

## THE SUSCEPTIBILITY OF JUVENILES TO FALSE CONFESSIONS AND FALSE GUILTY PLEAS

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INTRODUCTION .....	943
JUVENILES AND GUILTY PLEAS .....	945
JUVENILES AND FALSE ADMISSIONS.....	951
SUMMARY AND CONCLUSIONS .....	957

### INTRODUCTION

Over the past two decades, hundreds of factually innocent and wrongfully convicted persons have been exonerated.<sup>1</sup> As highlighted by the 2010 *Rutgers Law Review* symposium from which this article originates, juveniles, in comparison to adults, have been identified as being at increased risk of wrongful convictions.<sup>2</sup> Perhaps most notable is their increased risk of false confession, one of the leading contributors to these miscarriages of justice.<sup>3</sup> Social scientists now

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1. See INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Aug. 27, 2010) (identifying various cases in which wrongly convicted persons were exonerated).

2. See Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 257-62 (2007).

3. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 5 (2010); Jessica Owens-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOL. 286, 296-97 (2006).

know a great deal about the how, when, and why of false confessions.<sup>4</sup> Less is known about false guilty pleas—a form of false confessions. However, there are many reasons to suspect that false guilty pleas are even more prevalent, but more difficult to identify than false confessions.<sup>5</sup>

A purpose of this article is to review why youth at risk for false confessions in the interrogation room may and may not be at risk for false confessions to prosecutors or false guilty pleas. The overwhelming majority (97%-99%) of convictions in adult and juvenile courts are the result of plea arrangements.<sup>6</sup> It is estimated that every two seconds a defendant pleads guilty.<sup>7</sup> This heavy reliance on pleas has prompted several controversies, including that defendants who exercise their constitutional right to a trial are penalized, that criminal justice safeguards are eschewed in lieu of expediency, and that innocent defendants are induced to plea by overly lenient bargains.<sup>8</sup> Therefore, it is quite surprising that this near-exclusive and controversial method of conviction has received only slight research attention. As argued cogently by Drizin and Luloff, the problem of innocent, juvenile defendants pleading guilty in the juvenile justice system may be even greater than in the adult system.<sup>9</sup> In considering whether juveniles are at an increased risk of false guilty pleas in comparison to adults, it is important to consider whether juveniles are more likely to plead guilty to crimes they

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4. See Kassin, *supra* note 3, at 3-4. See generally POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (detailing scientific studies and findings on the psychological and physiological components of false confessions); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008) (using direct observation to analyze American police interrogation practices).

5. See Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542-46, 551-53 (2005); Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, in POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE AND POLICY 49, 60 (G. Daniel Lassiter & Christian A. Meissner eds., 2010); Allison D. Redlich et al., *Self-Reported Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 80-81, 87-88 (2010) (each analyzing the rise in false guilty pleas and false confessions).

6. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 3 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf>; Barbara Kaban & Judith C. Quinlan, *Rethinking a "Knowing, Intelligent, and Voluntary Waiver" in Massachusetts' Juvenile Courts*, 5 J. CTR. FAM., CHILD., & CTS. 35, 37 (2004).

7. Timothy Lynch, *The Case Against Plea Bargaining*, REGULATION, Fall 2003, 24, 24.

8. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464-69 (2004); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, CARDOZO L. REV. 2295, 2297-99 (2006).

9. Drizin & Luloff, *supra* note 2, at 257-62.

actually did commit. As such, I first review the relevant literature on the ability of youths to understand and appreciate the plea decision and on the influential factors that affect plea decision-making and reasoning.

#### JUVENILES AND GUILTY PLEAS

Every day, hundreds of juvenile and adult defendants must decide whether to plead guilty.<sup>10</sup> This decision is presumably based on numerous factors, including their understanding of the law, the perceived strength of evidence against them, the probability of conviction at trial, the value of the plea offer (the distance between the sentence if convicted at trial and the proposed plea sentence), the advice and perceived effectiveness of attorneys, perceptions of procedural justice, etc.<sup>11</sup> Classic decision-making theories, including rational choice<sup>12</sup> and expected utility,<sup>13</sup> predict that the decision to plead is driven by the maximization of benefits and reduction of costs.<sup>14</sup> However, research shows that factors other than plea value-probability of conviction considerations affect these decisions. For instance, demographic (race, ethnicity, gender) and criminal characteristics (number of prior convictions) are known to affect willingness to plead.<sup>15</sup>

Although there is not much direct research, age (juvenile versus adult status) has also been found to influence decisions to plead guilty.<sup>16</sup> Grisso and colleagues examined the willingness of more than

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10. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA, 223-27 (2003).

