BEHIND CLOSED DOORS: WHAT REALLY HAPPENS WHEN COPS QUESTION KIDS

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Much of what passes for knowledge about police interviewing practices is no more than assumption and conjecture. Such knowledge probably owes more to television, films, or novels than to any informed understanding of what happens in police interview rooms. Because of the secrecy that has always surrounded police-suspect interviews and the traditional reluctance of police officers to allow outsiders access to the interview room, debates on the crucial questions of interview procedures had to be conducted in something of an information vacuum.[1]

INTRODUCTION 396
I. INTERROGATING JUVENILES 399
A. *Interrogating Juveniles: Youthful Vulnerability and Adult Standards* 400
B. *Developmental Psychology, Judgment, and Self-Control* 404
1. Immature Judgment and Risk Perception 405
2. Neuroscience: Judgment and Impulse Control 406
C. *Juveniles' Ability to Meet Legal Standards* 408
1. Understanding *Miranda*: Knowing and Intelligent 408
2. Susceptibility to Adult Authority and Social Influence: Voluntariness 411
II. *MIRANDA* AND INTERROGATION: THEN AND NOW 412
A. *Interrogation Tactics* 413
1. The Reid Method: Accusatory Interrogation 413
2. PACE and PEACE: Investigative Interview 415
B. *Police Interrogation: Empirical Research* 416
III. DATA AND METHODOLOGY 418
IV. REAL INTERROGATION 421
A. *Characteristics of Juveniles Whom Police Interrogated* 421

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[1] John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 334 (1993).

B. *To Waive or Not to Waive: That is the Question* 423
1. *Miranda* Framework: Custody + Interrogation = Warning 424
2. Negotiating *Miranda* Warnings 425
3. Waive or Invoke *Miranda* 427
a) Waiving *Miranda* 428
b) Invoking *Miranda* 430
C. *Interrogation Tactics: On the Record* 432
140
1. Maximization Techniques 433
2. Minimization Techniques 436
D. *Interrogation Outcomes and Lengths* 440
1. Outcomes: Confessions, Admissions, and Denials 440
2. Attitudes and Outcomes 442
3. Corroborationg Evidence 444
4. Length of Interrogation 445
a) Interrogation and Guns 448
V. POLICY IMPLICATIONS 450
A. *Protecting Youth in the Interrogation Room* 452
B. *Limiting the Length of Interrogations* 457
C. *On the Record* 459
CONCLUSION 461

INTRODUCTION

Police interrogation raises difficult legal, normative, and policy questions because of the State's need to solve crimes and obligation to protect citizens' rights. These issues become even more problematic when police question juveniles. For more than a century, justice policies have reflected two competing visions of youth: vulnerable and immature versus responsible and adult-like. A century ago, Progressive reformers emphasized youths' immaturity and created a separate juvenile court to shield children from criminal trials and punishment.[2] By the end of the twentieth century, lawmakers adopted "get tough" policies, which equated adolescents with adults and punished youths more severely.[3]

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[2] BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 46 (1999) [hereinafter FELD, BAD KIDS] (noting that Reformers characterized children as irresponsible and incompetent).

[3] *See* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447, 1558–73 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*] (describing "get tough" changes in waiver and sentencing policies); Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentences to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 11–16 (2008) [hereinafter Feld, *A Slower Form of Death*] (changing waiver policies).

Over the past three decades, these changes have transformed the juvenile court from a social welfare agency into a second-class criminal court.[4] The direct results—institutional confinement—and collateral consequences—transfer to criminal court, use of delinquency convictions to enhance sentences, or sex offender registration—preclude fewer protections for interrogating juveniles than questioning adults.[5]

For more than a century, the Supreme Court's interrogation decisions attempted to balance the state's need for information from suspects with protecting autonomy and freedom from police coercion. The Fifth Amendment privilege against self-incrimination is the bulwark of the adversary process and presumes equality between the individual and the state.[6] The Court has used three constitutional strategies—Fourteenth Amendment due process voluntariness, Sixth Amendment right to counsel, and Fifth Amendment privilege against self-incrimination—to regulate interrogation, restrict coercive pressures, and preserve the adversarial balance.[7] The Court in *Miranda v. Arizona* used the Fifth Amendment to

[4] *See* FELD, BAD KIDS, *supra* note 2, at 287–90 (analyzing punitive transformation of juvenile justice policies); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 151–64 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*] (analyzing constitutional decisions and procedural convergence); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV 821, 850–79 (1988) [hereinafter Feld, *The Juvenile Court Meets the Principle of Offense*] (analyzing sentencing statutes and shift in emphasis from offender to offense).

[5] *See* Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver*: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1203–1214 (2003) [hereinafter Feld, *Constitutional Tension*] (examining using delinquency convictions to enhance criminal sentences); *see also* Allen v. Illinois, 478 U.S. 364, 373 (1986) (recognizing that "the State intended to *punish* its juvenile offenders"); Breed v. Jones, 421 U.S. 519, 530 (1975) (applying Double Jeopardy Clause to delinquency adjudications because "there is little to distinguish an adjudicatory hearing . . . from a traditional criminal prosecution").

[6] The theoretical idea of an adversarial model is that a passive umpire adjudicates a dispute between two equal parties: the state and defendant. *See* Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 524 (1975). The Fifth Amendment privilege furthers three interrelated values. One is to promote factual accuracy—to insure the reliability of the process. *See In re* Gault, 387 U.S. 1, 47 (1967) ("The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth."). A second is to prevent governmental oppression by making the individual unavailable to the state as a source of evidence and limiting the pressure the state can bring to bear on the individual in pursuit of its own goals. *See id.* ("One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction."). Third, the adversarial process promotes respect for individual dignity and autonomy. *See id.*

[7] The Court's Fourteenth Amendment due process decisions focus on whether a suspect's statement was voluntary under the totality of the circumstances. Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 490–91 (2005). *See generally Developments in the*

fashion the *Miranda* warning, protecting suspects from the compulsive pressures of custodial interrogation.[8] Over three decades, *Miranda* doctrine has transmogrified from a safeguard for suspects to a safe-harbor for police. If police warn a suspect and secure a waiver, then courts will admit nearly every subsequent statement regardless of the tactics used to obtain it.[9]

Despite the importance of interrogation, we know remarkably little about what actually happens when police question suspects. Police, prosecutors, defense lawyers, and judges do not have the time or training to systematically analyze interrogation practices. Police have resisted incursions into interrogation rooms by behavioral scientists, whom they regard as potential critics.[10] Law professors, psychologists, and criminologists who write about interrogation lack access to venues where police question suspects. Appellate courts base rules of interrogation on a biased sample of unrepresentative cases. Most of what we think we know about interrogation derives from aberrational cases—false-confessions and wrongful convictions—or from television programs and movies that misleadingly depict police questioning suspects. In the four decades since *Miranda*, we have few empirical studies about what actually happens in an interrogation room, and none about how police question juveniles.[11]

This Article begins to fill the empirical void.[12] It focuses on the role of interrogation at the inquisitorial heart of our nominally adversarial

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Law: Confessions, 79 HARV. L. REV. 935, 954–84 (1966) (discussing the shift from common law to due process analyses of voluntariness). The Court excluded statements police elicited by psychological or physical coercion because they were unreliable, overwhelmed a person's free will, and used tactics a free society cannot condone.

The Court's Sixth Amendment decisions concluded that suspects needed tactical and strategic advice of counsel at interrogation because a confession was a critical stage that determined the outcome of proceedings. *E.g.*, Massiah v. United States, 377 U.S. 201, 205 (1964); Escobedo v. Illinois, 378 U.S. 478, 490 (1965).

[8] 384 U.S. 436, 467–68 (1966) (extending the Fifth Amendment privilege to the interrogation room and requiring police to advise suspects of the rights to remain silent and to assistance of counsel).

[9] *See* Missouri v. Seibert, 542 U.S. 600, 608–09 (2004); Dickerson v. United States, 530 U.S. 428, 544 (2000); *infra* note 339 and accompanying text.

[10] *See* REBECCA MILNE & RAY BULL, INVESTIGATIVE INTERVIEWING: PSYCHOLOGY AND PRACTICE 74 (1999) [hereinafter MILNE & BULL, INVESTIGATIVE INTERVIEWING].

[11] *See* Barry C. Feld, *Juveniles' Competence to Exercise* Miranda *Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 52 (2006) [hereinafter Feld, *Juveniles' Competence to Exercise* Miranda *Rights*]; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 222 (2006) [hereinafter Feld, *Police Interrogation of Juveniles*]; Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 263 (1996) [hereinafter Leo, Miranda*'s Revenge*]; *see infra* notes 113–120 and accompanying text.

