JUVENILE *MIRANDA* WAIVER AND PARENTAL RIGHTS

Critics lament that *Miranda* waiver doctrine is broken for juveniles. But it is also broken for parents. Juvenile advocates speak of child suspects as independent actors with individual rights. Yet police questioning of minors also threatens the rights of parents, "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[1]

When the state threatens to break "familial bonds, it must provide the parents with fundamentally fair procedures."[2] Police interrogation currently creates a substantial risk that children will be removed from their parents after confessing falsely. Questioning may also cause psychological harm that damages the parent-child relationship. Though so far ignored in the constitutional analysis of juvenile justice, parental rights reinforce children's individual *Miranda* rights and demand strong prophylactic protections for interrogated children, far stronger than those provided by today's weakened adult *Miranda* regime.

This Note seeks to bring parental rights into the interrogation room. Part I outlines juvenile *Miranda* waiver, contrasting recent developments in the constitutional law of children with a stagnated waiver doctrine. Part II describes the nature of parental rights, explaining that courts apply the most searching scrutiny when parental rights cases involve a hybrid constitutional claim and when government action threatens custody. Synthesizing, Part III explains that juvenile interrogations violate hybrid parental-*Miranda* rights by threatening to elicit false confessions that remove innocent children from their parents' care. Per se rules offer solutions: either parents should be empowered to guard their interests through truly informed consent, or child suspects should be provided with other risk-reducing protections.

I. *MIRANDA* WAIVER FOR CHILD SUSPECTS

Interrogation coerces by design.[3] We regulate interrogation because it can go too far, harming suspects and producing unreliable confessions.[4] Common sense backed by brain science leaves no doubt that juveniles are often more vulnerable to the pressures of police questioning.[5] Protective procedures designed for adults offer limited help.

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[1] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

[2] Santosky v. Kramer, 455 U.S. 745, 754 (1982).

[3] *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) ("Any interview of one suspected of a crime by a police officer will have coercive aspects to it . . . .").

[4] *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."); *id.* at 455 n.24 ("Interrogation procedures may even give rise to a false confession.").

[5] *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 19–20 (2010) (collecting developmental psychology research

Younger juveniles misunderstand *Miranda* warnings at alarming rates,[6] and developmental psychologists question whether minors are ever competent to make "knowing, intelligent, and voluntary" waivers of their rights.[7] For child victims and witnesses, police and judges have developed extensive protocols to ensure that statements are reliable, but there are no similar safeguards for juvenile suspects.[8] Instead, to take advantage of psychological reality, interrogation training instructs officers to treat children no differently than they do adults, except when employing strategies for manipulating children's special sensitivities.[9] These methods work. As a matter of course, questioned minors waive their rights and make incriminating statements.[10]

"[Y]oung people are especially prone to confessing falsely."[11] Juveniles account for as much as a third of documented false confessions.[12] Experimental results are consistent with this finding,[13] as are studies of the reliability of child witnesses.[14] The very young — those under fifteen — are most at risk.[15] Perversely, innocent children are especially likely to confess because suspects who did nothing wrong are more will-

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that provides "strong evidence that juveniles are at risk for involuntary and false confessions in the interrogation room," *id.* at 19). This Note refers interchangeably to all individuals under eighteen years old as juveniles, children, kids, or minors.

6 *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1166 (1980) ("The two empirical studies described in this Article indicate that younger juveniles as a class do not understand the nature and significance of their *Miranda* rights to remain silent and to counsel.").

7 Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 228 (2006) (internal quotation marks omitted).

8 *See* Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 420–27 (2008).

9 *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 298–303 (4th ed. 2004); Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 761, 773–76 (2007).

10 *See* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS 170 (2013) (reporting study of interrogated sixteen- and seventeen-year-olds charged with felonies in which 92.8% waived their *Miranda* rights and 88.4% confessed or made incriminating statements).

11 Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 61 (2007).

12 Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004) ("[J]uveniles . . . are over-represented in our sample of [125] false confessions. . . . [J]uveniles comprise approximately one-third (33%) of our sample.").

13 *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003) ("Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures, such as confessing to the police rather than remaining silent . . . ."); 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) ("Age was associated with compliance with signing the false confession, particularly when false evidence was presented.").

14 *See generally* Amye R. Warren & Dorothy F. Marsil, *Why Children's Suggestibility Remains a Serious Concern*, LAW & CONTEMP. PROBS., Winter 2012, at 127 (2002) (summarizing studies).

15 *See, e.g.*, Grisso et al., *supra* note 13, at 356.

ing to begin frank conversations with police.[16] And even a false incriminating statement "leads almost ineluctably to a plea or conviction."[17]

A. Michael C.*: An Adult Model Applied to Juvenile Waiver*

For statements made during custodial interrogations to be admissible, the familiar rule of *Miranda v. Arizona*[18] requires that suspects waive their rights before questioning and after adequate warnings.[19] The bulk of *Miranda* litigation turns on (1) whether interrogation was "custodial" and (2) whether waiver was made "voluntarily, knowingly and intelligently."[20] This Note concerns the second inquiry, for which courts apply a standard that does not meaningfully distinguish children from adults.

Before *Miranda*, the Supreme Court in *Haley v. Ohio*[21] showed some solicitude for the "mere child — an easy victim of the law" whose interrogation "cannot be judged by the more exacting standards of maturity."[22] But post-*Miranda* juvenile cases have applied a police-friendly adult analysis without much flexibility for children, excluding "only the most egregiously obtained confessions and then only on a haphazard basis."[23] *Fare v. Michael C.*[24] imported to child cases the adult totality of the circumstances standard,[25] which courts apply by systematically discounting children's special susceptibilities.[26] Amid concerns about restraining police, the slightest outward hint of voluntariness can suffice for waiver; judges rarely probe a juvenile suspect's inner experience.[27] While the presence of a parent all but ensures a

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[16] *See* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211, 217–18 (2004).

[17] Feld, *supra* note 7, at 221; *see also* Drizin & Leo, *supra* note 12, at 923 ("Confession evidence (regardless of how it was obtained) is so biasing that juries will convict on the basis of confession alone, even when no significant or credible evidence confirms the disputed confession and considerable significant and credible evidence disconfirms it."); Kassin et al., *supra* note 5, at 5 ("In total, 81% of false confessors in [the study's] sample whose cases went to trial were wrongfully convicted."). Given this reality, and the prevalence of plea bargaining, trials cannot be said to cure due process wrongs when interrogations elicit false confessions.

[18] 384 U.S. 436 (1966).

[19] *See id.* at 498–99.

[20] *Id.* at 444.

[21] 332 U.S. 596 (1948).