11. See Drizin & Luloff, *supra* note 2, at 257-62.

12. See John Scott, *Rational Choice Theory*, in UNDERSTANDING CONTEMPORARY SOCIETY: THEORIES OF THE PRESENT 126-28 (Gary Browning, Abigail Halcli & Frank Webster eds., 2000) (explaining that people "calculate the likely costs and benefits of any action before deciding what to do").

13. See Phillippe Mongin, *Expected Utility Theory*, in HANDBOOK OF ECONOMIC METHODOLOGY 17 (John B. Davis et al., eds., 1997) (explaining that people make choices "by comparing their expected utility values, [or] weighted sums obtained by adding the utility values of outcomes multiplied by their respective probabilities").

14. See William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 61-62 (1971); Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 950-51 (1986); David L. Weimer, *Plea Bargaining and the Decision to Go to Trial: The Application of a Rational Choice Model*, 10 POL'Y SCI. 1, 3-4 (1978) (presenting economic models and empirical data to forecast factors in defendants' pleas bargaining decisions, including maximizing utility and the probability of conviction).

15. Jeremy D. Ball, *Is it a Prosecutor's World?: Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241, 242-43 (2006); Erika D. Frenzel & Jeremy D. Ball, *Effects of Individual Characteristics on Plea Negotiations under Sentencing Guidelines*, 5 J. ETHNICITY CRIM. JUST. 59, 65-68 (2007); Smith, *supra* note 14, at 950, 958.

16. See, e.g., Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A*

one thousand community and justice-involved juveniles and adults (youngest aged eleven to thirteen years; oldest aged eighteen to twenty-four years) to accept a hypothetical plea offer (when guilty), and found that with increasing age, willingness to plead decreased.<sup>17</sup> Whether the person was in the community or justice-involved did not impact decisions.<sup>18</sup> About 70%-74% of the eleven- to fifteen-year-olds accepted the plea offer in comparison to 50% of the adults, which was attributed in part to compliance with authority.<sup>19</sup> Grisso and colleagues also found that in their plea decision-making, minors focused on the length of time associated with the plea (two versus six years), whereas the adults' reasoning reflected attempts to weigh the odds (two versus six years versus the possibility of zero).<sup>20</sup>

However, studies have not always found age to associate with guilty plea decisions, though these associations can be dependent on crime type and strength of the evidence.<sup>21</sup> Viljoen and colleagues did find that variations in legal understanding influenced plea decisions: juvenile detainees with less understanding were more likely to state they were unsure as to how they would plead than those with more understanding.<sup>22</sup> Thus, although preliminary, this research supports the common-sense link that may exist between understanding and appreciation of pleading guilty and willingness to plead guilty.<sup>23</sup> An increasingly large literature demonstrates that in comparison to adults, juveniles aged fifteen and younger have deficits in their legal understanding, knowledge, and decision-making capabilities.<sup>24</sup> These deficits have been shown for the understanding of *Miranda* rights and other interrogation-related matters,<sup>25</sup> adjudicative competence,<sup>26</sup>

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*Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356-57 (2003).

17. *Id.* at 337-38, 357.

18. *Id.* at 356.

19. *Id.* at 351.

20. *Id.* at 357-58.

21. See Michele Peterson-Badali & Rona Abramovitch, *Grade Related Changes in Young People's Reasoning About Plea Decisions*, 17 LAW & HUM. BEHAV. 537, 537-41 (2006); Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUMAN BEHAV. 253, 271 (2005).

22. Viljoen, *supra* note 21, at 264.

23. *Id.* at 270-72.

24. *Id.*

25. *Id.* at 271; THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 59-93 (1981).

