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Underage and Unprotected: Federal Grand Juries, Child Development, and the Systemic Failure to Protect Minors Subpoenaed as Witnesses

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UNDERAGE AND UNPROTECTED: FEDERAL GRAND JURIES, CHILD DEVELOPMENT, AND THE SYSTEMIC FAILURE TO PROTECT MINORS SUBPOENAED AS WITNESSES

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CONTENTS

I. INTRODUCTION

In the United States, as in England, grand juries were originally intended to protect the people against unwarranted criminal prosecution by the government;[1] however, they have since been abolished in England, and criticism of federal grand juries in the U.S. throughout the past five decades suggests that these deliberative bodies presently protect prosecutors at the expense of the people subjected to their investigations.[2]

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1. *See, e.g.*, Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process* 24 FLA. ST. U. L. REV. 1 (1996) (summarizing the establishment of grand juries under English common law over 800 years ago with the goal of protecting citizens against corrupt judges or misinformed, overzealous law enforcement personnel; ultimately, these grand juries came to be viewed as insufficiently effective, such that the United Kingdom abolished them altogether approximately eighty years ago); *see also, e.g.*, W.J. Heyting, *The Abolition of Grand Juries in England*, 19 AM. BAR ASS'N J. 648 (1933); Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623 (1934).

2. *See, e.g.*, Robert Gilbert Johnson, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY (1974) ("While the grand jury in England was able to maintain considerable independence from government prosecutors, the grand jury today is much more dependent on the prosecutor for its successful operation. Indeed, the grand jury normally hears only those cases presented by the prosecutor and only the prosecution's side of those cases. . . . With this added responsibility and power comes the danger that the prosecutor may also be able to prejudice or even manipulate the grand jurors and obtain an indictment when there may not be sufficient evidence to hold an accused for trial. This conduct may take several forms and may occur at different stages in the

Worse still, federal grand jury proceedings operate outside of fundamental constitutional rights such as the right to an attorney and the right to remain silent,[3] and also outside of procedural protections against the admissibility of hearsay or unlawfully obtained evidence; yet, they enable prosecutors to strip unaccused individuals subpoenaed solely for witness testimony[4] of their safety, rights, and liberty. Prosecutorial

indictment process. . . . But if the prosecutor is successful in obtaining an indictment under these conditions, the grand jury becomes the 'tool' of the prosecutor and no longer protects the interests of the accused"); William Blake Bennett, *In re Grand Jury Subpoenas – Juveniles' Right to Counsel Inside the Grand Jury*, 41 LA. L. REV. 1305, 1307 n.12 (1981) ("Many writers argue that the modern grand jury basically functions as the investigative arm of the prosecutor, which makes it unlikely for the grand jury to be able to fulfill its traditional role as 'independent protector' of the witness or the accused. The prosecutor's control of grand jury proceedings, the lack of procedural safeguards to protect the witness'[s] constitutional rights, and the legally binding nature of a witness' testimony have eroded prior justifications for the exclusion of counsel. [An argument that] these considerations should necessarily compel the right to counsel for *all* grand jury witnesses . . . could be persuasive," citing several articles that make such an argument) (italics in original); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1 (1999) (citing United States v. Williams, 504 U.S. 36, 48 (1992)) ("While the grand jury is an independent body, it is misleading to consider it a self-governing investigatory institution because the prosecutor actually controls the process of the investigation and the presentation of evidence to the grand jurors. . . . The Supreme Court has recognized the prosecutor's leading role in the proceedings, noting that the prosecutor does not 'require leave of the court to seek a grand jury indictment[‘] . . . the prosecutor's actions in directing the course of an investigation are largely free from judicial oversight. With that authority comes the possibility that prosecutors will abuse the privilege by engaging in misconduct in the course of a grand jury proceeding"). Although outside the scope of this Article, Henning goes on to challenge claims that high indictment rates indicate prosecutorial misconduct, instead, urging readers to focus their criticism on prosecutorial abuse throughout the pre-indictment investigative process. *Henning*, *supra*, at 6.

3. *See, e.g.*, U.S. DEP'T JUST., Justice Manual (used interchangeably here with "Justice Manual" and "JM," formerly referred to as the "United States Attorneys' Manual" or "U.S.A.M.," but "comprehensively revised and renamed in 2018 . . . [and] updated periodically") § 9-11.151(2020), https://www.justice.gov/jm/jm-9-11000-grand-jury) ("The Supreme Court [has] declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness's grand jury testimony can be used against the witness. *See* United States v. Washington, 431 U.S. 181, 186 and 190-191 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7. (1976). In *Mandujano* the Court took cognizance of the fact that Federal prosecutors customarily warn 'targets' of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington*, the Court pointed to the fact that Fifth Amendment warnings were administered as negating 'any possible compulsion to self-incrimination which might otherwise exist' in the grand jury setting. *See Washington*, at 188."); James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 537-38 (2006) ("A prosecutor's use of the grand jury's power is limited only by the grand jury's obligation to evaluate evidence to determine whether to return an indictment. It is not an abuse of the grand jury process if, in addition to conducting an investigation, a prosecutor seeks to obtain evidence of additional criminal conduct or seeks to 'lock in' witnesses' testimony under oath for further investigation of wrongdoing. As in 1980, a federal prosecutor cannot use the grand jury for the sole or dominant purpose of: (1) obtaining additional evidence on charges already made against an indicted defendant, or (2) eliciting evidence for a civil case. A prosecutor also cannot use the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest.").

4. While beyond the scope of this Article, it is relevant to this topic that prosecutors can also classify witnesses as targets or subjects. *See* U.S. DEP'T JUST., *supra* note 3, § 9-11.151 ("It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a 'target' or 'subject' of a grand jury investigation. A 'target' is a person as to whom the prosecutor or the grand

recklessness and misconduct generally have received increasingly widespread attention, especially in recent years, with some prosecutor offices championing "progressive prosecution" reforms.[5] Nonetheless, federal grand jury proceedings continue to occur in secrecy and by design are subject to minimal judicial review or oversight.[6]

The lack of explicit protections or oversight for minors subpoenaed for witness testimony before grand juries leaves them especially vulnerable to one of the most coercive, terrifying, and unaccountable processes in the

jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target. A 'subject' of an investigation is a person whose conduct is within the scope of the grand jury's investigation. . . . Although the Court . . . [has] held that 'targets' of the grand jury's investigation are entitled to no special warnings relative to their status as 'potential defendant(s),' the Department of Justice continues its longstanding policy to advise witnesses who are known 'targets' of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs [of this section]. In addition, these 'warnings' should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them. When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served."); *see also* PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE 8-12 (5th ed. 2012) ("A subject is a person whose conduct is within the scope of the grand jury's investigation. . . . [A target is] a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."). Some prosecutors disclose a witness' status directly, others disclose it in response to a request for the information from the witness's attorney. While such information can help the witness evaluate potential risk when testifying, it is also subject to change. Subjects can become targets and vice-versa without any additional updates to the witness. This is another factor that makes witness testimony before federal grand juries so high-stakes.

5. *See, e.g.*, Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), https://innocenceproject.org/news/why-holding-prosecutors-accountable-is-so-difficult/; Robin McDowell, *Report: 'Alarming' Rates of Police and Prosecutor Misconduct*, AP NEWS (Sept. 15, 2020), https://apnews.com/article/police-lifestyle-crime-us-news-82a0a00ad9b9876b465f99137d9376c6; Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll & Klara Huber Stevens, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, NAT'L REGISTRY OF EXONERATIONS (Sept. 1, 2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf; Aimee Ortiz, *Wrongly Convicted Black Defendants Were Slightly More Likely Than Whites to Be Victims of Misconduct, Especially in Drug and Murder Investigations*, N.Y. TIMES (Sept. 16, 2020), https://www.nytimes.com/2020/09/16/us/exonerations-report-misconduct.html. For a description of both state-level prosecutorial misconduct and "progressive prosecution," see generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2020).

6. *See* Holderman & Redfern, *supra* note 3, at 573-77 (citing United States v. Mechanik, 475 U.S. 66 (1986); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Williams, 504 U.S. 36 (1992)) (" [T]he federal courts now have less inherent authority to remedy alleged inappropriate prosecutorial conduct occurring at the pre-indictment stage than in 1980. It is also clear that today's defendant has a lesser chance of success on a motion to dismiss an indictment for prosecutorial misconduct than a defendant bringing the same motion in 1980.").

U.S. criminal legal system.[7] While most cases about federal grand jury subpoenas of minors involve child custody issues or children who witnessed violent acts committed against their loved ones, this Article approaches the issue through a lens informed by scholarship, positing that the federal criminal legal system disproportionately targets Black and Brown young men and adolescents within the "gang" prosecution context. Presumably, Black and Brown minors are, or could be, disproportionately targeted by federal prosecutors to provide grand jury witness testimony for "gang-related" pre-indictment investigations as well.[8] Thus, while the right to an attorney for any grand jury witness warrants consideration, this Article is especially concerned with the rights of subpoenaed minors as a starting point.

A. RICO Prosecutions: A Case Study in Racism and Vulnerable Minors

Prosecutions under the federal criminal Racketeer Influenced and Corrupt Organizations Act[9] ("RICO") and the related Violent Crimes in Aid of Racketeering Activity Act[10] ("VICAR") have had a disproportionately negative impact on the Black and Brown young men and adolescents in low-income communities who have been charged with these crimes (not to mention the related harm caused to their communities and loved ones).[11] Courts interpret both RICO and VICAR broadly, which

7. Spring 2021 discussions with Assistant U.S. Attorneys from the Southern District of New York and the District of New Jersey, as well as federal public defenders from the New York Federal Defender and an Assistant Federal Public Defender for the District of Maryland (all of whom prefer to remain anonymous) revealed that prosecutors generally opt to use case agents for grand jury testimony; since hearsay is allowed in the federal grand jury context, case agents can relay everything other parties might have said during interviews or other communications, without those parties (or witnesses to those communications) being present. While this might be common practice, the federal grand jury practice of subpoenaing minors remains allowable. In the hands of the wrong prosecutor, this possible course of action could become a dangerous tool within a broader criminal legal system that is often weaponized against vulnerable people.

8. *See, e.g.*, Jordan Blair Woods, *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303 (2012); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014); K. Babe Howell, *Prosecutorial Misconduct: Mass Gang Indictments and Inflammatory Statements*, 123 DICKINSON L. REV. 691 (2018); BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS "GANG" PROSECUTION (2019); Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71 (2021).

9. 18 U.S.C. §§ 1961-1968.

10. 18 U.S.C. § 1959.

11. For in-depth discussion of the influence of racial bias in federal criminal RICO and VICAR street gang prosecutions, *see* Litt, *supra* note 8, at 90-101. For discussion of the frictional harm caused by these prosecutions on the families and communities of those charged, *see* Alice Speri & Stephanie Tangkilisan, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren't In Gangs: The Prosecution of the Bronx 120 Raises Serious Questions About Due Process and the Abuse of*

creates a low bar for prosecutors and a nearly insurmountable one for defendants in these cases.[12] Once an individual is charged under RICO, escaping the statute's grasp is nearly impossible. RICO and VICAR convictions lead to over-inclusion and severe sentences by design, including with respect to activities of other people with whom a particular defendant might never actually have been involved.[13] Inevitably, this negative impact has extended to minor peers of RICO and VICAR defendants who are, or could be, subpoenaed to testify.

Some of these "gang-involved" or gang-adjacent young people are still minors, even very young minors, when subpoenaed or charged. A cursory review of news articles[14] covering mass street gang arrests in major U.S. cities over the past thirty years offers overwhelming evidence that Black and Brown young men and adolescents are the primary suspects who are later convicted and harshly sentenced through federal RICO prosecutions.[15] If some of the possible suspects for these federal RICO and VICAR cases are minors, some of their acquaintances must also be minors (or, at least, minors could be suspected of having knowledge useful to prosecutors); therefore, these minors are potentially subject to federal grand jury subpoenas.

Federal Conspiracy Charges, THE INTERCEPT (Apr. 25, 2019), https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico ("Police and prosecutors spent years building a case against the Bronx 120. When the conspiracy allegedly started, in 2007, the average age of those who would eventually be swept up in it was 14. The youngest were 9. By the time the raid happened, most of those involved in crimes had already been caught by the system—and most others had moved on with their lives, if not out of the neighborhood, and had jobs and families."); *see also* Litt, *supra* note 8, at 138.

12. For federal prosecutors, some RICO cases involve VICAR charges while others do not; the result, either way, is a colossal advantage for prosecutors over defendants.

13. Speri & Tangkilisan, *supra* note 11 (explaining that, in the 2016 "Bronx 120" gang raid, thirty-five people were ultimately convicted of federal conspiracy charges based on selling marijuana, which is only a misdemeanor in New York State). Unfortunately, the aggregate drug sales amounted to over fifty kilograms of marijuana—whether or not any of this was even common knowledge—across all defendants in the raid, throughout the length of the alleged conspiracy. Multiple defendants were charged with the aggregate amount, rather than the much smaller quantities they might have sold. *Id.*

14. *See generally* Karen Savage & Daryl Khan, *Teens Remain Squarely in Crosshairs of NYC Law Enforcement, Panelists Say*, JUV. JUST. INFO. EXCH. (Feb. 13, 2017), https://jjie.org/2017/02/13/teens-remain-squarely-in-crosshairs-of-nyc-law-enforcement-panelists-say; Clarissa Sosin, *A Civil Rights Movement Grows in Brooklyn*, YOUTH TODAY (Mar. 22, 2017), https://youthtoday.org/2017/03/a-civil-rights-movement-grows-in-brooklyn; Max Rivlin-Nadler, *A Year After NYC's Biggest "Gang Raids," Families Say It's Just Stop and Frisk By Another Name*, THE VILL. VOICE (Apr. 28, 2020), https://www.villagevoice.com/2017/04/28/a-year-after-nycs-biggest-gang-raids-families-say-its-just-stop-and-frisk-by-another-name; Speri & Tangkilisan, *supra* note 11.

15. *See, e.g.*, United States v. Parrish, 755 F. App'x 59 (2d Cir. 2018).

