to those who are under [eighteen].").

47. *Id.* at 561–64 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

48. *Id.* at 564–67. What is arguably different about Justice Kennedy's analysis, as compared with *Thompson* and *Atkins*, and what both Justices O'Connor and Scalia objected to in their respective dissenting opinions, is the reasoning Kennedy employed to conclude that the national tide had shifted in regard to attitudes towards the juvenile death penalty. In determining that thirty states had prohibited the juvenile death penalty by the time of the *Simmons* decision, Kennedy included the twelve states that had rejected capital punishment altogether, along with the eighteen that had maintained it but had specifically excluded juveniles from its reach. *Id.* at 564. While *Atkins* had utilized the same method of calculation and produced parallel results, the rate of abolition of the death penalty for the mentally retarded was much more dramatic between the *Penry* and *Atkins* decisions (sixteen states had prohibited the practice in the intervening three years) than the rate of abolition of the juvenile death penalty between *Stanford* and *Simmons* (only five states had prohibited the practice in the intervening fifteen years, one of which did so through a judicial decision, not a legislative enactment). *Id.* at

the Court's earlier opinions addressing the proper reach and parameters of the Eighth Amendment,[49] and he ultimately concluded that a national consensus had, in fact, developed against the juvenile death penalty.[50]

Justice Kennedy then introduced one of the central arguments of the Court's opinion, that because juveniles under eighteen are fundamentally different from adults, the classic rationale for imposing "the death penalty appl[ies] to them with lesser force than to adults."[51] Relying on neuro-psychiatric and psychosocial assessments of death-row inmates as well as imaging studies exploring brain maturation in adolescents, Kennedy set forth three principal areas of difference to support the Court's conclusion that juveniles cannot be classified "among the worst offenders": juveniles' "lack of

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565. To justify his contention that these numbers demonstrated sufficient evidence of consensus, Kennedy emphasized the "consistency of the direction of change" as supported by the fact that since *Stanford*, no state that previously had prohibited the juvenile death penalty had since reinstated it. *Id.* at 566. Kennedy ultimately concluded that based on the aforementioned "objective indicia of consensus," juveniles—like the mentally retarded in *Atkins*—are viewed by society as "categorically less culpable than the average criminal." *Id.* at 567 (citing Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

49. *Id.* at 564–67. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592–98 (1977) (plurality opinion) (concluding that because Georgia was the only state authorizing the death penalty for raping an adult woman and because Georgia juries had not imposed the death sentence in a vast majority [90%] of rape convictions, the death penalty was a "grossly disproportionate and excessive punishment" for that crime); Penry v. Lynaugh, 492 U.S. 302, 330–35 (1989) (concluding that, as there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses" (in 1989, only two states banned the execution of retarded persons), it is not categorically prohibited by the Eighth Amendment), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); Stanford v. Kentucky, 492 U.S. 361, 369–78 (1989) (holding that because "a majority of the States that permit capital punishment [also] authorize it" for murders committed at ages sixteen and seventeen, the practice does not constitute cruel and unusual punishment in violation of the Eighth Amendment).

50. *Simmons*, 543 U.S. at 567. Justice O'Connor rejected Justice Kennedy's claim of sufficient evidence of national consensus based not only on a comparison with the numbers in *Atkins* but also on the argument that even the "strong evidence" of consensus that existed in *Atkins* justified that decision *only when combined with* the moral proportionality argument—that the execution of the mentally retarded, because of their significant cognitive and behavioral deficits, would not measurably contribute to the goals of retribution and deterrence—and that the proportionality argument against the juvenile death penalty was fundamentally "flawed" and "too weak" to warrant the Court's categorical rule. *Id.* at 593–94, 597–98 (O'Connor, J., dissenting). Justice O'Connor also took issue with Kennedy's interpretation of the objective legislative evidence, finding it significant that, unlike in *Atkins*, there was "some measure of continuing public support" for applying the death penalty to sixteen- and seventeen-year-olds. *Id.* at 595–96 (O'Connor, J. dissenting). She cited the fact that at least seven states—two since *Stanford*—specifically had set sixteen or seventeen as the minimum age at which an offender could be exposed to the death penalty, that five of these seven states had at least one juvenile offender presently on death row, and that four of them had executed at least one juvenile offender in the past fifteen years. *Id.* at 595–96 (O'Connor, J., dissenting).

51. *Id.* at 571.

maturity . . . and underdeveloped sense of responsibility result[s] in impetuous and ill-considered actions and decisions";[52] juveniles' increased vulnerability and susceptibility to negative influences (i.e., peer pressure) makes them more worthy of forgiveness for falling prey to those influences;[53] and because juveniles' characters are not as well-formed as adults and their personality traits

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52. *Id.* at 569 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993)). In her dissent, Justice O'Connor objected to the Court's "sweeping conclusion" that only in "rare" cases might a juvenile offender have the maturity and demonstrate the depravity to warrant a sentence of death, stating that "[t]he fact that juveniles are generally *less* culpable for their misconduct than adults does not necessarily mean that a 17-year-old murderer cannot be *sufficiently* culpable to merit the death penalty." *Id.* at 599 (O'Connor, J., dissenting). O'Connor found this to be particularly so for those "at the margins between adolescents and adulthood—and especially for 17-year-olds such as [Simmons]." *Id.* at 600 (O'Connor, J., dissenting). Relying on the facts of the murder, which she characterized as "premeditated, wanton, and cruel in the extreme," and on Simmons's belief, albeit erroneous, that he could kill with impunity because he was a minor, O'Connor found that a sentencing jury *could* reasonably conclude that Simmons was both sufficiently mature *and* sufficiently depraved to merit a death sentence. *Id.* at 600–01 (O'Connor, J., dissenting). Therefore, she also found that it was reasonable for a legislature to conclude that *some* seventeen-year-old murderers merited the death penalty and that Christopher Simmons appeared to be one of them. *Id.* at 600 (O'Connor, J., dissenting).

53. *Id.* at 569–70. One of Justice Scalia's more provocative—and persuasive—arguments in dissent was made on the subject of Justice Kennedy's reliance on scientific and sociological studies to establish that juveniles are too impressionable and unformed to warrant the death penalty. Scalia pointedly rejected Kennedy's adoption of this characterization of adolescents, both on the basis of the methodological inadequacy of the Court's cited support for its claims as well as on the grounds that Kennedy had merely privileged one stereotyped notion of adolescents over another. *See id.* at 616–19 (Scalia, J., dissenting) ("[A]ll the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends."). Anticipating arguments made by everyone from so-called "youth liberationists"—children's rights advocates who work to advance the autonomy and self-determination of young people—to abortion rights advocates troubled by the suggestion that juveniles are incapable of taking moral responsibility for their actions, Scalia referenced studies and treatises that directly contradicted the Court's conclusions, including ones relied upon in previous cases by *Simmons* amici. *See id.* at 617–18 (Scalia, J., dissenting) (stating that the American Psychological Association, which in *Simmons* asserted that minors "lack the ability to take moral responsibility for their [actions]," had taken the opposite position in an amicus brief filed in an earlier case before the Court). In challenging a parental notification requirement in a Minnesota abortion law, the American Psychological Association's brief stated that "[p]sychological theory and research about cognitive, social and moral development strongly supports the conclusion that most adolescents are competent to make informed decisions about important life situations" and that decisions regarding the ability of adolescents to understand and make decisions about intellectual and social dilemmas and to reason through hypothetical situations should be made on a case-by-case basis. Brief for Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners/Cross-Respondents at 18–21, Hodgson v. Minnesota, 497 U.S. 417 (1990) (Nos. 88-1125 & 88-1309), 1989 WL 1127529; *see also* Emens, *supra* note 31, at 70–72 (discussing the criticisms of Kennedy's generalizations of youth that have come from proponents of youth liberation). Kennedy's failure to anticipate and respond to these points is a legitimate weakness of the majority opinion.

are more transitory and less fixed, their commission of heinous crimes is not evidence of "irretrievably depraved character[s]."[54]

Echoing the Court's reasoning in *Atkins v. Virginia* as applied to the mentally retarded, Kennedy also advanced an argument based on the concept of moral proportionality, that given the "diminished culpability of juveniles," the penological justifications for capital punishment—retribution and deterrence of capital offenses—fail to resonate with regard to this age group.[55] If retribution

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54. Roper v. Simmons, 543 U.S. 551, 569–70 (2005). As for the third area of difference, Justice Kennedy wrote, "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater probability exists that a minor's character deficiencies *will be reformed*." *Id.* at 570 (emphasis added). The claim that most teenagers who exhibit antisocial behavior will "grow out of it" and that "the cure for youth crime is growing up" is supported by the findings of social scientists. *See, e.g.*, Steinberg & Scott, *supra* note 13, at 1014 ("For most teens, [risky, illegal, or dangerous] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."); Franklin E. Zimring, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL 271, 283–84 (Thomas Grisso & Robert G. Schwartz eds., 2000) (recommending that a "rich mixture of risk-management strategies," rather than purely punitive responses, be utilized to reduce the harmful consequences of youth crime). Zimring observes:

> [T]he high prevalence of offense behavior in the teen years and the rather high rates of incidence for those who offend are transitory phenomena associated with a transitional status and life period. Even absent heroic interventions, the conduct that occurs at peak rates in adolescence will level off substantially if and when adolescents achieve adult roles and status.

Id. at 283.

55. *Simmons*, 543 U.S. at 571–72 (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)). In her dissent, O'Connor argued that drawing a line between seventeen-year-olds and young adults was "indefensibly arbitrary," as it was based on chronological age alone, and that it was fundamentally different than drawing a line between the mentally retarded and those without intellectual impairments, a distinction she saw as inherent or definitional. *Id.* at 601–02 (O'Connor, J., dissenting). While she summarily rejected Kennedy's contention that an arbitrary line may be necessary—and possibly morally compelled—in the very specific context of applying the death penalty to minors, *id.* (O'Connor, J., dissenting), O'Connor failed to acknowledge that it is not always clear or universally agreed upon who should be diagnosed as mentally retarded and who should not, evidenced by the fact that the very definition of mental retardation, which typically refers to both intellectual and adaptive functioning, can differ from state to state. *See Atkins*, 536 U.S. at 308 n.3, 317 n.22, 318 (discussing characteristics of mental retardation); *id.* at 317 (leaving to the states the development of mechanisms to determine which offenders fall within the class of mentally retarded persons exempt from capital punishment); Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them from Execution*, 30 J. LEGIS. 77, 89–93 (2003) (analyzing the differences between states' definitions of mental retardation both before and after *Atkins*); Christopher L. Chauvin, Note, Atkins v. Virginia*: How Flawed Conclusions Convert Good Intentions Into Bad Law*, 65 LA. L. REV. 473, 503–04 (2004) (noting that following *Atkins*, some states adopted the American Association on Mental Retardation's (AAMR) definition of mental retardation referred to in the opinion). Other states have established their own

is viewed alternatively as an expression of "the community's moral outrage" and an "attempt to right the wrong to the victim," the death penalty's application to juveniles is disproportionate because their "blameworthiness" is diminished by their very youth and immaturity.[56] Similarly, with regard to deterrence, Kennedy asserted that the teenager's ability to perform a "cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."[57]

In sum, the primary argument put forward by the *Simmons* majority, that the exemption of all minors from the death penalty is necessitated by the profound psychological and developmental differences between adolescents and adults, finds its roots in *Thompson v. Oklahoma*, although Kennedy gave it more prominence in *Simmons* than in any previous Eighth Amendment opinion by the Court.

B. Countering Jurors' Implicit Bias Against Young Offenders

The second of Justice Kennedy's principal bases for the majority opinion was his contention that jurors should not be relied upon to decide which young offenders have committed crimes that are deserving of death.[58] That Kennedy began the opinion by recounting the rather harrowing facts of the murder of Shirley Crook speaks to the question of whether capital jurors should have the discretion to decide which juvenile offenders should be executed as well as to the matter of the proper weight that a defendant's youth should be given in the death penalty calculus.

In the opinion, Kennedy described the murder of Shirley Crook at the hands of Christopher Simmons in uncompromising detail. He portrayed seventeen-year-old Simmons, a high school junior, as the "instigator of the crime," someone who spoke in "chilling, callous terms" about his plan,

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definitions, which can differ significantly from the AAMR definition. Ohio, for instance, has adopted an approach that focuses on IQ scores, while Oklahoma's standards do not include IQ scores at all. Chauvin, *supra*, at 503–04; Cynthia A. Orpen, Note, *Following in the Footsteps of* Ford*: Mental Retardation and Capital Punishment Post-*Atkins, 65 U. PITT. L. REV. 83, 91–97 (2003) (identifying the sources of inconsistencies in states' definitions of mental retardation as well as in sentencing guidelines for the mentally retarded). For a list of states that have acted in accordance with *Atkins* by changing their statutes, see Death Penalty Information Center, States That Have Changed Their Statutes to Comply With the Supreme Court's Decision in Atkins v. Virginia, http://www.deathpenaltyinfo.org/article.php?scid=28&did=668 (last visited Jan. 12, 2008) (on file with the Washington and Lee Law Review).

56. *Simmons*, 543 U.S. at 571.

57. *Id.* at 571–72 (citing Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

58. *Id.* at 572–74.

asserting that he "wanted to murder someone" and believing that he and his friends could "get away with it" because they were minors.[59] On September 9, 1993, Simmons and another boy, fifteen-year-old Charles Benjamin, entered Shirley Crook's home at two a.m. after reaching through an open window to unlock the back door.[60] Crook, alone in the house, called out "Who's there?" after being awakened when Simmons turned on a hallway light.[61] Simmons recognized Crook as someone with whom he had been in a minor automobile accident and later said that "this confirmed his resolve to kill her."[62] He and Benjamin duct-taped Crook's eyes and mouth and bound her hands before driving in her minivan to a state park.[63] They then "reinforced the bindings, covered her head with a towel, and brought her to a railroad trestle [that crossed] the Meramec River."[64] There they tied together her hands and feet with electrical wire and threw her from the bridge where she drowned in the water below.[65] Later that day, Crook's husband, Steven, returning from an overnight trip, found his bedroom in shambles, and reported his wife missing.[66] Shirley Crook's body was found in the river later that day by a fisherman.[67] Meanwhile, Simmons bragged to friends that he had killed a woman "because the bitch seen my face."[68]

Justice Kennedy's willingness to provide a full recitation of the facts and circumstances of the murder is significant, as it diverges from the pattern and practice established in *Thompson* and *Atkins* in which Justice Stevens, writing for the majority, provided only a brief statement of the facts,[69] while Justice

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59. *Id.* at 556.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 557.

65. *Id.* at 556–57.

66. *Id.* at 557.

67. *Id.*

68. *Id.*; *see* Respondent's Statement, Brief, and Argument at 7–12, State *ex rel.* Simmons v. Luebbers, 112 S.W.3d 397 (Mo. 2003) (en banc) (No. SC 84454), 2003 WL 24219768 (recounting the details of the crime as told by Simmons to friends during September 1993); *see also* Brief for Petitioner at 3–5, Roper v. Simmons, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 903158 (same); Brief for Respondent at 1–9, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1947812 (same; also noting psychiatrists' evaluation of Simmons as "very immature" and noting his "dysfunctional home environment").

69. *See* Thompson v. Oklahoma, 487 U.S. 815, 819 (1998) ("Because there is no claim that the punishment would be excessive if the crime had been committed by an adult, only a brief statement of facts is necessary."); *see also* Atkins v. Virginia, 536 U.S. 304, 307 (2002) (describing the murder in only two sentences).

Scalia, writing for the dissent, countered with fuller, more graphic versions of the violence perpetrated by the defendants and the testimony introduced against them at trial.[70] In the context of *Thompson* and *Atkins*, cases in which the death penalty was found to be cruel and unusual as a categorical matter, Stevens' decision not to include the specifics of the crime is consistent with the Court's ultimate holding that regardless of the amorality of the murderous act, this particular category of offenders must be exempt from execution.[71] In contrast, Scalia's decision to provide detailed descriptions of the crimes advanced his argument that the true culpability and depravity of an offender will only be revealed through a close examination of the offense,[72] a truth that—by his lights—the majority refused to confront when it determined to substitute its judgment for that of both legislators and jurors.[73] In this way, Kennedy's inclusion of the full factual narrative in *Simmons* in a sense preempted Scalia,

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70. In both decisions, Justice Stevens briefly described the charges and the facts of the crime followed by a short statement of the case history, while Justice Scalia provided a blow-by-blow account of the crime as well as the evidence presented at trial and at resentencing, including verbatim quotes from the suspect and witnesses made before, during, and after the crime was committed. *See Thompson*, 487 U.S. at 859–63 (Scalia, J., dissenting) (including incriminating after-the-fact statements made by the defendant); *see also Atkins*, 536 U.S. at 338–39 (Scalia, J., dissenting) (noting that the defendant "ignored [the victim's] pleas to leave him unharmed").

71. *See Thompson*, 487 U.S. at 838 ("[T]he Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."); *see also Atkins*, 536 U.S. at 321 (concluding that the Eighth Amendment prohibits a state from executing a mentally retarded offender).

72. *See Thompson*, 487 U.S. at 859–60 (Scalia, J., dissenting) ("I begin by restating the facts since I think that a fuller account of William Wayne Thompson's participation in the murder, and of his certification to stand trial as an adult, is helpful in understanding the case."); *see also Atkins*, 536 U.S. at 338 (Scalia, J., dissenting) ("I begin with a brief restatement of [the] facts that are abridged by the Court but important to understanding this case."). Justice Rehnquist also made a practice of detailing the violent facts of the crime in death penalty cases, presumably for the same reasons that motivated Justice Scalia. *See, e.g.*, Barclay v. Florida, 463 U.S. 939, 942–44 (1983) (incorporating long excerpts of tape recordings made by the defendants, members of the Black Liberation Army, discussing their killing of the victim as well as extensive comments of the trial judge condemning the defendants' attempt to initiate a "racial war"). Interestingly, in cases involving juveniles—even ones in which the facts were not relevant to the issues presented—Justice Rehnquist made a practice of emphasizing both the crime's brutality and the offender's youth. *See, e.g.*, Schall v. Martin, 467 U.S. 253, 256–60 (1984) (detailing the delinquency histories of each of the three young appellees in an opinion that concluded that a New York pretrial detention statute was not unconstitutional as applied to juveniles).