26. See Grisso, *supra* note 16, at 333; Allison D. Redlich et al., *Preadjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 BEHAV. SCI. & L. 393, 396, 403-08 (2003).

legal terminology,<sup>27</sup> and legal decision-making.<sup>28</sup>

Decisions to plead guilty are required to be made knowingly, intelligently, and voluntarily.<sup>29</sup> The primary methods to determine this are oral plea colloquies (or plea inquiries) and written tender-of-plea forms. Generally, plea colloquies consist of a series of questions asked by the judge to the defendant to determine whether any promises other than the plea offer itself were made (voluntary), whether the defendant understands the legal rights he is ceding and the possible consequences associated with the plea (knowing and intelligent), and whether the defendant is incapacitated (on medication, intoxicated).<sup>30</sup> Some defendants are also asked to allocute to the details of the crime, essentially providing in-court confessions.<sup>31</sup>

Little research has been conducted on these plea materials, despite their daily, widespread use. In contrast, adjudicative competence has been the subject of a significant amount of research.<sup>32</sup> In *Godinez v. Moran*, the United States Supreme Court explicitly rejected the notion that competence to stand trial and competence to plead guilty require different standards.<sup>33</sup> However, at the same time, the Court recognized that guilty pleas require the added determination that the decision be made knowingly and voluntarily, as well as competently. Justice Thomas stated in the majority opinion:

The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision . . . .<sup>34</sup>

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27. See Kaban & Quinlan, *supra* note 6, at 48; Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 LAW & HUM. BEHAV. 523, 531-34 (1990).

28. See Grisso, *supra* note 16, at 353-56; Melinda G. Schmidt et al., *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 186-87, 193 (2003); Lacey Cole Singleton, *Say "Pleas": Juveniles' Competence to Enter Plea Agreements*, 9 J. LAW & FAM. STUD. 439, 443-44 (2007).

29. AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY 2-4 (3d ed. 1999).

30. *Id.* at 35-41, 61-62.

31. *Id.* at 64-70; Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *supra* note 5, at 59; Singleton, *supra* note 28, at 447-50.

32. See generally Grisso, *supra* note 16; Norman Poythress et al., *The Competence-Related Abilities of Adolescent Defendants in Criminal Court*, 30 LAW & HUM. BEHAV. 75 (2006); Patricia A. Zapf et al., *Competency: Past, Present, and Future*, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 171 (J.R.P. Ogloff ed., 2002).

33. 509 U.S. 389, 397 (1993).

34. *Id.* at 401 n.12 (internal citations omitted).

Indeed, there are important differences between adjudicative competence and valid guilty pleas. The concepts in plea colloquies/forms tend to be much more specific than the concepts in competence. Adjudicative competence refers to a general set of abilities related to legal decision-making and knowledge, rational thinking, understanding, and appreciation.<sup>35</sup> In *Godinez*, the Court noted that competence has a “modest aim: It [sic] seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel.”<sup>36</sup> Plea forms and colloquies go a step further by attempting to ensure that the defendant, presumed or determined to have the capacity to make a competent decision, is indeed making an informed and voluntary decision.

Only one study, to my knowledge, has addressed whether juveniles understand and appreciate plea colloquies and tender-of-plea forms. Kaban and Quinlan questioned ninety-eight court-involved juveniles about their understanding of thirty-six words used in the Massachusetts tender-of-plea form and juvenile court colloquies.<sup>37</sup> The juveniles ranged in age from nine to seventeen years, and were divided into an uninstructed group of sixty-nine juveniles and an instructed group of twenty-nine juveniles.<sup>38</sup> The results were striking. On average, members of the uninstructed group defined only two of thirty-six words correctly, and members of the instructed group, only five words correctly.<sup>39</sup> Kaban and Quinlan provided examples of incorrect answers, such as “presumption of innocence” being defined as “[i]f your attorney feels you didn’t do it” (age fifteen) and “disposition” repeatedly defined as “bad position” (age sixteen).<sup>40</sup> Thus, even with instruction, some juveniles (and perhaps even some adults) may not have sufficient understanding of plea-relevant materials.

The results of Kaban and Quinlan’s study are unlikely to only apply to juveniles in Massachusetts. As found with other legal documents (such as *Miranda* warnings),<sup>41</sup> the comprehensibility of plea materials exceeds the aptitude of the majority of defendants. In preliminary research, Redlich and Norris found statewide tender-of-plea forms for adult defendants to have an average reading grade level of 8.6 (range = grade 4.9 to 11.9), whereas statewide forms

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35. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291 (1992).

36. *Godinez*, 509 U.S. at 402.

37. Kaban & Quinlan, *supra* note 6, at 39.

38. *Id.* at 40-41.

39. *Id.* at 42.

40. *Id.* at 45.