[22] *Id.* at 599 (plurality opinion) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

[23] Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions,* Miranda*, and the Right to Counsel*, *in* YOUTH ON TRIAL 105, 113 (Thomas Grisso & Robert G. Schwartz eds., 2000).

[24] 442 U.S. 707 (1979).

[25] *Id.* at 725.

[26] *See* Feld, *supra* note 23, at 113 ("Courts readily admit the confessions of illiterate, mentally retarded juveniles with I.Q.s in the sixties whom psychologists characterize as incapable of abstract reasoning.").

[27] *See, e.g.*, *Michael C.*, 442 U.S. at 726.

finding of voluntariness, it is far from required.[28] Recently, and unexceptionally, a Michigan court applying *Michael C.* admitted statements made by a wailing fourteen-year-old during early-morning questioning without his parents, after an officer purportedly threatened to send his mom and dad to prison if he did not confess.[29] With *Miranda* sheets read and signed, and without physical abuse, confessions come in.[30]

Though the federal system and thirty-five states apply only the *Michael C.* totality of the circumstances approach, some states take additional steps to safeguard juvenile suspects.[31] Fourteen states enforce per se rules that invalidate juvenile waivers without adequate protections.[32] These rules often require that children below a certain age be questioned in the presence of a parent or legal counsel, or that young children consult such an adult before waiving *Miranda* rights.[33] Still, courts in most states apply an exceedingly light touch when deciding whether a child's waiver was knowing and voluntary.

B. Twenty-First-Century Juvenile Rights

Federal (and most state) waiver law has remained stagnant amid recent juvenile constitutional developments. In *J.D.B. v. North Carolina*,[34] the Supreme Court took a significant step toward bringing the first branch of *Miranda* doctrine — custody analysis — in line with juvenile reality. *Miranda*'s rules apply only to those in custody,[35] which courts determine using an objective standard that excludes personal characteristics.[36] Before *J.D.B.*, youth was immaterial.[37]

J.D.B. announced a child exception to this adult custody analysis. North Carolina courts admitted statements made without *Miranda* warnings by thirteen-year-old J.D.B. during an in-school police inter-

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[28] *See* 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, 462–63.

[29] *See* People v. Jones, No. 308482, 2012 WL 4839858, at *1–2 (Mich. Ct. App. Oct. 11, 2012).

[30] *See, e.g.*, *id.* at *3–4; *see also* King, *supra* note 28, at 456 ("A review of several hundred juvenile *Miranda* cases . . . reflect[s] grudging, if any, accommodations to the youth of the accused.").

[31] *See* King, *supra* note 28, at 451–53.

[32] The fourteen are Colorado, Connecticut, Indiana, Iowa, Kansas, Massachusetts, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Vermont, and Washington. *See id.* at 451–52 & nn.89–91. Texas alone mandates that juveniles signing written statements waive their *Miranda* rights in front of a magistrate. *See* TEX. FAM. CODE ANN. § 51.095 (West 2008 & Supp. 2012).

[33] *See* King, *supra* note 28, at 451–52 & nn.89–91.

[34] 131 S. Ct. 2394 (2011).

[35] *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[36] *See* Thompson v. Keohane, 516 U.S. 99, 112 (1995) (asking whether circumstances would have made "a reasonable person [feel] he or she was not at liberty to terminate the interrogation and leave").

[37] *See* Yarborough v. Alvarado, 541 U.S. 652, 668 (2004).

view, finding he had not been in custody when questioned.[38] The Supreme Court reversed, recognizing the inadequacy of viewing children "simply as miniature adults"[39] and instead endorsing a "reasonable child" standard.[40] In situations like the in-school interview, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[41]

J.D.B.'s fresh look at juvenile *Miranda* custody complemented the Eighth Amendment triptych headlining this century's juvenile rights renaissance.[42] As in the Supreme Court cases banning for juveniles the death penalty (*Roper v. Simmons*[43]), nonhomicide life without parole (*Graham v. Florida*[44]), and mandatory life without parole (*Miller v. Alabama*[45]), the *J.D.B.* Court relied on children's impetuosity and impressionability. Quoting precedent, the Court observed that children "are more vulnerable or susceptible to . . . outside pressures"[46] and "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[47] Children's unique experience of perpetual custody — always subject to parents, teachers, or other authorities — means they can never choose to walk free.[48]

The lesson of *J.D.B.* — that emotional, impulsive, suggestible, and present-focused juveniles struggle to grasp their options when dealing with police — suggests that children also differ categorically from adults for the purposes of *Miranda* waiver.[49] An easily manipulated child is less likely to invoke rights she already does not fully understand,[50] and her immediate desire to return to loved ones encourages (false) confessions that promise an end to questioning.[51] Yet the "evo-

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[38] *J.D.B.*, 131 S. Ct. at 2399–400.

[39] *Id.* at 2404.

[40] *See id.* at 2403.

[41] *Id.*

[42] *See id.*

[43] 543 U.S. 551 (2005).

[44] 130 S. Ct. 2011 (2010).

[45] 132 S. Ct. 2455 (2012).

[46] *J.D.B.*, 131 S. Ct. at 2403 (alteration in original) (quoting *Roper*, 543 U.S. at 569) (internal quotation marks omitted).

[47] *Id.* (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion)) (internal quotation marks omitted).

[48] *Cf. In re* Gault, 387 U.S. 1, 17 (1967) (describing the traditional view that "a child, unlike an adult, has a right 'not to liberty but to custody'").

[49] *See J.D.B.*, 131 S. Ct. at 2403 (reaching "conclusions [that] apply broadly to children as a class").

[50] A study found that only 20.9% of all children, against 42.3% of adults, comprehend the meaning and significance of *Miranda* warnings. Grisso, *supra* note 6, at 1153. While *Miranda* balancing may tolerate this lack of comprehension for adults, parental rights demand a different result for children, especially given the doctrine's optical function (discussed in section III.A).

[51] *Cf. Gault*, 387 U.S. at 52 (describing a case in which a psychiatrist found that a twelve-year-old boy would admit "whatever he thought was expected so that he could get out of the immediate situation" (quoting *In re* Gregory W., 224 N.E.2d 102, 105 (N.Y. 1966)) (internal quotation

lution of juvenile justice standards"[52] has not made its way to waiver doctrine. With a largely superficial waiver test (and with no guarantee that courts will conduct *J.D.B.*'s custody inquiry with any more rigor[53]), children lack meaningful *Miranda* protections.