73. *See Thompson*, 487 U.S. at 873 (Scalia, J., dissenting) ("On its face, the phrase 'cruel *and unusual* punishments' limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences."); *see also Atkins*, 536 U.S. at 341–48 (Scalia, J., dissenting) (criticizing the Court's use of statistics and studies "to fabricate 'national consensus'").

who provided no additional facts in his dissent, while also setting the stage for Kennedy's argument that adolescent offenders must be categorically exempted from the death penalty because the very nature of a particularly brutal and abhorrent crime can, indeed, overpower—in the minds of jurors—mitigating arguments made on behalf of a defendant.[74]

The purported catalyst for Kennedy's argument that a bright line is needed to protect juveniles from execution was the exchange that occurred between the defense attorney and prosecutor during the penalty phase of Christopher Simmons's trial. Defense counsel told the jury that "Simmons' age should make 'a huge difference to [them] in deciding just exactly what sort of punishment to make.'"[75] In response, the prosecutor argued the following: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[76] Kennedy referred to these statements in his narrative of the facts and then invoked them later in the opinion when asserting that while this sort of prosecutorial "overreaching" might be corrected by the application of a particular rule, it would not address the Court's larger concern that the criminal justice system is unable with sufficient reliability to identify those juveniles for whom a death sentence would be appropriate.[77]

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74. *See* Roper v. Simmons, 543 U.S. 551, 573 (2005) ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."); *see also* Robin West, *Narrative, Responsibility and Death: A Comment on the Death Penalty Cases from the 1989 Term*, MD. J. CONTEMP. LEGAL ISSUES 161, 173–76 (1990) (discussing liberal dissenters' failure in death penalty decisions to provide a "counter-narrative" to that of the conservative majority opinion which details the victim's horrific death, and calling for the dissenters to "construct an alternative understanding of societal responsibility for criminality that might challenge the unbridled individualism" of the majority's narrative).

75. *Simmons*, 543 U.S. at 558 (internal citations omitted).

76. *Id.*; *see also* Brief for Respondent, *supra* note 68, at 4 (describing the prosecutor as exhorting the jury in closing argument not to let Simmons "use his age as a shield to protect him"); Ashley Dobbs, *The Use of Youth as an Aggravating Factor in Death Penalty Cases Involving Minors*, JUV. JUST. UPDATE, June/July 2004, at 1, 14–15 (discussing how the prosecutor in *Simmons* made youth an aggravating factor by appealing to the jurors' basic fear of the irrational conduct of children, fear resulting from their impetuosity, unpredictability, and inability to understand the consequences of their actions—all qualities "that should reduce their culpability, not augment it").

77. *Simmons*, 543 U.S. at 573. Instances in which prosecutors characterize a juvenile's youth as an aggravating—rather than a mitigating—factor are hardly limited to the case of Christopher Simmons; there are many such examples. *See, e.g.*, *Ex parte* Davis, 866 S.W.2d 234, 237 (Tex. Crim. App. 1993) (en banc) (finding that a Texas prosecutor improperly secured commitments during voir dire from all twelve eventual jurors that they "would not let the 'youthful appearance and age of a defendant . . . affect [their] deliberations on punishment'"); *see also* Dobbs, *supra* note 76, at 15 (describing instances in which prosecutors argued to the

Consistent with other aspects of his argument in *Simmons*, Kennedy found that statutes and court decisions intended to ensure that capital jurors do *not* perceive a juvenile offender's youth as aggravating have little impact on the very real risk that at least some jurors will judge the worth of a violent adolescent through the lens of bias and stereotype—and that at least some will consider it scary that an individual who was so young could commit a crime that was so brutal.[78] Kennedy foresaw that this potential risk would be

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jury in closing that the youth of the defendant was aggravating, not mitigating).

78. *Simmons*, 543 U.S. at 572–73. There are explicit rules that direct capital jurors as to how to weigh the evidence introduced by each side at sentencing; state statutes specifically enumerate what circumstances are to be considered aggravating and clearly instruct the sentencer to weigh the mitigating evidence introduced by a defendant against the aggravating circumstances proved by the state. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703.01 (Supp. 2007) (describing the process by which the trier of fact weighs mitigating and aggravating circumstances during sentencing and referencing §§ 13-702 & 13-703(f), which list the relevant aggravating and mitigating circumstances); DEL. CODE ANN. tit. 11, § 4209 (2001 & Supp. 2006) (requiring juries to first determine whether aggravating circumstances exist—"including, but not limited to" those listed in the statute—then whether aggravating circumstances outweigh mitigating factors); FLA. STAT. ANN. § 921.141 (West 2006) (mandating that juries in capital cases weigh both mitigating and aggravating circumstances, and detailing what constitutes each); IDAHO CODE ANN. § 19-2515 (2004 & Supp. 2007) (requiring the trier of fact to weigh mitigating factors against aggravating ones, and enumerating specific aggravating circumstances); N.C. GEN. STAT. § 15A-2000 (2005) (requiring the trier of fact to weigh mitigating factors against aggravating factors, and enumerating specific mitigating as well as aggravating circumstances). Of the thirteen states that currently have juveniles on death row (out of nineteen that allow minors to be executed), ten have statutes that "specifically identify youth as a mitigating factor to be considered by the sentencer." Dobbs, *supra* note 76, at 14. Even if youth is not enumerated as a statutory mitigator, it is a "constitutional requirement" that the defendant's age be "one of the individualized mitigating factors that sentencers . . . be permitted to consider." Stanford v. Kentucky, 492 U.S. 361, 375 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

Similarly, case law has made it explicit that the Eighth Amendment requires the sentencer to consider in mitigation the defendant's youth, as well as family history and mental and emotional development, during the sentencing hearing. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (holding that a defendant's youth or immaturity is paradigmatic evidence of constitutionally relevant mitigating evidence); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (finding that a state statute that precludes the consideration of relevant mitigating factors required by the Eighth and Fourteenth Amendments does not meet constitutional requirements); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (finding that a sentencer in a capital case must be permitted to give full effect to all constitutionally relevant mitigating evidence); *see also* Farina v. State, 801 So. 2d 44, 56 (Fla. 2001) (stating that "[in Florida], when a defendant is sixteen years of age, his or her youth is such a substantial mitigating factor that it cannot be outweighed by any set of aggravating circumstances as a matter of law" (citing Brennan v. State, 754 So. 2d 1 (Fla. 1999))); State v. Nicholson, 558 S.E.2d 109, 145 (N.C. 2002) (stating that, in considering the statutory mitigating factor of age, a jury may also take into account the defendant's experience and emotional maturity); State v. Raglin, 699 N.E.2d 482, 497 (Ohio 1998) (finding that "appellant's troubled childhood, history, and family background are entitled to some meaningful weight in mitigation"); State v. Stevens, 78 S.W.3d 817, 842 (Tenn. 2002)

compounded by the fact that, almost by definition, the evidence introduced during capital cases is difficult to evaluate objectively, as the details put forward by the state are particularly violent and disturbing. Subsequently, the sheer "brutality [and] cold-blooded nature" of the crime has the capacity to overcome the mitigating arguments presented on behalf of the offender, and as a result, "a defendant's youth may even be counted against him."[79] Kennedy's discomfort with and refusal to accept this possibility strongly contributed to the bright-line holding in *Simmons*.[80] Because juries cannot be trusted to make such determinations without error, and because the ending of a young life means forever extinguishing an adolescent's potential to mature and develop, a line must be drawn—however arbitrarily.[81]

In sum, *Roper v. Simmons* provides room to argue that the inherent differences between adolescents and adults call for fundamentally different treatment within the criminal justice system, and that bright lines are needed to counter the implicit biases that exist against juvenile offenders. Part III imports the dual themes of *Simmons* to the area of juvenile interrogation, demonstrating that similar biases are found among police officers, and that young people are as vulnerable in the interrogation room as they are in the courtroom.

III. Importing Roper v. Simmons *to Juvenile Interrogation*

On September 10, 1993, having learned of his involvement in the murder of Shirley Crook, police arrested Christopher Simmons at his school.[82] They brought

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(stating that age is among the "factors relevant to the comparison of the characteristics of defendants").

79. *Simmons*, 543 U.S. at 573.

80. *See id.* at 573–74 (discussing the dangers of individualized consideration and concluding that, despite the imperfection of a categorical rule, "a line must be drawn"). In response, the dissenters—Scalia in extreme terms and O'Connor in more nuanced ones—invoked the "slippery slope" that would arise when Kennedy's reasoning is taken but a few steps further. Scalia suggested that if juries cannot be relied upon to accurately evaluate an adolescent offender's maturity or appropriately determine the weight to give a defendant's youth, Kennedy's argument could be extended to support the removal of cases with other mitigating factors, such as childhood abuse or poverty, from juries. *Id.* at 621 (Scalia, J., dissenting). O'Connor, too, found fault with Kennedy's conclusion that juries cannot accurately evaluate a youthful offender's maturity, asserting that the Court has provided no "real evidence" to support the claim; she questioned why it would be any more difficult for juries to assess mitigating characteristics related to youth than "any other qualitative capital sentencing factor." *Id.* at 603–04 (O'Connor, J., dissenting).

81. *See id.* at 573–74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.").

82. *Id.* at 557.

him to the police station in Fenton, Missouri, and read him his *Miranda* rights.[83] Simmons quickly waived his rights and agreed to answer questions.[84] After less than two hours of custodial interrogation by police, Simmons—in tears—not only confessed to the murder but agreed to perform a videotaped reenactment at the crime scene.[85]

One might question why someone would so readily confess to a capital offense and, having done so, why he would agree to act it out for the police—to give a three-dimensional, live version of an otherwise staid oral or written confession.[86] One can only imagine the impact that the video had on the jury during sentencing, particularly in light of the state's argument that the defendant's youth should be viewed as an aggravating—and not a mitigating—factor. It raises several interrelated questions: Does a suspect's adolescence contribute to his vulnerability and malleability during police interrogation? Would an adult interact differently with law enforcement? Should there be additional protections for juveniles under such circumstances?[87]

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83. *Id.*; *see also* Miranda v. Arizona, 384 U.S. 436, 498 (1966) (holding that prior to custodial interrogation, suspects must be advised they have a right to remain silent, anything they say can be held against them in a court of law, they have a right to an attorney, and if they cannot afford an attorney, one will be appointed).

84. Roper v. Simmons, 543 U.S. 551, 557 (2005); *see also* Respondent's Statement, Brief, and Argument, *supra* note 68, at 12 (describing the interrogation of Simmons as having begun "shortly" after his arrival at the police station and stating that Simmons waived his rights before any questions were asked).

85. *Simmons*, 543 U.S. at 557; *see also* Respondent's Statement, Brief, and Argument, *supra* note 68, at 12 (stating that the interrogation of Simmons lasted for approximately one hour and forty-five minutes, after which Simmons confessed to the murder and agreed to perform a video re-enactment); Brief for Petitioner, *supra* note 68, at 5 (noting Simmons's waiver of his *Miranda* rights and agreement to provide a video confession); Brief for Respondent, *supra* note 68, at 1–2 (stating that after nearly two hours of interrogation, during which the "police accused [Simmons] of lying, falsely told him that [the co-defendant] had confessed, and explained that he might face the death penalty and that it would be in his interest to cooperate," Simmons began crying and then confessed).

86. *See* Jennifer L. Mnoonkin & Nancy West, *Theaters of Proof: Visual Evidence and the Law in* Call Northside 777, 13 YALE J. L. & HUMAN. 329, 378–80 (2001) (asserting that reenactments of crimes by suspects are the most powerful form of confession, as they are confessions by demonstration, not merely by words).

87. While these are critical questions in the context of a discussion of *Simmons* and how it might inform juvenile interrogation practices, their inclusion—and the summary of the circumstances surrounding Christopher Simmons's confession—should not be read to suggest or imply that Simmons's confession was necessarily improper or that confessions, in general, are suspect. *See, e.g.*, Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1284 (2007) (arguing that confessions are critical to the business of solving crime, and that police deception is a "necessary component" of successful interrogations in a narrow subset of cases).

Using *Simmons* as a point of departure, this Part argues that such questions may be answered in the affirmative, and that juvenile suspects should be treated differently than adults in the context of interrogation. It describes the concept and phenomenon of interviewer bias and demonstrates how it results in inaccurate reporting; it then explores the ways in which adolescents are particularly vulnerable to the effects of interviewer bias when questioned by police; and finally it argues that the law should apply appropriate protections to all young people who are questioned by law enforcement, whether they are victims, witnesses, or suspects.

A. Interviewer Bias + The Reid Technique = Inaccurate Reporting

Given that the *Simmons* opinion was driven, at least in part, by a commitment to protect juveniles from the biases inherent in U.S. culture and law—as expressed through the sentencing decisions of capital jurors—it follows logically that juveniles who are subjected to police interrogation should also be protected from the deep-seated biases of law enforcement.[88] In order to demonstrate *Simmons*'s applicability to the questioning of adolescent suspects, it is necessary first to explain how interviewer bias combines with the Reid

88. It may also be argued that the decision was either wholly, or in part, motivated by the concept that "death is different" or, in other words, that a categorical rule is justified only because of the extreme nature of the penalty imposed. *See Simmons*, 543 U.S. at 573–74 ("When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State *cannot extinguish his life* and his potential to attain a mature understanding of his own humanity." (emphasis added)); *see also* Victor L. Streib, *Standing Between the Child and the Executioner: The Special Role of Defense Counsel in Juvenile Death Penalty Cases*, 31 AM. J. CRIM. L. 67, 82–85, 94–95 (2003) (characterizing "death is different" jurisprudence as that which acknowledges—and emphasizes—the uniqueness of the punishment of death, and addressing how the *Simmons* decision might fit into this theme). One response is to suggest that the parallels between the biases of capital jurors against juvenile offenders and those of police officers against adolescent suspects are more closely drawn when the notion of assigning lesser culpability to minors is animated by a commitment to ensuring that the criminal justice system is both fair and reliable. In other words, it may be argued that Justice Kennedy drew bright lines in *Simmons* not merely because "death is different," but because of an overarching commitment to advance societal norms of fundamental fairness and human dignity. This view is supported, in part, by the majority's reliance on international laws and covenants:

> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights [including the rights of individual freedom and human dignity] by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Simmons, 543 U.S. at 578.

Technique, the widely utilized interrogation strategy of police investigators, to produce statements from suspects that are false or inaccurate.

The term *interviewer bias* refers to those interviewers who "hold a priori beliefs about the occurrence of certain events and, as a result, mold the interview to elicit statements from the interviewee that are consistent with these prior beliefs."[89] It is marked by attempts to gather information that confirms one's initial suspicions and to avoid all questioning that may contradict one's already-formed suppositions.[90] Developmental psychologists have, in the past two decades, produced a number of studies that have found that the phenomenon of interviewer bias is the hallmark of many forms of police interrogation, that it can drive suggestive interviewing techniques, and that it results in a significant number of reports that are ultimately proven to be unreliable.[91]

Furthermore, psychological research confirms that the process of questioning by law enforcement is typically a guilt-presumptive one.[92] According to the authors of the seminal text on the Reid Technique, in order for the interrogator to be successful, "he must possess a great deal of inner confidence in his ability to detect truth or deception, elicit confessions from the

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89. Maggie Bruck, Stephen J. Ceci & Laura Melnyk, *External and Internal Sources of Variation in the Creation of False Reports in Children*, 9 LEARNING & INDIVIDUAL DIFFERENCES 289, 293 (1997).

90. *Id.* Researchers have identified the following biased interviewing techniques: (1) not asking questions that allow for alternative explanations; (2) not asking questions about events that are inconsistent with the investigator's hypothesis; (3) not challenging the authenticity of reports that are consistent with the hypothesis; and (4) ignoring contradictory or unexplainable evidence. Owen-Kostelnik, Reppucci & Meyer, *supra* note 27, at 294. A fitting illustration of the phenomenon of interviewer bias was provided at a 2004 conference on police interviewing at which Joseph Buckley, the president of John E. Reid and Associates—the organization that has trained thousands of law-enforcement professionals—presented the Reid Technique. Following the presentation, a member of the audience asked Buckley if the recommended persuasive interviewing methods did not at times cause innocent people to confess. His reply was telling: "No, because we don't interrogate innocent people." Kassin & Gudjonsson, *supra* note 26, at 36.

91. Owen-Kostelnik, Reppucci & Meyer, *supra* note 27, at 294–97; *see also* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 199–203 (2003) (concluding, as a result of a two-phase empirical study, that the presumption of guilt that underlies police interrogation sets in motion a process of behavioral confirmation in which erroneous prejudgments of guilt influence the behavior of both the investigator and the suspect).

92. *See* Kassin & Gudjonsson, *supra* note 26, at 41 ("By definition, interrogation is a guilt-presumptive process, a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by the ability to extract an admission from that target.").

guilty, and stand behind decisions of truthfulness."[93] The guilt-presumptive approach is characterized principally by the following: (1) the interviewer's success is measured by her ability to extract an admission; (2) once she has formed a belief about the suspect, she listens selectively and only accepts information that is consistent with that belief; (3) she is resistant to change, even when confronted by contradictory evidence; and (4) she unconsciously forms "behavioral support"—also referred to as self-fulfilling prophesy or behavioral confirmation bias—for her pre-established belief.[94]

Errors of judgment are often made at the earliest stages of an investigation because police officers determine whether to advance from the initial interview to more aggressive forms of interrogation based on their evaluation of the suspect's candor and truthfulness as well as on their identification of behaviors that they deem guilty or deceptive.[95] Unfortunately, as much research has shown, people in general are not good lie detectors, and police officers—particularly those trained in the Reid Technique—often see deception where it does not exist.[96] In fact, empirical studies have shown that police do not

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93. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 78 (4th ed. 2004). The first edition of the text, by Fred E. Inbau and John E. Reid, was published in 1962 and referenced in *Miranda v. Arizona*. *See* Miranda v. Arizona, 384 U.S. 436, 449 n.9 (1966) (noting that the Inbau & Reid text, along with other police manuals, "professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation").