41. See generally Richard Rogers et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177 (2007).

specific for juvenile defendants had an even higher average reading level at grade 10.0 (range = 6.4 to 14.8).<sup>42</sup> A particularly egregious example is the State of Alabama Unified Judicial System Form C-44A, entitled "Explanation of Rights of Youthful Offender and Plea of Guilty."<sup>43</sup> This form was found to have a Flesch Reading Ease score of 46 (scores of 60-70 are "easily understood by 13-15 year-olds;" lower scores indicate more difficulty), and a Flesch-Kincaid Grade Level score of 14.7 (i.e., college level).<sup>44</sup> A sample passage from this juvenile tender-of-plea form is:

If you enter a plea of guilty, you will wave [sic] your right to appeal, unless (1) you have, before entering the plea of guilty, expressly reserved the right to appeal with respect to a particular issue or issues, in which event appellate review shall be limited to a determination of the issue or issues reserved, or (2) you have timely filed a motion to withdraw the plea of guilty after pronouncement of sentence on the ground that the withdrawal is necessary to correct a manifest injustice, and the court has denied your motion to withdraw your plea, or the motion has been deemed denied by operation of law.<sup>45</sup>

According to the National Adult Literacy Survey, 70% of inmates read at or below the sixth grade reading level.<sup>46</sup> Further, 41% of adults incarcerated have not completed high school, compared to 18% of the general population,<sup>47</sup> and 20%-70% of youth in juvenile detention settings are estimated to have learning disabilities, compared to 5% of the general population.<sup>48</sup> In addition to intellectual impairment, mental impairments, which are known to impede legal comprehension, are significantly more likely to be present among adult and juvenile offenders than in the general population.<sup>49</sup>

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42. Allison Redlich, Address at the Rutgers Law Review Symposium: Righting the Wronged: Causes, Effects, and Remedies of Juvenile Wrongful Conviction (Apr. 9, 2010) (presenting the results of research conducted by Redlich and Norris).

43. ALA. ADMIN. OFFICE OF COURTS: ALA. UJS FORMS, FORM C-44A, EXPLANATION OF RIGHTS OF YOUTHFUL OFFENDER AND PLEA OF GUILTY (Revised June 2007), available at <http://eforms.alacourt.gov/displayall.aspx> (follow "Criminal" hyperlink; then follow "Explanation of Rights of Youthful Offender and Plea of Guilty" hyperlink).

44. Redlich, *supra* note 42.

45. FORM C-44A, *supra* note 43.

46. KARL O. HAIGLER ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY 20-23 (1994).

47. CAROLINE W. HARLOW, BUREAU OF JUST. STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003).

48. Malika Closson & Kenneth M. Rogers, *Educational Needs of Youth in the Juvenile Justice System, in THE MENTAL HEALTH NEEDS OF YOUNG OFFENDERS: FORGING PATHS TOWARD REINTEGRATION AND REHABILITATION* 229, 233-34 (2007).

49. See H. Richard Lamb & Linda E. Weinberger, *Persons With Severe Mental*

Although legally the decision to plead guilty is ultimately the defendant's,<sup>50</sup> are juvenile defendants making decisions autonomously? To what degree do juveniles have to understand these documents on their own? Do parents and attorneys advise juvenile defendants, and if advice is given, is it effectual? There are several reasons to theorize that advice is non-existent, limited, or based on incorrect understanding. First, parents often do not have the requisite knowledge to provide "good" advice and may not understand the legal language themselves.<sup>51</sup> Second, although attorneys will certainly be more informed than parents, a study done by the U.S. Department of Justice found that in certain jurisdictions upwards of 80% to 90% of juveniles waive their right to counsel and proceed in court without attorneys present.<sup>52</sup> Thus, many juveniles may be making plea decisions without the benefit of counsel.<sup>53</sup> Third, if present, juvenile justice representation has been described as woefully inadequate.<sup>54</sup> Juvenile (as well as adult criminal court) attorneys often have burdensome caseloads and meet with their clients for the very first time the day of the disposition hearing.<sup>55</sup> Drizin and Luloff state problems such as "poor investigation, infrequent use of motions, high caseloads, over-reliance on pleas, a juvenile court culture of wanting to 'help' juveniles, and a general lack of training among attorneys on youth and adolescents."<sup>56</sup> Finally, even with the assistance of effective counsel, it is questionable whether juveniles truly understand and participate in their cases, and follow the advice of or listen to counsel. A small pilot study of juvenile defendants and their attorneys,<sup>57</sup> concluded that almost all of the youths were viewed as "too acquiescent, passive, or naïve—compared to most adults—in their approach to decisions

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*Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVICES 483, 483-84 (1998); Allison D. Redlich, *Double Jeopardy in the Interrogation Room for Youths with Mental Illness*, 62 AM. PSYCHOLOGIST 609, 610 (2007).