B. If Prosecutors Rarely Engage in this Practice, Why Make a Change?

I originally wrote this Article in the wake of the Trump presidency and its aftermath, which heightened challenges to legal and other norms previously unquestioned, increased public discourse around both problematic and progressive approaches to prosecution, and led to movements that focused on the life-altering effects of abuse of power (especially law enforcement power) in the context of racism and sexual abuse. Informed by that context, I argue that we cannot ignore the permitted practice of subpoenaing minors as unprotected federal grand jury witnesses. In Section II, I provide background context on federal grand juries and the pre-indictment federal investigation process, especially where broader federal criminal investigations overlap with a federal grand jury. In Section III, I identify the specific rule that prohibits the presence of an attorney for a witness before a federal grand jury, the implications of this rule, and debate around its application to minors at both federal and state levels (with particular emphasis on a Louisiana state-level case proposed as a model solution, which I detail in Section VII). In Sections IV and V, I discuss racial and child psychological development considerations, especially within the context of law enforcement interrogations. I conclude with a proposal for explicit statutory protection of subpoenaed minors, including procedural measures to address critics' concerns.

The focus and proposal herein primarily involve federal law, in the hope that, if adopted federally, the proposal would trickle down to state grand jury laws and procedures. Where, as in Louisiana, state law could be helpful in improving federal law, I have drawn from that example. Whether or not the subpoena of minors by federal grand juries occurs frequently and whether or not minors are subjected to the same process (such as it is) as subpoenaed adults is irrelevant; if statutory gaps leave this possibility available to prosecutors, and courts do not address it, the legislature must explicitly fill this need for protection. Specifically, the risk of prosecutorial misconduct, and its impact on child psychological development, urgently warrants a provision within 18 U.S.C. § 3509 (the federal statute governing the rights of child victims and child witnesses) that permits subpoenaed minors to be accompanied by an attorney of their choosing in an appearance before a federal grand jury.

II. FEDERAL GRAND JURIES AND PROSECUTORIAL MISCONDUCT

Federal prosecutors must secure the approval of a federal grand jury ,[16] an independent deliberative body comprised of ordinary citizens from the jurisdiction, in order to charge a person with a serious federal crime.[17] The role of the federal grand jury is enshrined in the Fifth Amendment to the U.S. Constitution: "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[18] Grand juries are meant to serve as an independent, investigative collection of people from the jurisdiction in which the alleged crime(s) would be tried.[19] This collection of people is intended to serve two main purposes: (1) assist the U.S. government with its investigation into the alleged crime to determine whether there is probable cause to believe that a crime occurred, and (2) protect citizens against wrongful charges[20] by deciding whether the available evidence is sufficient for federal prosecutors to charge the suspect(s) with a crime.[21]

A. The Hyde and McDade Amendments

In the late 1990s, Congress enacted two statutes in response to mounting concerns about prosecutorial misconduct in the federal grand jury context: the Hyde Amendment (part of the 1998 Department of

16. The Fifth Amendment only makes one exception to its grand jury requirement: "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. CONST. amend. V.

17. *See* FED. R. CRIM. P. 7(a) (requiring prosecution by indictment for capital felonies and felonies punishable by imprisonment for more than one year).

18. U.S. CONST. amend. V.

19. *See* 28 U.S.C. § 1861.

20. *See, e.g.*, United States v. Thomas, 788 F.2d 1250, 1254 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 187 (1986) ("The grand jury is designed principally to prevent the prosecutor from subjecting innocent people to the burden and trauma of trial."); United States v. Vetere, 663 F. Supp. 381, 386 (S.D.N.Y. 1987) ("Incorporated into the Bill of Rights as a bulkward against unfounded government prosecution . . . .").

21. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 343-44 (1974) (describing the grand jury's dual functions as including "both the determination of whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded prosecutions.") =; United States v. DiBernardo, 775 F.2d 1470, 1476 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 1948 (1986); United States v. Sells Eng'g Inc., 463 U.S. 418, 423-24 (describing the grand jury's historical "dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."); *see also* Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 FORDHAM L. REV. 129, 130 (1987); Janice S. Peterson, *Criminal Procedure—Federal Rule of Criminal Procedure 6(e): Criminal or Civil Contempt for Violations of Grand Jury Secrecy?*, 12 W. NEW. ENG. L. REV., 245, 245 n.2 (1990); Kadish, *supra* note 1, at 56.

Justice Appropriations Act) and 28 U.S.C. § 530B (commonly known as the "Citizens Protection Act" or the "McDade Amendment").

The Hyde Amendment authorized courts to award attorney's fees and other litigation costs to criminal defendants who prevailed in claiming that, absent "special circumstances," the U.S. took a position that was "vexatious, frivolous, or in bad faith" in its litigation.[22] Currently, there is a circuit split as to what constitutes an acceptable response to concerns about prosecutorial misconduct in such instances.[23]

The McDade Amendment requires "that federal government attorneys . . . be subject to local state laws and ethical requirements as well as to local federal court rules."[24] Since its enactment, the McDade Amendment has served as guidance that federal prosecutors must comply with the same ethical rules as all other practicing attorneys.[25] Federal prosecutors consult the *Justice Manual* for internal guidance, but "[t]he Manual . . . only provides internal Department of Justice guidance and does [not] create any rights that a party can rely upon. . . . Federal courts have uniformly applied the Manual's statement in holding that [it] does not create enforceable rights for criminal defendants."[26]

B. The Subpoena Power

The subpoena power of federal courts is governed by Rule 17 of the Federal Rules of Criminal Procedure.[27] A federal grand jury's subpoena power relies on subpoena issuance by the grand jury's summoning federal district court.[28] Subpoenas direct a witness to produce physical evidence or to give live testimony before the grand jury. "Courts have held that properly issued grand jury subpoenas enjoy a presumption of regularity. Unlike warrants, subpoenas are traditionally issued without prior judicial review and approval."[29]

22. Adequate Representation of Defendants, 18 U.S.C.A. § 3006A note (Burden of Proof) (West).

23. *See* Holderman & Redfern, *supra* note 3, at 529-30 (citing United States v. Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999); Elkin Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecutions*, CHAMPION, Mar. 1998, at 22, 23.

24. *See* Holderman & Redfern, *supra* note 3, at 530-32.

25. *See id.*

26. *Id.* at 532-33.

27. *See* FED. R. CRIM. P. 17.

28. *Id.*

29. Holderman & Redfern, *supra* note 3, at 538-39 (citing United States v. R. Enters., Inc., 498 U.S. 292, 300-01 (1991)); Nat'l Commodity & Barter Ass'n v. United States, 951 F.2d 1172, 1174-75 (10th Cir. 1991); *In re* Grand Jury Subpoena, 920 F.2d 235, 244 (4th Cir. 1990); *In re* Grand Jury Proceedings Involving Vickers, 38 F. Supp. 2d 159, 163 (D.N.H. 1998); United States v. Phibbs, 999 F.2d 1053, 1077 (6th Cir. 1993)).

C. Federal Grand Jury Secrecy

Rule 6(e) of the Federal Rules of Criminal Procedure requires that grand juries operate in secrecy.[30] This rule theoretically protects uncharged individuals from reputational harm, grand jurors from threats or harassment, and subpoenaed individuals from violence (thereby discouraging them from fleeing).[31] Grand juries also have vast authority to investigate possible federal crimes tried within their district;[32] even without probable cause or serious suspicion, they may commence investigation.[33]

D. Persons Allowed Inside the Federal Grand Jury Room

The evidence from which grand juries make their determinations typically includes witness testimonies elicited by the attorney for the government. Witnesses are required to appear before the grand jury through the issuance of subpoenas[34] (which may come from the grand jury panel[35] or, more often, from the prosecutor).[36] Notably, no person may come before the grand jury without a subpoena,[37] placing control over the perspectives considered in the prosecutor's hands. Potential defendants, subpoenaed individuals, and defense counsel are neither authorized to object to evidence presented to the grand jury nor permitted

30. For an in-depth explanation of Rule 6(e) and the history of grand jury secrecy, *see* Kadish, *supra* note 1, at 12-22 (describing, for example, that "[t]he issue of grand jury secrecy arose later in a First Amendment context. In 1917, a Rhode Island federal district court addressed the issue of widespread public disclosure of grand jury proceedings in *United States v. Providence Tribune Co.* [241 F. 524 (D.R.I. 1917)] . . . the court analyzed the historical justifications for grand jury secrecy[:] . . . (1) preventing the escape of offenders; (2) preventing the destruction of evidence; (3) preventing tampering with witnesses; (4) preserving the reputations of innocent persons whose conduct comes under the grand jury's investigation; (5) encouraging witnesses to disclose their full knowledge of possible wrongdoing; and (6) preventing undue prejudice of the public jury pool.").

31. *See generally* MICHAEL A. FOSTER, CONG. RSCH. SERV., R45456, FEDERAL GRAND JURY SECRECY: LEGAL PRINCIPLES AND IMPLICATIONS FOR CONGRESSIONAL OVERSIGHT (2019).

32. *See* Brown v. United States, 245 F.2d 549, 554-55 (8th Cir. 1957); United States v. Brown, 49 F.3d 1162, 1168 (6th Cir. 1995).

33. *See* United States v. Williams, 504 U.S. 36, 48 (1992) (permitting grand juries to "investigate merely on suspicion that the law is being violated, or even because it wants assurance that [the law] is not [being violated]" (citations omitted)).

34. *See* FED. R. CRIM. P. 17.

35. *See* United States v. Calandra, 414 US. 338, 343 (1974) (explaining that "[t]he grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate").

36. *See* Lopez v. Dep't of Just., 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("[T]he term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does.").

37. *See* United States v. Williams, 504 U.S. 36, 51-54 (1992).

to present exculpatory evidence.[38] The prosecutor conducts most of the witness questioning.[39] Throughout its investigations, the prosecutor also serves as the grand jury's advisor, answering the jury's legal questions and drafting indictments.[40]

E. The Contempt Power

The powers available to federal grand juries and prosecutors are formidable. The contempt power can be wielded as a legal form of extortion in the U.S. criminal legal system,[41] rendering federal grand juries and federal prosecutors especially powerful.[42] Civil confinement for failure to comply with a grand jury subpoena is meant to coerce compliance. The maximum length of confinement for contempt is the shorter of eighteen months or the duration of the proceeding.[43] Further, a subpoenaed individual who lies to the grand jury is subject to prosecution for perjury.[44]

F. Immunity

Prosecutors before federal grand juries have the power to confer immunity from prosecution on a witness. Pursuant to 18 U.S.C. §§ 6001-6005, only federal prosecutors can request an immunity order from a district court; otherwise, courts lack the power to grant immunity.[45] This is an area in which access to counsel for minors inside the grand jury room would be especially helpful. Prosecutors can use immunity to effectively strip hesitant witnesses of their Fifth Amendment rights; indeed,

38. *Id.*

39. *See* United States v. Merrill, 685 F.3d 1002, 1013 (11th Cir. 2012); United States v. Wadlington, 233 F.3d 1067, 1075 (8th Cir. 2000).

40. *See, e.g.*, United States v. Sigma Int'l, Inc., 196 F.3d 1314, 1323 (11th Cir. 1999).

41. Lecture by Judge John Gleeson, Complex Federal Investigations Course at Harvard Law School (Oct. 7, 2020) [hereinafter Gleeson].

42. *See* 28 U.S.C. § 1826(a) (civil contempt); 18 U.S.C. § 401 (criminal contempt); *see generally* Simkin v. United States, 715 F.2d 34 (2d Cir. 1983).

43. Gleeson, *supra* note 41 (describing the contempt tool available to prosecutors when witnesses subpoenaed by federal grand juries are unwilling to testify). If an empaneled individual is already serving a sentence and decides not to testify, that person goes back into confinement on contempt, which stops the sentence time served clock until the period of contempt confinement terminates; and if the empaneled individual is also facing a criminal charge but does not yet have a sentencing outcome, the judge could, but is not required to, treat the time in confinement for contempt as a substitute for time served. *Id.*

44. 18 U.S.C. § 1621 (perjury); § 1623 (false declarations before grand jury). I do not discuss perjury and the rules about grand jury outcomes in this Article, but for more information about these topics, *see* Bronston v. United States, 409 U.S. 352 (1973); FED. R. CRIM. P. 7(c)(1), 6(g); Vasquez v. Hillery, 474 U.S. 254, 263 (1986); United States v. Christian, 660 F.2d 892, 902 (3d Cir. 1981); United States v. Calandra, 414 U.S. 338, 343 (1974).

45. *See* 18 U.S.C. §§ 6001-6005.

prosecutors leverage their power to subpoena witnesses, grant them immunity, and place witnesses who refuse to testify in custody for contempt. As prosecutorial conduct experts James F. Holderman and Charles B. Redfern have cautioned:

> [T]he prosecutor is able to fashion a situation in which the witness must either testify or go to prison. Immunity is only available to a witness who has invoked the privilege against self-incrimination or has proffered to do so because a grant of immunity removes the privilege.[46]

Use (or derivative use) immunity grants a subpoenaed witness immunity from the prosecution's future use of compelled testimony and any evidence derived from that testimony; transactional immunity grants the witness "immunity from prosecution for offenses to which compelled testimony relates."[47] These definitions are not all-inclusive: in practice, use and derivative use immunity only protect witnesses from use of their own testimony or evidence derived therefrom, with prosecutors maintaining their authority to prosecute the witness using evidence they obtain "independently."[48] The customary standard for the prosecution to prove an independent source is "preponderance of the evidence" (a low bar); this standard shifts to a "clearly erroneous" standard on appellate review.[49] Thus, the "immunity" label here is actually a misnomer.[50] In *In re Daley*, the court explained that the conferral of use immunity means that the witness is immunized "against use of his compelled testimony 'in any criminal case,' rather than against all potential opprobrium, penalties[,] or disabilities which occur as a consequence of the compelled disclosures."[51] Minors are likely particularly ill-equipped to understand such rhetorical nuance.

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46. Holderman & Redfern, *supra* note 3, at 567.