[12] This article is part of a larger study that examines police interrogation practices, how juveniles respond to their questioners, the impact of *Miranda* waivers on case processing, the role of parents at interrogations, and the impact of geographic locale, race, and gender on

process.[13] It analyzes quantitative and qualitative data of 307 interrogations police conducted of sixteen- and seventeen-year-old youths whom prosecutors charged with felonies. Unlike most states, Minnesota has required police to record interrogations for nearly two decades.[14] The tapes and transcripts enable me to describe what happens when police interrogate serious young offenders. These analyses also test developmental psychologists' hypotheses about adolescents' competence to exercise *Miranda* rights. For three decades, psychologists have questioned whether young people possess the competence to exercise rights. While their research demonstrates younger and mid-adolescent youths are *not* as competent as adults, it suggests most youths sixteen years of age and older understand *Miranda* on par with adults.

Part I reviews the law governing interrogation of juveniles and contrasts it with psychologists assessments of juveniles' competence to exercise rights. Part II examines interrogation practices, post-*Miranda* impact-studies and empirical research on interrogation. Part III describes the study's data and methodology. Part IV presents quantitative and qualitative data about what happens when police question serious offenders. It focuses on juveniles' waivers of *Miranda* rights, techniques police use to question them, length of interrogations, and outcomes. Part V recommends policy changes based on these analyses.

I. INTERROGATING JUVENILES

The Supreme Court has decided more cases about interrogating youths than any other issue in juvenile justice.[15] Although the Court has repeatedly cautioned that youthfulness adversely affects juveniles' ability to exercise *Miranda* or make voluntary statements, it has not required special procedures to protect young suspects. Rather, it endorsed the adult waiver standard of "knowing, intelligent, and voluntary" to gauge juveniles' *Miranda* waivers.[16]

police practices. *See* BARRY C. FELD, KIDS, COPS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM (2013) [hereinafter FELD, KIDS, COPS, AND CONFESSIONS].

[13] Constitutional theory notwithstanding, American criminal and juvenile justice is an inquisitorial system for nearly all offenders. *See* HERBERT L. PACKER, THE LIMITS OF CRIMINAL SANCTION 239 (1968) ("[T]he real-world criminal process tends to be far more administrative and managerial than adversary and judicial."). Police establish most defendants' guilt through informal, administrative fact-finding, i.e. interrogation, *see id.* at 187–90, 192, that leads to pleas, *see id.* at 222–23, 225. A guilty plea in court simply ratifies the real trial that occurred when police questioned the suspect. *See id.* at 222–23; *infra* note 388 and accompanying text.

[14] *See* State v. Scales, 518 N.W.2d 587 (Minn. 1994) (requiring police to record all custodial interrogations of criminal suspects, including juveniles).

[15] *See, e.g.*, Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Colorado, 370 U.S. 49 (1962); *In re* Gault, 387 U.S. 1 (1967); Fare v. Michael C., 442 U.S. 707 (1979); Yarborough v. Alvarado, 541 U.S. 652 (2004); J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

[16] *See Michael C.*, 442 U.S. at 725–26.

A. *Interrogating Juveniles: Youthful Vulnerability and Adult Standards*

In the decades prior to *Miranda*, the Court adopted a protectionist stance and cautioned trial judges to examine closely how youthfulness affected the voluntariness of confessions.[17] The Court in *Haley v. Ohio* found involuntary the confession of a fifteen-year old boy whose youth and inexperience left him vulnerable[18] to "overpowering" police interrogation.[19] The *Gallegos v. Colorado* Court found age was a special circumstance[20] that rendered a fourteen-year-old boy's confession involuntary.[21] In *In re Gault*, the Court reiterated its concerns over youthfulness adversely affecting the voluntariness of juveniles' statements.[22] The *Gault* Court granted delinquents most procedural rights—notice, hearing, counsel, and cross-examination—based on Fourteenth Amendment due process.[23] It also granted Fifth Amendment privilege

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[17] Supreme Court decisions about youth reflect competing liberationist and protectionist policies. FELD, BAD KIDS, *supra* note 2, at 106–08; Jessica Owen-Kostelnik et al., *Testimony and Interrogation of Minors: Assumptions About Maturity and Morality*, 61 AM. PSYCHOL. 286, 287–90 (2006). A paternalistic stance protects children from their own immature judgment, provides them additional safeguards, and denies rights because of their presumed inability to exercise them responsibly. *Id.* at 288. A liberationist model portrays youths as autonomous and adult-like and treats them as it does other responsible actors. *Id.*

[18] *Haley*, 332 U.S. at 599–600 ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic.").

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

[20] 370 U.S. 49, 54 (1962) ("[A] 14-year-old boy, no matter how sophisticated . . . is not equal to the police in knowledge and understanding . . . and . . . is unable to know how to protect his own interests or how to get the benefits of his constitutional rights. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.").

[21] *Id.* at 55 ("The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested was obtained in violation of due process.").

[22] *See* 387 U.S. 1, 52 (1967) ("[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children."); *see also* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 Calif. L. Rev. 1134, 1137 (1980) [hereinafter Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*] ("*Gault* recognized that even greater protection might be required where juveniles are involved, since their immaturity and greater vulnerability place them at a greater disadvantage in their dealings with the police.").

[23] *Gault*, 387 U.S. at 30; Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 154–55 (analyzing constitutional bases for Court's juvenile due process decisions).

against self-incrimination in delinquency proceedings.[24] It recognized that the Fifth Amendment contributes to accurate fact-finding *and* maintains the adversarial balance between the individual and the state.[25]

The Court's due process decisions fostered a convergence between juvenile and criminal courts and converted the former into a scaled-down criminal court.[26] Some analysts advocate relaxed safeguards in juvenile courts to foster a rehabilitative or preventive mission.[27] In the words of two such analysts:

> Permitting a juvenile to remain silent during interrogation or trial could easily reduce reliability and efficiency in the typical case, concerns that arguably trump the lesser autonomy interests at stake in the juvenile context. . . . [M]any technical rules that have developed around *Miranda* would not need to be followed by law enforcement officials.[28]

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[24] *Gault*, 387 U.S. at 49–50. In extending the Fifth Amendment privilege against self-incrimination to delinquency proceedings, the Court held:

> It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. In the first place, juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination.

Id.

[25] *Id.* at 47. The Court recognized a number of significant benefits of the Fifth Amendment privilege against self-incrimination:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not mere fruits of fear or coercion, but are reliable expressions of the truth. . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his convictions.

Id.

[26] Subsequent decisions further criminalized delinquency proceedings. *See In re* Winship, 397 U.S. 358 (1970) (requiring states to prove delinquents' guilt by the criminal law's standard of proof beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519 (1975) (positing a functional equivalence of criminal and delinquency trials); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (denying delinquents the right to a jury trial). However, *Gault* and *Winship* provided impetus to transform the juvenile court from a social welfare agency into a scaled-down criminal court. Feld, *Criminalizing Juvenile Justice*, *supra* note 4, at 161–62; *see* FELD, BAD KIDS, *supra* note 2, at 106–07; *see also* Feld, *The Juvenile Court Meets the Principle of Offense*, *supra* note 4, at 829–831.

[27] *See, e.g.*, Elizabeth S. Scott and Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) [hereinafter Scott & Grisso, *Developmental Incompetence*] (advocating lower standard for competency in juvenile than in criminal court).

[28] CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE 116–17 (2011); *see also* Scott & Grisso, *Developmental Incompetence*, *supra* note 27, at 796 (advocating a reduced competency standard in juvenile court).

However, the Supreme Court's opinions in *In re Winship* and *Breed v. Jones* recognized juvenile courts' criminal aspects, and *Gault* highlighted their adversarial character.

The Court in *Fare v. Michael C.* held that the "totality of the circumstances" test used to evaluate adults' waivers governed juveniles' waivers as well.[29] By the Court's reasoning, *Miranda* provided an objective basis to evaluate waivers.[30] The Court denied that youths' developmental differences required special procedural protections[31] and required children to assert their rights clearly.[32]

Miranda provided that if police question a suspect who is in custody—arrested or "deprived of his freedom of action in any significant way"—they must administer a warning.[33] The Court in *J.D.B. v. North Carolina* considered "whether the *Miranda* custody analysis includes consideration of a juvenile suspect's age,"[34] and reasoned that age was an objective fact that would affect whether a person felt restrained.[35]

Most state courts use *Michael C.*'s totality framework for juveniles and adults.[36] Trial judges consider characteristics of the offender—age, education, I.Q., and prior police contacts—and the context of interrogation—location, methods, and length of questioning—when they evaluate *Miranda* waivers.[37] Appellate courts do not assign controlling weight to

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[29] 442 U.S. 707, 725 (1979) (holding that a request for a probation officer did not invoke *Miranda*'s privilege against self-incrimination or right to counsel). The Court decided *Michael C.* as a *Miranda* case rather than as a juvenile interrogation case. Kenneth J. King, *Waiving Childhood Goodbye: How Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary Waivers of* Miranda *Rights*, 2006 WIS. L. REV. 431, 449 (2006).