Antipathy to the *Miranda* regime deserves a good bit of the blame. From the start, *Miranda* drew opposition from politicians and the public,[54] and its erosion has been driven by a steady stream of criticism. Chief Justice Burger and then-Justice Rehnquist "played a prominent role in the downsizing and dismantling of *Miranda*,"[55] and the Roberts Court has continued the "substantial retreat."[56]

Merely reinvoking a declining doctrine that has been tarred as a constitutionally illegitimate[57] poster child for overproceduralization[58] holds limited promise. But a reinforcing right could add weight to arguments for strengthened protections. An exclusive focus on children's procedural rights too often runs headlong into a hailstorm of *Miranda* hostility. Overlooked has been the complementary, compelling interest of parents in the interrogation of their children.

II. PARENTAL RIGHTS AND JUVENILE JUSTICE

Parents' rights to the care, custody, and control of children stem from the Constitution's "protect[ion of] the sanctity of the family," an institution "deeply rooted in this Nation's history and tradition."[59] Parental domain over the "private realm of the family"[60] grants guardianship over a child's "education and upbringing,"[61] body and mind.

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marks omitted)); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

52 Mae C. Quinn, *Introduction* to Colloquium, *Access to Justice: Evolving Standards in Juvenile Justice: From* Gault *to* Graham *and Beyond*, 38 WASH. U. J.L. & POL'Y 1, 1 (2012).

53 *See, e.g.*, *In re* A.N.C., Jr., No. COA12-482, 2013 WL 427095, at *3–4 (N.C. Ct. App. Feb. 5, 2013) (applying *J.D.B.* but finding no custodial interrogation when police questioned a thirteen-year-old at the scene of a car accident).

54 *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968 § 701, 18 U.S.C. § 3501 (2006), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).

55 Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 980 (2012).

56 Berghuis v. Thompkins, 130 S. Ct. 2250, 2266 (2010) (Sotomayor, J., dissenting); *see also* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 24 (2010) ("*Miranda* has effectively been overruled.").

57 *See Dickerson*, 530 U.S. at 445–46 (Scalia, J., dissenting).

58 *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 216–43 (2011).

59 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion). References to parents throughout this Note encompass all parents, custodians, and legal guardians.

60 Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion).

61 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

Parents may make decisions about the secular[62] and religious[63] education children receive, the medical treatment they undergo,[64] and the people they spend time with,[65] all based on an underlying right to physical child custody absent signs of unfitness.[66] These parental rights, particularly strong when custody is threatened and when paired with complementary rights, demand greater protections than existing juvenile interrogation doctrine provides.

A. The Nature of Parental Rights

Today, most judges recognize a baseline "settled principle" of parental rights rooted in the Due Process Clause of the Fourteenth Amendment.[67] It was not always so. Just as *Miranda* has suffered a storm of skepticism, toward the end of the twentieth century parental rights came under fire. While critics of substantive due process bucked at broad, judicially enforced rights,[68] other scholars questioned the proprietarian origins of parental rights, which they tarred with the Thirteenth Amendment–evoking epithet "children as chattels."[69] This distaste was motivated by concern for the best interests of children and the belief that parental rights obscured a "child-centered" perspective.[70] In legal circles, it became "unfashionable . . . to speak of parental rights."[71]

Still, the core of parental rights survived these salvos, with the Supreme Court's near-unanimous endorsement in *Troxel v. Granville*[72] signaling their continuing vitality.[73] *Troxel*, which required that courts

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[62] *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[63] *See* Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 532, 534–35 (1925).

[64] *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979).

[65] *See Troxel*, 530 U.S. at 72 (plurality opinion).

[66] *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982).

[67] *Troxel*, 530 U.S. at 77 (Souter, J., concurring in the judgment); *see also id.* at 66 (plurality opinion); *id.* at 80 (Thomas, J., concurring in the judgment); *id.* at 86–87 (Stevens, J., dissenting); *id.* at 95 (Kennedy, J., dissenting) (describing "[t]he parental right" as "a beginning point that commands general, perhaps unanimous, agreement in our separate opinions"). *But see id.* at 92–93 (Scalia, J., dissenting) (denying the existence of judicially enforceable parental rights).

[68] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.).

[69] Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1044 (1992); *see also* Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1364 (1992).

[70] Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1754 (1993); *cf.* Parham v. J.R., 442 U.S. 584, 630 (1979) (Brennan, J., concurring in part and dissenting in part) ("In our society, parental rights are limited by the legitimate rights and interests of their children.").

[71] Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 979 (1988).

[72] 530 U.S. 57 (2000).

[73] *See* opinions cited *supra* note 67.

considering grandparent visitation weigh the views of a fit mother,[74] did little to specify the bounds of parental rights,[75] but it reinforced the importance of a buffer that prevents the state from reshaping the family. The property model has faded, with modern parental rights embraced as "far more precious than any property right."[76] Instead, while remaining rooted in due process, the parental right is best seen today as a flavor of associational freedom that recognizes the importance of family in citizens' lives and in the social order.[77]

Like associational freedoms, parental rights are "intrinsic and instrumental,"[78] safeguarding both individual and structural interests.[79] On an individual level, parental rights allow the opportunity to enjoy others' companionship, to satisfy human needs to love and be loved, to build an intimate emotional shelter, and to protect relationships that define identity.[80] Parental rights carve out a sphere of personal privacy valuable to the children and parents who inhabit it.[81]

Perhaps a stronger justification for parental rights rests on the structural role of the family in society.[82] Presumptions in favor of parents guard against state-imposed, Spartan homogeneity. The originating *Lochner*-era precedents, *Meyer v. Nebraska*[83] and *Pierce v. Society of Sisters*,[84] formally rested on liberty-of-contract principles, but they embraced the parent as a constitutional buffer who prevents the state from "'standardiz[ing] its children' or 'foster[ing] a homogenous peo-

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[74] *See Troxel*, 530 U.S. at 72 (plurality opinion).

[75] *See* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 377–92 (2002); John DeWitt Gregory, *The Detritus of* Troxel, 40 FAM. L.Q. 133, 147 (2006).

[76] Santosky v. Kramer, 455 U.S. 745, 758–59 (1982).

[77] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 989 (1st ed. 1978) ("[T]he embedding of a choice within a close human relationship or network of relationships should always be regarded as significantly increasing the burden of justification for those who would make the choice illegal or visit it with some deprivation." (emphasis omitted)).

[78] Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984); *see also* NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[79] *See Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1353 (1980).

[80] Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 630–37 (1980).

[81] *See Jaycees*, 468 U.S. at 618–20.

[82] *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[Supreme Court] jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765, 772 (1973) ("Our political system is superimposed on and presupposes a social system of family units, not just of isolated individuals. . . . Any sharp departure from this [arrangement] would cut as deeply at the underlying conditions of acceptance of our society and governing institutions as a broad restriction on the right to vote or hold office.").

[83] 262 U.S. 390 (1923).