50. Robert E. Shepherd, Jr., *Plea Bargaining in Juvenile Court*, 23 CRIM. JUST. 61, 61 (2008).

51. See e.g., Jennifer L. Woolard et al., *Examining Adolescents' and their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH & ADOLESCENCE 685, 695-96 (2008).

52. Judith B. Jones, *Access to Counsel*, JUV. JUST. BULL. (U.S. Dep't of Justice, Washington, D.C.), June 2004, at 1-2.

53. Drizin & Luloff, *supra* note 2, at 284-86.

54. Drizin & Luloff, *supra* note 2, at 289; Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 911-12 (2010).

55. Jones, *supra* note 52, at 6; Kaban & Quinlan, *supra* note 6, at 38.

56. Drizin & Luloff, *supra* note 2, at 289.

57. Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 225, 225-26 (Thomas Grisso & Robert G. Schwartz eds., 2000).

about pleas.”<sup>58</sup> Similarly, in a study of juvenile and adult detainees’ appreciation of the attorney-client relationship, juveniles were more likely than adults to suggest not talking to their attorney and to recommend denying involvement in the crime, and less likely to recommend honest communication with one’s attorney.<sup>59</sup>

In summary, guilty pleas comprise the majority of criminal convictions for juvenile and adult defendants.<sup>60</sup> The mechanisms in place—plea colloquies and tender-of-plea forms—to ensure knowing, intelligent, and voluntary decision-making may not sufficiently safeguard individuals because of comprehensibility and content issues.<sup>61</sup> Some but not all of the extant research indicates that juveniles, especially younger ones, will be more likely to plead guilty than adults.<sup>62</sup> However, much, if not all, of the research on juveniles’ ability to meaningfully understand and participate in legal situations has been within a framework of presumed guilt.<sup>63</sup> That is, the studies tend to employ methodologies asking juveniles what they would or did do when guilty.<sup>64</sup> The question remains whether younger, innocent individuals will also be more likely to plead guilty than older, innocent individuals.

#### JUVENILES AND FALSE ADMISSIONS

Pleading guilty to crimes one did not commit—or false guilty pleas—undoubtedly exists,<sup>65</sup> but has not been well researched. Of the few studies that have been conducted, it is clear that mock innocent (adult) defendants are much less likely to plead guilty than mock guilty defendants,<sup>66</sup> but still as many as 50% of innocents in laboratory experiments have been induced to plead guilty.<sup>67</sup> Most often, the bargains and incentives associated with pleading guilty (such as getting out of jail) are cited as reasons underlying false

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58. *Id.* at 240.

59. Schmidt, *supra* note 28, at 191.

60. *See supra* text accompanying note 6.

61. *See supra* text accompanying notes 29-31, 37-48.

62. *See supra* text accompanying notes 16-17, 20-28.

63. *See, e.g.,* Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *supra* note 5, at 58.

64. *See, e.g., id.*

65. *See, e.g.,* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008); Gross, *supra* note 5, at 537, 544-45.

66. Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59, 71 (1984); W. Larry Gregory et al., *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOL. 1521, 1528 (1978).

67. Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL STUD. 97, 106 (2010).

guilty pleas.<sup>68</sup>

False guilty pleas are essentially false confessions, though there are important differences.<sup>69</sup> One of the primary risk factors to police-induced false confessions is youth.<sup>70</sup> Juveniles are over-represented in proven false confession cases, typically accounting for about one-third of the samples.<sup>71</sup> To understand why juveniles are susceptible to coerced (as opposed to voluntary) false confessions, it is important to understand modern-day police interrogation. In brief, U.S. interrogation methods are typified by accusation, confrontation, isolation, and psychological manipulation.<sup>72</sup> Formal interrogations are not conducted until the police are reasonably certain of the suspect's guilt, and thus interrogations by definition are guilt-presumptive. Specific to false confessions, Kassin and colleagues in a recent scientific consensus paper addressed three situational aspects of interrogations that are common to these statements: 1) physical custody and isolation: interrogations conducted in the absence of social support for protracted periods; 2) presentation of false evidence: lying to suspects about non-existent evidence against them; and 3) minimization: police-originated scenarios that serve to minimize the severity of the crime and/or the suspect's culpability, making it easier to confess.<sup>73</sup>