[30] *Michael C.*, 442 U.S. at 724–25.

[31] *See id.* at 729–30 (Marshall, J., dissenting) (arguing that the Court should have adopted broader protection of juvenile suspects by holding that a juvenile's request for any person who represents their interests be treated as a Fifth Amendment invocation).

[32] *See id.* at 723–24 (deciding that a juvenile's request to see a trusted adult is not an invocation of Fifth Amendment rights); *see also* Francis Barry McCarthy, *Pre-Adjudicatory Rights in Juvenile Court: An Historical and Constitutional Analysis*, 42 U. PITT. L. REV. 457, 461 (1981); Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not So Distant Past*, 27 UCLA L. REV. 656, 686–91 (1980).

[33] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[34] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011); *see also id.* at 2406 (concluding that courts should consider how a thirteen-year-old youth's age would affect his feelings of custodial restraint).

[35] *Id.* "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality." *Id.*

[36] King, *supra* note 29, at 456; Kimberly Larson, *Improving the "Kangaroo Courts": A Proposal for Reform in Evaluating Juveniles' Waiver of* Miranda, 48 VILL. L. REV. 629, 645 & n.91, 646 (2003) (summarizing the majority of states' use of the "totality of circumstances" test and the factors they consider).

[37] *See*, *e.g.*, *Michael C.*, 442 U.S. at 727 (1979); West v. United States, 399 F.2d 467, 469 (5th Cir. 1968).

any factor,[38] and the totality approach provides no meaningful check on trial judges' discretion.[39] Judges find valid waivers by children as young as ten years of age with no prior police contacts, with limited intelligence, and without parental assistance.[40] About ten states require a parent to assist juveniles in the interrogation room,[41] although commentators question the policy assumptions or utility of their participation.[42] The Minnesota Supreme Court has rejected a parental presence requirement and uses *Michael C.*'s totality approach to gauge juveniles' *Miranda* waivers.[43]

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38 FELD, BAD KIDS, *supra* note 2, at 118.

39 Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 11 (2010) [hereinafter Kassin et al., *Police-Induced Confessions*]. Trial judges failed to recognize juveniles' claims that waivers were involuntary or confessions coerced even when DNA evidence subsequently exonerated them. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88–91 (2008) [hereinafter Garrett, *Judging Innocence*]. In practice, judges invalidate waivers or exclude confessions only under the most egregious circumstances. FELD, BAD KIDS, *supra* note 2, at 118; Barry C. Feld, *Juveniles' Waiver of Legal Rights: Confessions, Miranda, and the Right to Counsel*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 105, 113 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Feld, *Juveniles' Waiver of Legal Rights*].

40 *See* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 39, at 112–13; Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note 11, at 32 n.18; Feld, *Police Interrogation of Juveniles*, *supra* note 11, at 224 n.19; King, *supra* note 29, at 456–57.

41 Hillary B. Farber, *The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?*, 41 AM. CRIM. L. REV. 1277, 1287 n.65 (2004) (listing the states with parental presence requirements); King, *supra* note 29, at 451–52; *see* Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 39, at 116–18; *see, e.g.*, *In re* B.M.B., 955 P.2d 1302, 1312–13 (Kan. 1998) (protecting youths younger than 14); Commonwealth v. A Juvenile, 449 N.E.2d 654, 657 (Mass. 1983) (requiring parent or appropriate adult); State v. Presha, 748 A.2d 1108, 1114, 1117 (N.J. 2000) (requiring parent for younger juveniles); *In re* E.T.C., 449 A.2d 937, 940 (Vt. 1982) (holding as a matter of state constitutional law that a youth "must be given the opportunity to consult with an adult").

42 States assume that a parent will understand rights, provide legal advice, mitigate coercive influences, prevent unreliable statements, and reduce feelings of isolation. Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 39, at 117–18; *see* Lisa M. Krzewinski, *But I Didn't Do It: Protecting the Rights of Juveniles During Interrogation*, 22 B.C. THIRD WORLD L.J. 355, 374–77 (2002). *See generally* Steven A. Drizin & Beth A. Colgan, *Tales from the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions from Juvenile Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 127, 153–55 (G. Daniel Lassiter ed., 2004) (endorsing a parental presence requirement even though interrogators reduce parents' role to passive observer); Farber, *supra* note 41. Parents may pressure their children to tell the truth and confess. *See* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 180–81 (1981) [hereinafter GRISSO, JUVENILES' WAIVER OF RIGHTS]; Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Right in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 213–14 (1979).

43 *See, e.g.*, State v. Burrell, 697 N.W.2d 579, 597 (Minn. 2005) (noting that repeatedly requesting a parent before and after a *Miranda* warning may render a waiver or statement involuntary); State v. Nunn, 297 N.W.2d 752, 755 (Minn. 1980); State v. Loyd, 212 N.W.2d 671, 677 (Minn. 1973).

B. *Developmental Psychology, Judgment, and Self-Control*

Roper v. Simmons barred states from executing offenders for murder they committed when younger than eighteen years of age because of reduced culpability.[44] *Graham v. Florida* extended *Roper* and banned life without parole sentences for non-homicide crimes.[45] *Miller v. Alabama* and *Jackson v. Hobbs* banned mandatory life sentences without parole for youths who kill.[46] The Court's "children are different" jurisprudence reasoned that states could not punish youths as severely as adults. The Court attributed juveniles' tendency to act impulsively and without full appreciation of consequences to their immature judgment and limited self-control.[47] Greater susceptibility to peer influences diminished their criminal responsibility.[48] These developmental characteristics—immaturity, impulsivity, and susceptibility to social influences—heighten youths' vulnerability in the interrogation room.

Developmental psychologists distinguish between cognitive ability and maturity of judgment. The former bears on youths' ability to understand and make a knowing and intelligent waiver and the latter on voluntariness and susceptibility to coercive pressures. By mid-adolescence, most youths' cognitive abilities compare with adults—they can distinguish right from wrong and reason similarly.[49] However, the ability to

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[44] Roper v. Simmons, 543 U.S. 551, 569 (2005). *Roper* attributed their reduced culpability to three factors:

> [A] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . [T]hese qualities often result in impetuous and ill-considered actions and decisions; (2) [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and (3) [T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

Id. See generally Feld, *A Slower Form of Death*, *supra* note 3 (analyzing the Court's three rationales to support reduced culpability).

[45] Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.").

[46] 132 S. Ct. 2455, 2464 (2012). *See generally* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 J. LAW & INEQUALITY 263 (2013) (analyzing sentencing policy implications of the Court's "children are different" jurisprudence).

[47] *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2032.

[48] *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2032.

[49] *See* Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 407–09 (1999) [hereinafter Steinberg & Cauffman, *The Elephant in the Courtroom*]; *see also* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 164 (2008) [hereinafter SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE] (comparing cognitive competence of adolescents and adults); Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOL. 583, 584 (2009) [hereinafter Steinberg et al., *Are*

make good choices with complete information in a laboratory differs from the ability to make adult-like decisions under stressful conditions with incomplete information.[50] Research conducted by the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice distinguishes between cognitive ability and psychosocial maturity of judgment—risk assessment, temporal orientation, capacity for self-regulation, and susceptibility to external influences.[51] While most youths sixteen years of age or older exhibit cognitive abilities comparable with adults, they do not develop mature judgment and adult-like competence to make decisions until their twenties.[52]

1. Immature Judgment and Risk Perception

Youths' short- and long-term time perspective, risk perception, and appreciation of future consequences differ from adults.[53] Differences in

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Adolescents Less Mature Than Adults?] (noting that the American Psychological Association affirmed the maturity of adolescent girls to make abortion decisions without parental assistance).

[50] *See* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REV. 417, 423 (2000) ("[U]nlike adults, adolescents may exhibit considerably poorer cognitive performance under circumstances involving everyday stress and time-limited situations than under optimal test conditions." (citation omitted)); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychological Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249, 812–13 (1996) [hereinafter Steinberg & Cauffman, *Maturity of Judgment in Adolescence*] ("These findings from laboratory studies are only modestly useful, however, in understanding how youths compare to adults in making choices that have salience to their lives or that are presented in stressful unstructured settings (such as the street) in which decision-makers must rely on personal experience and knowledge."); *see also* Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 49, at 586 ("[W]hereas adolescents and adults perform comparably on cognitive tests measuring the sorts of cognitive abilities . . . that permit logical reasoning about moral, social, and interpersonal matters—adolescents and adults are not of equal maturity with respect to the psychosocial capacities . . . such as impulse control and resistance to peer influence.").