[84] 268 U.S. 510 (1925).

ple.'"[85] "The child is not the mere creature of the State,"[86] and neither is the family.[87] In addition, safeguards against state intervention advance equal protection by limiting demographically disparate child removal.[88] Parental rights also reflect a default presumption that children do best under parental control because fit parents act in children's interests[89] and because children thrive with continuity,[90] while the state has limited ability to perceive and protect children's interests.[91]

The need to step in for unfit parents helps explain why judges are skittish about applying strict scrutiny to a right they label "fundamental."[92] Judges often refuse to recognize parental rights that hamstring the state when it acts to protect child welfare,[93] giving government the greatest latitude when the interests of parents and children conflict.[94] Parents may not "make martyrs of their children"[95] or base decisions about kids' medical, psychological, or reproductive care on personal motives.[96]

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[85] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1319 (2d ed. 1988) (footnote omitted) (first quoting *Pierce*, 268 U.S. at 535, and then quoting *Meyer*, 262 U.S. at 402).

[86] *Pierce*, 268 U.S. at 535.

[87] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion) ("[T]he Constitution prevents East Cleveland from standardizing its children — and its adults — by forcing all to live in certain narrowly defined family patterns."); USDA v. Moreno, 413 U.S. 528, 538 (1973); Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

[88] *See* Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 265 (1994).

[89] *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979).

[90] *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 6 (1973).

[91] *See* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2441–42 (1995).

[92] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion); *see also* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 545 (2000) ("[T]he Court's parental-rights cases remain profoundly murky regarding the balance they strike between private and communal interests in childrearing because they rest uncomfortably upon two competing and as-yet-unreconciled metaphors: the family as a 'private refuge' from a brutal or indifferent community and the state as 'protector' of children from a brutal or indifferent family." (footnotes omitted) (first quoting Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1157, and then quoting Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894))).

[93] *See* Prince v. Massachusetts, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . .").

[94] *See generally* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

[95] *Prince*, 321 U.S. at 170.

[96] *See* Bellotti v. Baird, 443 U.S. 622, 637–39 (1979) (plurality opinion) (assessing the parental interest in abortion notification); Parham v. J.R., 442 U.S. 584, 611–12 (1979) (guarding against parents "dump[ing]" children in mental institutions, *id.* at 611 (internal quotation marks omitted)); Curran v. Bosze, 566 N.E.2d 1319, 1345 (Ill. 1990) (ignoring parent's assessment in determining whether infants should undergo bone-harvesting procedure for donation to half-brother).

On the other hand, as with Justice Jackson's *Youngstown* zones,[97] parental rights are at their highest point when they complement children's interests. When the Court in *Santosky v. Kramer*[98] strengthened due process protections at parental rights termination hearings, it observed that "at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures."[99] The same principle applies to juvenile questioning. Some parents might have conflicting interests when seated in the interrogation room,[100] but this concern conflates the remedy with the right.

B. Threats to Custody as the Height of Parental Rights

Custody lies at the core of the protected right, and "unless there is a strong state interest and no less drastic alternative," courts should not remove children from their parents.[101] Because juvenile interrogation can break families, it threatens the heartland of parental rights.

In other contexts, parental rights require special procedural safeguards when government action affects custody.[102] Termination of parental rights may be the most dramatic intervention: *Santosky* overturned New York's pro-removal abuse and neglect regime, which legally ended parenthood if permanent neglect was shown by a mere preponderance of the evidence.[103] Because of parental rights, due process demanded at least clear and convincing evidence.[104] Long-term loss of custody presents the most serious incursion into parental rights, creating "a more critical need for procedural protections than state intervention into ongoing family affairs."[105] "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one,"[106] demanding "fundamentally fair procedures."[107] Applying a similar analysis, *M.L.B. v.*

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[97] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

[98] 455 U.S. 745 (1982).

[99] *Id.* at 761.

[100] Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1291–98 (2004).

[101] *Developments in the Law — The Constitution and the Family*, *supra* note 79, at 1355; *see also id.* at 1354 ("The form of state intervention that most strongly implicates each of these [individual and structural] interests is removal of a child from parental custody.").

[102] *See generally* Cathy M. Badal, Comment, *Child Custody: Best Interests of Children vs. Constitutional Rights of Parents*, 81 DICK. L. REV. 733 (1977).

[103] *See Santosky*, 455 U.S. at 747–48.

[104] *Id.*

[105] *Id.* at 753.

[106] *Id.* at 759 (alteration in original) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)) (internal quotation marks omitted).

[107] *Id.* at 754.

S.L.J.[108] required that states waive record preparation fees for indigent parents appealing termination orders.[109]

Parental rights factor most powerfully when the custody interests of fit parents are imperiled. In *Stanley v. Illinois*,[110] the Court declared that an unwed custodial father had a "cognizable and substantial" "interest in retaining custody of his children" after their mother died.[111] A state rule presuming that unmarried fathers were unsuitable, regardless of individualized proof, violated due process and equal protection.[112] Similarly, *Troxel* declared that a state statute permitting anyone, at any time, to seek child visitation violated the rights of custodial parents.[113] When the state takes custody from parents, especially those who have not defaulted on their duties, it must overcome the strongest of parental rights.

C. Strength Through Hybridity

A parental rights claim is also particularly compelling when it "buttresses" complementary freedoms[114] — here the child's right against self-incrimination. Many cases have recognized the reinforcing power of parental rights when paired with the First Amendment freedoms of parents or children. *Meyer* invalidated a foreign language education prohibition,[115] *Pierce* struck down a mandatory public school attendance law that threatened private religious instruction,[116] and *Wisconsin v. Yoder*[117] overturned a requirement that Amish parents send older children to public schools.[118] Foundational children's speech and religion cases like *West Virginia State Board of Education v. Barnette*[119] and *Tinker v. Des Moines Independent Community School District*[120] implicitly deferred to parental rights as essential protections against imposed orthodoxy.[121] Though *Prince v. Massachusetts*[122]

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[108] 519 U.S. 102 (1996).
[109] *Id.* at 107.
[110] 405 U.S. 645 (1972).
[111] *Id.* at 652.
[112] *Id.* at 658.
[113] Troxel v. Granville, 530 U.S. 57, 60, 75 (2000) (plurality opinion).
[114] Prince v. Massachusetts, 321 U.S. 158, 164 (1944).
[115] Meyer v. Nebraska, 262 U.S. 390, 391 (1923). While *Meyer* came down before the First Amendment was incorporated against the states, *see* Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting), today's doctrine would recognize speech interests in the teaching of German.
[116] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).
[117] 406 U.S. 205 (1972).
[118] *Id.* at 213–14.
[119] 319 U.S. 624 (1943).
[120] 393 U.S. 503 (1969).
[121] *See id.* at 511–12 (citing the antihomogeneity principle from *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)); *Barnette*, 319 U.S. at 642 (warning against educationally imposed orthodoxy).
[122] 321 U.S. 158 (1944).