47. Kastigar v. United States, 406 U.S. 441, 453 (1972); *see also* U.S. DEP'T. JUST., *supra* note 3, § 9-23.000; GORDON MEHLER, JOHN GLEESON, DAVID C. JAMES & ALICYN COOLEY, FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK 481-86 (20th ed. 2020); United States v. Vangates, 287 F.3d 1315, 1321 (11th Cir. 2002) (holding that use immunity only applies to statements made before a grand jury and does not apply in any subsequent civil trial).

48. *See* DIAMOND, *supra* note 4, at 8-12 (citing United States v. Daniels, 281 F.3d 168, 180 (5th Cir. 2002)). Even testimony from another witness can serve as an "independent" source. *Id.*

49. *See id.*; *see also* United States v. North, 910 F.2d 843, 855 (D.C. Cir. 1990), *modified on reh'g*, 920 F.2d 940 (D.C. Cir. 1990); United States v. Obermeyer, 899 F.2d 457, 463 (6th Cir. 1990); United States v. Lipkis, 770 F.2d 1447, 1450 (9th Cir. 1985); United States v. Rogers, 722 F.2d 557, 560 (9th Cir. 1983).

50. While the burden on the government is clearly a heavy one as articulated in the rules, the colloquial understanding of "immunity" in any form does not suggest its meaning within the federal grand jury subpoenaed witness context. For more on the burden on the government, *see* DIAMOND, *supra* note 4, at 8-20.

51. *In re* Daley, 549 F.2d 469, 474 (7th Cir. 1977) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 107 (1964) (White, J. concurring)); *see also* United States v. Nunez, 658 F. Supp. 828, 838 (D. Colo. 1987) (reiterating that the breadth of a witness's use and derivative use immunity does not exceed that of the Fifth Amendment privilege and certainly does not constitute amnesty); 18 U.S.C. § 6002.

In *Kastigar*, the Supreme Court held that any immunity in the federal grand jury context should not exceed the scope of the Fifth Amendment right against self-incrimination.[52] Justice Powell explained the majority's view that transactional immunity was more akin to "amnesty" and, therefore, broader than the Fifth Amendment protection; conversely, use and derivative use immunity were coextensive with the Fifth Amendment privilege.[53] In practice, witnesses before federal grand juries enter a practically lawless "Wild West" within the U.S. criminal legal system that is uniquely devoid of protections provided by the Fourth and Fifth Amendments, as well as the Federal Rules of Evidence. The Honorable Paul S. Diamond, District Judge for the Eastern District of Pennsylvania, characterized it this way: "in adopting the Immunity Act, Congress strengthened the prosecution's hand to the full extent of what the Supreme Court would deem permissible."[54]

When the Supreme Court established that use and derivative use immunity apply to witnesses before federal grand juries, it effectively allocated the burden of persuasion to the prosecution, requiring that any information later used to prosecute a witness must be derived from an independent source, not the witness' immunized testimony.[55] The Court seems to have failed to anticipate the leniency with which judges now "oversee" *Kastigar* hearings and federal criminal investigations. Before a prosecutor can present an immunity order to a judge for approval,[56] that prosecutor must first obtain the U.S. Attorney's affidavit that the order is in the public interest. Consequently, by the time an immunity order reaches a judge for approval, the judge has little choice but to approve it. U.S. Attorneys almost invariably can provide the requisite affidavit, rendering prosecutors essentially unfettered, unsupervised control over immunity orders in the federal grand jury context. The whole process rests on a presumption of good faith on the part of the government, with judges tending to rely on prosecutors' good faith[57] and seldom testing the

52. *Kastigar*, 406 U.S. at 453.

53. *See* DIAMOND, *supra* note 4, at 8-9 ("Before 1970, prosecutors seeking to compel testimony from a witness invoking the Fifth Amendment often were statutorily obligated to confer transactional immunity . . . . Congress repealed [the various] transactional immunity provisions in 1970, adopting in their place 18 U.S.C. §§ 6001-6005 ('The Immunity Act').").

54. DIAMOND, *supra* note 4, at 8-20.

55. *Kastigar*, 406 U.S. at 460.

56. Lecture by Judge John Gleeson, Complex Federal Investigations course at Harvard Law School (Sept. 30, 2020) (explaining that these orders usually say that the witness already has or is expected to assert the Fifth Amendment in response to questions before the federal grand jury, so it is in the public interest to coerce testimony through use and derivative use immunity).

57. For discussion of "relevancy," which serves as another example of how judges presume good faith on the part of prosecutors and the grand jury, *see* United States v. R. Enters., Inc., 498 U.S. 292, 297, 300-01 (1991) ("We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. Consequently, a grand jury subpoena

government's assertion of an independent source.[58] The immunity process in federal grand jury proceedings is perplexing and deleterious for adults; it would inevitably be worse for minors.

G. Prosecutors Run the Show

While grand juries are authorized to consider matters from a variety of sources, they tend to focus on the information presented by federal prosecutors. Moreover:

> The Federal Rules of Evidence do not apply in a grand jury proceeding except for the privilege provisions. The prosecutor can present hearsay to the grand jury and the grand jury can use the hearsay as the basis of its indictment. The prosecutor's presentation is ex parte[,] and [the prosecutor] can provide legal advice to the grand jury, discuss the

issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c), which permits a subpoena to be quashed only 'on motion' and 'if *compliance* would be unreasonable.' . . . Drawing on the principles articulated above, we conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Respondents did not challenge the subpoenas as being too indefinite nor did they claim that compliance would be overly burdensome. . . . The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. . . . A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged. 'The identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.'" (citations omitted)). The language here is telling: "no reasonable *possibility*;" not "substantial likelihood," not "the specific crime in question." This is very hard for the moving party to prove because they are unlikely to know the subject matter of an investigation. Moreover, the investigation process itself can cause the investigation's subject matter to shift with the discovery of new information.

58. Information presented here about the technicalities of how this process works in practice comes from Judge John Gleeson's Fall 2020 Complex Federal Investigations course at Harvard Law School. It is also worth noting that Judge Gleeson described a possible check on this process: *Kastigar* hearings do not always occur pre-trial; however, whenever possible, defense attorneys strongly prefer pre-trial *Kastigar* hearings because they are more likely to force prosecutors to show an independent source for all of their evidence than would be the case in a post-trial hearing (since investigations do not end once a defendant is indicted and evidence continues to accumulate). Unfortunately, judges prefer post-trial *Kastigar* hearings because they do not have to participate in one at all should the trial result in an acquittal. In my view, this is another example of why data collection is an important step; it is possible to track all pre-trial hearings, but if some are set to occur post-trial and ultimately never happen, due to an acquittal, prosecutorial misconduct might routinely go unidentified, regardless of trial outcome.

> prosecution's strategy with the grand jury and can respond to grand juror questions.[59]

All of this occurs without any input from the suspect(s) or a requirement, or even ability, to produce exculpatory evidence.[60]

III. COUNSEL FOR THE WITNESS IS NOT PERMITTED INSIDE THE FEDERAL GRAND JURY

Rule 6(d) of the Federal Rules of Criminal Procedure explains who is permitted to be present during federal grand jury proceedings:

> (1) *While the Grand Jury Is in Session*. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.
>
> (2) *During Deliberations and Voting*. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.[61]

The purpose of this exclusivity is to preserve federal grand jury independence and secrecy, which are reinforced by 18 U.S.C. § 1508. Witnesses must appear separately before the grand jury and are required to leave the room immediately after they conclude their testimony.[62]

IV. CONTEXTUAL FRAMEWORK: FEDERAL GRANDY JURY CASE LAW, RACISM, AND GANG PROSECUTIONS

Existing precedent in the area of minors moving to quash federal grand jury subpoenas generally consists of cases in which a child witnessed violence, a relative allegedly committed a murder, or in which there is some question of child abduction or custody. In these cases, very young children are almost always permitted to testify, and the test for determining their competence to do so is whether they know the difference between the truth and a lie. No matter how inconsistent their statements may be or what they might believe (e.g., believing in Santa Claus or Spider-Man),[63] courts permit testimony from children of all ages,

59. Holderman & Redfern, *supra* note 3, at 549.

60. *See id.* at 557.

61. FED. R. CRIM. P. 6(d). *See, e.g.*, United States v. Echols, 542 F.2d 948, 951 (5th Cir. 1976); *In re* Grand Jury Nov. 1989, 735 F. Supp. 323, 325 (E.D. Ark. 1990).

62. *See* Holderman & Redfern, *supra* note 3, at 547-48.

63. *See, e.g.*, Harris v. Thompson, 698 F.3d 609, 637 (7th Cir. 2012) ("A child's belief in Santa Claus or Spiderman [sic] does not make the child's testimony about his real-life experiences unreliable.");

especially if they are the only witnesses or one of just a few witnesses who can testify for or against the defendant.

Notably, none of these cases address federal grand jury proceedings in which teenagers are subpoenaed as witnesses within the gang/organized crime context. Such federal grand jury proceedings are distinguishable from other proceedings in important ways. First, in the gang context, alleged "gang members" and, presumably, their suspected or possible affiliates, have consistently been subjected to "adultification" by the criminal legal system.[64] Even though the Supreme Court has largely moved away from this practice in the decades since the 1960s and has increasingly emphasized adolescent development in its twenty-first century analyses, federal prosecutors continue to transfer juvenile alleged gang members to adult federal criminal courts.[65] In three 2018 cases in the Eastern District of New York concerning young people who were allegedly involved with the MS-13[66] gang, the court considered the federal juvenile transfer statute, which requires the court to account for a young person's:

> age and social background; . . . the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; [and] the availability of programs designed to treat the juvenile's behavioral problems.[67]

Despite all of these factors, the court consistently held that:

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see also Hunt v. Commonwealth, No. 2002-SC-0209-MR, 2003 WL 22417232, at *5 (Ky. Oct. 23, 2003); Humphrey v. State, No. A-6543, 1999 WL 46541, at *3 (Alaska Ct. App. Feb. 3, 1999); State v. Miller, No. 21250-5-III, 2003 WL 22077677, at *5 (Wash Ct. App. Sept. 9, 2003).

64. *See* Mae C. Quinn & Grace R. McLaughlin, *Article III Adultification Of Kids: History, Mystery, and Troubling Implications of Federal Youth Transfers*, 26 WASH. & LEE J. C.R. & SOC. JUST. 523, 555 n.185 (2019) (citing Riane Miller Bolin, Adultification in Juvenile Corrections: A Comparison of Juvenile and Adult Offenders (Aug. 9, 2014) (Ph.D. dissertation, University of South Carolina) (on file with University of South Carolina Scholar Commons)) ("These changes largely resulted from the growing belief that some juveniles, particularly those involved in violent and serious crimes, deserved to be treated as adults as they were engaging in adult crimes.").

65. *See, e.g.*, United States v. Juvenile Male (*Juvenile Male I*), 327 F. Supp. 3d 573 (E.D.N.Y. 2018); United States v. Juvenile Male (*Juvenile Male II*), 316 F. Supp. 3d 553 (E.D.N.Y. 2018); United States v. Juvenile Female (*Juvenile Female*), 313 F. Supp. 3d 412 (E.D.N.Y. 2018).

66. MS-13 is also known as "La Mara Salvatrucha." Danny Pirtle, *Mara Salvatrucha*, BRITANNICA (Aug. 1, 2023), https://www.britannica.com/topic/Mara-Salvatrucha.

67. 18 U.S.C. § 5032; s*ee also* Quinn & McLaughlin, *supra* note 64, at 558-59 ("For instance, Juvenile Male II was left by his parents at a young age in El Salvador, grew up in poverty, saw his uncle murdered by a gang, and was smuggled to the United States. . . . As for Juvenile Male I, his doctor opined on apparent 'immaturity and executive function issues;' however, the court concluded that this opinion was 'of limited significance in the context of this transfer motion.' This was because the court did not have confidence in the doctor's ability 'to conclude whether the defendant's behavior reflect[ed] immaturity or simply a lack of remorse.' But a lack of confidence in determining whether a minor can be rehabilitated should weigh in favor of retaining juvenile jurisdiction, not waiving it . . . .").

> [N]otwithstanding the statutory presumption in favor of juvenile adjudication, the government has rebutted that presumption and met its burden by proving by a preponderance of evidence that the defendant's transfer to adult status [was] warranted.[68]

These Eastern District of New York cases, along with other similar cases involving so-called organized crime,[69] do not account for what has become increasingly common knowledge, including among Justices on the Supreme Court: minors are categorically less culpable than adults—their decision-making, especially under pressure or in response to social influence, does not reflect full psychological and developmental maturity.[70] Instead, federal courts too often persist in focusing on alleged gang involvement, the notoriety of a particular gang, and the severity of the alleged crime.[71] If key actors in the criminal justice and law enforcement arenas treat allegedly gang-involved young people more like adults than like minors, this approach likely also extends to perceived potential affiliates of those allegedly gang-involved minors. Certainly, some young, subpoenaed witnesses might simply have observed an event because of their physical proximity at the time of the incident, but because "gangs" are amorphous and often mislabeled, a federal grand jury could also seemingly be justified in issuing a subpoena to a young person who might have some other relationship with one or more of the alleged gang members being investigated. When law enforcement labels young people who are not actually gang-affiliated as such, and any congregating or communicating collection of teens can be erroneously labeled a "gang," any acquaintance or even spectator of those involved can become subject to federal grand jury subpoena as a witness should the alleged gang members be suspected of violating the law.

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68. *See, e.g.*, *Juvenile Male I*, 327 F. Supp. 3d at 577; *Juvenile Male II*, 316 F. Supp. 3d at 556; *Juvenile Female*, 313 F. Supp. 3d at 416.

69. *See, e.g.*, Speri & Tangkilisan, *supra* note 11 ("Police and prosecutors spent years building a case against the Bronx 120. When the conspiracy allegedly started, in 2007, the average age of those who would eventually be swept up in it was 14. The youngest were 9. By the time the raid happened, most of those involved in crimes had already been caught by the system—and most others had moved on with their lives, if not out of the neighborhood, and had jobs and families."); Litt, *supra* note 8, at 75 n.3, 76 n.6, 100-01.