94. Kassin & Gudjonsson, *supra* note 26, at 41. The phenomenon of behavioral support was first demonstrated by a 1968 field study on the effects of teachers' expectations of student performance; similar results have also been seen in other organizational settings, such as the military and in business. *Id.*; *see also* Kassin et al., *supra* note 91, at 198–201 (discussing the results of a study on behavioral confirmation and the dangers of presuming guilt during police interrogation).

95. *See* INBAU, REID, BUCKLEY & JAYNE, *supra* note 93, at 5–10 (describing the characteristics and purpose of the initial interview). Proponents of the Reid Technique have identified the following behaviors as signs of deception in suspects: (1) responding to questions with short, monosyllabic answers; (2) refusing to discuss possible suspects or people who could be eliminated from suspicion; (3) downplaying the significance of being a suspect and displaying a nonchalant affect; (4) responding to questions in a circumspect, rather than a direct, manner; (5) pausing or hesitating before answering; (6) laughing, coughing, or clearing the throat immediately following a denial of guilt; (7) slouching or appearing distant and disinterested; and (8) failing to make eye contact. *Id.* at 121–53.

96. Owen-Kostelnik, Reppucci & Meyer, *supra* note 27, at 293; *see also* Kassin, *supra* note 25, at 219–22 (referring to research showing that investigators are prone to make false-positive errors during pre-interrogation interviews); Kassin & Gudjonsson, *supra* note 26, at 42–43 (describing a 2003 study in which interrogators who presumed guilt did not reevaluate this belief when paired with innocent people who gave plausible denials; instead, they worked harder to elicit confessions than they did either with guilty suspects or when they believed the suspect to be innocent).

perform better than mere chance when attempting to identify deception.[97] Research has also shown that confidence does not statistically correlate with accuracy, meaning that police investigators who have great confidence in their ability to detect lies are no more accurate than those who express minimal or no confidence.[98] As a result of such findings, one may conclude that the pre-interview or diagnostic phase of the investigation utilizes techniques and strategies that are ultimately ineffectual, for deception cannot reliably equate with guilt when there is no means for accurately evaluating deceptive behaviors. In addition, as the next subpart discusses, adolescents in particular often exhibit, quite naturally and consistent with theories of psychological and brain development, many of the traits and behaviors claimed to be signs or signals of deception.[99] As a result, adult and especially adolescent suspects may be found to be deceptive and worthy of interrogation when they are not.[100]

Further contributing to our understanding of the dynamic between interviewer and interviewee, social scientists have demonstrated that police interrogation is a process of social influence.[101] The term refers both to the physical setting for the interrogation—one in which the suspect is isolated, removed from familiar sights and people, and monitored by other detectives through a one-way mirror—as well as to the procedures followed during the questioning itself.[102] The nine enumerated steps of the Reid Technique—which

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97. Owen-Kostelnik, Reppucci & Meyer, *supra* note 27, at 293; *see also* Saul M. Kassin, *Effective Screening for Truth Telling: Is it Possible? Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 810–11 (2002) (referring to a 1991 study that found that police detectives had a 55.8% accuracy rate in lie detection tasks, only slightly higher than the 52.8% rate of college students). Why is it so difficult for people to judge whether someone else is lying? Studies have shown that people mistakenly focus on the faces of others—on whether they are making eye contact and on their specific facial expressions—rather than on the more telling cues expressed by the voice, such as changes in pitch and rate of speech, pauses, and hesitations. *Id.* at 810.

98. Kassin, *supra* note 97, at 810 (citing Bella M. DePaulo et al., *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346 (1997)).

99. *See* Owen-Kostelnik, Reppucci & Meyer, *supra* note 27, at 293 ("Given that Reid's verbal and behavioral indicators of deception are naturally displayed by adolescents, the rate of false-positive identifications of guilt likely increases when suspects are young."); *see also infra* Part III.B (discussing the particular vulnerability of children in the interrogation context).

100. *See* Kassin & Gudjonsson, *supra* note 26, at 42 ("The presumption of guilt, which underlies interrogation, thus [sets] into motion a process of behavioral confirmation, shaping the interrogator's behavior, the suspect's behavior, and ultimately the judgments of neutral observers.").

101. *See id.* at 42–44 (discussing specific social influence techniques that are designed to elicit confessions).

102. *Id.*

psychologists have descriptively reduced to the three general processes of "isolation, confrontation, and minimization"—form the basis of the social influence techniques utilized by law enforcement to elicit confessions from suspects.[103] And, as demonstrated in *Simmons*, there is no age cohort more vulnerable to the destructive influences of others than adolescents.[104]

Thus, close analysis of the confluence of interviewer bias with the Reid Technique, combined with other recent research by social scientists, has demonstrated that police interrogation often is driven by the inherent biases and presumptions of the interviewer. While investigators are trained to trust and have confidence in their ability to detect truth or deception, studies have shown that there is, in fact, no accurate means, technique, or strategy to identify deception.[105] Biased and suggestive questioning can elicit unreliable information from witnesses, and such information can result in both false accusations and false confessions.[106]

The next subpart takes the analysis a step further by arguing that children and adolescents are particularly susceptible to guilt-presumptive questioning techniques, and illustrates the ways in which juveniles—by their very nature—

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103. Kassin, *supra* note 25, at 221. The nine steps generally track the following sequence: (Step 1) confront the suspect with your belief that she committed the offense; (Step 2) suggest a reason for the crime's commission that provides a "moral excuse" for having committed the offense, placing blame on someone else, such as an accomplice or victim; (Step 3) interrupt the suspect's denials of guilt and reiterate the moral excuse theme; (Step 4) counter the suspect's reasons and excuses for why she could not or would not have committed the crime; (Step 5) keep the suspect's full attention by speaking with compassion and sincerity, sitting close to her, and maintaining eye contact; (Step 6) take note of any changes in the suspect's nonverbal behavior, such as crying, slumping forward in the chair, or looking away from the investigator, as such behaviors suggest that she is weighing the benefits of telling the truth; (Step 7) present the "alternative question" or a question that seemingly provides the suspect with a choice but actually results in an incriminating admission regardless of which option the suspect chooses, such as "Did you plan this out or was it spontaneous?"; (Step 8) express satisfaction with the suspect's "choice" and encourage her to provide the factual details of the offense; and (Step 9) convert her statement into a complete oral or written confession. INBAU, REID, BUCKLEY, & JAYNE, *supra* note 93, at 212–14.

104. *See supra* notes 84–85 and accompanying text (describing the interrogation of Christopher Simmons). There is evidence that the false confessions of young offenders do not result from deception per se, but from the inherent vulnerabilities of adolescents to suggestive questioning techniques. *See* Slobogin, *supra* note 87, at 1291 & nn.88–89 ("Research indicates that leading questions based on the *actual* evidence and *sincere* assertions about its strength are as likely as fraudulent tactics to cause a false confession from [youth].") Because of this phenomenon, some call for a complete ban on interrogation of particularly vulnerable groups, while others assert that the finding does not justify prohibiting deception in *all* interrogations regardless of the suspect's age, mental capacity, etc. *Id.* at 1291.

105. Kassin et al., *supra* note 91, at 188–89.

106. *Id.* at 189–90.

exhibit many of the behaviors that police investigators mistakenly associate with guilt or deception.

B. The Vulnerability of Juvenile Suspects

The reasons Justice Kennedy enumerated in *Roper v. Simmons* for why juveniles could not be classified among the worst offenders in the context of capital punishment also serve to explain, at least in part, why children and adolescents are particularly vulnerable in the context of interrogation. In *Simmons*, Kennedy relied on neuroscience and sociological studies to conclude the following: that juveniles' lack of maturity can result in impulsive actions and decisions; that because of their susceptibility to outside pressures—whether from authority figures or peers—they have less control over what goes on around them;[107] and that because juveniles' characters are transitory "works-in-progress," they should be evaluated and judged less harshly than adults.[108] Kennedy also referred specifically to amici curiae briefs citing studies by neurologists finding that adolescent brains are not fully developed in regions related to reasoning, risk taking, and impulse control as well as research by social scientists demonstrating that because of lags in psychosocial development, juveniles are less competent than adults in the areas of perception, decisionmaking, and judgment, making them more "suggestible" to negative influences.[109]

Of course, studies on the suggestibility of children are nothing new; since the end of the nineteenth century, developmental psychologists have researched

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107. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) ("Juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . . Juveniles have less control, or less experience with control, over their own environment.").

108. *Id.* at 569–70. For a discussion of Kennedy's argument in *Simmons* that, because juveniles under eighteen are fundamentally different from adults, the classic rationale for the death penalty does not apply to them, see *supra* notes 46–57 and accompanying text. *See also* 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, 434–44 (2006) (discussing adolescent psychosocial and brain development as they relate to the adolescent's limited capacity to waive rights).

109. *Simmons*, 543 U.S. at 569; Brief for the Am. Med. Ass'n et al. as Amici Curiae Supporting Respondent at 9–20, *Simmons*, 543 U.S. 551 (No. 03-633); Brief for Am. Psychological Ass'n & Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 9–12, *Simmons*, 543 U.S. 551 (No. 03-633); *see also* Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 SCI. 596, 596 (2004) (discussing brain studies that have shown that the brain is still growing and maturing during adolescence, "beginning its final push around 16 or 17," and citing neuroscientists who have asserted that brain maturation does not peak until the early twenties).

and written on the topic.[110] It was not until the 1980s, however, following several highly publicized cases involving allegations of sexual abuse against childcare providers, that both the volume and methodology of the research changed.[111] With greater numbers of preschool-age children testifying in court, the numbers of studies increased and the focus shifted to exploring the causes for variation and differences in children's suggestibility.[112] As a result, researchers have taken greater care to consider and determine the relevance of such factors as the age, intelligence, and memory of the child as well as the style of questioning, tone, and demeanor of the interviewer.[113]

Relying on the vast body of research that has consequently developed concerning the different variables impacting children's suggestibility, researchers have found that children and adolescents are particularly vulnerable to the coercive questioning techniques described in the previous section.[114]

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110. *See, e.g.*, Maurice H. Small, *The Suggestibility of Children*, 13 PEDAGOGICAL SEMINARY 176, 177 (1896) ("[I]t seems both legitimate and sufficient, to regard 'suggestibility,' in a provisional way, as a natural condition of mind which makes it possible for psychic activity to be induced in a human being by means of a hint, sign or symbol; an indirect question, proposition, association, or kindred stimulus."). In this context, children's "suggestibility" is defined as "the tendency to be vulnerable to outside influences and pressures. It is understood as the degree to which the encoding, storage, retrieval, and reporting of events (i.e., abilities to observe, remember, communicate, and distinguish truth from falsehood) can be influenced by developmental factors." Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 291.

111. Bruck, Ceci & Melnyk, *supra* note 89, at 289; *see also* Stephen J. Ceci & Richard D. Freidman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 84–106 (2000) (analyzing the legal implications of their conclusions that interview techniques influence the degree to which children can be inadvertently manipulated, that child abuse investigations often themselves exacerbate such suggestibility, and that a false finding of guilt is worse than an incorrect finding of innocence); Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 927–32 (1993) (describing three high-profile cases of child sexual abuse and advocating for the videotaping of child witness interviews and the passage of fundamental hearsay reform and other remedial legislation to ensure the integrity of the fact-finding process and to protect children from abusive interviewing techniques); Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility,* 65 LAW & CONTEMP. PROBS. 149, 151 (2002) (discussing the McMartin Preschool Case, in which a number of children claimed to have been abused by preschool workers, and *State v. Michaels*, a case scrutinizing the methods of interviewing children). Walker concluded that, "[a]s [these cases] illustrate, truth-finding involving assessments of children's retrospective reports may be seriously compromised, if not completely obscured, when interviewing techniques are faulty." *Id. But see* Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1009–11 (1999) (discussing the effect of several well-publicized cases of false accusations of ritualistic child abuse on the development of research in the area of child suggestibility and critiquing aspects of such research).

112. Bruck, Ceci & Melnyk, *supra* note 89, at 289.

113. *Id.*

114. *See* Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*,

They have also determined—in general terms—that children are more likely to provide unreliable information when questioned suggestively.[115] Extending logically from these findings, social scientists have concluded that youth is a "substantial risk factor" for false confessions.[116]

In recent years, there have been a number of highly publicized cases involving adolescents who have been induced to give false confessions following aggressive interrogation by police. From New York's Central Park jogger case, in which five juveniles—all aged fourteen to sixteen—falsely confessed to rape and assault, to the Seattle case in which fourteen-year-old Michael Crowe falsely confessed to the brutal murder of his younger sister, incidents in which teenagers have wrongly confessed are not uncommon.[117]

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in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 107, 108–11 (G. Daniel Lassiter ed., 2004) (referencing four empirical studies on the interrogation of juveniles); *see also supra* Part III.A (discussing the Reid Technique).

115. Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 291.

116. *See* Kassin & Gudjonsson, *supra* note 26, at 52 (discussing cases in which juveniles have falsely confessed and stating that juvenile suspects are highly vulnerable to false confessions, particularly when interrogated by authority figures); Redlich et al., *supra* note 114, at 109 ("A commonly noted vulnerability to false confession is youthfulness."); *see also* WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* 190–95, 201–14 (2001) (calling for prohibitions on interrogations of vulnerable subjects, including juveniles and people with disabilities, based on findings that they are more likely to falsely confess); Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, July 23, 2007, at A1(reporting that a new study of the 200 U.S. prisoners cleared by DNA evidence found that "[t]here were false confessions in 16 percent of the cases, with two-thirds of those involving defendants who were juveniles, mentally retarded or both").

117. *See, e.g.*, People v. Wise, 752 N.Y.S.2d 837, 845–47 (2002) (reassessing the juveniles' confessions of raping a Central Park jogger in light of new exculpatory evidence). In the Central Park jogger case, five teenagers ages fourteen to sixteen were convicted in 1990 of beating and raping a woman in Central Park, but their convictions were overturned when Matias Reyes, an adult, confessed to the crime in 2002. *Id.* at 840, 842. The original convictions were supported by the confessions of all the juveniles, although DNA testing done at the time of the original trial did not match any of them, none of the teenagers had given an accurate description of the crime scene, and each one initially had implicated one of the others. *Id.* at 846–47. Over a decade later, DNA evidence confirmed that Reyes, not the five juveniles, had raped the victim. *Id.* at 842; *see also* Lisa M. Krzewinski, *But I Didn't Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 357–59 (2002) (describing one case in which two young boys falsely confessed to killing an eleven-year-old girl, and another in which a ten-year-old boy falsely confessed to murdering his elderly neighbor after being promised that he would be released in time to attend his brother's birthday party); 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, 671–77 (2002) (describing the case of eleven-year-old Lacresha Murray whose conviction for negligent homicide of a two-year-old girl was overturned after finding that her confession was coerced, that she did not understand her *Miranda* rights or the content of her typed confession, and that she could not have committed the crime). A six-part article series, reported in the *San Diego Union-Tribune*,

The primary focus of the media, however, has been on the questionable techniques utilized by the police in each case, rather than the more global question of *why* such tactics are particularly effective when interrogating juveniles.[118]

The differences in the psychological and brain development of adolescents versus adults go a long way to explaining how, in the context of police interrogation, these common characteristics of adolescence can translate into attitudes, behaviors, and beliefs that compromise a juvenile's ability to resist suggestive questioning techniques.[119] For instance, because children and adolescents have a different sense of time than adults—they live in the present without much consideration for the long-term consequences of their actions—studies have shown that it is not uncommon for juvenile suspects to waive their

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detailed the 1998 murder of twelve-year-old Stephanie Crowe in her bedroom in Escondido, California. Her fourteen-year-old brother, Michael, was interrogated by police after he told them that he had walked by Stephanie's room that morning but did not see her body. Mark Sauer & John Wilkins, *Haunting Questions: The Stephanie Crowe Murder Case*, SIGNONSANDIEGO.COM, May 1999, at pt. 1 http://www.signonsandiego.com/news/reports/crowe/crowe1.html (last visited Jan. 12, 2008) (on file with the Washington and Lee Law Review). Although Michael initially denied any involvement in the crime, after many hours of interrogation in which the police falsely claimed there was incriminating evidence against him and promised that Michael would receive "help" instead of jail, he falsely confessed. *Id.* at pt. 2. Two of Michael's teenage friends were also interrogated and falsely confessed to participating in the crime. *Id.* at pt. 4. During pretrial motion hearings, Michael's confession was suppressed after the judge found that the interrogation techniques had been coercive. *Id.* at pt. 6. Months later, Stephanie's blood was found on the sweatshirt of Richard Tuite, a mentally ill, homeless man who had been seen in the area on the day of the crime. *Id.* These developments led to the eventual dismissal of murder charges against Michael and his friends. *Id.*

118. *See, e.g.*, Bill Moushey, *False Confessions: Coercion Often Leads to False Confessions*, PITTSBURGH POST-GAZETTE, Aug. 31, 2006, http://www.post-gazette.com/pg/06243/717790-84.stm (last visited Mar. 3, 2008) (citing that 42% of wrongful convictions of juveniles involved false confessions and that police interrogation techniques can be coercive but not explaining how or why) (on file with the Washington and Lee Law Review); Henry Weinstein, *Panel Seeks to Curb False Confessions*, L.A. TIMES, July 26, 2006, at 3 (characterizing juveniles as being among those most vulnerable to making false confessions but not discussing why); John Wilkens, *Untrue Confessions*, SAN DIEGO UNION-TRIB., Apr. 15, 2004, at E1 (stating only in passing that police use coercive tactics during interrogations and that juveniles are particularly vulnerable to them).