found that a custodial aunt and her nine-year-old niece caught selling religious magazines were not immune from child labor laws, the Court emphasized: "The parent's conflict with the state . . . is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters."[123] As noted in *Employment Division v. Smith*,[124] parental rights can tip the scales when they complement otherwise insufficient constitutional claims.[125]

Similarly, many regulations that do not violate children's individual rights require exceptions that accommodate the parental interest. In *Ginsberg v. New York*,[126] the Court upheld a prohibition on the underage sale of materials deemed obscene for minors when the ban did "not bar parents who so desire from purchasing the magazines for their children."[127] Juvenile curfews raise few constitutional concerns for courts — children do not possess adults' freedom of movement[128] — except when such laws lack an exception for parental consent.[129] Legislators have noticed: the sales restrictions on violent video games struck down in *Brown v. Entertainment Merchants Ass'n*[130] included a parental purchase exemption.[131]

III. BRIDGING THE DOCTRINES

Over two weeks during the summer of 1979, the Supreme Court handed down *Parham v. J.R.*,[132] *Fare v. Michael C.*, and *Bellotti v. Baird*.[133] The two bookend cases carefully considered parental rights when addressing voluntary psychiatric commitment of children[134] and parent notification requirements for minors seeking abortions.[135] In between, *Michael C.* applied the adult *Miranda* waiver standard to

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123 *Id.* at 165. More recent (unsuccessful) parental-religious rights cases include *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), and *Bowen v. Roy*, 476 U.S. 693 (1986).

124 494 U.S. 872 (1990).

125 *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents, acknowledged in *Pierce* v. *Society of Sisters*, to direct the education of their children." (citation omitted) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

126 390 U.S. 629 (1968).

127 *Id.* at 639.

128 *See, e.g.*, Hutchins v. Dist. of Columbia, 188 F.3d 531, 536–39 (D.C. Cir. 1999).

129 *See* Anonymous v. City of Rochester, 915 N.E.2d 593, 600–01 (N.Y. 2009) ("[T]he curfew fails to offer parents enough flexibility or autonomy in supervising their children.").

130 131 S. Ct. 2729 (2011).

131 *Id.* at 2747 (Alito, J., concurring).

132 442 U.S. 584 (1979).

133 443 U.S. 622 (1979).

134 *See Parham*, 442 U.S. at 602–04.

135 *See Bellotti*, 443 U.S. at 637–39 (plurality opinion).

children while ignoring the connection to parental custody.[136] No judges have remedied this oversight, though one observer noticed the incongruity.[137] Two 1970s academic treatments that tried to bring together parental rights and juvenile justice gained little traction.[138] Formally, the doctrines of parental rights and juvenile interrogations proceed incommunicado along parallel tracks.

Still, parental rights lie beneath existing protections for juvenile suspects.[139] Though states with per se rules justify them almost exclusively by appeal to an individual's Fifth Amendment rights, parental motivations occasionally bubble to the surface. In 1983, the Massachusetts Supreme Judicial Court adopted a per se rule to protect children's rights and to "involve[] the parent at the initial stage of the juvenile proceedings in which the parent obviously has a significant interest."[140] Per se rules in other states that require parental consent or presence are designed to guard children, but they are also in a real sense about parental rights.[141] They reflect the impulse of mothers and fathers to protect sons and daughters in danger. For courts and legislatures assessing juvenile interrogation, the instinct to preserve the parent-child relationship is perhaps too plain for citation.

A. Hybrid Miranda*–Parental Rights Analysis*

Despite these undercurrents, regulation of juvenile interrogation has been framed almost exclusively in the language of adult *Miranda*. But speaking only of individual rights against self-incrimination has damaged juvenile interrogation doctrine because it distorts the rights at issue and costs supporters much-needed allies.

At the start, *Miranda* sought to ensure reliability and safeguard interrogated suspects, but "[t]he Court's most recent cases shatter protections at [its] core."[142] The remaining skeletal safeguards persist in

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[136] *See* Fare v. Michael C., 442 U.S. 707, 725–26 (1979).

[137] *See* Leslie J. Harris, *Children's Waiver of* Miranda *Rights and the Supreme Court's Decisions in* Parham*,* Bellotti*, and* Fare, 10 N.M. L. REV. 379 (1980).

[138] Mary Virginia Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393 (1970); Raymond F. Vincent, *Expanding the Neglected Role of the Parent in the Juvenile Court*, 4 PEPP. L. REV. 523 (1977).

[139] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 112 (1909) ("It is, therefore, important to provide . . . that the parents be made parties to the proceedings, and that they be given an opportunity to be heard therein in defense of their parental rights."); *see also In re* Gault, 387 U.S. 1, 33–34 (1967) ("Due process of law . . . does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.").

[140] Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 658 (Mass. 1983).

[141] *See* CONN. GEN. STAT. § 46b-137 (2012); IOWA CODE § 232.11 (2007).

[142] Friedman, *supra* note 56, at 24.

large part because they convey an appearance of propriety.[143] To encourage this impression of evenhandedness, *Miranda* emphasizes a suspect's "free choice."[144] Everyone reads the rules upfront, and those who lose cannot plead ignorance.[145] With reliability compromised, *Miranda*, like many other regulations that serve meaningful optical functions,[146] prioritizes perceptions.[147] In this context, parental rights would do more than duplicate juveniles' personal *Miranda* interests. Driven by outcomes, not appearances, parental rights demand a higher level of reliability than today's weakened *Miranda*. A hybrid claim combining parental rights with the child's freedom from self-incrimination demands closer scrutiny than an invocation of either right alone and allows the expansion of protections without reopening *Miranda*'s floodgates.

Augmenting children's *Miranda* rights with the structural safeguards of parental rights is needed now more than ever. The mass incarceration of young African-American males starts at an early age.[148] A common element of the school-to-prison pipeline is the questioning of juvenile suspects by police officers, often carried out in public schools.[149] Urban police contact the parents of juvenile suspects less frequently than do suburban officers.[150] Most parents do not know that police can question children without parental presence or notification,[151] but suburban parents are more likely to have the political clout

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143 *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 671 (1996) (reporting an officer's belief that *Miranda* "most importantly . . . gives us a professional appearance in the eyes of a jury"); Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 788 (1999) (describing how a return to a voluntariness standard "allows the Court to maintain the appearance of concern over the acquisition and use of coerced confessions, while washing its hands of the improprieties that will inevitably result").