[51] *Less Guilty by Reason of Adolescence*, MACARTHUR FOUND. RES. NETWORK ON ADOLESCENT DEV. & JUV. JUST., http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Oct. 4, 2013); *see also* SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 49, at 160–165; Feld, *A Slower Form of Death*, *supra* note 3, at 31–32 (summarizing Adolescent Development and Juvenile Justice research).

[52] *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 811–17 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*] ("Psycho-social development proceeds more slowly than cognitive development."); Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1011–14, 1016–17 (2003).

[53] *See* Scott & Steinberg, *Blaming Youth*, *supra* note 52, at 813 ("[E]ven when adolescent cognitive capacities approximate those of adults, youthful decision-making may still differ due to immature judgment. The psychosocial factors most relevant to differences in judgment include: (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management. . . . [I]mmature judgment can affect outcomes because these developmental factors influence adolescent values and preferences that drive the cost-benefit calculus in the making of choices.").

knowledge, experience, and impulse control contribute to poorer decisions.[54] A person must be able to think ahead, delay gratification, and restrain impulses to exercise good judgment, and adolescents underestimate risks, use a shorter frame, and focus on gains rather than losses.[55] Sixteen- and seventeen-year-olds are more present-oriented and perceive fewer risks than do either younger or older subjects.[56] Youth regard *not* engaging in risky behaviors differently than do adults because the appetite for risk peaks at sixteen or seventeen years of age and then declines into adulthood.[57]

2. Neuroscience: Judgment and Impulse Control

Neuroscientists attribute differences in how adolescents and adults think and behave to brain maturation.[58] The prefrontal cortex (PFC) of

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[54] *See* Scott & Steinberg, *Blaming Youth*, *supra* note 52, at 814 ("Future orientation, the capacity and inclination to project events into the future, may also influence judgment, since it will affect the extent to which individuals consider the long-term consequences of their actions in making choices."); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 227 (1995); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 160–61 (1997) [hereinafter Scott & Grisso, *The Evolution of Adolescence*].

[55] *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 19 (1992); William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 66 (Nancy J. Bell & Robert W. Bell eds., 1993); Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 139, 160–62 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Grisso, *What We Know*].

[56] *See Development and Criminal Blameworthiness*, MACARTHUR FOUND. RES. NET. ON ADOLESCENT DEV. & JUV. JUST., http://www.adjj.org/downloads/3030PPT- Adolescent Development and Criminal Blameworthiness.pdf (last visited Oct. 4, 2013) (graph entitled "Impulsivity Declines with Age"); Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 52, at 1012.

[57] Risky behavior provides excitement and an adrenaline rush. Emotions affect decision-making and researchers distinguish between choices made under conditions of "cold" and "hot" cognition or states or arousal. *See* Jay D. Aronson, *Brain Imaging Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 119 (2007) ("[A]dolescents are much less capable of making sound decisions when under stressful conditions or when peer pressure is strong. Psychosocial researchers have referred to cognitition in these different contexts as *cold* versus *hot*."); Ronald E. Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60, 61 (2001) ("*Cold cognition* refers to thinking under conditions of low emotion and/or arousal, whereas *hot cognition* refers to thinking under conditions of strong feelings or high arousal."); Steinberg et al., *Are Adolescents Less Mature Than Adults?*, *supra* note 49, at 586. Mood volatility, an appetite for excitement, and stress adversely affect adolescents' decisions to a greater degree than they do adults. *See* Spear, *supra* note 50, at 421–23, 428–29; *see also* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992).

[58] *See* Dahl, *supra* note 57, at 69 ("Regions in the PFC [prefrontal cortex] that underpin higher cognitive-executive functions mature slowly, showing functional changes that continue well into late adolescence/adulthood."); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships*

the frontal lobe of the brain regulates executive functions such as abstract thinking, strategic planning, and impulse control—skills necessary to exercise legal rights.[59] The amygdala (the limbic system) controls emotional and instinctual behavior—the fight-or-flight response—and in stressful situations, adolescents rely more heavily on the amygdala and less heavily on the PFC than do adults.[60] Novel circumstances and emotional arousal challenge youths' ability to exercise self-control.[61] *Graham* noted that impaired judgment, risk-calculus, and short-term perspective adversely affected youths' ability to exercise rights and impaired defense representation.[62]

During Postadolescent Brain Maturation, 21 J. NEUROSCIENCE 8819 (2001) [hereinafter Sowell et al., *Mapping Continued Brain Growth*] (discussing significant changes in brain structure prior to adulthood); Spear, *supra* note 50, at 438 ("[T]he adolescent brain is a brain in flux, undergoing numerous regressive and progressive changes in mesocorticolimbic regions.").

[59] *See* Staci A. Gruber & Deborah A. Yurgelun-Todd, *Neurobiology and the Law: A Role in Juvenile Justice?*, 3 OHIO ST. J. CRIM. L. 321, 323 (2006) ("The frontal cortex has been shown to play a major role in the performance of executive functions including short term or working memory, motor set and planning, attention, inhibitory control and decision making."); Tomás Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908, 1908–10 (1999).

[60] *See* David E. Arrendondo, *Child Development, Children's Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & POL'Y REV. 13, 15 (2003) ("Adolescents tend to process emotionally charged decisions in the limbic system, the part of the brain charged with instinctive (and often impulsive) reactions. Most adults use more of their frontal cortex, the part of the brain responsible for reasoned and thoughtful responses. This is one reason why adolescents tend to be more intensely emotional, impulsive, and willing to take risks than their adult counterparts."); Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 198 (1999).

[61] *See* Scott & Steinberg, *Blaming Youth*, *supra* note 52, at 816, (summarize the interaction between the PFC—the executive functions—and the limbic system—associated with impulsive or instinctual behavior).

> [R]egions of the brain implicated in processes of long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward continue to mature over the course of adolescence, and perhaps well into young adulthood. At puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more risks; these changes also may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision-making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence.

Id.; *see also* Allison Redlich et al., *Pre-Adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 BEHAV. SCI. & L. 393, 403 (2003) [hereinafter Redlich et al., *Pre-Adjudicative and Adjudicative Competence*].

[62] Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) ("[T]he 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 seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.").

C. *Juveniles' Ability to Meet Legal Standards*

Despite the Court's repeated references to developmental differences, most states use adult legal standards to gauge juveniles' *Miranda* waivers. If youths differ from adults in understanding *Miranda*, in ability to exercise rights, or in susceptibility to social influences, then the law may hold them to a standard that few can meet. Some juveniles simply do not understand the words of *Miranda* warnings. Police use hundreds of versions of the *Miranda* warning.[63] Psychologists contend that the vocabulary, concepts, and reading levels required to understand *Miranda* exceed the ability of many adolescents.[64] Some concepts—the meaning of a *right*, the term *appointed* to secure counsel, and *waive*—require a high-school education and render *Miranda* incomprehensible to many juveniles.[65] Dumbed-down juvenile warnings often are longer than those used for adults and inhibit understanding.[66]

1. Understanding *Miranda*: Knowing and Intelligent

Thomas Grisso has studied juveniles' ability to exercise *Miranda* rights for more than three decades and reports that many youths do not adequately understand the warning.[67] Half (55.3%) of juveniles, as con-

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[63] *See* Richard Rogers et al., *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 181 (2007) [hereinafter Rogers et al., *An Analysis of* Miranda *Warnings*].

[64] *See* Richard Rogers et al., *The Comprehensibility and Content of Juvenile* Miranda *Warnings*, 14 PSYCHOL. PUB. POL'Y & L. 63, 72–85 (2008) [hereinafter Rogers et at., *Comprehensibility and Content*]; *see also* Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 135 (2008) [hereinafter Rogers et al., *The Language of* Miranda *Warnings*]. Key words and concepts of a warning require at least an eighth-grade level of education to understand, and juveniles thirteen years of age or younger cannot grasp its meaning. *See* Rogers et al., *Comprehensibility and Content*, *supra*, at 72.

[65] *See* Rogers et al., *Comprehensibility and Content*, *supra* note 64, at 74 tbl.3, 76 tbl.4. Many juveniles cannot define critical words used in *Miranda* warnings. *See id.* at 72–75. *See generally* ALAN M. GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda* Rights (2010) [hereinafter GOLDSTEIN & GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda*].

[66] *See* Rogers et al., *Comprehensibility and Content*, *supra* note 64, at 71 (comparing lengths of juvenile and adult *Miranda* warnings).