119. It is important, however, to acknowledge that there is a distinction between the role that brain development plays when determining an adolescent's culpability and the weight to be given to the *suggestibility* or *impulsivity* of that adolescent during interrogation. There is not, at this time, scientific evidence to support the claim that the ways in which adolescent brain development make the death penalty inappropriate also produce systemic unreliability in terms of adolescents' responses to interrogation. In other words, evidence that an adolescent's brain may be *less culpable* than an adult's is not necessarily evidence that an adolescent brain is *more suggestible* than an adult's. It is hoped that such inquiries will be pursued in the near future by those in the fields of neuroscience and developmental psychology.

right to an attorney and to falsely confess in order to be released from custody and allowed to go home.[120] Similarly, because juveniles are particularly susceptible to pressure from authority figures, research has found that they are more compliant and open to suggestion, repetition, and other social influence tactics than adults, meaning that a teenage suspect is more likely than an adult to agree to a false or inaccurate version of an event when interrogated by a police officer.[121]

A related problem with the traditional investigative techniques used during police questioning is that juveniles, as a result of their youth and because of their very nature, often exhibit behaviors that investigators are trained to associate with deception.[122] For instance, studies have found that although adolescents have difficulty understanding legal terminology, they rarely ask questions or request clarification and instead pause, hesitate, or equivocate before answering.[123] It has also been shown that teenagers, as a result of lack of confidence and general anxiety during questioning, avoid making eye contact, qualify their statements, respond in monosyllables, and provide nonlinear narratives that are difficult to follow.[124] As discussed previously, all such characteristics should be considered as indicators of deception according to the Reid Technique, which offers very little in the way of precautions or guidelines for investigators who must evaluate the behaviors of adolescents.[125] Therefore,

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120. *See* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28–29 (2000) (discussing a thirteen-year-old who falsely confessed because he was "desperate to go home" and "believed he could take back his false confession later"); Kassin & Gudjonsson, *supra* note 26, at 52 (describing a 1981 study which found that over 90% of juveniles who are questioned waive their *Miranda* rights, motivated primarily by the potential for release from detention).

121. *Id.* (citing studies from 1995, 1999, and 2003 that found that juveniles are particularly susceptible when interrogated by police and others in positions of authority).

122. Related to this phenomenon is the law's expectation that children and adolescents who have committed serious crimes will demonstrate appropriate levels of remorse. *See* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1473 (2002) (drawing on psychology, sociology, and literature to challenge the law's view of remorse as an emotional state that "decent" people—regardless of age—demonstrate after committing a heinous offense, and explaining that for developmental reasons, adolescents "may show less grief than the system demands").

123. *See, e.g.*, Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRAC. 112, 112 (2001) (discussing that 17%–53% of juveniles charged with criminal offenses have learning disabilities and that this often results in difficulties processing information).

124. *Id.*

125. *See supra* note 95 and accompanying text (listing behaviors that are considered signs and signals of deception according to proponents of Reid). The 2004 edition of the text on the Reid Technique has a short chapter that lists factors that may lead to the misinterpretation of behaviors during the pre-interrogation interview, including two paragraphs that mention that

it stands to reason that because police officers do not consciously recognize, and do not control for, the fact that adolescents—by simple virtue of their adolescence—often talk and behave in ways that are otherwise consistent with deception, juveniles are more likely to be deceptive in the pre-interrogation interview than adults.[126]

There are several procedural aspects of traditional police interrogation that also contribute to the particular vulnerability of juveniles. Much has been written by both legal scholars and social scientists regarding the difficulties that young people have understanding the language and meaning of *Miranda* rights, rendering the warnings almost completely ineffectual in serving their stated purpose—at least for juveniles.[127] In addition, empirical studies have shown

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caution must be used when evaluating behaviors of children *less than* nine-years-old. INBAU, REID, BUCKLEY & JAYNE, *supra* note 93, at 155–71. The only mention within the chapter of juvenile subjects *older* than nine is a single paragraph that includes the pejorative statement: "Ordinarily it seems to matter rather little to these subjects whether what they say is truthful or untruthful; they tend to envision themselves as socially unaccountable for their conduct. As a consequence, their behavior symptoms tend to be unreliable." *Id.* at 168.

126. Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 293. In recent years there have been a number of well-publicized cases in which police investigators have wrongly found juveniles to be deceptive during the initial stages of an investigation, leading to coercive and/or suggestive interrogations that result in false confessions. *See, e.g.*, 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, *supra* note 114, at 127, 130–51 (discussing several recent cases in which the police, driven by interviewer bias, conducted investigations that led them wrongly to suspect that the children they interrogated were involved in the crimes); *see also supra* note 117 (discussing the specifics of several recent cases in which children wrongly confessed as a result of coercive interrogation techniques).

127. A 1981 study of juveniles' comprehension of *Miranda* rights concluded that juvenile detainees aged fourteen and younger were significantly less likely to comprehend their interrogation rights than older teens and adults. These results were complemented by a study that found that intelligence strongly correlates with the understanding of one's legal rights, a significant finding given that many juvenile offenders have been found to be of low intellect. *See, e.g.*, THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL & PSYCHOLOGICAL COMPETENCE 39–93, 109–60 (1981) (describing previous research assessing juveniles' ability to understand and waive *Miranda* rights and reporting the results of his own study on this subject); Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants,* 27 LAW & HUM. BEHAV. 333, 333–63 (2003) (finding that adolescents performed more poorly than adults on a test used to measure competence to stand trial); Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1134–66 (1980) (describing the methodology and results of empirical studies conducted to assess the capacity of juveniles and adults to knowingly waive their *Miranda* rights); *see also* Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 233 (2006) (finding that juveniles aged fifteen and younger showed the "clearest and greatest disability" in exercising their *Miranda* rights and their adjudicative competence and that while juveniles aged sixteen and older appeared to function comparably with adults, "many still exhibited significant deficits

that adolescents are particularly vulnerable to the classic interrogative techniques of confronting the suspect with false evidence and utilizing other forms of "trickery."[128] There has also been recent research demonstrating that the presence of an "interested adult"—such as a parent, guardian, or friend—which is required by some states to protect juveniles during interrogation, has no impact on the rate at which juveniles waive their rights, as many parents assume a passive role during questioning or, instead, strongly urge their children to "do the right thing" and cooperate.[129]

The majority holding in *Roper v. Simmons*, therefore, is instructive in delineating the central reasons why juveniles are particularly vulnerable to standard police interrogative techniques. Because adolescents are impulsive, highly suggestible, and susceptible to the influences of authority figures, the effects of interviewer bias, guilt-presumption, and the Reid Technique can be especially pernicious. Further compounding the inherently problematic nature of interrogation, police often mistake the traits and behaviors naturally

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which could increase their vulnerability during interrogation"); King, *supra* note 108, at 458–62 (discussing the difficulties that adolescents have understanding their *Miranda* rights and their resultant inability to make a knowing and intelligent decision to waive them); Redlich et al., *supra* note 114, at 112–14 (discussing contemporary empirical studies, including those conducted by Grisso, that have investigated juveniles' comprehension of *Miranda* rights); *infra* notes 172–76 and accompanying text (discussing the distinctions drawn between the comprehension of "younger" versus "older" adolescents and the significance of such for the arguments advanced in this Article).

128. *See* Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (proposing a per se bar on all police deception in interrogations of juveniles). *But see* Feld, *supra* note 127, at 312–13 (stating that while deceit, trickery, and false evidence play a "significant role" in eliciting some false confessions and that *Miranda* does not "significantly restrain" the interrogation practices police use following waivers, more empirical research is needed in this area).

129. *See* Kassin & Gudjonsson, *supra* note 26, at 52 (citing a 2001 study finding that the presence of an "interested adult" does not lower the waiver rate for juvenile suspects); *see also* Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions,* Miranda*, and the Right to Counsel*, *in* YOUTH ON TRIAL, *supra* note 1, at 105, 116–18 [hereinafter Feld, *Juveniles' Waiver*] (discussing that the presence of a parent during interrogation may increase, rather than decrease, the coercive pressure on a juvenile); Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 36 (2006) [hereinafter Feld, *Juveniles' Competence*] (stating that approximately twelve states have a per se rule requiring a parent, guardian, or other interested adult at interrogation and before rights are waived and citing examples of such). As of the end of the 2002 legislative session, eleven states had adopted an "interested adult test," requiring that juveniles have an opportunity to consult with a parent or other interested adult before or during an interrogation. National Center for Juvenile Justice (NCJJ), Frequently Asked Questions, http://ncjj.servehttp.com/NCJJWebsite/faq/legislation5.htm (last visited Jan. 12, 2008) (on file with the Washington and Lee Law Review).

exhibited by adolescents for conscious signs of deception, heightening the potential for interviewer bias and for false statements by juveniles.

The next subpart addresses the disparity that exists between the number and quality of procedural protections offered to child witnesses and victims during questioning and the lack of similar safeguards for juvenile suspects.

C. Young Victims and Suspects: Same Posture, Different Treatment

1. Safeguards for Some but Not Others

Extrapolating the holding and bases of *Roper v. Simmons* to the area of juvenile interrogation crystallizes the ways in which juvenile suspects are particularly vulnerable to the implicit biases and standard questioning techniques of police investigators. The conundrum is that while the criminal justice system has not, as of yet, acknowledged or directed its attention to what is known about the suggestibility of juvenile suspects during questioning, extensive reforms and procedural safeguards have been developed to reduce the likelihood that unreliable or inaccurate information will be elicited from young victims and witnesses of crimes.[130] Clinicians, for instance, are trained not to use leading questions, to video or audiotape the interview, and to avoid intimidating the child by exerting "undue influence."[131] Law enforcement officers often receive specialized training in child development, child psychology, and the sociology of the family in preparation for interviewing child victims and witnesses, and they are taught to avoid suggestive or leading questioning and to limit the total number of interviews conducted with any one child.[132] Judges have also been educated regarding the special issues that may arise with child witnesses, including the use of alternative procedures designed

130. *See* Redlich et al., *supra* note 114, at 122–23 (arguing that while numerous reforms and accommodations exist for the questioning of child victim/witnesses, there has been very little done regarding the interrogation of youthful suspects); *see also* Feld, *Juveniles' Waiver*, *supra* note 129, at 106 (discussing the "procedural disparity" that occurs given "the two competing and conflicting images of young people" contained within American law and culture, which presents them alternately as "innocent, vulnerable, fragile, and dependent children" and as "vigorous, autonomous, responsible, almost adult-like people from whose criminal behavior the public needs protection").

131. NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, THE CHILD WITNESS: LEGAL ISSUES AND DILEMMAS 236–46 (1991).

132. *Id.* at 248–50; *see also At This Prosecutor's Office, A Furry Soft Spot for Kids*, A.B.A. J., July 2007, at 18 (describing a prosecutor's office in Seattle that utilizes service dogs to assist child victims and witnesses during the legal process—training the dogs to stand by the children during the initial forensic interview, sit with them during trial, and even accompany them to the witness box when they testify).

to reduce trauma to the child, the appointment of experts to inform the court as to how children process memories and understand language, and the importance of instructing the jury about children's abilities and shortcomings as witnesses.[133]

In addition, in each of the fifty states, judges have written opinions and legislators have drafted statutes delineating the basic requirements for the competency of child witnesses.[134] Some states hold that children below a specified age—usually ten, twelve, or fourteen—are presumptively incompetent to testify, unless a trial judge finds otherwise.[135] Other states require the child to indicate that she understands the difference between the truth and a lie and to agree to tell the truth while testifying.[136] In recent years, an increasing number

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133. PERRY & WRIGHTSMAN, *supra* note 131, at 250–52.

134. Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 288; *see* PERRY & WRIGHTSMAN, *supra* note 131, at 41; *see also, e.g.*, *In re* J.M., 2006 OH Ct. App. 1203, ¶ 26 (reversing a sixteen-year-old juvenile's delinquency adjudication for rape and remanding to the trial court to conduct a more complete competency hearing to determine whether the twelve-year-old complaining witness was competent to testify).

135. PERRY & WRIGHTSMAN, *supra* note 131, at 41; *see, e.g.*, COLO. REV. STAT. § 13-90-106 (2002) (providing a rebuttable presumption that children under the age of ten may not testify, except in cases involving abuse); IDAHO CODE ANN. § 9-202 (2004) (creating a similar presumption of incompetence for children under ten years of age and providing that the trial judge may assess the competency of a child under the age of ten individually); LA. REV. STAT. ANN. § 15:469 (repealed 1988) (providing that children under the age of twelve must be evaluated by the court); MO. REV. STAT. § 491.060 (West 1996 & Supp. 2007) (same, also providing an exception for victims under the age of ten); N.Y. CRIM. PROC. LAW § 60.20 (McKinney 2003 & Supp. 2008) (creating the same rebuttable presumption of incompetence for people under the age of nine).

136. *See* PERRY & WRIGHTSMAN, *supra* note 131, at 43–45 (explaining that this requirement is also characterized as appreciating "the duty to tell the truth" which is a corollary of the traditional testimonial oath requirement); *see also, e.g.*, Suggs v. State, 879 S.W.2d 428, 431–32 (Ark. 1994) (holding that the trial court did not abuse its discretion in finding child witnesses competent where two boys, ages five and seven, showed the ability to distinguish between the truth and a lie and additionally promised to tell the truth); Z.P. v. State, 651 So. 2d 213, 213–14 (Fla. Dist. Ct. App. 1995) (reversing and remanding the trial court's decision in a case where the trial court failed to inquire into whether a child witness knew the difference between a truth and a lie "in addition to whether the child ha[d] a moral sense of the duty to tell the truth"); State v. Ransom, 864 P.2d 149, 156–57 (Idaho 1993) (holding that the trial court did not abuse its discretion in allowing the testimony of a child victim where she testified that she could distinguish between the truth and a lie and additionally promised to tell the truth); Commonwealth v. Monzon, 744 N.E.2d 1131, 1135 (Mass. App. Ct. 2001) (discussing whether a child witness has the "understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment" (citations omitted)); People v. Shavers, 613 N.Y.S.2d 393, 393–94 (N.Y. App. Div. 1994) (holding that a child's testimony at trial was properly admitted where the child "knew the difference between the truth and a lie and that the word 'swear' means that 'you will always tell the truth'").

of states have adopted some form of the Federal Rules of Evidence, under which the judge determines the witness's competency, while the jury determines the credibility and weight of that testimony.[137] Similarly, we have seen the development and increasing availability of "taint hearings," in which defense attorneys can request that an evidentiary hearing be held to determine if the child's testimony has been improperly "tainted" by suggestive interviewing techniques or practices.[138] *Crawford v. Washington*[139] provided further

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137. *See* PERRY & WRIGHTSMAN, *supra* note 131, at 45–47 (discussing Rules 601 and 603 of the Federal Rules of Evidence and the difficulties that states have had in meaningfully interpreting these rules); *see, e.g.*, ALA. CODE § 12-21-165 (LexisNexis 2005) (providing that the trial judge determines the competency of potentially incompetent witnesses, including children); MICH. R. EVID. 601 (stating that everyone is competent to testify as a witness, unless the trial judge determines otherwise); N.C. GEN. STAT. § 8C-1, Rule 601 (2007) (same); TENN. R. EVID. 601 (same); TEX. R. EVID. 601 (same). In states where trial judges have such broad discretion, a finding of competency can only be overruled on appeal if it can be determined that it was unreasonable for the trial judge to find that a witness was competent. *See* State v. Hicks, 352 S.E.2d 424, 426 (N.C. 1989) (stating that "[a]bsent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal"). Additionally, "[t]he test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts" that will enable the jury to decide a case. State v. Turner, 150 S.E.2d 406, 410 (N.C. 1966). The *Turner* court, in interpreting the North Carolina Rules of Evidence, further observed that "[t]here is no age below which one is incompetent, as a matter of law, to testify." *Id.*

138. Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 288. Taint hearings in child sexual abuse cases were first adopted in New Jersey, following the highly publicized New Jersey case of *State v. Michaels*. *See* Julie A. Jablonski, *Where Has* Michaels *Taken Us?: Assessing the Future of Taint Hearings*, 3 SUFFOLK J. TRIAL & APP. ADVOC. 49, 50–57 (1998) (describing the procedure for pretrial taint hearings in New Jersey following *Michaels*); *see also* Clayton Gillette, Comment, *Appointing Special Masters to Evaluate the Suggestiveness of a Child-Witness Interview: A Simple Solution to a Complex Problem*, 49 ST. LOUIS U. L.J. 499, 520–37 (2005) (describing the *Michaels* solution for suggestive interviewing techniques and expanding on it). *But see* John E.B. Myers, *Taint Hearings for Child Witnesses? A Step in the Wrong Direction*, 46 BAYLOR L. REV. 873, 899 (1994) (describing the procedure adopted by the *Michaels* court but asserting that pretrial taint hearings compromise the prosecution of legitimate sexual abuse cases). Although only a couple of states expressly allow for pretrial taint hearings, several others address the issue of taint in separate pretrial hearings; these states include New Jersey, New York, Pennsylvania, and Wyoming. *See* State v. Michaels, 642 A.2d 1372, 1382 (N.J. 1994) (holding that where a defendant can show that there is sufficient evidence of unreliability of a child witness's statements, the state must conduct a pretrial taint hearing); People v. Michael M., 618 N.Y.S.2d 171, 180 (N.Y. Sup. Ct. 1994) (holding that in some cases it is appropriate for the court to order a hearing to assess whether trial testimony has been tainted); Commonwealth v. Delbridge, 855 A.2d 27, 39–40 (Pa. 2003) (holding that "taint is a legitimate question for examination in cases involving complaints of sexual abuse made by young children" and that the proper way to explore potential taint is in a pretrial competency hearing); English v. State, 982 P.2d 139, 146–47 (Wyo. 1999) (holding that taint should be addressed in a pretrial competency hearing).

139. *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (finding a Sixth Amendment violation and holding inadmissible an out-of-court, adverse statement made by petitioner's wife

guarantees for the reliability of children's testimony, holding that out-of-court statements of witnesses can be admitted only if the speaker is unavailable and the accused had a prior opportunity for cross examination.[140]

In comparison, few, if any, protections have been developed to ensure that the information elicited from juvenile suspects is reliable; in fact, prior to *Roper v. Simmons*, the last major decision that protected the rights of juvenile suspects was *In re Gault*, decided over forty years ago.[141] *Gault* was preceded by *Haley v. Ohio*[142] and *Gallegos v. Colorado*,[143] opinions which recognized that young people, based on their age and relative immaturity, needed explicit protections under the law, particularly in the context of criminal interrogation.[144] Four

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where the petitioner had no opportunity to confront the evidence).