144 Miranda v. Arizona, 384 U.S. 436, 458 (1966); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 211 (2002).

145 One scholar has suggested that this mode of interrogation "resemble[s] the structure and sequence of a classic confidence game." Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 261 (1996).

146 *See generally* Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012).

147 *See* Thomas & Leo, *supra* note 144, at 255 ("*Miranda* in 2001 imposes low costs on those whom it was intended to regulate and also offers few benefits for its intended recipients.").

148 *See* MICHELLE ALEXANDER, THE NEW JIM CROW 115 (2010) ("[S]tudies have shown that youth of color are more likely to be arrested, detained, formally charged, transferred to adult court, and confined to secure residential facilities than their white counterparts.").

149 *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399 (2011) (involving in-school police questioning of a thirteen-year-old student about neighborhood burglaries).

150 *See* FELD, *supra* note 10, at 10.

151 *See id.* at 196.

to raise hell when police question their kids.[152] Parental rights can check government action that disproportionately institutionalizes minority children when the tangled roots of discrimination complicate equal protection analysis.[153]

B. The Due Process Calculus

As applied in *Santosky*, *Mathews v. Eldridge*[154] provides the framework for determining what due process requires of the state when it confronts child suspects.[155] *Eldridge* instructed courts considering procedural safeguards to weigh three factors: (1) the private interest affected; (2) the comparative risk of erroneous deprivation of that interest under current procedures and alternatives; and (3) the state's countervailing interest, including the administrative burdens of reforms.[156] Measured using this model, parental rights demand further protection during juvenile interrogation.

First, parental rights create a powerful private interest, but only against the threat of continued state detention, not the immediate transfer during questioning. By definition, a custodial interrogation deprives a parent of custody in the moment, but without deeply threatening constitutional principles. The state regularly requires that parents relinquish custody temporarily, most noticeably through compulsory education laws.[157] Police investigating crimes often have good reason to question child suspects, and though officers cannot seize children without justification, parents cannot get far by complaining about police taking temporary custody for questioning.

Immediate separation could create a stronger parental interest if interrogations were shown to cause psychological harm to children that could be minimized by present parents.[158] While many studies demonstrate the susceptibility of children to interrogation pressure, few shed light on the harms it can cause to a child's mental health. There is good reason to believe that this damage may be very real: interrogators use intimidation techniques that confront children as liars, play on

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[152] *See id.* at 199 (reporting the impression of an urban prosecutor that suburban parents "maybe feel like they have the right to be there").

[153] *Cf., e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (protecting the Amish); Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925) (Catholics); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (German immigrants).

[154] 424 U.S. 319 (1976).

[155] *See* Santosky v. Kramer, 455 U.S. 745, 758–68 (1982).

[156] *See Eldridge*, 424 U.S. at 334–35.

[157] *See, e.g.*, *Pierce*, 268 U.S. at 534 ("No question is raised concerning the power of the State reasonably . . . to require that all children of proper age attend some school . . . .").

[158] *Cf.* Wallis v. Spencer, 202 F.3d 1126, 1142 (9th Cir. 2000) (recognizing a right of family association for parents to comfort children during investigatory medical examinations "in part because of the family's right to be together during such difficult and often traumatic events").

their fears, and maximize their anxiety.[159] Still, without knowing more, including whether parental presence alleviates or exacerbates harm to children, parents will struggle to prove that their immediate interest overcomes the state's.

The parent has a far more serious private interest in averting the extended removal threatened by the consequences of false incrimination. When the state takes physical control after finding a child delinquent or criminal, it breaks parental bonds — as it does when it removes children because of abuse or neglect. Under the first *Eldridge* factor, parents have a "commanding" private interest in maintaining permanent custodial control.[160]

Second, systems of juvenile interrogation in the majority of states run an unacceptably high risk of false incrimination. In practice, *Michael C.*'s lax totality of the circumstances standard lets in confessions when suspects go through the motions of waiver.[161] An alarming share of questioned juveniles, both guilty and innocent, waive their *Miranda* rights, confess, and suffer sanctions that can deprive parents of custody.[162] A court need not specifically quantify the risk so long as the proposed remedy promises to reduce this danger significantly.[163] "Given the weight of the private interests at stake, the social cost of even occasional error is sizable."[164]

Nor does the state's interest, the third *Eldridge* factor, justify interrogations that risk false confession. The state may take custody of children only when procedures are tailored to serve government interests.[165] The government has a powerful interest in punishing or rehabilitating guilty children, and it may do so consistently with the Fifth and Eighth Amendments. As a result, interrogation methods that further the public interest while guarding against false confessions, and thus against the risk of wrongful incarceration of innocent children, may overcome parental rights. But juvenile interrogation can only advance investigatory interests if it yields reliably truthful results, requiring

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[159] *See* FELD, *supra* note 10, at 103–40. Studies of similarly stressful situations suggest that child suspects suffer serious psychological effects. *See* Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, MONOGRAPHS SOC'Y FOR RES. CHILD DEV., July 1992, at 1, 44–62.

[160] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.").

[161] *See* Feld, *supra* note 23, at 113; *see also supra* notes 23–30 and accompanying text.

[162] *See supra* notes 10–17 and accompanying text. Though available data show that juveniles falsely confess more frequently than adults, even if that were not the case, parental rights would create a special interest in protection not applicable to adults.

[163] *See* Santosky v. Kramer, 455 U.S. 745, 764 (1982) (finding a "significant prospect of erroneous termination").

[164] *Id.*

[165] *See id.* at 766.

"procedures that promote an accurate determination"[166] of the suspect's guilt. Though protections are needed because of the risk to innocent child suspects, they must be applied to all juvenile interrogations, which by their very nature involve uncertainty over guilt or innocence.

C. Solutions

With a powerful private interest, a dangerous risk of erroneous deprivation, and no strong state interest in procedures that produce false confessions, *Eldridge* analysis would support a remedy that reduces risks without imposing unmanageable administrative burdens. Either parents must be given the ability to protect children from the dangers of confession, or those dangers must be otherwise addressed.

1. Empowering the Parent. — At first blush, parents seem perfectly suited to aiding their offspring in the interrogation room. In reality, even if parents intend "to act in the best interests of their children"[167] during interrogations, circumstances intervene. Instead of providing needed help, most parents add to the psychological threats confronting children. Emotionally overwhelmed parents routinely misunderstand *Miranda* warnings[168] and underestimate the dangers children face from police questioning. Meanwhile, the structure of interrogation pressures parents to convince children to "do the right thing."[169] Well-meaning parents become part of the coercive machinery, as in the following unexceptional case: "[T]he father appeared to understand the *Miranda* rights, but '[h]e was very upset' and wanted the [twelve- and thirteen-year-old] boys to tell [the detective] what they knew. Both boys then confessed their involvement in the theft."[170] As currently practiced, the "fool's gold" of simple parental presence offers insufficient protection from interrogation's threat to long-term custody.[171]

Similarly, simple parental notice serves more of a political than a protective purpose. In the absence of a federal constitutional mandate, several states have required that police make "reasonable"[172] or "good faith"[173] efforts to contact parents when children face questioning. Be-

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166 *Id.* at 767.