There is convergent evidence that adults and juveniles are interrogated with the same tactics.<sup>74</sup> American interrogation techniques are not developmentally informed or appropriate. When these inappropriate techniques are employed on juveniles, who are at varying stages of immature development cognitively, socially, emotionally, and neurologically, and who are misjudged to be guilty,

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68. See Redlich et al., *Self-Reported Confessions and False Guilty Pleas Among Offenders with Mental Illness*, *supra* note 5, at 85.

69. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *supra* note 5, at 59-62.

70. Gross, *supra* note 5, at 544-46; Owens-Kostelnik, *supra* note 3, at 287; Allison D. Redlich & Saul M. Kassin, *Police Interrogation and False Confessions: The Inherent Risk of Youth*, in CHILDREN AS VICTIMS, WITNESSES, AND OFFENDERS: PSYCHOLOGICAL SCIENCE AND THE LAW 275, 276 (Bette L. Bottoms et al., eds., 2009).

71. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 944 (2004); Gross, *supra* note 5, at 545.

72. See generally GISHI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003); Kassin et al., *supra* note 3; Lassiter & Meissner, *supra* note 4; LEO, *supra* note 4.

73. Kassin, *supra* note 3, at 6-7; see also Drizin & Leo, *supra* note 70, at 907-18.

74. FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 298-303 (4th ed. 2004); Jessica R. Meyer & N. Dickson Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 761 (2007); Redlich & Kassin, *supra* note 69, at 277-79.

the risk of false confession increases.<sup>75</sup>

Because of an increased susceptibility to false confessions,<sup>76</sup> one could hypothesize that age and likelihood of false guilty pleas are also negatively related.<sup>77</sup> Many traits of adolescence, such as a foreshortened sense of future, impulsiveness, and other defining characteristics of youth that help to explain why juveniles falsely confess to police, will also be present for juveniles deciding whether to take a plea.<sup>78</sup> Limited one-time plea offers, the authority of prosecutors, and other social influence compliance-gaining tactics<sup>79</sup> that can be present in plea negotiations may also be more effective with juveniles than with adults.<sup>80</sup> Further, the corpus of knowledge reviewed above—juveniles' deficits in legal knowledge and understanding, willingness and abilities related to participating in their own defense, the heavy reliance on pleas in juvenile courts, ineffective juvenile representation, and increased likelihood compared to adults of pleading guilty when guilty—supports the notion that innocent youths may also be more likely to falsely plead guilty than innocent adults.

However, there are also reasons supporting the alternate hypothesis, that is, that younger juveniles will be less likely to plead guilty when innocent than older juveniles and adults. Some characteristics of youth may serve to lower rather than heighten their risk of false guilty pleas. For example, youths' proclivity toward risk seeking<sup>81</sup> and risk taking<sup>82</sup> may negatively relate to false guilty pleas. Unquestionably, defendants who choose to go to trial rather than plead are accepting risk. There is a great deal of research on the so-called "trial penalty," that is, that defendants convicted at trial are

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75. Owens-Kostelnik, *supra* note 3, at 291; Redlich & Kassin, *supra* note 70, at 279-82; Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogations*, 31 *LAW & PSYCHOL. REV.* 53, 66-69 (2007).

76. Owens-Kostelnik, *supra* note 3, at 287; 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).

77. See Drizin & Luloff, *supra* note 2, at 274 (noting that "juveniles [are] significantly more likely to claim responsibility for acts they did not commit than adults"); Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *supra* note 5, at 60; Redlich & Kassin, *supra* note 70, at 282.

78. Drizin & Luloff, *supra* note 2, at 293.

79. See generally ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (4th ed. 2001) (describing various techniques of influence and persuasion).

80. For example, compliance with authority is a theorized reason for increasing juveniles' likelihood of accepting pleas in comparison to adults. Grisso, *supra* note 16, at 361.

81. 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).