140. *Id. See generally* Robert P. Mosteller, Crawford v. Washington: *Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511 (2005) (discussing how *Crawford v. Washington* radically changed Confrontation Clause doctrine and proposing how the doctrine should develop in response). *Crawford* and its progeny have rejected any policy-based-child-hearsay exceptions to this firm rule of exclusion, with one state supreme court recently noting that "[e]ven though there are sound public policy reasons for limiting a child victim's exposure to a potentially traumatizing courtroom experience, we nonetheless must be faithful to the Constitution's deep concern for the fundamental rights of the accused." Snowden v. State, 867 A.2d 314, 329 (Md. 2005). *See also* Daniel E. Monnat & Paige A. Nichols, *The Kid Gloves Are Off: Child Hearsay After* Crawford v. Washington, CHAMPION, Jan.–Feb. 2006, at 18, 18 (discussing *Crawford v. Washington* from the perspective of the criminal defense attorney and offering arguments for keeping accusatory child hearsay out of court).

141. *See supra* note 8 and accompanying text (discussing the holding and significance of *In re Gault* for the development of the rights of juvenile suspects). *Gault* emphasized that "the greatest care must be taken to assure that [a minor's] admission was voluntary." *In re* Gault, 387 U.S. 1, 55 (1967).

142. *See* Haley v. Ohio, 332 U.S. 596, 598–99 (1948) (plurality opinion) (holding that a confession obtained from a fifteen-year-old boy without the benefit of counsel and through the utilization of coercive techniques failed to comport with due process).

143. *See* Gallegos v. Colorado, 370 U.S. 49, 55 (1962) (plurality opinion) (concluding that the totality of circumstances surrounding the confession of a fourteen-year-old, including his age, his prolonged detention, and the failure to provide him with counsel or a friendly adult, violated his due process rights).

144. *Gallegos*, 370 U.S. at 51–55; *Haley*, 332 U.S. at 599–601. The paternalistic language used to describe the vulnerabilities of youth in these two cases is striking. In *Haley*, in which the U.S. Supreme Court reversed a murder conviction based on the coerced confession of a fifteen-year-old African-American boy, Justice Douglas wrote for the plurality:

> What transpired would make us pause for careful inquiry if a mature man were involved. And when, 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 which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces . . . . He needs counsel and support if he is not to become the victim first of fear, then of panic.

years after *Gallegos*, *Miranda v. Arizona* was decided, and its due process protections were extended to juveniles in *Gault* and several other cases decided during this period.[145] This resulted in juveniles being granted such rights as the assistance of counsel during hearings to determine if the juvenile court should retain or transfer jurisdiction of a juvenile's case to adult court,[146] the "beyond a reasonable doubt" standard of proof,[147] and the protection from double jeopardy, with jeopardy attaching at the adjudicatory hearing.[148]

This expansion of juveniles' due process rights was followed in 1979 by *Fare v. Michael C.*,[149] in which a sixteen-year-old murder suspect's request for his probation officer at the onset of questioning was held not to be a per se invocation of his Fifth Amendment right to remain silent, analogous to a request for an attorney.[150] With *Michael C.*, the U.S. Supreme Court adopted the "totality of the circumstances" approach for determining whether a juvenile's confession is made knowingly, intelligently, and voluntarily.[151] This

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Haley, 332 U.S. at 599–600.

In *Gallegos*, in which the U.S. Supreme Court also reversed a murder conviction based on the coerced confession of a teenage boy, Justice Douglas again wrote for the plurality:

> [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. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54.

145. *See, e.g.*, Breed v. Jones, 421 U.S. 519, 528–31 (1975) (holding that juveniles are protected from double jeopardy and that jeopardy attaches at adjudicatory hearings); *In re* Winship, 397 U.S. 358, 368 (1970) (applying the "beyond a reasonable doubt" standard of proof to juvenile delinquency cases); Kent v. United States, 383 U.S. 541, 557–63 (1966) (holding that a juvenile is entitled to a hearing that meets the essentials of due process and fair treatment—including assistance of counsel, access to records, and statement of reasons—before being transferred from juvenile court to adult court for serious offenses).

146. *See Kent*, 383 U.S. at 558 ("[A]ssistance of counsel in the 'critically important' determination of waiver [from juvenile to adult court] is essential to the proper administration of juvenile proceedings.").

147. *See Winship*, 397 U.S. at 365 ("The same considerations that demand extreme caution in fact finding to protect the innocent adult apply as well to the innocent child.").

148. *See Jones*, 421 U.S. at 530 ("Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution.").

149. *See* Fare v. Michael C., 441 U.S. 707, 727–28 (1979) (holding that a sixteen-year-old juvenile's request for his probation officer during police questioning is not the same as a request for counsel and should not be treated as a per se assertion of his Fifth Amendment rights and adopting the use of the "totality of the circumstances" approach).

150. *Id.*

151. *Id.* at 725–26.

required that the factors surrounding the circumstances of the interrogation be considered, including: the juvenile's age, experience, background and intelligence, education, prior experience with the criminal justice system, and whether the questioning was repeated or prolonged. Because Michael C., who had been on juvenile court probation since age twelve and had "considerable experience with the police," did not explicitly ask for an attorney or assert his right to remain silent, the Court found that based on the totality of the circumstances the sixteen-year-old had understood the nature of his actions and that his confession, therefore, was admissible.[152]

While *Michael C.* recognized that a juvenile's age is a factor to be considered when determining whether a confession is voluntary, the Court rejected the notion that because most juveniles do not understand their rights when advised of them, a request for a parent or other interested adult—and not just a request for counsel—requires that interrogation stop immediately.[153] In overruling the per se approach, *Michael C.* also rejected the presumption that young suspects require certain safeguards that adults do not and that they lack the competency to waive their *Miranda* rights and to be interrogated without the presence of an adult.[154] Instead, the Court paid particular heed—as it has in

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152. *Id.* at 726–27. However, the totality of the circumstances analysis led Justice Powell, in his dissenting opinion, to conclude that:

> [Michael C.] was a young person, 16 years old at the time of his arrest and the subsequent prolonged interrogation at the station house. Although [he] had had prior brushes with the law, and was under supervision by a probation officer, the taped transcript of his interrogation—as well as his testimony at the suppression hearing—demonstrates that he was immature, emotional, and uneducated, and therefore likely to be vulnerable to the skillful, two-on-one, repetitive style of interrogation to which he was subjected.

Id. at 733 (Powell, J., dissenting).

153. *Id.* at 724–25. Research has shown that juveniles are "more prone than adults" to confuse their right to an attorney with a right—which they do not have—to a social worker or other service provider. Redlich et al., *supra* note 114, at 112.

154. *Michael C.*, 441 U.S. at 730 (Marshall, J., dissenting). Justice Marshall observed that:

> A juvenile in these circumstances will likely turn to his parents, or another adult responsible for his welfare, as the only means for securing legal counsel. Moreover, a request for such adult assistance is surely inconsistent with a present desire to speak freely. Requiring a strict verbal formula to invoke the protections of *Miranda* would "protect the knowledgeable accused from stationhouse coercion while abandoning the young person who knows no more than to ask for the . . . person he trusts."

Id. (Marshall, J., dissenting) (quoting Chaney v. Wainwright, 561 F.2d 1129, 1134 (5th Cir. 1977) (Goldberg, J., dissenting)); *see also* Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 518–22 (2006) (discussing major cases that have impacted the law of juvenile interrogations, including *In re Gault*, *Gallegos v. Colorado*, *Haley v. Ohio*, and *Fare v. Michael C.*).

many criminal procedure decisions—to the needs of law enforcement, emphasizing that the totality approach "refrains from imposing rigid restraints on police."[155]

In the decades between *Michael C.* and *Simmons*, although there has been a push for reform in the area of procedural protections for juvenile suspects, progress has been slow and the results have been modest. Interrogations of juveniles, for instance, are mandated to be videotaped in only a few states;[156] in a majority of states, attorneys are not required to be present during the questioning of juveniles;[157] and—for better or for worse—the presence of a parent or guardian is required in only a small number of states and only for juveniles of specified ages.[158] Similarly, few laws exist that regulate the number of hours during which a juvenile may be interrogated or that prohibit police officers from lying to young suspects, making false promises of leniency, or utilizing other forms of trickery or deceit during investigatory interviews.[159]

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155. Fare v. Michael C., 442 U.S. 707, 725 (1979). *See also* Feld, *Juveniles' Waiver*, *supra* note 129, at 112 ("The 'totality' approach gives trial judges discretion to consider a youth's immaturity, but imposes minimal interference with police investigative work."); *infra* notes 194–98 and accompanying text (discussing the ways in which courts reinforce the biases and questionable interrogation practice of law enforcement when they fail to establish clear rules and guidelines, particularly for the interrogation of juveniles).

156. *See* Feld, *supra* note 127, at 246–47 (finding that despite the benefits, only a few states require interrogations to be videotaped). Alaska, Minnesota, and Texas require all interrogations to be videotaped, and Illinois requires recording in first degree murder cases. *Id.* at 246–47 n.124. Wisconsin requires interrogations of juveniles to be videotaped. *Id.* at 247.

157. *See* Brief for Juvenile Law Center, et al. as Amici Curiae Supporting Respondent at 25–26, Yarborough v. Alvarado, 541 U.S. 652 (2004) (No. 02-1684), 2003 WL 23055034 (describing statutes that require the presence of an interested adult during interrogations of minors). In states employing the "interested adult" test, most consider either a parent/guardian *or* an attorney to be a satisfactory "interested adult," and very few specifically require an attorney. *Id.* In Illinois, minors under a certain age must be represented by counsel during the entirety of a police interrogation; in Texas, written waiver of one's *Miranda* rights is required from both the child and her attorney. *Id.* at n.15. In most other states with "interested adult" requirements, representation by counsel can be waived by a parent or guardian, the juvenile may waive it herself as long as a parent or guardian is present, or the presence of a parent or guardian may simply replace the "required" presence of counsel. *Id.*

158. *See* Feld, *supra* note 127, at 226 (finding that approximately one dozen states require the presence of either a parent or guardian or another "interested adult" presence during police interrogations, in order to ensure a valid waiver of *Miranda* rights); *see also supra* note 129 and accompanying text (noting that a parent's presence during interrogation of his/her child may, in fact, increase the pressure on the juvenile to confess).

159. *See* Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 298 (noting that "the responses of lawmakers to [children as victims, witnesses, and suspects] have diverged, with protections being institutionalized for witnesses and victims and deinstitutionalized for suspects"). In the years since *Miranda*, courts have held that questionable interrogation techniques, including the misrepresentation of evidence, are generally acceptable as long as *Miranda* rights have been waived; statements elicited as a result of such techniques are held to

Having established the disparity between the legal safeguards put in place for young victims and the lack thereof for juvenile suspects—who are similarly situated in regard to age and development—the next question is why this disjunction in treatment has prevailed. The next section argues that the typical rationales advanced to support the inconsistency in treatment between young victims and suspects fail to hold.

2. Why the Rationales for Different Treatment Fail

The disparity between the numbers of legal reforms designed to protect the integrity of information elicited from young victims and the relative lack of such safeguards for juvenile suspects is one that the criminal justice system must begin to address. The fact that juvenile victims and suspects have the same developmental posture, causing both groups to be equally vulnerable to suggestive or coercive questioning, must be acknowledged by law enforcement, and the courts and legislatures must take the lead in ensuring that appropriate safeguards are put into place for juveniles who are questioned.

While Part III.B discussed the reasons why juvenile suspects are themselves vulnerable to standard police interrogation tactics, studies have also shown that investigators have demonstrated bias against adolescents suspected of criminal activity—in stark contrast to the lack of bias that they express for children and teenagers alleged to be victims.[160] Recent research has found, for instance, that when a juvenile suspect arrives in the interrogation room, the detective assumes that she is competent (i.e. has an accurate memory of relevant events and details), though is likely to lie and is, therefore, not credible.[161] On the other hand, these same investigators assume that child victims and witnesses—based only on their preliminary identification as such—may be incompetent (i.e. poor at remembering the relevant details of an event) but are generally honest and, therefore, credible.[162] Further compounding the

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the "totality of the circumstances" standard. 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, 798–99 (2006). Statements by juveniles are also held to the totality test, notwithstanding their particular susceptibility to such interrogation techniques. *See* Marrus, *supra* note 154, at 517 (arguing that such a standard "is clearly insufficient to protect minors").

160. *See* Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 294 (discussing the biases of police officers vis-à-vis juvenile suspects).

161. *See id.* (citing Kassin, *supra* note 25, at 215–28, and Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 221–33 (1997)).

162. *See id.* (citing PERRY & WRIGHTSMAN, *supra* note 131, at 52).

negative impact on juvenile suspects of this extreme form of interviewer bias is the recent finding that in the interrogation room, police officers do not acknowledge the same developmental differences between adolescents and adults that they would give credence to in other contexts.[163]

Of course, there are understandable reasons for a police investigator to assume that a young person who is interrogated as a suspect would have a very different attitude than an adolescent who has been identified as a possible witness or victim of a crime. The young suspect, knowing she is considered to be a possible perpetrator of a crime, may be driven to lie or be deceptive by a variety of motivations ranging from self-interest or the protection of others (peers, adults, or family members) to fear of punishment by her parents or reprisal from the victims or the true perpetrators—among other myriad causes.[164] The reality, however, based on research in the area of psychosocial development, is that children who are alleged to be witnesses or victims of crimes may also be motivated to lie during questioning by many of these very same factors.[165]

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163. *See id.* (referring to a manuscript in preparation by the authors entitled, *Police Interrogation Practices and Perceptions of Youth Interrogative Suggestibility: A Comparison of Multiple Police Departments*).

164. *See* Beyer, *supra* note 120, at 31–32 (showing, through interviews with juvenile offenders, that an adolescent may lie because she feels ashamed when her parents or other family members find out about her actions, or because she simply cannot believe that she is "the kind of person who could have committed the offense"). Additionally, some adolescents have a sense that being punished for their roles in certain crimes just isn't fair, or think that lying will keep them out of jail. *Id.* at 32, 34. Lies in the form of false confessions may be motivated by loyalty to peers, frustration due to being unfairly arrested and interrogated by police, or fear. *Id.* at 33, 35.

165. *See* Kay Bussey, *Children's Lying and Truthfulness: Implications for Children's Testimony*, *in* COGNITIVE AND SOCIAL FACTORS IN EARLY DECEPTION 89, 105 (Stephen J. Ceci et al. eds., 1992) ("The more censure children anticipate for truth telling, such as threat from an adult, the less likely they are to tell the truth. Children may have more to fear for truth telling than adults, especially in sexual abuse cases where they might be threatened with dire consequences for disclosure."); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 87–88 (1989) (suggesting that child victims tell their stories in small pieces, rather than all at once, to gauge the reactions of their adult listeners). Child victims may also recant their stories after disclosure due to "guilt and the martyred obligation to preserve the family." *Id.* at 88; *see* Daniel B. Lord, Note, *Determining Reliability Factors in Child Hearsay Statements:* Wright *and Its Progeny Confront the Psychological Research*, 79 IOWA L. REV. 1149, 1171–72 (1994) (summarizing research that suggests that child victims are capable of lying to please an interviewer, to avoid punishment, and to avoid embarrassment or awkwardness). In fact, sometimes no bright-line distinction can be drawn between a child defendant and a child victim:

> Although it is arguable whether children who commit crimes are qualitatively similar to children who are victimized by crime, we have seen no research comparing characteristics (e.g., intelligence, psychosocial maturity) of same-age

The critical point here, and the one that *Simmons* highlights, is that the common denominator for young victims and juvenile suspects who are questioned is their developmental posture. Regardless of whether the investigator believes the juvenile to be a suspect, witness, or victim, the youth may be incapable of adult reasoning during questioning because of the long maturation process of the adolescent brain.[166] As a result of cognitive and social immaturity, she may have difficulty understanding the substance, relevance, and significance of the questions posed.[167] Because of her still-developing sense of identity, her moral judgment may be overshadowed by a strong sense of loyalty to peers, family, or other adults in positions of authority, such that the veracity of her responses is compromised.[168] In short, no matter what law enforcement *believes* about the young person, when the goal is the gathering of reliable evidence, specific precautions should be taken and safeguards implemented during the questioning of a minor.

It is worth noting that there were also naysayers after the first studies were published in the early 1990s that questioned the reliability of children's accounts of sexual abuse—studies that eventually led to an overhaul of the methods commonly used to question children victims and witnesses in court cases.[169] Some researchers and many in the law enforcement community feared that the new findings would stymie investigators, making it difficult—if not

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> child victim/witnesses and child suspects. From a developmental standpoint, it is illogical to think that child suspects/defendants differ from child victim/witnesses. Indeed, a large percentage of child defendants were once child victims themselves.

Redlich et al., *supra* note 114, at 114; *see also* PERRY & WRIGHTSMAN, *supra* note 131, at 55–96 (providing a "psycholegal" perspective on the developing child). The discussion is framed in terms of physical, mental, emotional, and social development, including such topics as cognitive limitations, the development of perception, psychosocial needs, moral reasoning, and moral development. PERRY & WRIGHTSMAN, *supra* note 131, at 55–96.

166. *See* Beyer, supra note 120, at 27 ("[S]cientific evidence now supports the contention that the juvenile brain is often incapable of adult reasoning because of its long maturation process."); *see also* Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 286 ("A 13-year-old is predictably less mature than an 18-year-old, whether that 13-year-old is a victim, a witness, or a suspect. Our assumption is that 'kids are kids' no matter the context in which they find themselves; being suspected of committing a crime does not make a child an adult.").

167. *See* Beyer, *supra* note 120, at 27 ("Immature thought processes, difficulty with comprehension, unstable identities, moral values that are overshadowed by a sense of loyalty, or the effects of childhood trauma can make a young person incompetent to participate in his or her own defense.").