167 Parham v. J.R., 442 U.S. 584, 602 (1979).

168 Farber, *supra* note 100, at 1291.

169 Birckhead, *supra* note 8, at 419 (internal quotation marks omitted); *see also* Farber, *supra* note 100, at 1307 ("A parent should not be forced to decide between teaching a child a moral lesson and protecting them from grave legal consequences.").

170 Commonwealth v. A Juvenile, 449 N.E.2d 654, 655 (Mass. 1983) (second alteration in original); *see also* Farber, *supra* note 100, at 1296.

171 King, *supra* note 28, at 468; *see also* Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 224 (1979) ("[P]arental guidance in [interrogations] often is not an adequate substitute for the advice of trained legal counsel.").

172 705 ILL. COMP. STAT. 405/3-8 (2010); KAN. STAT. ANN. § 38-2333 (Supp. 2011).

173 IOWA CODE § 232.11 (2007).

sides improving perceptions of clandestine questioning, notice alone without a right to presence may allow parents to contact an attorney. But unless parents understand the consequences of interrogation, a terse call from police can leave them upset and in the dark.

Parental rights can be better vindicated by a robust consent requirement that empowers parents to protect their own interests. Before questioning a child, police would have to make a reasonable, good faith effort to contact the suspect's custodial parents, inform them of the nature and risks of interrogation, and obtain their consent. Authorities would explain to parents the child's *Miranda* rights and that (1) because of their age, children may be pressured into making incriminating statements during interrogation; (2) as a result, children may say things that are false and that will result in them being taken out of the parents' custody; and (3) interrogation may have unpredictable psychological effects on children.[174] While this consent process must be more substantial than existing regimes, notice requirements in some states suggest that such a system would not impose unreasonable administrative burdens. Police may worry that parental refusal could keep them from questioning suspects, but the state could instead pursue its interest in criminal investigation by conducting less coercive (and thus less risky) interviews that do not call for parental consent.[175] Just as doctors generally must receive parental permission before treating children,[176] police should obtain truly informed parental consent before questioning kids.

Admittedly, informed consent does not resolve conflicts of interest that may prevent parents from protecting long-term custody interests. Parents may be suspects or victims, or have relationships with others affected by or involved in the crime, or possess financial interests that may encourage them to prefer cooperation.[177] Still, truly informed consent allows parents a real chance to assert their interests.[178]

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[174] Such a consent requirement could leave juveniles who lack traditional guardians, such as children removed from unfit parents, at a relative disadvantage. Providing less protection for the class of children without custodial parents may violate equal protection, requiring for them the alternative procedural protections suggested in the next section. *Cf.* Plyler v. Doe, 457 U.S. 202, 215, 230 (1982) (striking down the exclusion of undocumented children from public education).

[175] An *Eldridge* analysis should not only consider the costs of parental notice against the status quo baseline, but should also account for ways the state could reduce the added burden by increasing the reliability and safety of interrogations. *See infra* section III.C.2.b, pp. 2377–78.

[176] *See, e.g.*, Miller *ex rel.* Miller v. HCA, Inc., 118 S.W.3d 758, 767 (Tex. 2003) ("[T]he requirement that permission be obtained before providing medical treatment is based on the patient's right to receive information adequate for him or her to exercise an informed decision to accept or refuse the treatment.").

[177] *See* Farber, *supra* note 100, at 1291–98.

[178] When parents with conflicted interests consent to interrogation, children will be no worse off than if there had been no consent requirement, though they may fare worse relative to other children.

2. Reducing the Risk. — An informed consent requirement allows parents to protect against interrogation risks, but alternative procedural reforms that reduce the danger of harm and false confession can vindicate parental rights while accounting for conflicts of interest.

(a) Counsel. — Lawyers might be required to assist children during interrogations. Attorneys appreciate the pressures of questioning and know the significance of statements to police. Acting with the long-term interests of the child in mind, attorneys can check procedures that threaten to systematically strip innocent children from parents. A number of observers considering juveniles' individual *Miranda* rights have argued for "a bright-line rule"[179] that children must be provided a "mandatory non-waivable right to counsel" before interrogation.[180] New Jersey applies such a per se rule, refusing to recognize juvenile waivers without the presence of an attorney.[181] The presence of counsel could come with high costs, both in compensating attorneys and in curtailing police investigations, even though some states currently apply the system without adverse consequences. As with parental consent, though, a court requiring counsel would not impose a serious burden on *Eldridge* state interests if it also allowed states to reduce interrogation risks by crafting alternative, less costly steps like those that follow.

(b) Methodological Checks. — While it would be difficult for a court to issue more detailed regulations of interrogation procedures, legislatures should be free to opt out of a default per se rule by pursuing risk-reducing reforms that alter the methods of interrogators to eliminate particularly coercive environments.

(i) Limit the Duration of Uncounseled Questioning. — Most interrogations are short and simple: a study of a subset of juvenile interrogations found that 77.2% last less than fifteen minutes and 90.5% finish within thirty.[182] Proven false confessions almost always were the product of multiple hours of questioning.[183] Lengthy interrogation cultivates psychological and physical conditions conducive to false confes-

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[179] Marty Guggenheim & Randy Hertz, J.D.B. *and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 170 (2012).

[180] *See* Farber, *supra* note 100, at 1312 ("[P]roviding juveniles with a mandatory non-waivable right to counsel in the pre-interrogation setting is the surest way to insure the protections aspired to in both *Miranda* and *Gault*."). *J.D.B.* may have presaged an attorney requirement, and incorporating parental rights could guide the doctrine along this path without requiring a broader reconsideration of adult *Miranda*. *See* Guggenheim & Hertz, *supra* note 179, at 110, 160.

[181] *See* State *ex rel.* P.M.P., 975 A.2d 441, 448 (N.J. 2009).

[182] FELD, *supra* note 10, at 156.