70. *See infra* Part V; Miller v. Alabama, 567 U.S. 460, 472, 479 (2012) (citing Roper v. Simmons, 543 U.S. 551, 573 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)) (emphasizing the importance of heavily weighting consideration of youth when sentencing, in order to avoid excessive punishment); *see also* Mae C. Quinn, *Constitutionally Incapable: Parole Boards as Sentencing Courts*, 72 SMU L. REV. 565, 571 (2019) (citing the three aforementioned Supreme Court decisions in which the court asserted that young people are "more susceptible to negative influences and pressures"). All crimes committed by minors, no matter how severe, require analysis informed by the presumption that minors are especially likely to respond to rehabilitation and other interventions.

71. *See Juvenile Male I*, 327 F. Supp. 3d at 588; *Juvenile Male II*, 316 F. Supp. 3d at 565; *Juvenile Female*, 313 F. Supp. 3d at 427.

It is not a revelation that race figures prominently in gang labeling. Jordan Blair Woods, in *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, reported that, as of 2012, the Department of Justice ("DOJ") generally excluded white-affiliated gangs from its list of prominent criminal street gangs.[72] Gangs affiliated with white identity only appeared in lists of prison and motorcycle gangs, and they were fewer in number than those associated with people of color.[73] The DOJ's "About Violent Gangs" website remains unchanged in this respect.[74] Indeed, studies show that law enforcement officers have underestimated the number of white gang members for many years, and that this tendency persists. For example, criminologists conducting a multistate survey across nearly fifty schools and more than ten U.S. cities found that over 25% of participants who considered themselves "gang members" identified as white or some other white-perceived European ethnicity.[75] Woods explained that within the RICO context, "a facially neutral law (RICO) and a facially neutral concept ('criminal street gang') are being applied to prosecute [alleged] criminal groups that are predominantly affiliated with racial minorities."[76]

Racist stereotypes, reinforced in the U.S. by the media, politics, and socialization, can predispose the general public to perceive Black and Brown adolescent boys as dangerous, gang-involved criminals. Law enforcement officers are influenced by, authorized to act upon, and in a position to leverage these stereotypes to the detriment of low-income communities of color (whether or not the targeted individual(s) acted as part of a group or have any gang ties whatsoever). Further, gang databases and police report terminology can influence prosecutors' decisions to pursue RICO and VICAR charges when determining how to prosecute Black and Brown adolescent boys.[77] The cycle of racism in policing and

72. *See* Woods, *supra* note 8, at 309, 323, 330-33; *see also* Litt, *supra* note 8, at 131.

73. *See generally* JORJA LEAP, JUMPED IN: WHAT GANGS TAUGHT ME ABOUT VIOLENCE, DRUGS, LOVE, AND REDEMPTION (2012); JORJA LEAP, PROJECT FATHERHOOD (2016); CELESTE FREMON & TOM BROKAW, G-DOG AND THE HOMEBOYS: FATHER GREG BOYLE AND THE GANGS OF EAST LOS ANGELES (2008).

74. *See About Violent Gangs*, U.S. DEP'T OF JUST., https://www.justice.gov/criminal-ocgs/about-violent-gangs (last visited Apr. 24, 2021).

75. *See* Woods, *supra* note 8, at 308; *see also* Finn-Aage Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multisite Survey*, 15, JUST. Q. 505, 510 (1998); Litt, *supra* note 8, at 131.

76. *See* Woods, *supra* note 8, at 335.

77. *See* Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 332-45 (providing an extensive analysis of racism, including discussions of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), subsequent cases, and social science and legal scholarship on the complexity of racism in American culture and the U.S. criminal justice system); *see generally* Emily Badger, Claire Cain Miller, Adam Pearce & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-

prosecution thus enables law enforcement personnel at all levels to affirmatively "organize" young Black and Brown men into "organized crime" groups to which they often do not belong.[78]

V. CHILD DEVELOPMENT CONSIDERATIONS FOR SUBPOENAED MINORS

A. Introduction to Child Pscyhological Development and the Law

Child development scholarship, and even federal rules governing the rights of child witnesses in court,[79] suggest that children respond to trauma and intimidation differently from adults. Minors are unlikely to fully comprehend concepts such as consent, perjury, or immunity, each of which is foundational when testifying before a federal grand jury. Consequently, access to an attorney during federal grand jury proceedings is critical for subpoenaed minors; however, the federal rules and case law do not provide this protection for them.

Developmental science has shown that some psychological and cognitive development continues into individuals' mid-20s.[80] In this Article, I refer to "minors," "young people," "teenagers," and "juveniles" interchangeably when discussing possible witnesses between the ages of eleven[81] and eighteen—a conservative range given developmental scientists' findings. The neuroscientific bases of adolescent brain development, behavior, and decision-making, and the interdisciplinary research on juvenile interaction with the criminal legal system, all have relevance to an argument in favor of providing minors subpoenaed as federal grand jury witnesses with access to counsel inside the grand jury room.[82]

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and-black-men.html (quoting Khiara Bridges, "Simply because you're in an area that is more affluent, it's still hard for black boys to present themselves as independent from the stereotype of black criminality[.]").

78. *See* Litt, *supra* note 8, at 132 (drawing from Lucy Litt's October 24, 2020, interview with a Clinical Professor at New York University School of Law and an Assistant Federal Defender at the Federal Defenders of New York, Inc., in the Eastern District of New York, who wished to remain anonymous); *see also* Woods, *supra* note 8, at 338.

79. *See, e.g.*, 18 U.S.C. § 3509.

80. *See* Hayley M.D. Cleary, *Applying the Lessons of Developmental Psychology to the Study of Juvenile Interrogations: New Directions for Research, Policy, and Practice*, 23 PSYCH., PUB. POL'Y, & L. 118, 119(2017).

81. I begin this range at age eleven because I taught incarcerated children as young as age eleven and as old as age twenty-one in juvenile detention centers. Usually, students over age eighteen had significant cognitive delays that would have allowed them to remain in public high schools through age twenty-one.

82. For further discussion of psychological evidence and analogies to treatment of juveniles in other settings, *see* Gail S. Goodman, *The Child Witness: Conclusions and Future Directions for Research*

B. The Supreme Court on Child Development

The Supreme Court has periodically acknowledged various ways in which minors' different stages of psychological and cognitive development might negatively influence their legal and procedural awareness, as well as their understanding of the possible consequences that could ensue from unskilled, unrepresented interactions with the criminal legal system. For example, in *Haley v. Ohio*,[83] the Court acknowledged minors' vulnerability to coercion by law enforcement officers; in *Gallegos v. Colorado*,[84] the Court recognized that minors might not fully understand the interrogation process or its potential consequences; during *In re Gault*,[85] the Court confronted minors' heightened likelihood of confessions; and in *J.D.B. v. North Carolina*, the Court explored the issue of minors' perceptions of being held in police custody.[86] Courts have also considered the question of minors' capacity to testify as witnesses and whether they need particular supports to do so.[87] Unfortunately, despite the Court's (somewhat inconsistent and

and Legal Practice, 40 J. SOC. ISSUES 157 (1984); Priscilla Alderson, *In the Genes or in the Stars? Children's Competence to Consent*, 18 J. MED. ETHICS 119 (1992); Karen Saywitz & Lorinda Camparo, *Interviewing Child Witnesses: A Developmental Perspective*. 22 CHILD ABUSE & NEGLECT 825 (1998); Debra A. Poole & D. Stephen Lindsay, *Assessing the Accuracy of Young Children's Reports: Lessons from the Investigation of Child Sexual Abuse*, 7 APPLIED & PREVENTIVE PSYCH. 1 (1998); Ann-Christin Cederborg, Yael Orback, Kathleen J. Sternberg & Michael E. Lamb, *Investigative Interviews of Child Witnesses in Sweden*, 25 CHILD ABUSE & NEGLECT 1355 (2000); Michael E. Lamb & Angèle Fauchier, *The Effects of Question Type on Self-Contradictions By Children in the Course of Forensic Interviews*, 15 APPLIED COGNITIVE PSYCH. 483 (2001); Trian Fundudis, *Consent Issues in Medico-Legal Procedures: How Competent Are Children to Make Their Own Decisions?*, 8 CHILD & ADOLESCENT MENTAL HEALTH 18 (2003); Rachel Zajac, Julien Gross & Harlene Hayne, *Asked and Answered: Questioning Children in the Courtroom*, 10 PSYCHIATRY, PSYCH. & L. 199 (2003); Kristin Hanna, Emma Davies, Charles Crothers & Emily Henderson, *Questioning Child Witnesses in New Zealand's Criminal Justice System: Is Cross-Examination Fair?*, 19 PSYCHIATRY, PSYCH. & L. 530 (2012); Kimberlee Shannon Burrows & Martine Powell, *Prosecutors' Recommendations for Improving Child Witness Statements About Sexual Abuse*, 24 POLICING & SOC'Y 189 (2014); Robert H. Pantell, *The Child Witness in the Courtroom*, 139 PEDIATRICS 1 (2017).

83. Haley v. Ohio, 332 U.S. 596 (1948).

84. Gallegos v. Colorado, 370 U.S. 49 (1962).

85. *In re* Gault, 387 U.S. 1 (1967).

86. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

87. *See, e.g.*, Maryland v. Craig, 497 U.S. 836 (1990) (holding that court did not violate confrontation clause by allowing child witness in case about child abuse to testify by one-way television); Coy v. Iowa, 487 U.S. 1012 (1988) (holding that child witness had capacity to answer questions, and screen between defendant and child witnesses, who were victims, violated confrontation clause rights of defendant); People v. Collins, 491 P.3d 438, *cert. denied*, No. 21SC221, 2021 WL 5571783, at *1 (Colo. Nov. 22, 2021) (holding that trial court was authorized to permit facility dog to remain at feet of child witness, and that decision did not violate confrontation clause); People v. Tohom, N.Y.S.2d 123 (N.Y. App. Div. 2013) (holding that trial court had authority to allow therapeutic dog to join teenaged victim on witness stand); United States v. Thompson, 29 M.J. 541, 542 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 168 (C.M.A. 1990) (holding that court did not violate defendant's due process and confrontation rights by allowing his sons to testify with their backs to him); United States v. Johnson, 15 M.J. 518 (A.C.M.R.1983) (holding that trial judge was authorized to allow an adult relative to accompany four-

infrequent) acknowledgment of minors' limited reasoning skills and comprehension of both law enforcement and the criminal legal system, it has rarely taken these concerns as seriously as its recognition of "the injustice inherent in subjecting incapacitated defendants to a legal process they do not fully understand, particularly when they may face serious legal sanctions."[88]

C. Law Enforcement Interrogations: An Analogy

Since minors are susceptible to federal grand jury subpoenas, but federal grand jury proceedings occur in secret, research on law enforcement interrogation of juveniles presumably applies to minors subpoenaed to testify before grand juries as witnesses. Experts have classified interrogations by law enforcement as coercive "process[es] of social influence, . . . a theory-driven social interaction led by an authority figure who holds a strong a priori belief about the target and who measures success by the ability to extract an admission from that target."[89] Moreover, interrogations inherently create and exploit power imbalances, and this is especially true when minors are involved.

D. Child Psychological Development and Interrogations

Minors are generally socialized to respect adult authority figures. In the U.S., laws and norms that rely on specific ages of majority reinforce the division between minors and adults, based on assumptions about differences in judgment and overall cognitive development (e.g., age requirements for voting, combat, the purchase and consumption of alcohol, marriage, and child adoption). In *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, Ariel Spierer writes about the need for heightened protections for minors during interrogations. Essentially, "youthful suspects [are] particularly susceptible to the 'inherently distressing' conditions of police

year-old on the witness stand in sexual assault case). For discussion of psychological considerations regarding child witnesses in court and efforts by some prosecutors to mitigate that harm, *see* Pantell, *supra* note 82.

88. Cleary, *supra* note 80, at 123 (citing Drope v. Missouri, 420 U.S. 162 (1975)). However, even if the Court draws a brighter line for "incapacitated" persons, its application of capacity considerations is also limited. Many people with psychological and other limitations fall through the cracks into the criminal legal system, as well.

89. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 41-42 (2004).

interrogations, and thus more likely to make false confessions."[90] This vulnerability has implications in the federal grand jury context, as well, and it manifests in three primary ways.

First, children learn to treat adult authority figures, especially law enforcement officers, with respect. Thus, they "seek the interrogator's approval and to respond with the 'right' answers, even if they do not know what those are."[91] Spierer cites studies that reveal the heightened susceptibility of minors to be "manipulated into confessing falsely."[92] Second, the decision-making and risk-assessment skills of minors are not fully formed; this means that they have difficulty anticipating the long-term consequences of their decisions, weighing alternatives, and navigating hypothetical questions. Spierer cites research showing that minors tend to "falsely confess in order to be released from custody and allowed to go home."[93] Moreover, "[s]ince the interrogation context is imbued with alternative scenarios (both explicit and implicit), and the 'alternative question' plays a crucial role in the [most common interrogation technique], juveniles are left at a significant disadvantage."[94] Third, manipulation by law enforcement officers comprises most of the custodial interrogation process. As lawyer and law professor Steven Drizin explains, "children have a reduced ability to cope with a stressful interrogation and are less likely to possess the psychological and emotional abilities to withstand the rigors of police questioning."[95]

Professor Hayley M.D. Cleary similarly observes:

> [S]ocial forces governing youth-adult interactions in everyday contexts are perhaps even more palpable when the authority is a police officer [or a prosecutor, who is also guiding an entire grand jury of adults] and the adolescent suspect [or subpoenaed witness] is [or might be] "in trouble."[96]

This exaggerated divide could result in minors in such situations being

90. Ariel Spierer, *The Right to Remain a Child: The Impermissibility of the Reid Technique in Juvenile Interrogations*, 92 N.Y.U. L. REV. 1719, 1741 (2017) .

91. *Id.*

92. *Id.* (quoting Laurel LaMontagne, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 38-39 (2013)).

93. *Id.* at 1742 (quoting Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 416-17 (2008)).

94. *Id.*

95. *Id.* (quoting Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 274 (2007)).