168. *Id.*

169. *See, e.g.*, Daniel Goleman, *Studies Reveal Suggestibility of Very Young As Witnesses*, N.Y. TIMES, June 11, 1993, at A1 ("Some researchers fear that the new findings will be used to muzzle investigators, leaving them unable to get children to report sexual abuse when it has actually occurred.").

impossible—for them to elicit reports from children who had been abused.[170] Yet, as more and more child sex abuse cases were dismissed and convictions were overturned as a result of courts holding that suggestive interviews of children had "tainted" investigations, clinicians, prosecutors, and police investigators were given no choice but to change and adapt their practices for the questioning of young children.[171]

While it is sometimes argued that the perceived age difference between child victims and adolescent suspects justifies more "sensitive" treatment for the younger cohort, this argument needs to be reconsidered after *Simmons*.[172] One of the most critical issues addressed in the opinion is the question, "At what age do we draw the line?" In *Simmons*, of course, the context was the application of the juvenile death penalty, and the controversy was whether the Court should hold that eighteen—rather than sixteen or seventeen—is the age at which offenders have the maturity and demonstrate the depravity to "warrant" a death sentence.[173] Justice Kennedy held that setting a bright line at

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170. *Id.*

171. *See supra* note 111 and accompanying text (discussing several highly publicized cases involving allegations of sexual abuse by childcare providers that helped catalyze hearsay reform and other remedial legislation after the improper questioning of child witnesses was exposed); *see also supra* notes 131–40 and accompanying text (discussing the reforms and procedural safeguards for child witnesses and victims that were developed in response to these cases).

172. *See* Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 300 (challenging the notion that different interrogative treatment is appropriate for child victims versus child suspects, based on the age differential of the two groups). The corollary to this position has been that because juvenile suspects are generally "older" adolescents—fifteen-, sixteen-, or seventeen-years-old—they need not be interrogated any differently than adults, conceding that suspects who are fourteen and younger *may* require questioning procedures that are more similar to those used with child victims. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 152 (2003) (describing the results of a study showing that "minor children were more likely to falsely take responsibility [for a misdeed] than young adults"); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals,* 29 LAW & HUM. BEHAV. 253, 253 (2005) (finding differences between the legal decisionmaking abilities of adolescents aged fifteen to seventeen and those fifteen and younger, with the younger cohort "more likely to confess and waive their right to counsel and less likely to report that they would appeal their case or discuss disagreements with their attorneys"). This rationale is implicit in opinions such as *Michael C.* and *Yarborough v. Alvarado*, that operate from the assumption that because these juveniles are "older," they have a better understanding of their circumstances and of how to "navigate the complex legal system" than "younger" adolescents. Marrus, *supra* note 154, at 529; *see also* Fare v. Michael C., 442 U.S. 707, 726–27 (1979) (arguing that Michael C. could understand the nature of his actions because by sixteen-and-a-half he had experience with police, had been on juvenile probation for several years, and had been held at a youth detention camp); *infra* note 190 and accompanying text (discussing *Yarborough v. Alvarado* and the common perception that juveniles who are close to the age of majority can be expected to behave as adults).

173. Roper v. Simmons, 543 U.S. 551, 574 (2005); *see supra* notes 47–57 and

eighteen for death penalty eligibility was justified because of the likelihood that jurors—driven by their own biases and prejudiced by the horrifying nature of the crime—could not objectively determine that factors such as youth or immaturity were mitigating.[174] Similarly, appropriate safeguards must be implemented for the interrogation of suspects who are under eighteen, as law enforcement cannot objectively determine when a juvenile's youth calls for different treatment. Further, as a matter of fact, the median age of child victims has increasingly overlapped with that of young suspects. Whereas once the majority of child victims and witnesses who testified in court were quite young—between the ages of six and twelve-years-old—those numbers have increased as the median age of juvenile suspects has decreased.[175] The result is that, unlike two decades ago, there is no longer a wide age gap separating these two groups of potential interview subjects, tempering the argument that differences in age justify the differences in technique when questioning child victims versus suspects.[176]

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accompanying text (discussing that one of the major controversies addressed in *Simmons* was the justifiability and rationality of raising the age to eighteen for qualification for the death penalty).

174. *See supra* notes 59–81 and accompanying text (discussing Justice Kennedy's reasoning in the majority holding of *Simmons*). *But see Simmons*, 543 U.S. at 602 (O'Connor, J., dissenting) ("There is no such inherent or accurate fit between an offender's chronological age and the personal limitations which the Court believes make capital punishment excessive for 17-year-old murderers."). Justice Scalia also questioned the support for the majority's categorical approach:

> Even putting aside questions of methodology, the studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18. At most, these studies conclude that, *on average*, or *in most cases*, persons under 18 are unable to take moral responsibility for their actions. Not one of the cited studies opines that all individuals under 18 are unable to appreciate the nature of their crimes.

Id. at 618 (Scalia, J., dissenting).

175. *See, e.g.*, Howard N. Snyder et al., U.S. Dep't. of Justice, *Prevalence and Development of Child Delinquency*, Child Delinquency Bulletin Series, Mar. 2003, at 1 (finding that the number of offenders younger than age thirteen entering the juvenile justice system is increasing); Press Release, Dep't. of Justice, Nation's Younger Teens Experienced Largest Decrease in Crime Victimizations Between 1993 and 2003 (Aug. 31, 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/jvo03pr.htm (finding that the median age of juvenile crime victims is increasing).

176. *Id.*; *see also* Feld, *supra* note 127, at 233 (arguing that while younger adolescents demonstrated the clearest disabilities with regard to exercising their *Miranda* rights and displaying "adjudicative competence," older juveniles—aged sixteen and up—also showed significant deficits that could increase their "interrogative vulnerability").

A final critical point is that the reforms and procedural safeguards that were put into place for child witnesses and victims were not implemented—at least initially—out of a sense of good will or a commitment to the rights of defendants on the part of law enforcement and prosecutors. As illustrated, they were instituted only after courts "pushed back" by placing prosecutions in jeopardy that relied upon the improperly obtained testimony of child witnesses.[177] *Simmons* arguably compels that this same "push back" occur when the interrogation of juvenile suspects is demonstrated to be improper.[178] Courts and legislators must cease to reinforce the biases exhibited by law enforcement towards juvenile suspects and must, instead, take the lead in promoting and instituting reforms and procedural safeguards for the interrogation of juvenile suspects that are comparable to those that now exist for the questioning of child victims and witnesses.[179]

In sum, courts reinforce and become complicit in such phenomena as interviewer bias and coercive interviewing techniques when they fail to find that a suspect's age is a critical factor when determining whether interrogation was custodial. The next Part argues that *Simmons* has called into question such decisions and that its sound reasoning should prevail.

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177. *See supra* note 111 and accompanying text (discussing child abuse cases in which courts dismissed or reduced charges as a result of the improperly obtained testimony of child witnesses).

178. To clarify, my assertion is not that *Simmons* standing alone provides formal, doctrinal authority for—or that the *Simmons* majority would necessarily endorse—higher standards for the interrogation of juveniles; rather the argument is that the logic of the opinion—and the evidence upon which it rests—provides a necessary, though not sufficient, doctrinal foundation.

179. The argument here is not that every protection and reform that has been implemented to ensure the reliability of child victims' testimony should be automatically applied to the questioning of juvenile suspects; rather, the point is that those in the juvenile justice system—prosecutors, police officers, judges, etc.—must acknowledge that both groups of children are in the same developmental posture, and thus, appropriate steps should be taken to ensure the reliability of juvenile suspects' testimony with the same consideration that is given to ensuring the proper questioning of child victims and witnesses. *See infra* Part V.A (offering specific proposals for legislators and judges to consider in an effort to reframe the discussion and, thus, impact the culture of the interrogation of juveniles); Part V.B (proposing that police departments receive specialized training regarding adolescent development and that the general community be educated regarding the phenomenon of "disproportionate minority impact" in an effort to change the culture of police interrogation of juveniles).

IV. Reexamining Custodial Interrogation Through the Lens of Roper v. Simmons

A. Yarborough v. Alvarado*: Privileging "Objective" Standards Pre-*Simmons

As discussed in Part II, one of the most significant aspects of Justice Kennedy's opinion in *Roper v. Simmons* was his reluctance to leave the juvenile death penalty decision in the hands of jurors. Kennedy's refusal to do so was premised on the likely biases that jurors would have against adolescents accused of capital offenses as well as on the tendency for prosecutors to explicitly characterize a juvenile's youth as aggravating rather than mitigating.[180] Consequently, in order to protect juveniles against potential prejudices, misconceptions, and ambivalent attitudes of jurors, the Court adopted a categorical rule that the Eighth Amendment's proscription of cruel and unusual punishment prohibited the imposition of the death penalty for crimes committed when offenders were under the age of eighteen.[181]

Just four months before Kennedy heard oral argument in *Roper v. Simmons*, he wrote the majority opinion in *Yarborough v. Alvarado*, the most recent U.S. Supreme Court decision to address the question of whether a juvenile's age should be considered when determining if interrogation was custodial.[182] Relying on past precedent—from cases in which the suspects were adults, not juveniles—Kennedy found that seventeen-year-old Michael

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180. *See supra* Part II.B; *see also* Emens, *supra* note 31, at 52 ("[In the majority opinion in *Simmons*, Justice Kennedy] seems worried not only that juries lack the skill required to identify the cases in which youth should be treated as mitigating, but also that they will sometimes weigh youth in exactly the wrong way."). The *Simmons* decision was, of course, also undergirded by the developmental and neurological differences between adolescents and adults. *See supra* Part II.A.

181. *See* Roper v. Simmons, 543 U.S. 551, 572–75 (2005) ("The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

182. *See* Yarborough v. Alvarado 541 U.S. 652, 666–67 (2004) (finding that a suspect's age and experience with police are irrelevant to the custody inquiry). *Alvarado* was argued on March 1, 2004, and decided on June 1, 2004, while *Simmons* was argued on October 13, 2004, and decided on March 1, 2005. *Id.* at 652; *Simmons*, 543 U.S. at 551. The matter of whether a suspect is "in custody" is critical because pre-interrogation *Miranda* warnings are required only for *custodial* interrogation because of the "compulsion inherent in custodial surroundings." Miranda v. Arizona, 384 U.S. 436, 458 (1966). *Miranda* held that "custodial interrogation" meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. Yet, the decision did not provide the Court with an opportunity to apply the definition to a specific set of facts, leaving unclear what form of custody test or analysis should be used. *Id.* at 439–45.

Alvarado was not in custody when he confessed to the murder of a truck driver after two hours of interrogation without *Miranda* warnings.[183] Kennedy held that custody must be determined based on an "objective" test, one that focuses on how a "reasonable person" in the suspect's situation would perceive his circumstances.[184] He explicitly rejected a "subjective" inquiry that "turns too much on the suspect's . . . state of mind."[185] As in *Fare v. Michael C.*, the Court was motivated by a commitment not to "burden" the police but to give them "clear guidance," leaving no room for a different approach when

183. *Alvarado*, 541 U.S. at 655–60. It is not insignificant that *Alvarado* was a habeas corpus case decided under the deferential standard of 28 U.S.C. § 2254(d)(1), requiring that the Court determine whether the state court's holding that Alvarado was not in custody was an "unreasonable application of clearly established law," as the Court of Appeals for the Ninth Circuit had found. *Alvarado*, 541 U.S. at 663. In fact, in the context of discussing the habeas corpus standard of review, Justice Kennedy acknowledged that the particular facts and circumstances surrounding the interrogation of Michael Alvarado could lead "fair-minded jurists [to] disagree over whether Alvarado was in custody." *Id.* at 664. Kennedy discussed the facts that weighed against a custody finding, including that the police did not threaten or suggest that Alvarado would be arrested; the detective focused on the crimes of Paul Soto, the man who had shot the victim, and not Alvarado; the detective twice asked if Alvarado wanted to "take a break"; and at the end of questioning, Alvarado went home. *Id*. Kennedy also enumerated the facts that supported a custody finding, including that Alvarado was brought to the police station for questioning by his parents—his legal guardians—and not by his own accord; the interview lasted for two solid hours; the detective did not tell Alvarado that he was free to leave; and the requests of Alvarado's parents to be present at the interview were denied. *Id.* at 665. *But see id.* at 675 (Breyer, J., dissenting) (arguing that the majority wrongly focused on what the police did *not* do to Alvarado, rather than on what they *did* do). Breyer noted that the police had his parents bring him to the station, put him with a single officer in a small room, kept his parents out, let him know he was a suspect, and questioned him for two hours. *Id.*

184. *Alvarado*, 541 U.S. at 661–62. Justice Kennedy relied on five U.S. Supreme Court cases to support his application of the objective "reasonable person" test, rather than the "subjective" totality of the circumstances test, to the question of whether Michael Alvarado was in custody. *Id.*; *see* Thompson v. Keohane, 516 U.S. 99, 112 (1995) ("Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." (citations omitted)); Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) (holding that the initial custody determination depends on "the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned"); Berkemer v. McCarty, 468 U.S. 420, 442 n.35 (1984) (finding that an objective test is preferable to a subjective one because it does not "place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question" (citing People v. P., 233 N.E.2d 255, 260 (1967))); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (noting that what the police knew about the suspect and the short time that had elapsed since the incident had occurred were irrelevant to the custody inquiry); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding that questioning was not custodial because there was "no indication that the questioning took place in a context where [the suspect's] freedom to depart was restricted in any way").

185. *Alvarado*, 541 U.S. at 669.

questioning juveniles.[186] Thus, the police need not give particular thought to the interrogation of a child or adolescent; they need not evaluate the juvenile's state of mind; and they need not consider how factors such as age and experience might impact a juvenile's reasonable belief that she was—or was not—free to leave.[187]

Kennedy did recognize in *Alvarado* that "the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases."[188] He tried to resolve the quandary by distinguishing between "doctrinal tests," such as the totality approach that allows for the consideration of age and experience when courts analyze the voluntariness of a confession, and the "objective *Miranda* custody inquiry" that is "designed to give clear guidance to the police."[189] Kennedy, thus, handily rejected the lower court's approach, which he characterized as improperly subsuming subjective factors (i.e. the suspect's age and experience) into an objective test, by considering what "a reasonable 17-year-old, with no prior history of arrest or police interviews" would perceive.[190]

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186. *See id.* at 662 ("[A]n objective test was preferable to a subjective test in part because it does not 'place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.'" (quoting Berkemer v. McCarty, 468 U.S. 420, 442 n.35 (1984))); *id. at* 668 ("[T]he Court of Appeals ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry."); *id.* at 668–69 ("We do not ask police officers to consider . . . contingent psychological factors [such as prior history with law enforcement] when deciding when suspects should be advised of their *Miranda* rights."); *see also supra* notes 149–55 and accompanying text (discussing *Fare v. Michael C.* and the way in which the Court privileged the perspective of the police).

187. *See Alvarado*, 541 U.S. at 662 ("[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances.").

188. *Id.* at 667.

189. *Id.* at 667–68. One way of interpreting the Court's ultimate message in *Alvarado* is that it reveals a willingness to allow judges to consider a youth's age and experience *after* the fact when evaluating the voluntariness of a confession but an unwillingness to insist that police consider such factors *before* attempting to elicit the confession. *See also infra* Part IV.B (discussing other cases in which courts have privileged the goals and priorities of the police over the protection of juvenile suspects).

190. Yarborough v. Alvarado, 541 U.S. 652, 667 (2004) (citing Alvarado v. Hickman, 316 F.3d 841, 854–55 (9th Cir. 2002)). *But see id.* at 669 (O'Connor, J., concurring) (acknowledging that while "there may be cases in which a suspect's age will be relevant to the Miranda 'custody' injury," this is not one of them because Alvarado was—at seventeen-and-a-half—so close to the age of majority). Justice O'Connor also asserted that it would be too difficult for police to evaluate the significance of age, particularly when many juveniles of Alvarado's age "can be expected to behave as adults." *Id.*; *see also supra* note 172 and accompanying text (discussing arguments against giving juvenile suspects similar interrogative protections as juvenile victims, based on the alleged developmental differences between "older"

While the variances in the ultimate holdings of *Roper v. Simmons* and *Yarborough v. Alvarado* can be attributed to the differences between Eighth Amendment and Fifth Amendment jurisprudence or to the fact that *Alvarado* was decided under the deferential habeas corpus standard, the common thread is that each opinion addresses the question of whether decisionmakers (sentencing phase jurors in *Simmons* and police interrogators in *Alvarado*) have an obligation to give determinative weight to the age and vulnerabilities of youth. In *Simmons*, Kennedy concluded that because the stakes for juveniles are so high in capital cases—with the death penalty being the "ultimate punishment"[191]—a bright line must be drawn.[192] If the timing of the decisions had been reversed, with *Alvarado* coming on the heels of *Simmons*, perhaps the inconsistencies between them would have been more stark, resulting in a different holding for *Alvarado*; it might have been found, for instance, that despite the different contexts, the same factors—the unique developmental posture of adolescents and the implicit bias of law enforcement against juvenile suspects—are determinative, and that, therefore, Michael Alvarado had been subjected to custodial interrogation in violation of the Fifth Amendment.[193]

The next subpart closely examines several federal and state court opinions issued both before and after *Alvarado* that address whether a juvenile was subjected to custodial interrogation. It demonstrates that the subtext of these cases is the notion that police efficiency trumps juveniles' due process rights, and it argues that *Simmons* calls for their reexamination.

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and "younger" adolescents).

191. Roper v. Simmons, 543 U.S. 551, 593 (2005) (O'Connor, J., dissenting).

192. *See id.* at 573–74 (majority opinion) ("For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.").

193. Justice Kennedy's acknowledgement that "fair-minded jurists could disagree" over whether a reasonable person in Alvarado's position would have felt free to leave bolsters the view that if *Simmons* had been decided prior to *Alvarado*, the Court might have concurred that the state court had erred in failing to consider Alvarado's youth and inexperience. In such a circumstance, the basis for the Court of Appeals's decision—that the state court had unreasonably applied clearly established law—would have been predicated on the *Simmons* decision, and Kennedy might then have agreed, under the deferential habeas corpus standard of review, that "the relevance of juvenile status in Supreme Court case law as a whole compelled the 'extension of the principle that juvenile status is relevant' to the context of *Miranda* custody determinations." Yarborough v. Alvarado, 541 U.S. 652, 660 (2004).