[67] GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 106–07; Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 22, at 1152–54; Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 11 (1997) [hereinafter Grisso, *The Competence of Adolescents*] (noting adolescents' difficulty in grasping the concept of a right as an entitlement); J. Thomas Grisso & Carolyn Pomiciter, *Interrogation of Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 LAW & HUM. BEHAV. 321, 339 (1977) [hereinafter Grisso & Pomiciter, *Interrogation of Juveniles*]; Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 335 (2003) [hereinafter Grisso et al., *Juveniles' Competence to Stand Trial*]; Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, *in* CHILDREN'S COMPETENCE TO CONSENT 131 (Gary B. Melton et al. eds., 1983) [hereinafter Grisso, *Juveniles' Consent in Delinquency Proceedings*]. *See gener-*

trasted with less than one-quarter (23.1%) of adults, did not understand at least one of the warnings and only one-fifth (20.9%) of juveniles, as compared with almost half (42.3%) of adults, grasped the entire warning.[68] Sixteen- and seventeen-year-old juveniles understood *Miranda* about as well as did adults, but substantial minorities of both groups misunderstood some components.[69] Age-related improvements in comprehension appear in other studies.[70] Younger teens consistently understood *Miranda* even less well than did those in their mid-teens.[71] *Miranda*'s language put the warning beyond the comprehension of many mid-teen delinquents,[72] and its concepts beyond the grasp of many younger juveniles.[73] Even youths who understand *Miranda*'s words may be una-

ally THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING & APPRECIATION OF *Miranda* Rights (1998) (providing tests to assess an examinee's comprehension of the rights protected by *Miranda* warnings, the vocabulary of *Miranda* warnings, and the significance of *Miranda* rights in the context of interrogation).

[68] Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 22, at 1152–54.

[69] Grisso, *The Competence of Adolescents*, *supra* note 67, at 10–14.

[70] *See* Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 8 ("[U]nderstanding of adolescents ages 15–17 with near-average levels of verbal intelligences tends not to have been inferior to that of adults. But youths of that age with IQ scores below 85, and average youth below age 14, performed much poorer, often misunderstanding two or more of the warnings."); Jodi Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 LAW & HUM. BEHAV. 723, 736 (2005) [hereinafter Viljoen & Roesch, *Competence to Waive Interrogation Rights*] ("Youth's general intellectual ability, verbal ability, attention, and executive functioning increased with age. This indicates that young adolescents may not yet have acquired the cognitive abilities necessary to adequately understand and participate in legal proceedings.").

[71] *See* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 22, at 1160 (reporting that the majority of juveniles younger than fifteen years of age "failed to meet both the absolute and relative (adult norm) standards for comprehension . . . [and] misunderstood at least one of the four standard *Miranda* statements, and compared with adults, demonstrated significantly poorer comprehension of the nature and significance of the *Miranda* rights."); Jodi Viljoen et al., *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCI. & L. 1, 9 (2007) [hereinafter Viljoen et al., *Adjudicative Competence and Comprehension*] (reporting substantially impaired understanding by youths younger than sixteen).

[72] *See* Rogers et al., *Comprehensibility and Content*, *supra* note 64, at 80 ("The synergistic effects of poor reading comprehension, low intelligence, and comorbid mental disorders are likely to have catastrophic effects on *Miranda* comprehension and subsequent reasoning."); Richard Rogers, *A Little Knowledge Is a Dangerous Thing . . . Emerging* Miranda *Research and Professional Roles for Psychologists*, 63 AM. PSYCHOL. 776, 779 (2008) [hereinafter Rogers, *A Little Knowledge*].

[73] *See* Rona Abramovitch et al., *Young People's Understanding and Assertion of Their Rights to Silence and Legal Counsel*, 37 CAN. J. CRIMINOLOGY 1, 10–11 (1995); Rona Abramovitch et al., *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CAN. J. CRIMINOLOGY 309, 320 (1993) (arguing that most juveniles do not have sufficient understanding to be competent to waive Miranda); Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28 (2000); Redlich et al., *Pre-Adjudicative and Adjudicative Competence*, *supra* note 61, at 405; Viljoen & Roesch, *Competence to Waive Interrogation Rights*, *supra* note 70, at 736; Jodi Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas,*

ble to exercise the rights as well as adults. Juveniles do not fully appreciate the function or importance of rights,[74] or view them as an entitlement, rather than as a privilege that authorities allow, but which they may unilaterally withdraw.[75]

A person must be able to understand proceedings, make rational decisions, and assist counsel to be competent to stand trial.[76] Development limitations impair youths' competence, similar to how mental illness or retardation may render adults incompetent.[77] Many juveniles younger than fourteen years of age were as severely impaired as adults found incompetent to stand trial, and many older adolescents exhibited substantial impairments.[78] Their compromised competence equally affects their ability to exercise *Miranda* rights.

Communication with Attorneys, and Appeals, 29 LAW & HUM. BEHAV. 253, 256 (2005) [hereinafter Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants*] (finding that youths fifteen years of age and younger had poorer understanding and were more likely to waive rights and confess than older youths).

[74] *See* GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 130; Grisso, *The Competence of Adolescents*, *supra* note 67, at 11 (distinguishing between understanding words of warning and appreciating the functions of the rights and a warning conveys); Larson, *supra* note 36, at 649–53 (reviewing social psychological research and juveniles' limited understanding of the concept of "rights" as entitlements to be exercised).

[75] *See* Grisso, *The Competence of Adolescents*, *supra* note 67, at 10–11 ("[A] larger proportion of delinquent youths bring to the defendant role an incomplete comprehension of the concept and meaning of a right as it applies to adversarial legal proceedings."); Thomas Grisso, *Juveniles' Competence to Stand Trial: New Questions for an Era of Punitive Juvenile Justice Reform*, *in* MORE THAN MEETS THE EYE: RETHINKING, ASSESSMENT, COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE 23, 29–30 (Patricia Puritz et al. eds., 2002); GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 130; Grisso, *What We Know*, *supra* note 55, at 148–49.

[76] *See, e.g.*, Drope v. Missouri, 420 U.S. 162, 171 (1975) ("[A] person . . . that . . . lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) ("'[T]he defendant . . . must . . . ha[ve] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and have] a rational as well as factual understanding of proceedings against him.'"). Analysts question whether juveniles possess these competencies. *See* Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 73, 86–89 (Thomas Grisso & Robert G. Schwartz eds., 2000); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 67, at 335.

[77] *See* Grisso, *The Competence of Adolescents*, *supra* note 67, at 20–21; Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA J. SOC. POL'Y & L. 353, 374–78 (2001); Scott & Grisso, *Developmental Incompetence*, *supra* note 27, at 795–98.

[78] *See* Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings: Cognitive Maturity and the Attorney–Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 652 (1995); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 67, at 344; Redding & Frost, *supra* note 77, at 374–78; *see also* Bonnie & Grisso, *supra* note 76, at 87–88.

2. Susceptibility to Adult Authority and Social Influence: Voluntariness

Roper and *Graham* emphasized that youths' susceptibility to social influences reduced culpability.[79] *Miranda* characterized custodial interrogation as inherently compelling because police dominate the setting, control information, and create psychological pressures to comply.[80] Youths are not full-fledged citizens, and we expect them to answer questions posed by parents, teachers, police, and other adults. Children questioned by authority figures acquiesce more readily to suggestion during questioning.[81] They seek an interviewer's approval and respond more readily to negative pressure.[82] Under stress of a lengthy interrogation, they may impulsively confess falsely rather than consider the consequences.[83]

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[79] *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 569 (2005).

[80] *See* Miranda v. Arizona, 384 U.S. 436, 455–58 (1965). *See generally* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003) [hereinafter GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS] ("[I]nterrogative suggestibility [is defined] as '[t]he extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioral response is affected.'" (citation omitted)).

[81] *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 1005 (2004) [hereinafter Drizin & Leo, *The Problem of False Confessions*] (finding that juveniles' "eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making," puts them at greater risk to confess falsely); Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 8 ("[Y]outh under age 15 . . . are more likely to believe that they should waive their rights and tell what they have done, partly because they are still young enough to believe that they should never disobey authority."). Juveniles are more vulnerable to suggestion during questioning than adults. *See* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 381; K. Singh & Gisli H. Gudjonsson, *Interrogative Suggestibility Among Adolescents and Its Relationship with Intelligence, Memory, and Cognitive Set*, 15 J. ADOLESCENCE 155, 160 (1992).

[82] *See* F. James Billings et al., *Can Reinforcement Induce Children to Falsely Incriminate Themselves?*, 31 LAW & HUM. BEHAV. 125, 126 (2007); Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 BEHAV. SCI. & L. 757, 764 (2007) [hereinafter Meyer & Reppucci, *Police Practices & Perceptions*] ("Psychologically coercive strategies that contribute to interrogative suggestibility play on young suspects' eagerness to please, firm trust of people in authority, lack of self-confidence, increased desire to protect friends/relatives and to impress peers, and increased desire to leave the interrogation sooner." (citations omitted)); G. Richardson et al., *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 J. ADOLESCENCE 211, 215 (1995).