[183] *See* Drizin & Leo, *supra* note 12, at 949 tbl.7 (reporting that in fourty-four cases of documented false confession, eighty-four percent lasted six hours or longer). However, studies that rely on documented false confessions may understate the dangers of brief interviews because of the need for exoneration, an extraordinary event unlikely to occur with the low-priority offenses calling for short interviews.

sion for vulnerable juveniles.[184] Because time limits cut down on the most serious dangers, police could be allowed to question juveniles for only a limited time without the presence of counsel.[185]

(ii) Prohibit Manipulative Techniques. — The use of strategies known to elevate the risk of false confession or harm could present a per se basis for exclusion. The totality of the circumstances test allows loose judicial enforcement when police use troubling techniques, and the current doctrine creates uncertainty during plea bargaining that can lead the innocent to plead guilty. In the United States, most police question children and adults using the "Reid Technique," "a nine-step method aimed at breaking down the resistance of reluctant suspects and making them confess" by using tactics that "involve trickery and deceit."[186] Police could instead adopt methods like those used in the United Kingdom, where a string of high-profile wrongful convictions led to the adoption of "investigative interviewing," which favors neutral information gathering over coercive confession seeking.[187]

(iii) Videotape Interrogation. — Federal precedent instructs judges to assess juvenile *Miranda* waiver by considering the totality of the circumstances but does not demand that those circumstances be recorded. Preserving a visual record forces judges and juries to confront the conditions of interrogation, humanizing statements otherwise presented on paper or reported by police.[188] Videotape also allows courts to ensure compliance with other protections, such as the length and technique conditions described above, at minimal cost.

(c) Other Inquisitorial Models. — Finally, the state may adopt an alternative model of information gathering, such as questioning by a neutral magistrate. For written statements from child suspects, Texas requires something resembling the judicial waiver process for pregnant

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184 *See id.* at 948 ("[The study] supports the observations of many researchers that interrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect's resistance is worn down, coercive techniques are used, and the suspect is made to feel hopeless, regardless of his innocence.").

185 Specific limits could be defined with the understanding that "[p]olice complete nearly all felony interrogations of juveniles and adults in less than one hour and extract the vast majority of false confessions after prolonged questioning of six hours or longer." FELD, *supra* note 10, at 259.

186 GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 10 (2003).

187 *See id.* at 52–54. For similar proposals, see *Interviewing and Interrogating Juvenile Suspects*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Mar. 7, 2013), http://www.aacap.org/cs/root/policy_statements/interviewing_and_interrogating_juvenile_suspects.

188 "Within the past decade, criminologists, psychologists, legal scholars, police, and justice system personnel have reached consensus that recording interrogations reduces coercion, diminishes dangers of false confessions, and increases reliability of the process." FELD, *supra* note 10, at 262; *see also* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 291–305 (2008) (advocating electronic recording).

minors seeking abortions described in *Bellotti*.[189] A written statement may only be admitted if signed by a child without the presence of police or prosecutors and before a magistrate who is "fully convinced" of knowledge and voluntariness.[190] In practice the Texas regime has few teeth, as police elicit verbal statements that require no added precautions. Still, a system that adds a magisterial role to child interviews could allay fears of unreliability and abuse.[191]

D. Mounting the Challenge

Embracing parental rights helps on a basic political level. Miring the interrogation conversation in the bogs of *Miranda* sacrifices the support of important communities that should be sympathetic to protective principles. On the legislative reform front, parental rights appeal to a strong, organized political constituency.[192] Juvenile advocates might make headway by speaking more about *Meyer* and *Pierce* and less about *Miranda*, appealing to parents who have little sympathy for defendants but who are leery of police grilling their children.

Meanwhile, despite some circuit disagreement, the path may be opening to judicial challenges. Those asserting parental rights in legal challenges will do best to avoid judicial hostility to the exclusionary rule,[193] bringing instead federal civil actions under 42 U.S.C. § 1983. An ideal vehicle for a challenge would involve a parent of an exonerated child originally convicted or adjudicated delinquent after giving a custodial confession without needed protections.

The Fifth Circuit saw just such a case last year.[194] Interrogators forcibly separated a mother from her thirteen-year-old son, who then falsely confessed to murder.[195] The panel rejected the mother's parental rights claim as time barred, measuring the time elapsed since the

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189 Bellotti v. Baird, 443 U.S. 622, 643 (1979) (concluding that, should states require parental consent for minors to access abortions, they must "provide an alternative procedure" for authorization in which a minor may show "that she is mature enough and well-informed enough to make her abortion decision, in consultation with her physician, independently of her parents' wishes").

190 TEX. FAM. CODE ANN. § 51.095 (West 2008 & Supp. 2012).

191 For analogous judicial oversight proposals, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995), and Paul G. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

192 During the last Congress, conservative activists gained the cosponshorship of thirteen senators and eighty-six representatives for a proposed parental rights amendment to the U.S. Constitution that would echo Supreme Court precedent. *See* H.R.J. Res. 110, 112th Cong. (2012) ("The liberty of parents to direct the upbringing, education, and care of their children is a fundamental right."); S.J. Res. 42, 112th Cong. (2012) (same).

193 *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 704 (2009) (expanding the exclusionary rule's "good faith" exception).

194 *See* Edmonds v. Oktibbeha Cnty., 675 F.3d 911 (5th Cir. 2012).

195 *Id.* at 913, 916.

injury from the date of questioning instead of the end of the boy's incarceration.[196] Thus, the Fifth Circuit wrongly imagined the claim as tied to the immediate forced separation of mother and child during questioning, not the mother's continuing custody interest.

The Ninth Circuit has taken a different tack, indicating a willingness to protect the deeper parental rights violation. A 2010 panel refused to throw out a claim that police "denied [parents] their Fourteenth Amendment rights to familial companionship" when children's "continued detentions were wrongfully justified by their illegally coerced confessions."[197] Future litigants should take notice. When the state uses an interrogation process prone to eliciting false confessions from children, and then uses such statements to convict, it deprives parents of ongoing care, custody, and control. As this fledgling circuit conflict develops, the Supreme Court may soon have an opportunity to recognize the parental rights lying dormant in juvenile justice.

CONCLUSION

From juvenile interrogation, child suspects do not suffer alone. Police questioning can affect at least two parties' rights: the child's (individual) *Miranda* rights and parents' (structural) custody rights. Our Constitution protects the fundamental rights of parents to direct the upbringing of their children. The state may break custodial bonds only when it has a powerful interest, which it lacks in deploying juvenile interrogation procedures that create a high risk of false incrimination. To proceed with child interviews, then, police should either obtain the truly informed consent of parents or provide alternative procedural protections, which could include ensuring the presence of counsel or monitoring the methods of questioning.

In a long string of cases culminating in *Troxel*, the Supreme Court acknowledged parental interests, though justices disagreed on appropriate balancing. Throughout statehouses and courtrooms, juvenile interrogation deserves the same conversation.

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[196] *Id.* at 916.

[197] Crowe v. Cnty. of San Diego, 608 F.3d 406, 441 (9th Cir. 2010).