B. Judicial Reinforcement of Police Bias: Expedience Trumps Juveniles' Due Process Rights

Courts' deference to the needs of law enforcement, as expressed by Justice Kennedy in *Alvarado*, is the common denominator of many opinions issued in the area of criminal procedure.[194] These are cases in which courts are speaking not to the parties, necessarily, or to the public, but to the police. The opinions reveal that deciding judges have the perspective of law enforcement front and center when considering the steps and analyses that police must undertake both in the interrogation room and on the street.[195] The specific focus of this subpart is on cases that reject the notion that age should be a determinative factor in analyzing whether a juvenile felt free to leave during interrogation, cases mirroring *Alvarado* that have now been called into question by *Simmons*. In these opinions, courts typically confirm the constitutional legitimacy of certain investigative practices (e.g., holding that *Miranda* warnings are required *only when* interrogation is custodial) but fail to find the factors triggering such protections (e.g., reasoning that because the suspect was *not* in custody, *Miranda* was not required). Or courts acknowledge that police conduct was unconstitutional but fail to impose any sanctions (finding there was no "clear error,"[196] the error was "harmless,"[197] or it was not an "unreasonable application of clearly established federal law," as in *Alvarado*).[198]

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194. *See, e.g.*, Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 133–34, 158 (2003) (discussing the ways in which the Supreme Court defers to law enforcement, providing the police with too much discretion in the name of promoting efficiency, while intruding upon the constitutional rights of "the poor, minorities and the politically powerless").

195. *Id.*; *Alvarado*, 541 U.S. at 666–69; *see also* Rayee Lumer, Comment, Yarborough v. Alvarado: *Why is the Supreme Court Pretending that "A Child is an Adult or that a Blind Man Can See?*," 38 LOY. L.A. L. REV. 2297, 2310 (2005) ("Keeping in mind the Court's explicit commitment to law enforcement efforts, it is clear that its policy on protecting juveniles during police interrogations comes with a caveat: it will extend juveniles procedural safeguards as long as doing so does not interfere with police efforts.").

196. The "clear error" standard applies when findings are based upon a substantial error in proceedings or misapplication of law; when unsupported by substantial evidence; or when contrary to clear weight of evidence or induced by erroneous view of the law. BLACK'S LAW DICTIONARY 131 (5th ed. 1983).

197. The "harmless error" test assesses whether an error at trial "had substantial and injurious effect or influence in determining the jury's verdict," and examines the actual prejudicial effect of error on a verdict. Calderon v. Coleman, 525 U.S. 141,145–46 (1998) (per curiam) (reversing grant of habeas corpus relief and holding that the harmless error standard must be applied) (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).

198. When a case has been adjudicated by a state court and relief has been denied, a federal court may not find otherwise unless, as per 28 U.S.C. § 2254 (d)(1) (2000), the state court's

It is useful to examine several of the representative cases that fit into these categories—*In re J.H.*,[199] *People v. Howard*,[200] and *State v. Eggers*[201]—as they have bearing on the treatment of juveniles during interrogation and, thereby, illustrate courts' unwillingness to consider a suspect's youth as a determinative factor when evaluating whether the police have overstepped their bounds. *In re J.H.* is a recent decision that is representative of federal appellate opinions confirming the constitutional legitimacy of requiring *Miranda* warnings prior to custodial interrogation but ultimately holding—in tension with the spirit of *Simmons*—that the juvenile's age is not a critical factor in the analysis.[202] The case involved a twelve-year-old who was interrogated by a police officer at his school and confessed to a sexual offense involving his three-year-old sister.[203] The D.C. Circuit Court of Appeals upheld the trial court's denial of the juvenile's motion to suppress his statement on the ground that he was not in custody for *Miranda* purposes.[204] Relying on *Alvarado,* the court applied an "objective" test that considered the totality of the circumstances from the viewpoint of a "reasonable person."[205] Although the police investigator did not

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decision was an "unreasonable application of clearly established federal law." Brown v. Payton, 544 U.S. 133, 141 (2005) (holding that the jury instruction was not an unreasonable application of precedent). This standard is met when the state court "applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result." *Id.* (citation omitted). Thus, applying precedent to the facts at hand in "an objectively unreasonable manner" will result in a federal court overturning the decision. *Id.*

199. *In re* J.H., 928 A.2d 643 (D.C. Cir. 2007).

200. People v. Howard, 92 P.3d 445 (Colo. 2004).

201. State v. Eggers, 160 P.3d 1230 (Ariz. Ct. App. 2007).

202. *See, e.g.*, United States v. N.J.Y., 180 Fed. Appx. 1, 3–4 (10th Cir. 2006) (holding that, under the totality of the circumstances, a fourteen-year-old was not in custody for *Miranda* purposes because the questioning took place close to his house, he was told that he could leave, and agents did not make specific accusations); United States v. Erving L., 147 F.3d 1240, 1246–48 (10th Cir. 1998) (holding that a thirteen-year-old boy was not in custody when questioned in his home by an FBI agent and criminal investigator because a reasonable person in his position would not think he was under arrest); United States v. J.H.H., 22 F.3d 821, 831 (1st Cir. 1994) (finding that a fourteen-year-old was not in custody when he made incriminating statements based on the circumstances).

203. *In re J.H.*, 928 A.2d at 645.

204. *Id.*

205. *Id.* at 648. The trial court judge did consider the juvenile's age when examining the totality of the circumstances but concluded that the interview was "as non-custodial as one could imagine of an interview of a juvenile in school by a law enforcement officer." *Id.* at 650. The D.C. Circuit did not explicitly consider the juvenile's age, stating that age does not "require" suppression and citing *Alvarado* to support its assertion that "[t]he Supreme Court has not definitively ruled on whether a suspect's youth is part of the objective *Miranda* custody analysis." *Id.*

tell J.H. that he was free to go or that he was free not to answer questions when they met across the hall from the principal's office, the court held that the absence of such advice "does not, by itself, control the outcome of this case."[206] The circuit court affirmed the district court's refusal to impose such a per se rule for the questioning of juveniles.[207]

The second case, *People v. Howard*, echoes the reasoning and justification found in state appellate court opinions that fail to find the factors necessary to trigger protections—such as *Miranda* warnings—that are available to juveniles during interrogation.[208] In *Howard*, the Colorado Supreme Court reversed the lower court's decision to suppress a seventeen-year-old's admission to sexual abuse made to police who had spoken with Howard in the driveway area of his home.[209] The court found that when evaluating whether the interrogation was custodial under the totality of the circumstances test, though the juvenile's age may be considered, "it will not constitute the determinative factor in a finding of custody."[210] It also held that, in concluding that a reasonable person in Howard's position would not have felt free to leave, the lower court improperly focused on the "subjective intent" of the officers—who had deliberately separated the juvenile from his parents—rather than on the fact that the

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206. *Id.*

207. *Id.* at 649. In particular, the D.C. Circuit observed that:

> [T]o rule that this particular interview was custodial because [the investigator] did not advise [J.] that he was free not to answer questions and he was free to leave would, in effect, on these facts, impose what would amount to an across-the-board prophylactic rule that any time the police wanted to speak to a child in school, no matter how non-coercive the circumstances otherwise were[,] . . . the police would . . . always have to do that.

Id.

208. *See, e.g.*, State v. Tolliver, No. COA05-1687, 2007 WL 91654, at *7 (N.C. Ct. App. Jan. 16, 2007) (unpublished table decision) (finding that the juvenile was not in custody where the police picked him up, took him to a different location, and questioned him regarding a crime, despite the arguable "coercive nature" of the questioning); *In re* J.B., No. CA2004-09-226, 2005 WL 3610482, at *8–10 (Ohio App. 12 Dist. Dec. 30, 2005) (finding that, though the thirteen-year-old defendant and siblings were taken to the police station in the early hours of the morning when no other detectives were present, the defendant was not "in custody"); *In re* M.B., No. 22537, 2005 WL 2995113, slip op. at 3 (Ohio App. 9 Dist. Nov. 9, 2005) (finding that seventeen-year-old juvenile was not "in custody" in light of the totality of the circumstances); CSC v. State, 118 P.3d 970, 977–78 (Wyo. 2005) (finding that the police were not required to consider a sixteen-year-old suspect's age before beginning questioning, and that in light of totality of the circumstances, the defendant was not in custody).

209. People v. Howard, 92 P.3d, 445, 447 (Colo. 2004).

210. *Id.* at 450 (citation omitted).

"general atmosphere and tone of the interview . . . did not evince any attempt by police to subjugate the individual to the will of his examiner."[211]

The third case, *State v. Eggers*, is an example of a decision in which the court found that the police had acted unconstitutionally—in this instance by failing to give *Miranda* warnings to a sixteen-year-old murder suspect prior to custodial interrogation—but deemed the error to be "harmless," affirming the conviction.[212] In its analysis of whether Zachary Eggers was in custody, the Arizona Court of Appeals considered the usual factors that bear on the issue of custody, including indicia of arrest, the place, length, and form of the interrogation, and whether the accused knew that he was a suspect.[213] The court further noted—in contradiction with the spirit of *Simmons*—that the child's age, maturity and experience with law enforcement, and the presence of a parent or other supportive adult were merely "additional elements that bear upon a child's perceptions and vulnerability."[214] The court concluded that because the teenager was in the presence of police for several hours, either in a patrol vehicle or at the police substation, a "reasonable person" would have felt as though his "freedom of movement was significantly restricted, tantamount to formal arrest."[215] Ultimately, however, the court found that the admission of the juvenile's confession was "harmless beyond a reasonable doubt," as it did not "contribute to or affect the verdict."[216]

Focused analysis of *Alvarado* and the decisions discussed above should not be interpreted to suggest, however, that there are no bright spots—cases consonant with *Simmons* in which courts have recognized that age is a strong

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211. *Id.* at 450–52 (citation omitted). The trial court emphasized the unfair nature of this "ploy" in its decision to suppress the juvenile's statements, while the appellate court concluded that the motives of the officers should not be considered when applying the "objective" reasonable person test. *Id.* at 450–51.

212. *See* State v. Eggers, 160 P.3d 1230, 1247 (Ariz. Ct. App. 2007) ("Thus, even without [the confessions] that should have been excluded, the verdicts would not have been different. Upon review of the entire record, we conclude, as a matter of law, that the introduction of the [confessions] was harmless beyond a reasonable doubt."); *see also, e.g.*, United States. v. Doe, 170 F.3d 1162, 1168–69 (9th Cir. 1999) (holding that failure to notify the juvenile's parents of his *Miranda* rights as required by statute was harmless error); Tankleff v. Senkowski, 135 F.3d 235, 245 (2d Cir. 1998) (finding the admission of incriminating pre-*Miranda* statements by the seventeen-year-old murder suspect harmless error because a subsequent "Mirandized" confession was admissible); United States v. Indian Boy X, 565 F.2d 585, 592–93 (9th Cir. 1975) (finding that the juvenile's confession was properly admitted, because police and FBI agents committed harmless error by not taking the juvenile to magistrate "forthwith," as required by statute).

213. *Eggers*, 160 P.3d at 1239.

214. *Id.*

215. *Id.* at 1241.

216. *Id.* at 1246–47.

factor weighing against the voluntariness of a juvenile's confession or, perhaps even more significantly, that age is a critical factor supporting a finding that the interrogation was custodial. Such opinions do exist, and while most were decided by state courts,[217] there are a few federal court cases—decided prior to *Alvarado*—that have also recognized that age is a critical factor in the analysis of whether the juvenile was interrogated while in custody.[218]

One notable federal appellate decision is that of *A.M. v. Butler*[219] in which the court expunged a juvenile's delinquency finding after holding that the eleven-year-old murder suspect would not have reasonably believed he was free to leave during police interrogation.[220] The court found that the child was in custody based on his young age, his lack of prior experience with the criminal justice system, the fact that he was questioned for two hours without a parent or lawyer, and because he was dependent on the police detectives to drive him

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217. *See, e.g.*, *In re* Andre M., 88 P.3d 552, 555 (Ariz. 2004) (reversing juvenile adjudications for possessing a deadly weapon on school grounds and possessing a firearm as a minor after holding that the deliberate exclusion of a sixteen-year-old juvenile's mother from interrogation created a presumption of involuntariness); *In re* Ronald C., 486 N.Y.S.2d 575, 576 (N.Y. App. Div. 1985) (reversing the delinquency order and dismissing the petition for criminal mischief and possession of burglar's tools on grounds that the thirteen-year-old juvenile was unaccompanied by parent or counsel during questioning, and because the police "should have known" that placing screwdrivers in front of him would elicit incriminating response); *In re* W.R., 634 S.E.2d 923, 926 (N.C. Ct. App. 2006) (holding that the court must determine whether a juvenile was in custody considering all the facts and circumstances from the perspective of a reasonable person in the juvenile's position, and, thus, vacating delinquency adjudication after finding that the fourteen-year-old suspect's statement was made during custodial interrogation without *Miranda* warnings); *In re* K.Q.M., 873 A.2d 752, 757 (Pa. 2005) (vacating delinquency orders after holding that the sixteen-year-old suspect's confession was inadmissible because he wasn't advised of his *Miranda* rights based on the totality of the circumstances); *In re* Jerrell C.J., 699 N.W.2d 110, 123 (Wisc. 2005) (holding that the confession of a fourteen-year-old charged with armed robbery was involuntary based on a totality of the circumstances analysis, specifically citing his young age, limited education and low average intelligence, and limited experience with law enforcement as important factors). The court also rejected a request for a per se rule excluding custodial admissions from juveniles under sixteen who have been denied the opportunity to consult with a parent or other interested adult. *Id.*

218. *See, e.g.*, Bridges v. Chambers, 447 F.3d 994, 998 n.2 (7th Cir. 2006) (suggesting that the common police tactic of intentionally separating a seventeen-year-old juvenile suspect from his parents during questioning, despite the suspect's requests to the contrary, may be invalidated in the future in light of *Roper v. Simmons*); *In re* I.J., 906 A.2d 249, 264 (D.C. 2005) (holding that the officer should have known that his question, "What happened?" was reasonably likely to elicit an incriminating response and, thus, that custodial interrogation without *Miranda* warnings took place when a sixteen-year-old was questioned at the youth detention center where he resided).

219. A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004).

220. *Id.*

home.[221] This case is particularly significant, as it found that age is an "important factor" in the objective inquiry into whether the suspect felt at liberty to end interrogation and leave.[222] In fact, *A.M. v. Butler* explicitly stated that there was "no valid reason" why an analysis that considers the juvenile suspect's age—such as the totality test that is used to determine whether a confession was voluntary—should not "apply equally to an 'in custody' determination."[223]

Alvarado and the other cases discussed in Part III demonstrate that when courts fail to establish bright-line rules for police officers during the interrogation of juveniles, i.e. when they fail to explicitly consider the defendant's youth as a critical factor in the analysis of whether the questioning was custodial, they reinforce police prejudices and stereotyped notions about adolescent suspects, thereby privileging the objectives of the cop on the beat—or the detective in the interrogation room—over the rights of the juvenile suspect. In this way, courts become complicit in the types of interviewer bias that lead to inaccurate reporting by juveniles, just as they are complicit when affirming sentencing decisions by jurors motivated by implicit bias and prejudice against a juvenile offender. *Roper v. Simmons*, therefore, supports that bright lines be drawn by both the courts and the legislature to counter the ingrained biases held by the police against juvenile suspects.[224] Part V proposes specific rules and reforms that provide the bright lines needed to temper the biases held by police officers against juvenile suspects during interrogation.

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221. *Id.* at 797–98. Separate from the custody finding, the court found that A.M.'s statement was involuntary even though *Miranda* rights had been given, because "[t]here is no reason to believe that this 11-year-old could understand the inherently abstract concepts of the [*Miranda*] rights and what it means to waive them." *Id.* at 801 n.11.

222. *See id.* at 797 ("Every jurisdiction that has squarely addressed the issue, moreover, has ruled that juvenile status is relevant, either as a factor under the totality of circumstances test or by modifying the usual reasonable person standard.").

223. *Id.*

224. While some may perceive a tension between promoting a bright-line rule for the questioning of juveniles and advocating for "seeing . . . the three-dimensional reality" of children, the two impulses are not inconsistent. *See supra* notes 24–25 and accompanying text (characterizing bias—whether by jurors toward juvenile offenders or by police officers toward juvenile suspects—as seeing the type or category of the person rather than the "three-dimensional reality"). The argument here is that in the complex and highly nuanced context of the interrogation of children, where contextualized standards cannot provide adequate protections, categorical rules *are* necessary. *See supra* Part III (discussing the ways in which juveniles are particularly vulnerable to the effects of interviewer bias during interrogation, thereby necessitating that per se rules and policies be implemented for the questioning of adolescent suspects).

V. Changing the Culture of Police Interrogation of Juveniles

A. Top Down: Proposals for Legislators and Judges

In the context of capital punishment, it is relatively straightforward for a court or legislature to draw a bright line—as in *Simmons*, it can be done via a decision or statute defining the parameters of the state's ability to execute, with limits typically based on the offender's age or IQ or on the type of offense.[225] In the context of juvenile interrogation, the establishment of per se rules is not nearly as straightforward, though it is clear that comprehensive reform of the culture of juvenile interrogation must also begin in our courts and legislatures.[226] With that in mind, the following proposals are intended—at least initially—to apply only to those cases in which juveniles' statements are sought to be introduced during prosecutions in criminal court, not to matters in juvenile delinquency court.[227] A graduated implementation of such reforms is recommended, given the likely logistical complications and inevitable resistance that will ensue. Allowing for less rigorous protections of juveniles in the context of delinquency adjudications is only justified, however, if the

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

226. Kassin & Gudjonsson, *supra* note 26, at 59. The authors observed:

> In light of the recent high-profile wrongful convictions involving false confessions, as well as advances in psychological research in this area, the time is ripe for a true collaborative effort among law-enforcement professionals, district attorneys, defense lawyers, judges, social scientists, and policymakers to evaluate the methods of interrogation that are commonly deployed.

Id.