[83] *See* Steinberg & Cauffman, *Maturity of Judgment in Adolescence*, *supra* note 50, at 261; *see also* GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 158–59; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 67, at 357; Owen-Kostelnik et al., *supra* note 17, at 292 ("[J]uvenile offenders . . . are more susceptible than adult offenders to negative feedback from authority figures, because they demonstrate an increased tendency to change their previous answers . . . .").

The Court requires suspects to invoke *Miranda* rights clearly and unambiguously.[84] However, some groups—juveniles, females, or racial minorities—may speak indirectly or assert rights tentatively to avoid conflict with those in power.[85] *Davis v. United States* recognized that requiring suspects to invoke rights clearly could prove problematic for some.[86] Even older youths who understand *Miranda* may feel more constrained, more susceptible to power differentials, and less able to voluntarily relinquish rights.[87]

II. *MIRANDA* AND INTERROGATION: THEN AND NOW

The *Miranda* Court had no direct evidence or empirical studies of how police questioned suspects.[88] It had no way to assess how psychological tactics like isolation, confrontation, and minimization affected a suspect's willingness to talk.[89] The Court used training manuals as a proxy for interrogation practices.[90] The techniques recommended in Inbau and Reid's *Criminal Interrogation and Confessions*—the leading manual at the time—provided a surrogate for actual practices.[91] The Reid Method remains the leading training program in the United States and underlies most contemporary interrogation practice,[92] and its ubiq-

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[84] *See, e.g.*, Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010); Davis v. United States, 512 U.S. 452, 459 (1994).

[85] *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 318.

[86] *Davis*, 512 U.S. at 460 ("[R]equiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.").

[87] FELD, KIDS, COPS, CONFESSIONS, *supra* note 12, at 58.

[88] *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966) ("Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.").

[89] *Id.* at 448 ("[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented."). *See generally* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confession Evidence: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 53–56 (2004).

[90] *Miranda*, 384 U.S. at 448–55; *see also* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 407 (1999); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1526 (2008) [hereinafter Weisselberg, *Mourning* Miranda]. *See generally* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 119 n.48 (1998) [hereinafter Weisselberg, *Saving* Miranda] (describing the research conducted by the Supreme Court librarian to determine the representativeness of interrogation manuals).

[91] *See Miranda*, 384 U.S. at 449 n.9 ("The methods described in Inbau & Reid, Criminal Interrogation and Confessions . . . have had rather extensive use among law enforcement agencies . . . .").

[92] *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 111–12 (2008) [hereinafter LEO, POLICE INTERROGATION AND AMERICAN JUSTICE]. *See generally* Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 89 J. CRIM. L. & CRIMINOLOGY 1465 (1999) (contrasting the interrogation tech-

uity provides a research framework.[93] *Miranda* noted that isolating a suspect to eliminate psychological supports and using interrogation tactics to overcome resistance creates the compulsive pressures of custodial interrogation.[94]

A. Interrogation Tactics

Once police conclude a suspect is probably guilty, they build the strongest case they can for the prosecution. The police try to outsmart the suspect, overcome his resistance, and elicit an incriminating statement.[95] After the suspect waives his or her rights, police may use the same strategies they used prior to *Miranda* to obtain a confession.[96]

1. The Reid Method: Accusatory Interrogation

Social psychologists describe the Reid Method's manipulations as maximization and minimization techniques.[97] Maximization tactics "convey the interrogator's rock-solid belief that the suspect is guilty and that all denials will fail. Such tactics include making an accusation, overriding objections, and citing evidence, real or manufactured, to shift

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niques taught in third edition of Inbau and Reid's CRIMINAL INTERROGATION AND CONFESSIONS with the demands of modern confession law). Reid instructors have trained more than 500,000 investigators, *Interviewing & Interrogation*, JOHN E. REID & ASSOCS., *available at* http://www.reid.com/training_programs/interview_overview.html (last visited Oct. 4, 2013), and the Reid Method is the most widely taught interrogation technique in North America. Lesley King & Brent Snook, *Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies*, 36 CRIM. JUST. & BEHAV. 674, 674 (2009).

[93] Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note11, at 50–51; *see e.g.* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 10–21; King & Snook, *supra* note 92, at 675–80; Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 293 (1996) [hereinafter Leo, *Inside the Interrogation Room*].

[94] *Miranda*, 384 U.S. at 449–55; *see also* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 10–20 ("[Inbau and Reid] introduced a nine-step method aimed at breaking down the resistance of reluctant suspects and making them confess, referred to as the 'Reid Technique'."); *id.* at 30–31 ("Social isolation . . . can powerfully influence the decision-making of suspects and the reliability of their statements."); Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 15 ("[T]he goal of interrogation is to alter a suspect's decision making by increasing the anxiety associated with denial and reducing the anxiety associated with confession . . . ."); Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 222 (1997) [hereinafter Kassin, *The Psychology of Confession Evidence*] ("Against the backdrop of a physical environment that promotes feelings of social isolation, sensory deprivation, and a lack of control, Inbau et al. . . . described in vivid detail a nine-step procedure designed to overcome the resistance of reluctant suspects.").

[95] LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 23.

[96] *See* Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 224 ("[C]ommonly used [interrogation] techniques circumvent laws designed to prohibit the use of coerced confessions.").

[97] *See* Kassin & Gudjonsson, *supra* note 89, at 45 (discussing maximization and minimization techniques used in police interrogations).

the suspect's mental statement from confident to hopeless."[98] Minimization techniques "provide the suspect with moral justification and face-saving excuses for having committed the crime in question. Using this approach, the interrogator offers sympathy and understanding; normalizes and minimizes the crime."[99] Psychologists contend that many Reid techniques imply threats or promise leniency.[100]

The Reid Method claims that interrogators can use verbal and non-verbal cues—behavioral symptom analysis—to distinguish between guilty and innocent suspects and to question them accordingly.[101] It prescribes a nine-step sequence to increase stress, weaken resistance, provide face-saving rationales, and encourage confessions.[102] The Reid Method does not modify interrogation tactics to accommodate developmental differences between adolescents and adults.[103] It teaches police

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[98] Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 12.

[99] *Id.* at 14.

[100] *See id.* at 12 ("[I]t is particularly common for interrogators to communicate as a means of inducement, implicitly or explicitly, a threat of harsher consequences in response to the suspect's denials." (citation omitted)); Kassin & Gudjonsson, *supra* note 89, at 43 ("[T]he sympathetic interrogator morally justifies the crime, leading the suspect to infer he or she will be treated leniently and to see confession as the best possible means of 'escape.'").

[101] *See* Meyer & Reppucci, *Police Practices & Perceptions*, *supra* note 82, at 760 (describing how Reid Method interrogation begins with a "Behavioral Analysis Interview," where police decide if an interviewee is a "prime suspect" by observing whether the interviewee exhibits verbal and non-verbal deceptive behaviors such as "gaze aversion, unnatural body postures," "touching and scratching," "lack of confidence, and delays in response"). Psychologists question the theoretical underpinnings and scientific validity of the Reid Method. *See id.* ("Unfortunately, . . . many of these verbal and non-verbal behaviors have little discriminant function in the identification of liars versus truth-tellers." (citation omitted)); *see also* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 12 ("Inbau and [Reid] have not published any data or studies on their observations. In other words, they have not collected any empirical data to scientifically validate their theory and techniques.").

[102] *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 212–16 (4th ed. 2004); LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 119 ("[P]sychological interrogation . . . is a strategic, multistage, goal-directed, stress-driven exercise in persuasion and deception, one designed to produce a very specific set of psychological effects and reactions in order to move the suspect from denial to admission."); *see also* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 10–21 (presenting the bases of the Reid Method: "[b]reaking down denials and resistance" and "[i]ncreasing the suspect's desire to confess"); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 452 (1987) [hereinafter Schulhofer, *Reconsidering* Miranda] (arguing that the tensions police create in the custodial environment are designed to overcome a suspect's reluctance to talk).

[103] *See* Meyer & Reppucci, *Police Practices & Perceptions*, *supra* note 82, at 761; Owen-Kostelnik et al., *supra* note 17, at 290; N. Dickon Reppucci et al., *Custodial Interrogation of Juveniles: Results of a National Survey of Police*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 67, 69 (G. Daniel Lassiter & Christian A. Meissner eds., 2010).

the interrogation "principles . . . discussed with respect to adult suspects are just as applicable to the younger ones."[104]

2. PACE and PEACE: Investigative Interview

Interrogations in the England and Wales are less accusatory and designed to elicit information rather than to secure a confession.[105] The Police and Criminal Evidence Act (PACE 1984) required police to record interrogations.[106] The mnemonic PEACE—"Planning and Preparation," "Engage and Explain," "Account," "Closure," and "Evaluate"—describes the five components of the British interview approach.[107] Police, psychologists, and lawyers collaborated to develop a less confrontational, information-gathering method of interviewing.[108] Whereas Reid

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[104] INBAU ET AL., *supra* note 102, at 298. Reid-trained police view adolescents to be as competent as adults and use similar tactics with both. *See* Meyer & Reppucci, *Police Practices & Perceptions*, *supra* note 82, at 761; *see also* Jessica O. Kostelnik & N. Dickon Reppucci, *Reid Training and Sensitivity to Developmental Maturity in Interrogation: Results from a National Survey of Police*, 27 BEHAV. SCI. & L. 361, 370–74 (2009) [hereinafter Kostelnik & Reppucci, *Reid Training and Sensitivity*] (reporting that Reid-trained officers are less sensitive to developmental differences than are non-Reid trained officers and use with younger offenders the same techniques used with adults: isolation, psychological manipulation, and deceit).