82. *Id.*

penalized more severely (in terms of sentence lengths, collateral consequences, etc.) in comparison to those convicted via pleas.<sup>83</sup> And it is worth noting that about 85% of defendants are convicted at trial.<sup>84</sup> When facing serious sentences and the probability of conviction at trial is high, many lawyers would recommend to their clients to consider plea offers.<sup>85</sup> However, some juveniles cannot appreciate these risks (due to deficits in competence and overall immaturity) and may insist on going to trial.<sup>86</sup> This scenario is summarized well in an article entitled, “*I Ain’t Taking no Plea: The Challenges in Counseling Young People Facing Serious Time*.”<sup>87</sup>

There is also evidence to support that defendants who are innocent are more willing to accept the risk of a trial. For example, within the non-universal samples of wrongfully convicted individuals, guilty pleas account for only 5% to 11%<sup>88</sup>—rates which are drastically lower than the rates of guilty pleas generally, or even for murder and rape, specifically.<sup>89</sup> In addition, across four studies, Tor, Gazal-Ayal, and Garcia found that college and law students asked to imagine they were innocent of a mock crime demonstrated increased risk seeking in that they were willing to take their chances at trial and not accept pleas, than those asked to imagine they were guilty (except when the probability of conviction was high—95%—innocent and guilty participants displayed risk neutrality, and had comparable plea acceptance rates).<sup>90</sup> Tor and colleagues reasoned that innocents prefer risk because they perceive the choice between plea and trial (two negative outcomes) to be substantively unfair.<sup>91</sup> Because juveniles as a group are characterized as risk seekers,<sup>92</sup> and

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83. See Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67, 79-80 (2005); Jeffrey T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 632-33 (2006); Jeffrey T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383, 393-97 (1996); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84-86 (2005).

84. THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002 26 (2006).

85. Abbe Smith, “*I Ain’t Takin’ No Plea: The Challenges in Counseling Young People Facing Serious Time*,” 60 RUTGERS L. REV. 11, 12 (2007).

86. *Id.* at 13.

87. *Id.* at 13-18.

88. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *supra* note 5, at 53, 56.

89. COHEN & REAVES, *supra* note 83, at 25.

90. Tor, *supra* note 67, at 103-13.

91. *Id.* at 99.

92. LAURENCE STEINBERG, ADOLESCENCE 86-89 (Emily Barrosse et al. eds., 8th ed. 2008); Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 72-73 (2005).

perhaps because juveniles are less likely to appreciate that life is not always fair, it is possible that innocent juveniles (particularly younger ones) will be the least likely to accept plea offers compared to guilty juveniles and compared to adults who are either innocent or guilty.

Another trait of juveniles that may serve to decrease the risk of false guilty pleas concerns stages of moral reasoning. Studies have found youths are more likely than adults to refer to a person's actual guilt as a reason for pleading guilty.<sup>93</sup> Thus, if innocent, younger persons may refuse to plead guilty based on moral reasons; that is, only the guilty should plead guilty. This morally based refusal can become problematic when rejecting a plea is not the best course of action. Developmental deficits limit youths' ability to first appreciate what is in their best interest, and second to act in their best interest.

Falsely pleading guilty, while not ideal, can be construed as being in one's best interest. Innocent defendants when deciding whether to plead guilty are often faced with a Hobson's choice: plead guilty and (many times) get out of jail and go home, or maintain innocence, remain in jail, and risk a much harsher fate at trial. As argued by Bowers, the benefits of pleading guilty (à la the trial penalty) should not be denied to those innocent and wrongly accused.<sup>94</sup> In contrast, false confessions to police are almost never in one's best interest.<sup>95</sup> Although some false confessions are recognized as such before proceeding further into the criminal justice process, many are not, resulting in wrongful imprisonments and convictions.<sup>96</sup> Recantations of (false) confessions are rarely believed and may even serve to generate harsher punishment (insofar as the person appears to first take responsibility for the crime and then rescinds). In addition, because confession evidence is so highly valued by jurors,<sup>97</sup> false confessions can serve to increase the rates of false guilty pleas (in that the probability of trial conviction is raised). Because juveniles as a cohort are less able than adults to recognize and act in their best interests (and may be less likely to take the advice of learned counsel), juveniles may be less likely to plead guilty when it is in their best interest to do so.<sup>98</sup> At the point of plea decision-

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93. Peterson-Badali & Abramovitch, *supra* note 21, at 548-49.

94. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1173-74 (2008).

95. *See id.* at 1163 (noting that "[j]udges are especially loath to discredit even incredible police testimony").