96. Cleary, *supra* note 80, at 122. Cleary expands on this thesis by pointing out that "[m]uch of the commentary on compliance in juvenile interrogations is focused squarely on false confessions. . . . However, given that false confessions likely occur in a very small proportion of custodial interrogations, the more pressing question may be whether developmentally based inclinations to comply with authoritative requests in more typical interrogation situations may compromise youths' best legal interests or due process of law." *Id.*

especially vulnerable to neglecting, or failing to appreciate, the courses of action that are in their best interest, or even available to them. As the Supreme Court acknowledged in *J.D.B. v. North Carolina*, "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[97]

Police interrogation involves several cognitive and psychosocial processes. A few cases in which such interrogations of juvenile suspects facilitated extreme injustices have drawn public attention, especially raising concerns about false confessions;[98] however, those instances do not exist in a vacuum. Cleary asserts:

> False confessions and wrongful convictions are undeniable failures of the criminal justice system and . . . they cause irreparable harm . . . . However, although the false confession incidence rate is not known . . . , there is no evidence to indicate that false confessions occur in anywhere near the majority of interrogations. Instead, current evidence suggests that a . . . "significant minority of innocent people confess under interrogation." If we accept the [unsubstantiated] premise put forth by law enforcement that most suspects being interrogated are actually guilty and that most innocent suspects will not confess falsely, then the likelihood that any particular interrogation among the scores of interrogations conducted daily among 18,000 law enforcement agencies across the United States will result in a false confession seems quite low indeed. A low incidence rate in no way diminishes the tragedy of false confessions for those whose lives are impacted nor the immediacy of the need for research that reveals their causes and correlates.[99]

E. Instructive State Miranda *Laws and Fundamental Legal Principles*

Cleary cites some state requirements to involve parents in the *Miranda*[100] warnings process and notify a minor's parent(s) or guardian(s)

97. 564 U.S. 261, 272 (2011). Justice Sotomayor took a common sense, rather than fully scientific, approach when writing for the majority: "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. [There is] no reason for police officers or courts to blind themselves to that commonsense reality . . . ." *Id.* at 264-65. It is important to note here that age is not the only influence that might affect whether a person interacting with law enforcement feels "free to go," but expanding upon that point is beyond the scope of this paper. Still, race, sexual orientation, gender, religious beliefs, and ability are other identities that might make particular individuals feel compelled to submit to law enforcement, even as adults, while other adults would not experience law enforcement interactions in the same way.

98. *See* Cleary, *supra* note 80, at 118 (describing two particularly high-profile instances of law enforcement interrogations leading minors to falsely confess: Michael Crowe in 1998 and Brendan Dassey in 2006).

99. *Id.* (citations omitted).

100. A "Miranda warning" refers to the warnings that police officers are required to provide detainees. The requirement to provide Miranda warnings originated in Miranda v. Arizona, 384 US 436

of custodial interrogations (sometimes even requiring their presence during such interrogations) as examples of how the law has sometimes acknowledged the implications of minors' psychological development.[101] As Cleary notes, "[r]egardless of policy variations, however, the very fact of involving a parent, custodial guardian, or interested adult—to whatever degree and in whatever form—differentiates juvenile interrogations from adult interrogations in important ways."[102] Given that research indicates insufficiencies even among accompanying parents or guardians (when required or permitted and available) in the interrogation context,[103] and given the complexities of federal grand jury procedure, an attorney, rather than a parent, should be required to accompany a subpoenaed witness who is a minor.

F. Distinctive Adolescent Neurobiology and Psychology

Cleary offers a lens through which to analyze the relevant neurobiological and psychological differences that distinguish teenagers from children and adults within the juvenile interrogation context:

> Though specific mechanisms and pathways are still being debated and explored, there is consensus on the notion that adolescents are neurobiologically distinct from both children and adults in ways that directly impact decision making. Not all elements of adolescent neurobiological or psychosocial development are necessarily directly relevant to decision making during police interrogation. . . . Three factors—reward sensitivity, self-regulation, and future orientation—. . . may be particularly applicable to the juvenile interrogation context.[104]

Thus, neurobiological distinctions between adolescents and other potential witnesses indicate the added value of access to counsel during high-stakes law enforcement interrogation, including inside the grand jury.

(1966), in which the Court held that law enforcement cannot question a suspect or defendant in a custodial interrogation until that person has been informed of (1) the right to remain silent; (2) the right to consult an attorney and have an attorney present; and (3) the right to have an attorney appointed if the individual is indigent.

101. *See id.* at 119 ("[T]hese policies contain inherent assumptions about parents' competence in this role that early research has shown to be problematic").

102. *Id.*

103. *See, e.g.*, BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013); Jennifer L. Woolard, Hayley M.D. Cleary, Samantha A.S. Harvell & Rusan Chen, *Examining Adolescents' and their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH & ADOLESCENCE 685 (2008).

104. Cleary, *supra* note 80, at 120.

G. Reward Sensitivity

Reward sensitivity (the ways in which humans are motivated by rewards or potential rewards) studies have focused on juvenile confessions (both true and false confessions) during police interrogations, showing that "getting to go home" or "getting it over with" can be a motivating factor for true and false confessions alike. One 2004 study found that young people were more likely than adults to make decisions that would shorten the length of an interrogation, even if that meant falsely confessing.[105] Other scholars have reported that this increased likelihood led to more true than false confessions, but even so, this sensitivity is relevant within the context of due process rights.[106] Cleary emphasizes:

> Though true confessions may be desirable from a social control perspective, the American justice system affords the accused the right to make decisions in their best legal interest within the confines of due process. Research has indicated that developmental factors such as reward sensitivity may drive adolescent decision making and that these developmental influences on decision making are temporary. Ignoring such developmental incapacities effectively "penalizes" adolescents for making poor decisions influenced by transitory characteristics that they will likely outgrow.[107]

The likely applicability of these findings to interrogations in grand jury settings supports a conclusion that adolescents need support in such settings.

H. Self-Regulation

The ability or inability to self-regulate, which "involves capacities such as impulse control, response inhibition, resistance to peer influence, and ability to delay gratification,"[108] is also relevant. Studies have shown that adolescents exhibit self-regulation similar to that of children or adults in typical, lower-stakes situations, but they exhibit a notable disparity in self-regulation when presented with higher-stakes, stressful, frightening,

105. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 969 (2004).

106. *See* Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 38 L. & HUM. BEHAV. 181, 186 (2014).

107. Cleary, *supra* note 80, at 120.

108. *Id.* (citing Laurence Steinberg, Dustin Albert, Elizabeth Cauffman, Marie Banich, Sandra Graham & Jennifer Woolard, *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCH. 1764 (2008); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78 (2008)).

or upsetting situations.[109] Cleary further explains:

> Davis and Leo applied the notion of self-regulation to the interrogation context, proposing the concept of *interrogation-related regulatory decline* (IRRD) to describe the myriad individual and situational factors that impair interrogation decision-making abilities even among mentally healthy adults. Given the lessons of developmental psychology, it stands to reason that adolescent suspects are even more susceptible to IRRD, yet IRRD has never been studied in adolescents. Particularly relevant dispositional factors are fatigue, stress, and the influence of drugs or alcohol, all of which suspects could be experiencing even before an interrogation begins. While these factors may certainly impair even adult suspects' interrogation functioning, developmental research suggests that they may disrupt a youth's still-developing cognitive control system even more. In essence, adolescents' emergent abilities to exercise restraint and manage stress are particularly vulnerable during police interrogation.
>
> Regarding stress, it is reasonable to presume that typical adolescents would perceive an interrogation interaction as stressful and that youths' anxieties may differ from adults' in type and degree. Anticipating a parent's reaction, the worry of "getting in trouble," mounting pressure from police, or simply being in an unfamiliar environment without a support system could all contribute to feelings of stress. The limited existing data on actual interrogation experiences support the notion that these factors may be present.[110]

Here, too, these findings likely apply to grand juries.

I. Future Orientation

Studies have shown that teenagers have "limited future orientation."[111]

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109. Alexandra O. Cohen et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 PSYCH. SCI. 1, 1 (2016) ("An individual is typically considered an adult at age 18, although the age of adulthood varies for different legal and social policies. A key question is how cognitive capacities relevant to these policies change with development. The current study used an emotional go/no-go paradigm and functional neuroimaging to assess cognitive control under sustained states of negative and positive arousal in a community sample of one hundred ten 13- to 25-year-olds from New York City and Los Angeles. The results [of our study] showed diminished cognitive performance under brief and prolonged negative emotional arousal in 18- to 21-year-olds relative to adults over 21. This reduction in performance was paralleled by decreased activity in fronto-parietal circuitry, implicated in cognitive control, and increased sustained activity in the ventromedial prefrontal cortex, involved in emotional processes. The findings suggest a developmental shift in cognitive capacity in emotional situations that coincides with dynamic changes in prefrontal circuitry. These findings may inform age-related social policies.").

110. Cleary, *supra* note 80, at 121 (citing Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 PSYCH., PUB. POL'Y & L. 673 (2012); LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014)) (citations omitted).

111. *Id.*

Future orientation is defined as an individual's "constellation of abilities to think and reason about the future or connect current behavior with future events."[112] Teenagers' deficits in future orientation can make it especially difficult for them to withstand pressure-packed interrogations; to do so, one must "continually prioritize long-term interests over short-term impulses in the process of constant self-monitoring."[113] Consequently, young people might simply submit to interrogator requests and persuasion in order to end the process more quickly, "even to their legal detriment."[114]

Relatedly, a 2008 study published by the American Psychological Association evaluated "the comprehensibility and content of juvenile Miranda warnings" and considered factors such as the minors' reading levels and whether there was any parent or guardian involvement at the time the child was Mirandized:

> Annually, more than 1.5 million juvenile offenders[115] are arrested and routinely Mirandized with little consideration regarding the comprehensibility of these warnings. The current investigation examined 122 juvenile Miranda warnings from across the United States regarding their length, reading level, and content. Even more variable than general Miranda warnings, juvenile warnings ranged remarkably from 52 to 526 words; inclusion of Miranda waivers and other material substantially increased these numbers (64–1,020 words). Flesch-Kincaid reading estimates varied dramatically from Grade 2.2 to [post-college]. Differences in content included such critical issues as (a) right to parent/guardian input, (b) specification of free legal services for indigent defendants, and (c) statements of right to counsel in conditional terms. Recommendations for simplified juvenile Miranda warnings are presented.[116]

Ultimately, the researchers stressed the need for future research: "the relations between Miranda comprehension, invalid waivers, and false confessions by juveniles deserve a rigorous examination."[117]

Again, the findings to date lead to at least a preliminary conclusion that the lack of supports for juveniles at interrogation points in the system is particularly damaging given their lack of development.

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112. *Id.*

113. *Id.*

114. *Id.*

115. This is the terminology used in the study, and it is the terminology used by several courts and corrections officials; however, terms such as "juvenile offenders" dehumanize the young people to whom that label refers and essentially characterize them as "offenders" instead of using variations on the following phrases: minors who were convicted of a crime or minors who have violated the law. Some advocates would further press for the use of "allegedly" (e.g., "minors who allegedly violated the law") to account for the criminal legal system's many, often racist, flaws.

116. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCH., PUB. POL'Y & L. 63, 63 (2008).

117. *Id.* at 85.

J. Model Legislation Recognizing Risks of Interrogating Minors

In May 2021, Illinois became the first state to pass legislation that prohibits law enforcement officers from using "deceptive interrogation tactics" when interrogating minors.[118] These tactics have historically included:

> [M]aking false promises of leniency and false claims about the existence of incriminating evidence. Both of these tactics . . . significantly increas[e] the risk of false confessions, which have played a role in about 30% of all wrongful convictions overturned by DNA. . . . And recent studies suggest that [minors] are between two and three times more likely to falsely confess than adults.[119]

Senate Bill 2122 passed in the Illinois Assembly, "Senate 47-1 and the House 114-0."[120] Senator Robert Peters, who sponsored the bill, explained the overlaps among interrogation practices, wrongful convictions, minors, and race: "Chicago is the wrongful conviction capital of the nation, and a disproportionate number of wrongful convictions were elicited from Black youth by police who were allowed to lie to them during questioning. . . . It's time to . . . end [law enforcement] practices that perpetuate trauma . . . ."[121]

Similar bills, aimed at dismantling deceptive interrogation techniques,

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118. *Historic Deception Bill Passes Illinois Legislature, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (May 30, 2021), https://innocenceproject.org/historic-deception-bill-passes-illinois-legislature-banning-police-from-lying-to-youth-during-interrogations[hereinafter *Historic Deception*].

119. Rogers et al., *supra* note 116, at 66 (citing Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. & HUM. BEHAV. 141 (2003); Ariel Spierer, *supra* note 90, at 1719 ("Police interrogations in the United States are focused on one thing: getting a confession from the suspect. The Reid Technique, a guilt-presumptive nine-step method and the most common interrogation technique in the country, is integral to fulfilling this goal. With guidance from the Reid Technique, interrogators use coercion and deceit to extract confessions—regardless of the costs. When used with juvenile suspects, this method becomes all the more problematic. The coercion and deception inherent in the Reid Technique, coupled with the recognized vulnerabilities and susceptibilities of children as a group, has led to an unacceptably high rate of false confessions among juvenile suspects. And, when a juvenile falsely confesses as the result of coercive interrogation tactics, society ultimately suffers a net loss. In the Eighth Amendment context, the Supreme Court has recognized that children are different from adults and must be treated differently in various areas of the criminal justice system. The Court's recent Eighth Amendment logic must now be extended to the Fifth Amendment context to require that juveniles be treated differently in the interrogation room, as well. . . . [T]he Reid Technique [should] be categorically banned from juvenile interrogations through a constitutional ruling from the Court. Doing so would not foreclose juvenile interrogation; rather, a more cooperative and less coercive alternative could be utilized, such as the United Kingdom's PEACE method. Nonetheless, only a categorical constitutional rule that prohibits the use of the Reid Technique in all juvenile interrogations will eliminate the heightened risk of juvenile false confessions and truly safeguard children's Fifth Amendment rights.")).