[105] *See* Ray Bull & Becky Milne, *Attempts to Improve the Police Interviewing of Suspects*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 181, 185–86 (G. Daniel Lassiter ed., 2004) [hereinafter Bull & Milne, *Attempts to Improve the Police Interviewing of Suspects*]; Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 28. *See generally* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10; Ray Bull & Stavroula Soukara, *Four Studies of What Really Happens in Police Interviews*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 81 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) [hereinafter Bull & Soukara, *Four Studies*].

[106] Police and Criminal Evidence Act, 1984, c. 60, § 60; *see* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 73–76; GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 22 ("Since 1991 there has been mandatory tape-recording [in England and Wales] of any person suspected of an indictable offence who is interviewed under caution." (citation omitted)); Bull & Soukara, *Four Studies, supra* note 105, at 81–82.

[107] MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 159. The PEACE approach encourages officers to establish rapport, to obtain a free narrative, to use open rather than leading questions, and then provide meaningful closure by summarizing information and answering any questions. *See id.* at 157–67; Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 28.

[108] *See* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 53; *see also* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 157–67 (describing the goal of the interview as to gather as much information as possible to create an accurate factual picture, rather than simply to elicit a confession). PEACE techniques differ substantially from the Reid Method. Investigators conduct interviews as a search for truth rather than a quest for a confession, and the approach prohibits the use of trickery. *See* Bull & Soukara, *Four Studies, supra* note 105, at 81–83; S. Soukara et al., *What Really Happens in Police Interviews of Suspects? Tactics and Confessions*, 15 PSYCHOL. CRIME & L. 493, 500 (2009) [hereinafter Soukara et al., *What Really Happens*].

Advocates of the PEACE approach criticize Reid Method as "contrary to the principles of good investigative interviewing." Bull & Milne, *Attempts to Improve the Police Interviewing*

training equates juveniles and adults, PACE recognizes youths' vulnerabilities and requires the presence of an "appropriate adult" at a juvenile's interview.[109]

Minnesota interrogation practices reflect both Reid and PEACE elements. The Minnesota Supreme Court, in *State v. Scales*, required police to record custodial interviews,[110] and police trainers developed less confrontational strategies to question suspects.[111] Training protocols advocate use of open-ended questions to obtain a free narrative and to elicit information rather than to conduct the "recorded interview with the goal of getting a confession."[112]

B. Police Interrogation: Empirical Research

In the decades since *Miranda*, psychologists, criminologists, and legal scholars have conducted remarkably few empirical studies of how

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of Suspects, *supra* note 105, at 182. Reid tactics seek to control and manipulate the suspect to extract a confession. *See id.* The accusatorial approach is guilt-presumptive and confrontational and attempts to elicit statements that confirm police hypotheses about the suspect's guilt. *See id.* By contrast, the information-gathering method emphasizes rapport between the questioner and suspect and seeks the suspect's version of events. *See* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 157–58; Bull & Soukara, *Four Studies, supra* note 105, at 84–87. It uses open-ended questions to gather information, rather than simply to confirm a pre-existing assumption. *See* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 22–24; Bull & Soukara, *Four Studies, supra* note 105, at 84–87.

[109] *See* COLIN CLARKE & REBECCA MILNE, NATIONAL EVALUATION OF THE PEACE INVESTIGATIVE INTERVIEWING COURSE 32 (2001); *see also* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 77 (discussing youths' vulnerabilities during police questioning); Ray Bull, *The Investigative Interviewing of Children and Other Vulnerable Witnesses: Psychological Research and Working/Professional Practice*, 15 LEGAL & CRIMINOLOGICAL PSYCHOL. 5, 9 (2010) [hereinafter Bull, *Investigative Interviewing of Children*].

[110] 518 N.W.2d 587, 592 (Minn. 1994).

[111] *See* NEIL NELSON, STRATEGIES FOR THE RECORDED INTERVIEW (2006) (on file with author) (describing, as part of a police interrogation training program, various aspects of interrogation and questioning). "[T]he interview is used to gather information, not look for a confession. . . . Your goal is to remove the adversarial nature of the interview." *Id.* at 17. Minnesota trainers teach police to avoid minimization tactics because accusatorial tactics do not play well on tape when reviewed by fact-finders. *Id.* at 11–12. The purpose of the interview is "[t]o gather information (not to get a confession) as part of a thorough and exhaustive investigation." *Id.* at 4.

[112] *Id.* at 10. Neutral, open-ended questions and a free narrative give the suspect an opportunity to provide information without putting her on the defensive. The strategy emphasizes rapport with the suspect: "[be] friendly, receptive, non-adversarial. Be polite and respectful; doing so will help enforce the non-adversarial atmosphere and will demonstrate that you expect politeness and respect in return." *Id.* at 18. The officer attempts to develop a partnership with the suspect:

> Set yourself up as the simple and impartial carrier of facts. You are the vehicle that takes the story to the higher power—the people who decide the suspect's fate (e.g., charging attorney, judge, jury). . . . Say that you are not the person who decides that the suspect's story is unworthy. Continually reinforce your role as partner and messenger, rather than decision-maker.

Id. at 18–19.

police question people.[113] Research in the late-1960s evaluated whether police warned suspects and how warnings affected their ability to obtain confessions.[114] However, only the 1967 Yale–New Haven study actually observed police question suspects.[115] In the mid-1990s, Richard Leo conducted the only field study of interrogation in the United States.[116] Criminologists and legal scholars have used indirect methods to study tapes and transcripts of interrogation.[117] Analyses of PACE recordings

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[113] *See* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 4–5; Leo, *Inside the Interrogation Room*, *supra* note 93, at 267–68 ("[W]e know scant more about actual police interrogation practices today than we did in 1966 when Justice Earl Warren lamented the gap problem in *Miranda v. Arizona*."). *See generally* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 631 (1996) [hereinafter Leo, *The Impact of* Miranda *Revisited*] ("[E]verything we know to date about the impact of *Miranda* comes from research that was undertaken when *Miranda* was still in its infancy."); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 840 (1996) (decrying the dearth of knowledge about police interrogations).

[114] After *Miranda*, studies measured police compliance and the impact of warnings on confession rates. *See, e.g.*, Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L. J. 1, 11–34 (1970) (interviewing jailed suspects about their knowledge and understanding of *Miranda* warnings); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1348–50 (1968); Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) ("*Miranda* has not impaired significantly the ability of the law enforcement agencies to apprehend and convict the criminal."); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 326–27 (1973) (suggesting *Miranda* warnings have a marginal impact on collateral functions of interrogation, such as implicating accomplices).

Most researchers concluded that *Miranda* had a minimal effect on rates of confession and conviction or on interrogation tactics. *See, e.g.*, Stephen Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 547 (1996) [hereinafter Schulhofer, Miranda*'s Practical Effect*] ("*Miranda*'s empirically detectable net damage to law enforcement is zero."); George C. Thomas III, *Is* Miranda *a Real-World Failure? A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 837 (1996) [hereinafter Thomas, *Is* Miranda *a Real-World Failure?*] ("[T]here is no proof of a *Miranda* effect on the confession rate."). However, some insisted that *Miranda* adversely affected police effectiveness. *See*, *e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 394, 417 (1996) [hereinafter Cassell, Miranda*'s Social Costs*] (arguing *Miranda*'s costs include not just confessions suppressed because of *Miranda* violations, but also "lost confessions," i.e., statements not obtained because *Miranda* warnings dissuade suspects from talking).

[115] *See* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1533–58, 1613 (1967) (observing police interrogation of suspects and concluding "[n]ot much has changed after *Miranda*").

[116] In 1992–93, Richard Leo observed 122 interrogations at a major urban police department and reviewed sixty videotaped interrogations performed by two other police departments. Leo, Miranda*'s Revenge*, *supra* note 11, at 263; Leo, *Inside the Interrogation Room*, *supra* note 93, at 268.