227. Of course, it is not always known at the outset whether a young suspect will ultimately be prosecuted in delinquency or criminal court, for if automatic transfer and statutory exclusion provisions do not apply, the discretion to transfer a juvenile's case to adult court often lies with the prosecutor or judge—in some cases requiring that an evidentiary hearing be conducted to determine if the protection of the public and the needs of the juvenile would be best served by transfer. *See, e.g.*, CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN'T MINOR: THE IMPACT OF TRYING YOUTH AS ADULTS AND STRATEGIES FOR REFORM 5, 10 (2007), *available at* http://www.campaignforyouthjustice.org/Downloads/NEWS/National_Report_consequences.pdf (last visited Feb. 12, 2008) (finding that in approximately fifteen states, the discretion and authority to send youth to adult court has been delegated to prosecutors, while in most other states, the juvenile court judge has the authority to waive juvenile court jurisdiction and transfer the case to criminal court) (on file with the Washington and Lee Law Review). In most investigations of particularly serious or violent offenses, however, it is known by law enforcement that the perpetrator—whether a juvenile or an adult—will ultimately be charged in criminal court, thereby placing the police on notice that upon questioning a minor suspect, certain safeguards must be followed.

dispositional scheme is significantly less punitive and more rehabilitative for juveniles in delinquency court than in adult criminal court.[228]

The first step, effectively advocated for by Professor Steven Drizin, is the routine videotaping of interrogations.[229] Such a policy would serve to deter police from the most egregious interrogation tactics; it would discourage frivolous claims of police coercion; and it would provide an objective and accurate record of the process.[230] Mandatory videotaping is a practice that is slowly gaining ground across the United States, despite strong initial resistance by police and prosecutors.[231] In fact, in jurisdictions where it has been

228. The concern here is directed towards those jurisdictions that have instituted particularly punitive juvenile court dispositions as well as those in which juvenile court adjudications are used to enhance criminal court sentences. *See* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 798 (2005) (recommending, with the same caveats, that a less demanding standard for "adjudicative competence" be applied to young offenders in juvenile court than in criminal court).

229. *See, e.g.*, Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 646 (2004) (providing a historical overview of the practice of recording police interrogations and advocating for mandatory recording); 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, 341 (2001) (advocating for mandatory videotaping policy in Illinois); Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 925–35 (1995) (discussing existing provisions requiring videotaped interrogations and advocating for videotaping the interrogation of juveniles); Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 554 (2001) (advocating the videotaping of all interrogations generally); *see also* Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 300 (arguing that reforms such as mandatory videotaping are urgently needed for interrogations of juveniles, as research indicates that they are at "increased risk of providing false confessions"). *But see Feld*, *Juveniles' Competence*, *supra* note 129, at 92–98 (discussing the policy merits as well as the drawbacks of requiring interrogations to be recorded).

230. *See* Kassin & Gudjonsson, *supra* note 26, at 60–61 (arguing that a videotaping policy would have all these advantages, thereby creating a "more effective safety net").

231. *See id.* (discussing that the practice of videotaping interrogations is gaining ground, despite initial resistance from law enforcement); *see also In re* Jerrell C.J., 699 N.W.2d 110, 123 (requiring all custodial interrogations of juveniles to be electronically recorded "where feasible" and "without exception" when the questioning occurs at a place of detention); Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 258–60 (2005) (describing the creation of the new Illinois statute requiring interrogations to be videotaped and the initial concerns that videotaping interrogations will lead to fewer confessions and prejudice juries against police officers); Westling, *supra* note 229, at 552 (hypothesizing as to why there is "foot-dragging" about videotaping police interrogations and postulating that it is possibly because police do not want to learn new technology and because they wish to preserve the "incommunicado" nature of the current system); Matthew D. Thurlow, Comment, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771, 797–801 (2005) (citing cost, the

implemented, law enforcement has consistently reported that it has had no negative effects on the investigative process.[232] While questions remain regarding the most appropriate format and camera perspective to use during the recording of interrogation, clinicians, police, prosecutors, and juvenile defenders can cooperatively develop and recommend best practices to ensure that appropriate procedures are followed.[233]

Secondly, courts must be open and receptive to proposals to apply a per se analysis to central aspects of juvenile interrogation. This will serve to give clear guidance to police in the field while also providing appropriate due process protections for juvenile suspects. The rationale is straightforward: If we do not want to impose on law enforcement the responsibility to make subjective assessments of juvenile suspects—and rather than presuming, for example, that a suspect is *not* in custody as long as she is given the opportunity to take breaks and is allowed to go home—per se rules are warranted. The most critical step is to mandate through legislation that *Miranda* warnings be given to juveniles who are questioned—whether in custody or not—and that a simplified version of the rights form be used for juvenile suspects.[234] In

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belief that suspects will not be willing to talk when videotaped, and officers' dislike of being monitored as reasons for police to resist videotape requirements).

232. *See* THOMAS P. SULLIVAN & NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 22–23 (2004) (surveying more than 200 U.S. law enforcement agencies that videotape custodial interrogations and finding that videotaping does not inhibit suspects from talking with police or confessing and explaining the ways that videotaping interrogations can actually save money); *see also* Kassin & Gudjonsson, *supra* note 26, at 61 (citing a National Institute of Justice study that found that the vast majority of police and sheriffs' departments in the United States that voluntarily videotaped interrogations found the practice useful); Thurlow, *supra* note 231, at 810–13 (noting that most police departments found that videotaping was actually beneficial because it did not discourage suspects from confessing, was not too expensive, and provided officers with tools that they could use to evaluate their interviewing skills).

233. *See* Elizabeth C. Wiggins & Shannon R. Wheatman, *So What's a Concerned Psychologist To Do? in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 114, at 265, 266 (calling for a scientific review paper, endorsed and delineated by leading experts, that defines the critical psychological issues inherent in current police interrogation techniques and offers recommendations for conducting interrogations and guiding additional research); *see also* G. Daniel Lassiter et al., *Criminal Confessions on Videotape: Does Camera Perspective Bias Their Perceived Veracity?*, 7 CURRENT RES. IN SOC. PSYCHOL. 7 (2001), *available at* http://www.uiowa.edu/~grpproc/crisp/crisp.7.1.htm (last visited Feb. 24, 2008) (presenting research on the impact of camera point of view on judgments of coercion and voluntariness) (on file with the Washington and Lee Law Review); Kassin & Gudjonsson, *supra* note 26, at 61 (arguing that "the camera adopt a neutral 'equal focus' perspective that shows both the accused and his or her interrogators"); Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 301 (citing the Lassiter study); Tom Sigfried, *Camera Can Sway Jury's View of Video Confession*, DALLAS MORNING NEWS, Feb. 17, 2003, at 3C (discussing Lassiter's study).

234. *See, e.g.*, Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial*

addition, an attorney should be provided for juveniles prior to questioning or interrogation to advise the child and her parent or guardian.[235] Time limits should be placed on the interrogation of juveniles to prevent repeated and/or protracted, and potentially coercive, questioning sessions,[236] and utilizing trickery or false promises of assistance or leniency should be banned during police questioning of juveniles.[237]

Lastly, juvenile defenders must take the lead in—and courts must be receptive to—the utilization of experts to testify regarding adolescent psychological and brain development when the admissibility of a confession hinges on what the juvenile, herself, perceived during the interrogation.[238] Clinical and research psychologists, neuroscientists, and other experts can provide invaluable assistance as judges and juries grapple with such critical questions as, "Did the juvenile feel free to leave? Did she understand

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Interrogations: Friend or Foe?, 41 AM. CRIM. L. REV. 1277, 1308 (2004) (proposing the use of a simplified juvenile rights form, designed for differing levels of maturity and IQ, that would enhance the comprehension of juveniles).

235. *See, e.g.*, *id.* at 1280 (advocating that juveniles have a nonwaiveable right to counsel before waiving *Miranda* rights); King, *supra* note 108, at 475–76 (arguing for a per se rule that children must be provided with counsel prior to interrogation); Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 660–61 (2003) (advocating that all juveniles under the age of sixteen be required to consult with counsel); Marrus, *supra* note 154, at 527 ("To ensure equality between adults and minors in this context, I take the position that no juvenile can be interrogated unless an attorney is present."); Schlam, *supra* note 229, at 925 (citing the Institute of Judicial Administration and the American Bar Association Juvenile Justice Standards Project as suggesting that juveniles should have mandatory and nonwaiveable access to an attorney during "all stages of the proceeding").

236. *See, e.g.*, Kassin & Gudjonsson, *supra* note 26, at 60 (arguing that because excessive time in custody poses a risk to innocent suspects, policy discussions should begin with a proposal to impose time limits, or at least flexible guidelines, for detention and interrogation, as well as breaks from questioning for rest and meals).

237. *See, e.g.*, *id.* at 60 (citing controlled studies that have shown that the presentation of false evidence "substantially increases false confessions"); McMullen, *supra* note 128, at 1005 (proposing a per se ban on all police deception during the questioning of juveniles).

238. *See, e.g.*, Kassin & Gudjonsson, *supra* note 26, at 58 (arguing for the increased inclusion of expert testimony to inform judges and juries about police interrogations, false confessions, and personal and situational risk factors as well as to render opinions about the veracity of particular confessions); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence,* Miranda *and Juveniles*, 71 U. CIN. L. REV. 89, 113 (2002) (suggesting that an expert could have helped educate the court in a case where a twelve-year-old boy with limited communication skills confessed to stealing a car and was found competent during the suppression hearing); *see also* Leonard Post, *The False Confessions of Juveniles*, 47 BROWARD DAILY BUS. REV., Jan. 17, 2006, at 1 (quoting Simmie Baer of the National Association of Criminal Defense Lawyers' juvenile justice committee as advocating for the admission of expert testimony regarding juvenile confessions).

Miranda? Did she appreciate the significance of giving a statement?"[239] As discussed in Part III.C, when drafting specific proposals, legislators, police departments, and their policy advisors should use the reforms and procedural safeguards that have been developed to protect the integrity of information elicited from young victims and witnesses as their guides.[240]

While implementing per se rules and policies to ensure that the due process rights of juveniles are protected during police questioning may seem radical, given that the context is the interrogative treatment of children and teenagers—with all its inherent risks and pitfalls—it is the very least that must be done. As illustrated in the previous sections, bright lines are desperately needed in this area, and those at the top—judges and lawmakers—must take the first critical steps, confident that the other actors in the criminal and juvenile justice systems will follow.

B. Bottom Up: Educating Police Departments and the Community

In conjunction with the implementation of legal reforms and safeguards for the interrogation of children, law enforcement officers must be educated regarding the stages of adolescent development and the implications of such for the questioning of juveniles.[241] We have much to learn from social scientists who have made it clear that in order to determine a young person's intent or competency, a thorough assessment of whether their capacity is limited by a variety of disabilities, including trauma and developmental delay, is necessary.[242] Just as police investigators receive specialized training in this area in preparation for the appropriate interviewing of child victims and witnesses, comparable training must be required prior to interrogating juvenile suspects.[243]

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239. *See* Kassin & Gudjonsson, *supra* note 26, at 58 (noting that clinical and research psychologists in Great Britain have had a "substantial impact in recent years on law, police practice, trial verdicts, and appellate decisions" through their research and expert testimony).

240. *See supra* notes 131–40 and accompanying text (discussing the reforms and safeguards implemented for the questioning of child victims and witnesses by police).

241. *See, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. REV. 891, 1004–05 (2004) (advocating for training police officers, prosecutors, and judges in proper techniques of interrogating juveniles and the mentally handicapped); Owen-Kostelnik, Repucci & Meyer, *supra* note 27, at 300 (discussing the importance of training police in areas of child development to prepare them for the interrogation of juvenile suspects).

242. *See* Beyer, *supra* note 123, at 113 (discussing the importance of assessing the effects of disabilities on juvenile intent and the ability to assist counsel).

243. *See supra* Part III.C (discussing the disparity between the numerous reforms and

In addition, it is essential that those in the juvenile justice field take significant steps to promote community awareness of the phenomenon of disproportionate minority representation within the juvenile justice system and what it means for children of color.[244] Studies have recently demonstrated that most teenagers sent to death row are poor, black, and likely to have been convicted of killing whites.[245] Similar statistics exist for the demographics of children and adolescents in the juvenile court system.[246] Awareness that our

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accommodations that exist for the questioning of child victims compared with the lack of such safeguards for the interrogation of juvenile suspects); Krzewinski, *supra* note 117, at 384 (suggesting that juvenile interrogators should look to the protocols for questioning child victims in light of the high profile false confession cases involving juveniles); *see also* Redlich et al., *supra* note 114, at 122–23 (finding that the developmental similarities between child suspects and victims and the "mass of related research findings on the forensic interviewing of child victim/witnesses" suggest that interrogation techniques used with adults are not suitable for children).

244. *See, e.g.*, BUILDING BLOCKS FOR YOUTH, AND JUSTICE FOR SOME 1 (2000), *available at* http://www.buildingblocksforyouth.org/justiceforsome/jfs.pdf (last visited Feb. 24, 2008) (discussing disproportionate representation of minority youth in the justice system) (on file with the Washington and Lee Law Review). The study found that the phenomenon of disproportionate minority contact is the product of

> actions that occur at earlier points in the juvenile justice system, such as the decision to make the initial arrest, the decision to hold a youth in detention pending investigation, the decision to refer a case to juvenile court, the prosecutor's decision to petition a case, and the judicial decision and subsequent sanction.

Id.; *see also* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV 374, 402–17 (2007) (stating that "African American juveniles are overrepresented in juvenile justice institutions as compared to their levels in the general population"); Kasey Corbit, Note, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation in the Juvenile Justice System*, 3 HASTINGS RACE & POVERTY L.J. 75, 77 (2005) (stating that "minority youth are only one-third of the U.S. adolescent population, yet they account for two-thirds of incarcerated adolescents").

245. *See* Sasha Abramsky, *Taking Juveniles Off Death Row*, AM. PROSPECT, July 2004, at A16 (citing the "troubling body of evidence" that supports this conclusion, gathered by experts such as Ohio Northern University law professor Victor L. Streib). About one-third of juveniles on death row were white as of 2002, compared to three-quarters of victims, suggesting that a higher percentage of minority juveniles on death row have been convicted of killing a white victim. *See* Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121, 128–130 (2003) (noting that "it appears that executed juvenile offenders . . . are more likely to be offenders of color condemned for killing female victims")

246. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROTECTION, JUVENILES IN CORRECTIONS 9–13 (2004), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/202885.pdf (last visited Feb. 24, 2008) (finding that minority youth account for 70% of juveniles held in custody for violent offenses, that a disproportionate number of minorities are in residential placement, that custody rates are the highest for blacks, and that minority disproportionality exists at various decision points in the juvenile justice system) (on file with the Washington and Lee Law Review); *see also* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1576 (2003) ("The overrepresentation of

harshest juvenile laws and policies are borne by our most vulnerable populations must be broadly emphasized in order to promote specific reforms and changes. This is true for the interrogation of juveniles as well as for other issues of concern to juvenile justice advocates—from the proliferation of juvenile transfers to adult court[247] to the continued sentencing of juveniles to life in prison without the possibility of parole.[248]

Roper v. Simmons can serve as the catalyst and guide for such reforms. By providing education regarding adolescent development and promoting awareness of disproportionate minority impact, we can help alleviate Justice Kennedy's expressed concern that judgments about juveniles' behavior will be driven by misplaced and unjustified biases, prejudices, and stereotypes regarding our communities' children.

VI. Conclusion

Analyzing *Roper v. Simmons* and what it might mean for the interrogation of juveniles highlights the tension that has predominated in the law's approach to juvenile crime.[249] As mentioned at the outset, during the past century the focus of the legal system has shifted from protecting and rehabilitating young

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minority youths in the juvenile justice system, as well as in concentrated poverty, makes imperative the pursuit of racial and social justice.").

247. *See* Feld, *supra* note 246, at 1562–63 (stating that in the past two decades, almost every state has revised its transfer laws to facilitate the prosecution of more juveniles in adult court, and that such policies have had a disproportionate impact on black youth) (citing JUVENILE CRIME, JUVENILE JUSTICE 216 (Joan McCord et al. eds., 2001)). Feld further comments that "[a] high proportion of the juveniles transferred to adult court are minorities. . . . The preponderance of minorities among transferred juveniles may be explained in part by the fact that minorities are disproportionately arrested for serious crimes." *Id.*

248. *See* HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 39 (2005) (finding that blacks constitute 60% of the youth offenders serving life without parole nationwide and whites constitute 29%, with data showing that black youth are serving life without parole sentences at a rate that is ten times higher than white youth).

249. The forum of juvenile court, in particular, is a hybrid—it looks to both civil and criminal doctrine and relies upon the expertise of both lawyers and clinicians for its functioning. *See, e.g.*, Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1040 (1995) ("The juvenile courts . . . exist in a twilight, neither wholly bound by the constitutional norms of criminal procedure nor convincingly 'civil' and rehabilitative as envisioned by their founders."); Ira M. Schwartz et al., *Will the Juvenile Court System Survive?: Myopic Justice? The Juvenile Court and Child Welfare Systems*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 128 (1999) (exploring the difficult mission of juvenile court, expected "to fulfill the complicated dual roles of societal disciplinarian that can punish and of parental substitute that can treat, supervise, and rehabilitate").

offenders to punishing and imprisoning them—and then back again. As a result, we have seen court decisions that portray juveniles as vulnerable youth overruled months later by ones that characterize them as violent predators.[250] We have also seen cases such as *Simmons* follow on the heels of ones such as *Alvarado*, with procedural and substantive disparities arising alongside them.

The reality is that such disparities exist because, as seen in courtrooms as well as interrogation rooms, "American culture and law contain two competing and conflicting images of young people."[251] In some contexts within the legal system, they are considered to be vulnerable, incompetent, and needing of protection, while in others they are the equivalent of adults, requiring no such safeguards.[252] As Professor Barry C. Feld has written, it is the role of juvenile justice jurisprudence "to reconcile the fundamental ambivalence and conflicted impulses engendered by these competing social constructs of innocence and responsibility when the child is a criminal."[253]

Roper v. Simmons represents the latest—and most promising—attempt to reconcile the competing images of the juvenile offender. Its significance arises from its explicit recognition that adolescents are fundamentally different than adults and that courts must draw bright lines to protect vulnerable populations from the biases that predominate within American culture and law—whether among jurors, police officers, or the judiciary. The time has now come to apply *Simmons*'s lessons to the area of juvenile interrogation: It is the age of the child that matters.

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250. *Compare, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (prohibiting the death penalty for offenders fifteen and younger in 1988), *with* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (upholding the death penalty for offenders sixteen and older in 1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005); *see also* Commonwealth v. Kocher, 602 A.2d 1308, 1315 (1992) (remanding for further proceedings in a bitterly divided opinion addressing whether a nine-year-old should be tried for murder in juvenile delinquency or adult court).

251. Feld, *Juveniles' Waiver*, *supra* note 129, at 106.

252. *Id.*

253. *Id.*