120. INNOCENCE PROJECT, *supra* note 121.

121. *Id.* (quoting Illinois Senator Robert Peters) (internal citation omitted).

have also made headway in Oregon and New York. Notably, the New York bill would expand protections to adults, as well as minors.

In Illinois, Senate Bill 2122:

> would encourage law enforcement members to adopt alternative interrogation techniques commonly used in countries . . . where deceptive tactics have long been abandoned. These alternative methods have proven far more effective in producing reliable confessions from suspects. Yet, the vast majority of police agencies in the United States currently employ the psychologically coercive, but legally permissible, interrogation techniques that this bill would prevent when interrogating juveniles in Illinois.[122]

Legislators could look to such bills, as well as the research and advocacy that informed their creation, when crafting and passing an amendment to 18 U.S.C. § 3509 granting minors subpoenaed as federal grand jury witnesses the right to attorney access inside the federal grand jury.

K. Expanding Eighth Amendment Application as a Possible Pathway

In 2011, the Supreme Court recognized that minors should be treated differently from adults under the law.[123] Previously, in *Graham v. Florida*, the Court held that minors require different treatment from adults throughout the criminal legal system, not just during post-adjudication.[124] The Court also demonstrated its willingness to expand its Eighth Amendment jurisprudence, which differentiates minors from adults,[125] to similar Fifth Amendment cases, establishing "that juveniles should be treated differently *as a class*, and . . . that such differential treatment applies in the context of pre-adjudication processes."[126] Consequently, the Court set the foundation to further extend its Eighth Amendment

122. *Id.*

123. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

124. *See* Graham v. Florida, 560 U.S. 48, 74-75, 78 (2010) (citing Roper v. Simmons 543 U.S. 551, 574 (2005)) (holding that juvenile life without parole is unconstitutional and explaining that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings . . . . Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel. . . . all can lead to poor decisions by one charged with a juvenile offense.").

125. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court held that minors under eighteen years of age could not be sentenced with the death penalty for reasons noted earlier in this Section, such as diminished ability to assess risks and consequences, susceptibility to external pressure, and higher likelihood of feeling compelled to comply with authority figures. The Court also relied on *Roper* and *Graham*, even though those were Eighth Amendment cases, rather than Fifth Amendment cases. *See also* Martin Guggenhein & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J. L. & POL'Y 109, 153 (2012); Joshua A. Tepfer et.al., *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 893 (2010).

126. Spierer, *supra* note 90, at 1739.

reasoning to minors facing police interrogation (as it did by acknowledging that minors require additional protections during police interrogations in *Haley v. Ohio*,[127] *Gallegos v. Colorado*,[128] and eventually *In re Gault*[129]) as well as federal grand jury subpoenas.

Unfortunately, given courts' unimpressive performance in cases brought by minors moving to quash federal grand jury subpoenas, and the secrecy that surrounds federal grand jury subpoenas and testimony, it is unlikely that this shift will take place throughout the judiciary, even if the Supreme Court were to extend its recent Eighth Amendment jurisprudence to the police interrogation context. Accordingly, I submit that this injustice should be addressed by the legislature, a process that Congress can lead by amending 18 U.S.C. § 3509 as discussed below.

VI. INCOMPLETE CHILD WITNESS PROTECTIONS UNDER 18 U.S.C. § 3509

18 U.S.C. § 3509 addresses the rights of children who are "victims" and "witnesses." The parts of the statute most relevant to the position taken in this Article read as follows:

> (a) DEFINITIONS.—For purposes of this section—
>
> (1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
>
> (2) the term "child" means a person who is under the age of 18, who is or is alleged to be—
>
> (A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
>
> (B) a witness to a crime committed against another person;
>
> (5) the term "mental injury" means harm to a child's psychological

127. *See* Haley v. Ohio, 332 U.S. 596, 599 (1948) ("[W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

128. *See* Gallegos v. Colorado, 370 U.S. 49, 55 (1962) (remarking upon "the youth of the petitioner" in holding that the confession at issue "was obtained in violation of due process").

129. *See In re* Gault, 387 U.S. 1, 5, 47, 55 (clarifying, in the year after *Miranda v. Arizona*, that all protections against self-incrimination available to adults also applied to minors: "We conclude that the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults" and highlighting that "the greatest care must be taken" to make sure that a minor's statements are not "the mere fruits of fear or coercion [or] . . . the product of ignorance of rights or of adolescent fantasy, fright or despair."); *see also* Guggenhein & Hertz, *supra* note 125, at 121-22 for discussion of why this was not a self-evident extension under *Miranda*. *But see* Fare v. Michael C., 442 U.S. 707 (1979) and Yarborough v. Alvarado, 541 U.S. 652 (2004), which weakened protections for minors against self-incrimination. However, even in *Yarborough*, Justice O'Connor's concurrence conceded that a suspect's age might still be relevant to *Miranda* inquiries in some circumstances. *Id.* at 669 (O'Connor, J., concurring). Less than a decade after *Yarborough*, the court eventually came to the opposite conclusion in J.D.B. v. North Carolina., 564 U.S. 261, 272 (2011).

or intellectual functioning which may be exhibited by severe anxiety, depression, withdrawal or outward aggressive behavior, or a combination of those behaviors, which may be demonstrated by a change in behavior, emotional response, or cognition; [and] . . .

(7) the term "multidisciplinary child abuse team" means a professional unit composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse[.]

(b) ALTERNATIVES TO LIVE IN-COURT TESTIMONY.—

(1) LIVE TESTIMONY BY 2-WAY CLOSED CIRCUIT TELEVISION.

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television.[130] The person seeking such an order shall apply for such an order at least 7 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

(B) The court may order that the testimony of the child be taken by closed-circuit television as provided in subparagraph (A) if the court finds that the child is unable to testify in open court in the presence of the defendant, for any of the following reasons:[131]

(i) The child is unable to testify because of fear.

(ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying.

(iii) The child suffers a mental or other infirmity.

(iv) Conduct by defendant *or defense counsel* causes the child to be unable to continue testifying.[132]

(C) The court shall support a ruling on the child's inability to testify with findings on the record. In determining whether the impact on

130. Although outside the scope of this paper, Harvard Law School's Professor Charles Nesson discussed why this provision has led to ongoing debate over what qualifies as compliant with the Sixth Amendment's Confrontation Clause during his Fall 2020 Fair Trials course. The Confrontation Clause does not apply in the federal grand jury context, but any application of this kind of method for minors in the federal grand jury context should be informed by the ongoing Confrontation Clause debate regarding this provision's application at trial. *Compare* Coy v. Iowa, 487 U.S. 1012, 1014-15, 1019 (1988) (holding that the criminal defendant's Sixth Amendment right "to be confronted with the witnesses against him" was violated when the court placed a large screen in between him and two young girls who were testifying against him at trial), *with* Maryland v. Craig, 497 U.S. 836 (1990) (subsequently holding that testimony by an alleged child sexual abuse survivor via closed-circuit television did not violate the defendant's Sixth Amendment right to confrontation).

131. 18 U.S.C. § 3509. Furthermore, subsections (i)-(iv) exemplify statutory integration of important findings in the fields of child psychological development and childhood trauma. § 3509(i)-(iv). The same considerations arguably should extend to minors subpoenaed to provide witness testimony before federal grand juries.

132. This provision can be viewed as analogous to the trauma federal prosecutors are capable of inflicting on minors in the federal grand jury context.

an individual child of one or more of the factors described in subparagraph (B) is so substantial as to justify an order under subparagraph (A), the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, *the child's attorney*, the guardian ad litem, and the defense counsel present.

(D) If the court orders the taking of testimony by television, the attorney for the Government and the attorney for the defendant not including an attorney pro se for a party shall be present in a room outside the courtroom with the child and the child shall be subjected to direct and cross-examination. The only other persons who may be permitted in the room with the child during the child's testimony are—

(i) *the child's attorney* or guardian ad litem[133] appointed under subsection (h);

(ii) persons necessary to operate the closed-circuit television equipment;

(iii) a judicial officer, appointed by the court; and

(iv) other persons whose presence is determined by the court to be *necessary to the welfare and well-being of the child, including an adult attendant.*

The child's testimony shall be transmitted by closed circuit television into the courtroom for viewing and hearing by the defendant, jury, *judge, and public*. The defendant shall be provided with the means of private, contemporaneous communication with the defendant's attorney during the testimony. The closed circuit television transmission shall relay into the room in which the child is testifying the defendant's image, and the voice of the judge.

(2) VIDEOTAPED DEPOSITION OF CHILD.

(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian, or the guardian ad litem appointed under subsection (h) may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

(ii) If the court finds that the child is likely to be unable to testify in open court for any of the [aforementioned] reasons . . . , the court shall order that the child's deposition be taken and preserved by videotape.

(iii) The trial judge shall preside at the videotape

133. I do not propose the presence of an adult attendant, guardian ad litem, or any other non-attorney supportive adult (e.g., social worker, counselor, therapist, nurse) because of the legal nuances in the federal grand jury context, the legal risks for witnesses (e.g., civil confinement for contempt; unknowingly shifting in status among witness, target, and subject; inability to rely on constitutional protections otherwise available at trial and in daily life), and the lack of safeguards against prosecutorial abuse of federal grand jury secrecy. All of those unique factors warrant an attorney's skills and expertise before the federal grand jury even more than would be the case at trial, in the presence of a judge, where (theoretically) the case is also open to the public. For further discussion of the challenges associated with assigning a parent or guardian to this kind of role, see Cleary, *supra* note 80, at 123.

> deposition of a child and shall rule on all questions as if at trial. The only other persons who may be permitted to be present at the proceeding are [those listed in § 3509(b)(1)(D)(i)-(iv) above].
>
> (c) COMPETENCY EXAMINATIONS.
>
> (2) PRESUMPTION.—A child is presumed to be competent.
>
> (7) DIRECT EXAMINATION OF CHILD.—Examination of a child related to competency shall normally be conducted by the court on the basis of questions submitted by the attorney for the Government and the attorney for the defendant including a party acting as an attorney pro se. The court may permit an attorney but not a party acting as an attorney pro se to examine a child directly on competency if the court is satisfied that the child will not suffer emotional trauma as a result of the examination.
>
> (8) APPROPRIATE QUESTIONS.—The questions asked at the competency examination of a child *shall be appropriate to the age and developmental level of the child*, shall not be related to the issues at trial, and shall focus on determining the child's ability to understand and answer simple questions.
>
> (h) GUARDIAN AD LITEM.
>
> (1) IN GENERAL.—The court may appoint, and provide reasonable compensation and payment of expenses for, a guardian ad litem for a child who was a victim of, or a witness to, a crime involving abuse or exploitation to protect the best interests of the child. . . .
>
> (i) ADULT ATTENDANT.—A child testifying at or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support to the child. The court, at its discretion, may allow the adult attendant to remain in close physical proximity to or in contact with the child while the child testifies. The court may allow the adult attendant to hold the child's hand or allow the child to sit on the adult attendant's lap throughout the course of the proceeding. An adult attendant shall not provide the child with an answer to any question directed to the child during the course of the child's testimony or otherwise prompt the child. The image of the child attendant, for the time the child is testifying or being deposed, shall be recorded on videotape.[134]

Nowhere in this statutory provision, the *Justice Manual*, or the Federal Rules of Criminal Procedure is there any remotely explicit direction as to the rights and protections of minors subpoenaed to appear before federal grand juries as witnesses.[135]

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134. 18 U.S.C. § 3509 (emphasis added).

135. *See* United States v. Mandujano, 425 U.S. 564, 581 (1976); *In re* Groban, 352 U.S. 330, 333 (1957); United States v. Daniels, 461 F.2d 1076 (5th Cir. 1972); United States v. Blanton, 77 F. Supp. 812 (E.D. Mo. 1948); Gilmore v. United States, 129 F.2d 199 (10th Cir. 1942), *cert. denied*, 317 U.S. 631 (1942); United States v. Grunewald, 164 F. Supp. 640 (S.D.N.Y. 1958); State v. Williams, 310 So. 2d 528 (La. 1975).

That witnesses subpoenaed to testify before federal grand juries have not historically had a right to counsel inside the grand jury is most often attributed to the need to preserve the secrecy and form of the grand jury. Motions to quash subpoenas have been repeatedly denied, with children being held to, at best, a subjective and often burdensome (and incomprehensible to them) "totality of the circumstances" standard.[136] 18 U.S.C. § 3509 requires a provision similar to the standard applicable to trials, described above, to address the needs of minors subpoenaed to appear before federal grand juries; most importantly, that provision must prohibit federal grand juries and the prosecutors appearing before them from compelling a minor's attendance at a grand jury hearing without affording the minor the protection of counsel.

VII. LOUISIANA'S STATE-LAW MODEL FOR IMPROVED FEDERAL PROTECTION

A. In re Grand Jury Subpoenas *and* In re Dino*: Two Groundbreaking Cases*

In 1980, the Louisiana Supreme Court granted certiorari to review the Caddo Parish First Judicial District Court *In re Grand Jury Subpoenas* decision,[137] which quashed state grand jury subpoenas issued to two children, ages twelve and sixteen, who were at home with both parents when their mother was killed.[138] The Louisiana Supreme Court ultimately held that depriving juveniles of the right to counsel inside the grand jury violated the fundamental principles of fairness embodied in the Louisiana Constitution.[139] At that time, the only possibly controlling U.S. Supreme Court precedent addressing the question of whether witnesses have the

136. *Cf. In re* Grand Jury, 103 F.3d 1140 (3d Cir. 1997); Grand Jury Proc. of John Doe v. United States, 842 F.2d 244, 245-48 (10th Cir. 1988); United States v. Red Elk, 955 F. Supp. 1170, 1178-81 (D.S.D. 1997); *In re* Green Grand Jury Proc., 371 F. Supp. 2d 1055 (D. Minn. 2005); *In re* Grand Jury Proc., Unemancipated Minor Child, 949 F. Supp. 1487 (E.D. Wash. 1996).