96. Drizin & Leo, *supra* note 71, at 920-23.

97. Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 250 (2006); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 LAW & HUM. BEHAV. 469, 479 (1997); *see* Drizin & Luloff, *supra* note 2, at 272-73.

98. *See* STEINBERG, ADOLESCENCE, *supra* note 92, at 105-06.

making, the fact that one is innocent or guilty becomes arguably less important than the realities of what jurors are likely to do at trial.

Finally, it may be premature to generalize from youths' risk of false confessions to police to youths' risks of false guilty pleas. Though research has established that juveniles misjudged to be guilty are at risk for falsely confessing in the context of police interrogations,<sup>99</sup> the research has also suggested that it is the *combination* of dispositional factors (i.e., young age) and situational factors (i.e., overly long interrogations and inappropriate interrogation techniques) that serve to increase the risk.<sup>100</sup> There are notable differences between interrogations (particularly ones that produce false confessions) and plea negotiations. For example, does the isolation, coercion, and confirmation bias so commonly present in proven false confession cases<sup>101</sup> typify plea negotiations? Although, some juvenile defendants deciding whether to plea can be isolated in that they do not have parental or even attorney guidance, the isolation of the interrogation room is standard practice, an intentional tool of interrogators attempting to gain confessions. Isolating defendants in order to achieve plea deals is arguably not a goal of prosecutors (at least not ethical ones). Moreover, the context of false confessions is often prolonged isolation, which is unlikely to be present in plea negotiations, even when innocent defendants have been wrongly accused. In addition, though plea strategies are quite probably psychologically manipulative, it is less clear whether they are coercively so, as interrogation tactics that produce police-induced false confessions most often are. In police-induced false confession cases, interrogators certain of the suspect's guilt refuse to accept denials; the interrogation continues until the suspect privately realizes that the only way out is to offer false admissions.<sup>102</sup> Will prosecutors insist on guilty pleas and not give in until defendants agree? I suspect the answer to this question is "no." Prosecutors' perceptions and certainty of guilt are likely to be correlated with their perceptions of trial success, and thus, those prosecutors who have firm evidence of guilt would have less need to insist on pleas.

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99. Owen-Kostelnik, *supra* note 3, at 295-96; Allison D. Redlich & Steven Drizin, *Police Interrogation of Youth*, in *THE MENTAL HEALTH NEEDS OF YOUNG OFFENDERS: FORGING PATHS TOWARD REINTEGRATION AND REHABILITATION* 61, 68-69 (Carol L. Kessler & Lovis James Kraus eds., 2007).

100. See Owen-Kostelnik, *supra* note 3, at 296 (providing the example of a fourteen-year-old boy who falsely confessed "after two days of questioning").

101. Drizin & Leo, *supra* note 71, at 907-12; Brandon L. Garrett, *The Substance of False Confessions*, 62 *STAN. L. REV.* 1051, 1058 (2010).

102. Kassir, *supra* note 3, at 14-19.

## SUMMARY AND CONCLUSIONS

The scientific literature on guilty pleas is not extensive, which is noteworthy given that most convictions are the result of guilty pleas. In this article, I attempted to review research relevant to juveniles' plea decision-making, addressing the likely comprehension of plea materials for minor defendants as well as the reasoning underlying plea decisions. I also contrasted juveniles' known risk for false confession to their unknown risk for false guilty pleas.

My goal was *not* to demonstrate that juveniles are not susceptible to false guilty pleas. Indeed, I think there is good reason to suspect that they are; certain features of adolescence, such as impulsiveness and inability to consider long-term consequences, that place juveniles at risk for false confessions to police also place them at risk for false confessions to prosecutors.<sup>103</sup> In addition, the incentives that define plea bargains may be equally enticing to those guilty or innocent, regardless of age. My goal was rather to pose the question of whether juveniles, in comparison to adults, are more vulnerable to false guilty pleas and to fairly examine the evidence for both sides. In my estimation, the question has not been empirically tested, and we simply do not yet know whether juveniles are more likely to falsely plead guilty than adults. As scientists and legal scholars continue to learn more about the who, what, where, when, and why of wrongful convictions, the prevalence of and reasons for false guilty pleas will require greater attention.

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103. Drizin & Luloff, *supra* note 2, at 260; Tepfer et al., *supra* note 54, at 892-94.