137. 387 So. 2d 1140 (La. 1980). As noted in the text of this Section, *In re Grand Jury Subpoenas*, *id.*, relies heavily on another case, *In re* Dino, 359 So. 2d 586 (La. 1978), which was later overruled by State v. Fernandez, 712 So. 2d 485 (La. 1998). However, *In re* Grand Jury Subpoenas, 387 So. 2d 1140 (La. 1980), has not been explicitly overruled and is therefore presumably still good law. I confirmed this with the Harvard Law School Library on May 7, 2021. This case has a heightened risk of being overruled in the future, given its reliance on a subsequently overruled case, but its approach to the issue is slightly different than in the overruled case. Those caveats aside, neither of the two primary legal research databases (LexisNexis and Westlaw) presents any indication of courts giving negative treatment to *In re Grand Jury Subpoenas.* Therefore, reliance on the court's reasoning in that case as a model is not inappropriate.

138. *Id.* at 1141.

139. *See* Bennett, *supra* note 2, at 1305-06 (citing LA. CONST. art. I, §§ 2, 3, 16).

right to counsel before a grand jury was *United States v. Mandujano*,[140] in which the Court held that such a right does not exist. In its reasoning, the U.S. Supreme Court referred to its declaration in *Kirby v. Illinois*[141] that the Sixth Amendment right to counsel only activates post-indictment or subsequent to the initiation of criminal proceedings against a witness.[142]

In re Grand Jury Subpoenas was not the first Louisiana case to reflect some courts' growing concerns over the protection of minors' constitutional rights;[143] the Supreme Court of Louisiana demonstrated similar apprehension in its 1978 *State in Interest of Dino* ("*In re Dino*") decision a couple of years earlier. In that case, the Supreme Court of Louisiana granted certiorari to review the pre-trial rulings of Caddo Parish Juvenile Court on a petition seeking to have Andrew Dino, a boy in his early teens, "adjudicated a delinquent based on the allegation that he committed" first-degree murder; charges which the boy denied.[144] In advance of the hearing, Dino "filed a motion to suppress an inculpatory statement given to the Shreveport police on the ground that it was obtained in violation of his constitutional rights."[145] He also filed motions for a trial by jury and for a public trial. The hearing lasted five days, after which the juvenile court denied Dino's three motions.[146]

The facts of *In re Dino* illustrate why psychologists express concern about police interrogations of minors and advocate for enhanced protections against their self-incrimination. On June 26, 1977, a girl named Cynthia Tew went missing. Tew's parents set out to find her, joined by several neighbors. Later that day, Andrew Dino, who was involved in the search, reported finding Tew. Tew was hospitalized and

140. *Mandujano*, 425 U.S. at 581.

141. 406 U.S. 682, 689-90 (1972).

142. *Mandujano*, 425 U.S. at 602. Justice Brennan quoted *Kirby*, 406 U.S. at 687, and cited *Miranda v. Arizona*, 384 U.S. 436, (1966) and *Escobedo v. Illinois*, 38 U.S. 478 (1964), in his concurrence, expressing concern that grand jury interrogations pose inherent risk of self-incrimination and therefore warrant the protection of the Sixth Amendment right to counsel, in addition to the Fifth Amendment protection against self-incrimination. *Mandujano*, 425 U.S. at 603.

143. *See also In re* Gault, 387 U.S. 1 (1967) (expanding juveniles' access to counsel during delinquency proceedings); *In re* Winship, 397 U.S. 358 (1970) (holding that decisions in juvenile cases required proof beyond a reasonable doubt); *In re* Jones, 372 So. 2d 779, 779-80 (La. Ct. App. 1979) (requiring "affirmative" proof that, when a minor who is suspected of having violated the law consults with a non-attorney adult, "the adult understood the import of the constitutional rights waived by the juvenile").

144. *Dino*, 359 So. 2d at 587.

145. *Id.*

146. For the purposes of this Article, I focus on Andrew Dino's motion to suppress his statement to the police on the ground that it was obtained in violation of his constitutional rights. This is the only motion that raises issues analogous to the risks minors subpoenaed as federal grand jury witnesses would face without the right to be accompanied by an attorney inside the grand jury room.

subsequently died.[147]

Police commenced a six-week investigation into Tew's disappearance and death. Throughout the investigation, officers remained in contact with Andrew Dino and his parents. Law enforcement officers initially only considered Dino a witness, so they asked him to provide a witness statement at the police station on July 8, 1977. Dino's parents did not accompany him for this recorded, initial statement.[148]

Inconsistencies between Dino's statement and information provided by others throughout the investigation led police to request Dino's participation in a polygraph test. Dino's father canceled the first test due to Dino's distress, and officers never performed a make-up test.[149] Following a subsequent statement from Dino's father, in which he provided an account of Dino's activities on the day of Tew's disappearance that was entirely different from what Dino had recounted, law enforcement officers decided that Dino was a suspect.

The day after Dino's father provided his statement to the police, Dino told his mother about a dream he had while napping. In the dream, he and Tew were in the woods together when something approached them, prompting Dino to run to safety. Dino's mother relayed his dream to one of the investigating officers, and the officer told Dino's mother to bring him to the station. At the station, officers escorted Dino into an office, leaving Dino's mother in a separate room without any information, including that Dino had become a suspect, and without opportunity to advise her son. Officers, including the chief of police, proceeded to interrogate Dino.[150] According to the Supreme Court of Louisiana:

> [Dino] was in the office . . . for approximately four to eight minutes. During this short period of time, the officers testified, [Dino] read and listened to explanations of his constitutional rights, he waived his rights both orally and in writing, and he gave them an oral inculpatory statement. The officers' testimony was not detailed as to the oral explanation or the means by which it was determined that the warnings were fully understood by the thirteen year old [sic] youth. Contrary to the testimony of the officers, [Dino] testified that they gave no explanation of his rights and that he did not understand what was on the paper signed by him. At the motion to suppress hearing a psychiatrist and a clinical psychologist testified that [Dino] was incapable of understanding the language contained on the standard waiver form, but that he could have comprehended a statement of constitutional rights phrased in simpler terms. . . .

147. *Dino*, 359 So. 2d at 588.
148. *Id.*
149. *Id.*
150. *Id.*

> After [Dino's] statement . . . , the police informed [Dino's mother] that [he] had confessed to the murder and asked her to sign the waiver card. She signed it without reading the warnings. . . . [Dino] was placed in confinement . . . .[151]

The Supreme Court of Louisiana initially applied the "totality of circumstances" test,[152] which the Fourth Circuit Court of Appeals of Louisiana had previously employed[153] when determining whether the age of a person being interrogated should qualify them for additional protections. While the court found the circumstances in this case sufficient to conclude that:

> [T]he [s]tate has not carried its heavy burden in proving that young Dino was aware not only of his rights, but also of the consequences of foregoing them[;] that he knew he was faced with a phase of the adversary system, and that he was aware that he was not in the presence of persons acting solely in his interest,

it did not stop there.[154] The court went on to dismiss the test entirely, asserting that the test was not only highly speculative but also inappropriate given the gravity of self-incrimination and the recognized constitutional and precedential protections[155] against it:

> [T]he rights which a juvenile may waive before interrogation are so fundamental to our system of constitutional rule and the expedient of requiring the advice of a parent, counsel or adviser so relatively simple and well established as a safeguard against a juvenile's improvident judicial acts, that we should not pause to inquire in individual cases whether the juvenile could, on his own, understand and effectively exercise his rights. Assessments of how the "totality of the circumstances" affected a juvenile in a particular case can never be more than speculation. Furthermore, whatever the background of the juvenile interrogated, *assistance of an adult acting in his interest is indispensable to overcome the pressures of the interrogation and to insure that the juvenile knows he is free to exercise his rights at that point in time*.
>
> The presence of a parent, counsel, or other adult acting in the juvenile's interest at the interrogation may serve several significant subsidiary functions as well. If the juvenile decides to talk to his interrogators, the

151. *Id.* at 588-89.

152. *Id.* (comparing this test to the one applied in West v. United States, 399 F.2d 467 (5th Cir. 1968), *cert. denied*, 393 U.S. 1102 (1969)).

153. *Id.* at 590 n.12 (citing State v. Melanson, 259 So. 2d 609 (La. Ct. App. 1972)) ("[S]ee, however, the vigorous divergent view expressed in State v. Ross, 343 So. 2d 722 (La.1977) (Tate, J., concurring) and State in the Interest of Holifield, 319 So. 2d 471 (La. App. 4th Cir. 1975) (Fedoroff, J., concurring).").

154. *Id.* at 591.

155. *Id.* at 592 (citing *In re* Holifield, 319 So. 2d 471, (La. Ct. App. 1975) (Fedoroff, J., concurring); Miranda v. Arizona, 384 U.S. 436, 468 (1966)).

> assistance of an adult can mitigate the dangers of untrustworthiness. With an adult acting in his interest present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the adult can testify to it in court. The presence of such an adult can also help to guarantee that the accused gives a fully accurate statement and that the statement is rightly reported by the prosecution at trial.[156]

In re Dino was eventually overruled by *State v. Fernandez* in 1998, holding that courts should consistently apply the "totality of the circumstances" standard of consideration when assessing whether a minor knowingly waived *Miranda* rights and voluntarily confessed;[157] however, *In re Grand Jury Subpoenas*, which quickly followed and relied heavily (but not exclusively) on *In re Dino* remains good Louisiana law to this day. Both *In re Dino* and *In re Grand Jury Subpoenas* serve as models for the reasoning that I argue should inform the addition of the right to counsel for minors subpoenaed as federal grand jury witnesses inside the federal grand jury room.

As noted, *In re Grand Jury Subpoenas* involved two subpoenaed children who were among the few family members at home when their mother was killed.[158] The State of Louisiana asserted that the two children were not suspects, but it nonetheless declined to grant them immunity.[159] The lower Louisiana court granted the motions on behalf of the children to quash their subpoenas, but the Louisiana Supreme Court decided to resolve the question of whether the minors' right against self-incrimination outweighed the state's interest in preserving the structure and functioning of the grand jury before determining whether to reinstate the subpoenas.[160] The Louisiana Supreme Court ultimately favored

156. *Id.* (emphasis added).

157. *See* State v. Fernandez, 712 So. 2d 485, (La. 1998). The District Court granted a minor defendant's motion to suppress statements, and the prosecutor applied for review. The Court of Appeal, Fourth Circuit, Parish of Orleans, reviewed the case, affirming in part and reversing in part. *Id.* at 486. The prosecutor then applied for writ of certiorari, which the Louisiana Supreme Court granted, and held that the same "totality of circumstances" test applicable to adults should apply in all determinations of whether a minor knowingly waived Miranda rights and voluntarily confessed, overruling *Dino*, 359 So. 2d 586. *Id.* at 488. This standard is highly objective, and courts rarely conclude that the "totality of the circumstances" outweighs the state's interest in preserving the secrecy and function of the federal grand jury. *See also* Ira P. Robbins, *Sham Subpoenas and Prosecutorial Ethics*, 58 AM. CRIM. L. REV. 1, 45 (2021) ("[T]he totality-of-the-circumstances approach employed by courts is insufficient because it does not appropriately balance or account for the legal rights of individuals, and it recklessly disregards notions of judicial integrity and principles of fairness."); Hillary B. Farber, *Do You Swear to Tell the Truth, the Whole Truth, and Nothing but the Truth Against Your Child?*, 43 LOY. L.A. L. REV. 551, 583 (2010) ("In the wake of *Gault*, courts employ one of two tests to determine the validity of a juvenile's waiver of his Miranda rights: the totality of the circumstances test or the per se approach. Both of these tests place importance on the presence of a parent, or other interested adult, to confer with the juvenile suspect prior to the execution of a Miranda waiver.").

158. 387 So. 2d 1140, 1141 (La. 1980).

159. *Id.*

160. *Id.* at 1141-42.

protection for minors.[161] The court articulated its hesitation:

> As a witness also has no right to the presence of his counsel in the grand jury room, . . . the competing interests of grand jury secrecy and a witness' Fifth Amendment concerns have led to a rough compromise heavily dependent upon a witness' awareness and self-possession. The witness must grasp the implications of a question, halt his testimony, seek out his counsel at the grand jury door for his opinion, then return, either to answer the question or to assert a Fifth Amendment claim. The consequences of a failure to ask, or a misguided refusal to answer, rest with the witness.[162]

And, citing *In re Dino*:

> In *Dino*, . . . this Court held that before any inculpatory statements obtained during an interrogation may be used against a juvenile, the state must show that the child engaged in a meaningful consultation with an attorney, or an informed parent, guardian or other adult interested in his welfare before he waived his right to counsel and privilege against self-incrimination. . . . [M]ost juveniles are not mature enough to understand their rights and are not competent to exercise them, the concepts of fundamental fairness embodied in . . . our [C]onstitution require that juveniles not be permitted to waive constitutional rights on their own.
>
> [W]e disagree with the state's contention that the ordinary protections offered adult witnesses are sufficient to protect a child's interest. *For instance, allowing the juvenile witness to confer with his attorney outside the grand jury room offers little protection to the witness who may be too immature to accurately report the questions of the prosecutor to his attorney. Nor can we assume that the inexperienced minor unfamiliar with the self-incrimination privilege will understand when to assert the privilege. Further, we believe that a juvenile by virtue of his age and inexperience is likely to find the grand jury proceeding where he is surrounded by older authority figures a coercive experience.* For these reasons, we . . . conclude that the proper remedy, in order to provide both adequate safeguards for the juvenile and to protect the investigative duties of the grand jury, is to permit the subpoenas to stand and allow juveniles to be accompanied by an attorney.[163]

In re Grand Jury Subpoenas extends *In re Dino* to the grand jury context. As William Blake Bennett explained in his seminal 1981 *Louisiana Law Review* article about the two cases:

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161. *See, e.g.*, Bennett, *supra* note 2, at 1310 n.34 (highlighting that this need not be a binary decision, even though the Louisiana Supreme Court treated it as one in this case).

162. *In re Grand Jury Subpoenas*, 387 So. 2d at 1142 (emphasis added) (citation omitted) (citing United States v. Mandujano, 425 U.S. 564 (1976)).

163. *Id.* at 1142-43 (emphasis added) (citations omitted). The court further noted that this right to counsel before the grand jury applies only to minors, *id*. at 1143 n.3, and that each child should be represented by a separate attorney. *Id*. at 1143 n.4.

> [B]ecause of the isolation of the juvenile from the advice of such counsel[,] . . . the juvenile may waive unknowingly his privilege against self-incrimination. . . . [A]llowing the juvenile to be protected by counsel while testifying before the grand jury . . . [is] an important step in fully effectuating the rights enunciated in *Dino*.[164]

B. Procedural Safeguards and Format for Grand Jury Investigations

Federal statutory language explicitly granting minors access to counsel inside the federal grand jury room can be written in a way that is responsive to critics' concerns about preserving the form and function of the grand jury as a deliberative, theoretically independent, entity. William Blake Bennett's scholarship is instructive on this point. Notably, he highlights that *In re Grand Jury Subpoenas* does not articulate what the minor's attorney should do once inside the grand jury room; presumably, the attorney would aid the minor in determining whether to assert or waive the right against self-incrimination, but the court's silence on the topic leaves the parameters of the attorney's role open to some interpretation.

Historically, courts have found that access to counsel just outside of the federal grand jury room (and witnesses' ability to exit and confer with counsel) sufficiently protects the right of federal grand jury witnesses against self-incrimination.[165] However, the practice of witnesses repeatedly leaving and returning during federal grand jury testimony (to the extent that witnesses feel comfortable doing so, under the skeptical and often intimidating gaze of the prosecutor and the grand jurors) has been criticized for causing inefficiency in grand jury proceedings.[166] Other critics raise the points that the right to counsel outside the grand jury room is not described in the Constitution, and that allowing counsel outside the grand jury room only serves those with the financial means to afford representation.[167]

Most criticism of the right to counsel while appearing before a grand jury stems from concerns that an attorney's presence could substantially alter the grand jury's efficiency and format. For example, in *United States v. Dionisio*, the Supreme Court expressed its reservations that "[a]ny holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the

164. Bennett, *supra* note 2, at 1311-12.

165. *See, e.g.*, United States v. Capaldo, 402 F.2d 824 (2d Cir. 1968), *cert. denied*, 394 U.S. 989 (1969).

166. *See, e.g.*, *In re* Evans, 452 F.2d 1239, 1253 (D.C. Cir. 1971) (Wilkey, J., dissenting).

167. *See* United States v. Mandujano, 425 U.S. 564, 608-09 (1976) (Brennan, J., concurring).

public's interest in the fair and expeditious administration of the criminal laws."[168] Such criticisms can be addressed. An attorney's presence would not definitionally transform a grand jury proceeding into an adversarial process; indeed, it might even serve the grand jurors by slightly loosening the prosecutor's grip on their investigation and judgment.[169]

Procedural safeguards against the issues critics raise could also serve an important mitigating function. For example, scholar Walter W. Steele Jr. describes the following procedural safeguards, resembling those at trial, which could insulate the grand jury from detrimental attorney interference:

> [R]ules might deny the lawyer the right to ask questions during the proceedings but provide that he may submit a list of suggested questions to the foreman, to be used at his discretion. Although the lawyer might be granted some opportunity to give his opinion as to the chances of conviction, the rules could be written so as to deny him the opportunity to make a pyrotechnic summation. Currently, the grand jury is informed (implicitly at least) of the prosecutor's estimate of the chances of conviction when he recommends indictment. The validity of that recommendation would certainly be enhanced if the grand jury had the benefit of a reasoned opinion from the-suspect's own lawyer in those cases where he cared to comment. Such a procedure would force the prosecutor to exercise more responsibility in screening cases before presenting them to the grand jury and would also improve the grand jury's capacity to weed out cases that should not have been presented.[170]

Thus, the attorney's role, if clearly delineated in the applicable statute (which, for the federal grand jury context, would ideally be an amendment to 18 U.S.C. § 3509), could also serve as a check on unfettered prosecutorial power over the grand jury, a guard against the grand jury's transformation into an adversarial process in which the jurors are merely passive observers, and perhaps a counter to demands from the general public for complete grand jury abolition.[171] Providing minors subpoenaed

168. United States v. Dionisio, 410 U.S. 1, 17 (1973).

169. *See* Bennett, *supra* note 2, at 1312 (quoting Walter W. Steele Jr., *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 MO. L. REV. 193, 204 (1971)) "However, the '[p]resence of a lawyer at a hearing does not necessarily turn it into a contentious or adversary proceeding, anymore [sic] than the presence of a physician at an execution turns it into a medical treatment.'" (citation omitted)).

170. Bennett, *supra* note 2, at 1312-13 (quoting Walter W. Steele Jr., *Right to Counsel at the Grand Jury Stage of Criminal Proceedings*, 36 MO. L. REV. 193, 205 (1971)).

171. This claim does not reflect my personal views. I do not personally believe that the federal grand jury should be preserved at all costs; I merely point out the role these proposals might play in preventing its abolition for the purpose of assuaging potential traditionalists who would likely oppose special protections for minors, such as those proposed in this paper, altogether. Grand juries, at the state and federal levels, have long been criticized for various reasons. In recent years, some of the most salient criticisms of grand juries stem from instances of, sometimes fatal, police brutality, especially against Black people. *See, e.g.*, Malik Miah, *Justice Requires the Legal System Be Abolished and Replaced*, 1238 GREEN LEFT WEEKLY 15 (2020); Kevin Williams, Tim Craig & Marisa Iati, *Kentucky Grand Jury*

as federal grand jury witnesses with access to an attorney inside the grand jury room serves an important protective function—for the subpoenaed minor, for the integrity of our criminal legal system, and for this nation's foundational principles of fairness and justice. Importantly, such a provision could also serve to deter prosecutorial misconduct and restore the ability of federal grand jurors to fully and fairly execute on their charge as originally envisioned.

VIII. CONCLUSION

The combination of child psychological development considerations and prosecutorial misconduct, within the federal grand jury and federal investigation contexts in general, and in gang prosecutions in particular, urgently warrants an amendment to 18 U.S.C. § 3509 ensuring that minors will be accompanied by attorneys when subpoenaed to testify before a grand jury. Federal grand juries are closed environments, and it is virtually impossible to know what actually happens inside federal grand jury proceedings. Minors subpoenaed to testify as witnesses before grand juries can unwittingly self-incriminate. They undeniably need the protection afforded by the presence of counsel inside the grand jury room. The law should recognize that these children are not on trial.[172]

Federal grand jury subpoenas put young witnesses on prosecutors' radar, and if a minor refuses to testify, the likelihood that the minor will be held in confinement for civil contempt further enhances their risk of future court-involvement and even incarceration.[173] Even though grand

Declines to File Homicide Charges in Death of Breonna Taylor, WASH. POST (Sept. 23, 2020), https://www.washingtonpost.com/national/kentucky-grand-jury-declines-to-file-homicide-charges-in-death-of-breonna-taylor/2020/09/23/2472392a-fdb7-11ea-b555-4d71a9254f4b_story.html; Mark Berman, *Breonna Taylor's Case Shines Spotlight on Grand Juries, Which Usually Operate out of Public Eye*, WASH. POST (Oct. 2, 2020), https://www.washingtonpost.com/national/breonna-taylors-case-shines-spotlight-on-grand-juries-which-usually-operate-out-of-public-eye/2020/10/01/9b9b078c-043f-11eb-b7ed-141dd88560ea_story.html; Roger A. Fairfax Jr., *Testing Charges*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 59, 71 (Ronald F. Wright, Kay L. Levine, & Russell M. Gold, eds., 2021).

172. Subpoenas for children who are charged or under consideration for being charged in any way are beyond the scope of this paper, but they also warrant further research and consideration.

173. *See, e.g.*, *Study: Pretrial Juvenile Detention Increases Odds of Felony Recidivism by 33%*, ANNIE E. CASEY FOUND. (July 1, 2020), https://www.aecf.org/blog/study-pretrial-juvenile-detention-increases-odds-of-felony-recidivism-by-33 ("Jurisdictions use pretrial confinement to ensure that young people who have been accused of an offense attend court hearings. It is the most common use of local detention facilities, accounting for 75% of all admissions. Yet, a stay in pretrial juvenile detention increases a young person's likelihood of felony recidivism by 33% and misdemeanor recidivism by 11%, according to a new peer-reviewed study published in *Crime and Delinquency*. The study, conducted by researchers at the University of Washington and supported by the Annie E. Casey Foundation, looked at how long young people spend in pretrial detention and what impact this has on recidivism. . . . The researchers found that any pretrial detention stay—regardless of its length—increases the likelihood of recidivism. They also discovered that when a young person spends additional days in detention for pretrial

juries proceed "in secret," history demonstrates that those who testify risk reputational fallout and even retaliation for doing so. These subpoenas conceivably occur rarely enough that attorneys for subpoenaed teenage witnesses could come from federal public defender offices (ideally with additional funding from the prosecutor's budget), the private criminal bar (also at a cost unless pro bono), or even from law school pro bono clinics.[174] One advantage of allocating funding from prosecutors' offices for such representation is that the requirement could act as a sort of deterrent on prosecutors, disincentivizing the use of subpoenas for minors.

Providing an explicit statutory right to an attorney before the federal grand jury for minors subpoenaed as witnesses might also have further "chilling effect" implications with respect to possible prosecutorial misconduct within federal investigations and before federal grand juries, but consideration of those implications is beyond the scope of this Article; rather, I offer a few examples here to illustrate what some of these avenues might be. First, independent federal grand jury oversight of some sort, perhaps modeled on the most successful forms of corrections oversight, could serve a critical role that judges simply do not fulfill at scale. Corrections oversight might be an especially useful analogy because detention facilities, too, are closed environments, and not subject to public scrutiny. Second, a statutory provision requiring that prosecutors or even oversight entities collect more data on federal grand jury proceedings and federal investigations could lead to valuable information. More data is necessary both to develop meaningful interventions and protections, and to identify where misconduct or abuse is most likely to harm subpoenaed minors (or other particularly vulnerable parties).

When implementing these changes, it will be critical to recall that racist stereotypes, reinforced in the U.S. by the media, politics, and general socialization can predispose the public to perceive Black and Brown adolescents as criminals. Even if they did not enter their jobs with that preexisting bias in the first place, law enforcement officers often learn to perceive any young Black or Brown man they arrest (or subpoena) as

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reasons, their risk of recidivism jumps by 1% a day. . . . Pretrial detention was associated with higher felony recidivism for youth who had few or no prior arrests. According to the study, detained youth who are at lowest risk for reoffending will learn deviant behaviors, experience disruption in important protective influences, or be exposed to traumatic experiences when placed in secure care even for a very limited duration." (citation omitted)).

174. Student Practice Organizations and clinics at Harvard Law School offer an example of why this is a viable option: Harvard's Prison Legal Assistance Program allows law students to provide assistance and advocacy for incarcerated individuals during disciplinary hearings. Lawyers are not required in disciplinary hearings, but they are permitted; nonetheless, this is an under-appreciated need, so Harvard Law School students have stepped in. Federal grand juries present a similar semi-legal context, and trained, supervised, law school students could provide assistance for free. *See Harvard Prison Legal Assistance Project*, HARV. L. SCH., https://clinics.law.harvard.edu/plap/ (2023).

possibly involved in or knowledgeable about gang activity.; regardless of whether that young man allegedly acted as part of a group or has any actual ties to a gang.[175]

Gang databases and terminology on police reports can influence prosecutors' decisions to pursue federal charges (such as RICO charges) when determining how to prosecute Black and Brown adolescents.[176] The cycle of racial bias in policing and prosecution thus can effectively become a self-fulfilling prophecy in which law enforcement personnel at all levels increasingly risk being the instruments for "organizing" Black and Brown adolescents into "organized crime" groups to which they might not actually belong (as well as classifying them as affiliates of or witnesses to those groups).[177] When this happens, minors who could be considered witnesses become vulnerable to federal grand jury subpoenas and, if empaneled, risk facing one of the U.S. criminal legal system's most coercive, intimidating, unaccountable processes, headed by a powerful federal prosecutor, with no oversight or real-time assistance from counsel representing the minors. The life-changing result can be criminal charges.

The lack of protections for minors subpoenaed by federal grand juries, especially the lack of access to counsel inside grand jury proceedings, can be expected to perpetuate child trauma, wrongful indictments, systemic racism, and a pipeline to juvenile imprisonment. The pretextual use of "gang prevention" to justify racial profiling and to label people of color disproportionately and inappropriately as gang members amplifies this risk. The proposal in this Article is not intended to discount very real safety concerns of neighborhood residents who live in close proximity to gangs, but neither they nor anyone else benefits from the results of inappropriate application of harsh federal charges, or the consequences of federal grand jury witness testimony gone wrong (e.g., through confinement for contempt; deceivingly named non-prosecution agreements and statutory immunity) to minors who may or may not be involved in gangs generally or in the specific crimes alleged. The potential adverse consequences extend beyond the incarcerated individuals to families and communities.

Federal prosecutors should not enjoy complete secrecy, reduced barriers to indictment (including waived Fourth and Fifth Amendment

175. *See, e.g.*, Jomills H. Braddock, II et al., *How Many Bad Apples? Investigating Implicit and Explicit Bias Among Police Officers and the General Public*, CONTEXTS (Oct. 27, 2020), https://contexts.org/articles/how-many-bad-apples-investigating-implicit-and-explicit-bias-among-police-officers-and-the-general-public/; Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOCIAL JUST. 156 (2001). *See generally* Litt, *supra* note 8.

176. *See supra* note 77.

177. *See supra* note 78. *See generally* Lucy J. Litt, *From Rhyming Bars to Behind Bars: The Problematic Use of Rap Lyrics in Criminal Proceedings*, 92 UMKC L. REV. 121 (2023).

protections), and the lack of any requirement to include attorneys for subpoenaed minors inside the federal grand jury room. The inherent power imbalance violates and disregards foundational values and protections provided throughout the U.S. Constitution and decades of jurisprudence. Ensuring greater scrutiny and accountability through unequivocal language protecting subpoenaed minors is critical in light of the extreme consequences federal convictions pose for potential witnesses.