[117] *See, e.g.*, FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 6 (analyzing 307 interrogation tapes and transcripts); Cassell & Hayman, *supra* note 113, at 851–52 (attending prosecutor charge screening sessions and interviewing police about interrogations); Feld, *Juveniles' Competence to Exercise* Miranda *Rights*, *supra* note 11, at 62–63 (analyzing 66

in England have generated a substantial body of empirical research.[118] Psychologists Saul Kassin, Gisli Gudjonsson, and associates have conducted extensive laboratory research for decades, although these studies lack the external validity of custodial interrogation.[119] Studies of false confessions provide another glimpse into how police interrogate suspects and highlight the vulnerability of younger suspects.[120]

III. DATA AND METHODOLOGY

In 1994, the Minnesota Supreme Court in *State v. Scales* used its supervisory power to regulate admissibility of evidence and required po-

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tapes and transcripts of interrogation of sixteen- and seventeen-year-old felony delinquents in one county in Minnesota); Feld, *Police Interrogation of Juveniles*, *supra* note 11, at 248–49; King & Snook, *supra* note 92, at 674 (analyzing forty-four recorded criminal interrogations in Canada to assess the prevalence of Reid Method tactics); Weisselberg, *Mourning* Miranda, *supra* note 90, at 1521; Weisselberg, *Saving* Miranda, *supra* note 90, at 134–40 (analyzing police training manuals).

118 *See* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 75–76; *see, e.g.*, GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS, *supra* note 80, at 59–60, 79–80 (employing sophisticated quantitative and qualitative methods to code and analyze tapes and transcripts of interrogations); ROGER EVANS, ROYAL COMM'N ON CRIMINAL JUSTICE, THE CONDUCT OF POLICE INTERVIEWS WITH JUVENILES (1993) [hereinafter EVANS, THE CONDUCT OF POLICE INTERVIEWS] (analyzing PACE transcripts of police interviews of juveniles); Bull & Soukara, *Four Studies, supra* note 105, at 84–93 (analyzing audio tapes of interrogations to see whether interviewers employed the PEACE approach and which tactics helped the interviewer obtain a confession); Roger Evans, *Police Interrogations and the Royal Commission on Criminal Justice*, 4 POLICING & SOC'Y: INT'L J. RES. & POL'Y 73, 79–80 (1994); John Pearse et al., *Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession*, 8 J. COMMUNITY & APPLIED SOC. PSYCHOL. 1 (1998) [hereinafter Pearse et al., *Police Interviewing and Psychological Vulnerabilities*].

119 *See, e.g.*, Saul M. Kassin, *On the Psychology of Confessions: Does* Innocence *Put* Innocents *at Risk?*, 60 AM. PSYCHOL. 215, 218–21 (2005) [hereinafter Kassin, *On the Psychology of Confessions*] (summarizing a number of his laboratory studies and simulations of police interrogation); Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 16–17; Kassin, *The Psychology of Confession Evidence, supra* note 94, at 223 (describing "maximization" and "minimization" techniques); Kassin & Gudjonsson, *supra* note 89, at 33.

120 *See*, *e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 279 (2011) [hereinafter GARRETT, CONVICTING THE INNOCENT] (reporting false confessions in 16% of wrongful convictions); BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Drizin & Leo, *The Problem of False Confessions*, *supra* note 81 at 902 (noting that false confessions occur in about 14–25% or more of cases of wrongful convictions and DNA exonerations); Garrett, *Judging Innocence*, *supra* note 39, at 66, 89 (reporting that of 200 DNA exonorees, 11% were juveniles and many wrongful convictions contained false confessions); Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L & CRIMINOLOGY, 523, 545 (2005) (analyzing 340 criminal exonerations between 1989 and 2003 and reporting that 42% of juveniles gave false confessions); Richard A. Leo & Richard J. Ofshe, *The Consequence of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Integration*, 88 J. CRIM. L. & CRIMINOLOGY, 429, 429 (1998) ("[P]olice-induced false confession ranks amongst the most fateful of all official errors.").

lice to record custodial interrogations.[121] *Scales* held that "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."[122] Nearly two decades later, just over a dozen states require police to record interrogations.[123]

This study analyzes *Scales* tapes and transcripts, police reports, juvenile court petitions, and sentences associated with the felony offense for which police interrogated youth. Delinquency trials of sixteen- and seventeen-year-old youths charged with felony offenses are public proceedings.[124] County attorneys in Minnesota's four largest counties allowed me to search their closed files of sixteen- and seventeen-year-old youths charged with a felony[125] and

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[121] 518 N.W.2d 587, 592 (Minn. 1994).

[122] *Id.* The Minnesota court in *Scales* adopted the reasoning of the Alaska Supreme Court in *State v. Stephan*, 711 P.2d 1156, 1159 (Alaska 1985):

> A recording requirement . . . provides a more accurate record of a defendant's interrogation and thus will reduce the number of disputes over the validity of *Miranda* warnings and the voluntariness of purported waivers. In addition, an accurate record makes it possible for a defendant to challenge misleading or false testimony and, at the same time, protects the state against meritless claims. Recognizing that the trial and appellant [sic] courts consistently credit the recollections of police officers regarding the events that take place in an unrecorded interview, the [*Stephan*] court held that recording "is now a reasonable and necessary safeguard . . . ." A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.

Id. at 591 (citation omitted).

[123] *See* Thomas P. Sullivan, *The Wisdom of Custodial Recordings*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS, CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 127, 127–28 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) [hereinafter Sullivan, *The Wisdom of Custodial Recordings*]; *see, e.g.*, *In re* Jerrell C.J., 699 N.W.2d 110, 123 (Wis. 2005); *see also* GARRETT, CONVICTING THE INNOCENT, *supra* note 120, at 341 n.23 (listing statutes and regulations that require recording of interrogations); THOMAS P. SULLIVAN, NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS app. A1–A10 (2004) [hereinafter SULLIVAN, POLICE EXPERIENCES] (listing police departments that record custodial interrogations); Allison D. Redlich & Steven Drizin, *Police Interrogation of Youth*, *in* THE MENTAL HEALTH NEEDS OF YOUNG OFFENDERS 49, 73 (Carol L. Kessler & Louis James Kraus eds., 2007) [hereinafter Redlich & Drizin, *Police Interrogation of Youth*]; Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175, 176 (2006) [hereinafter Sullivan, *The Time Has Come*].

[124] MINN. STAT. § 260B.163(1)(c)(2) (2005). At the request of the County Attorneys, this study focused on older felony delinquents to obviate some privacy concerns. However, many files included information about younger juveniles—e.g., co-offenders—whose identity remained confidential.

[125] Police conducted most of the interrogations in this study between about 2003 and 2006. Anoka, Dakota, Hennepin, and Ramsey Counties are the four most populous of Minnesota's 87 counties and account for almost half (47.6%) the state's population and nearly half (45.6%) the delinquency petitions filed. See FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 272, for a more complete description of the methodology and data summarized here.

to copy those in which police interrogated or juveniles invoked *Miranda*.[126]

I analyzed 307 files of juveniles charged with felonies that invoked or waived *Miranda*. I reviewed police reports and other documents to learn about the crime, the context of interrogation, and evidence police possessed when they questioned a suspect. I coded each file to analyze where, when, and who was present at an interrogation, how police administered *Miranda*, whether juveniles invoked or waived, how officers interrogated them, how they responded, and how invoking *Miranda* affected case processing.[127] The 307 files reflect some sample selection bias because they are charged cases, serious delinquents, more likely to go to trial, and perhaps include more juveniles who waived *Miranda*.[128] Despite these caveats, the study includes a range of serious crimes and analyzes the largest number of routine felony interrogations ever aggregated in the United States.[129] More than 150 officers from more than

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[126] The court orders authorized access to juvenile courts' files and included confidentiality stipulations to protect juveniles' identity. The orders provided:

> Prof. Barry C. Feld shall retain personal custody of all edited files and no one else shall have access to those files. He shall personally transcribe all tapes not already transcribed and report his research findings only in ways that preserve the confidentiality of the information contained therein.

Order *In re* Request of Professor Barry C. Feld to Access Ramsey County Attorney's Juvenile Delinquency Felony Files (June 1, 2004) (on file with author). I personally transcribed interrogation tapes and coded all of the files to address confidentiality concerns. Confidentiality restrictions precluded use of multiple coders and inter-rater reliability scores.

[127] I obtained, modified, and expanded codebooks used in prior interrogation research. *E.g.*, Leo, *Inside the Interrogation Room*, *supra* note 93; John Pearse & Gisli H. Gudjonsson, *The Identification and Measurement of "Oppressive" Police Interviewing Tactics in Britain*, *in* THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 75 (2003); Wald et al., *supra* note 115.

[128] The sample includes only juveniles whom prosecutors charged with a felony and for whom an interrogation or invocation record exists. Other evidence being equal, prosecutors are more likely to charge suspects who waive than those who invoke *Miranda* because they have plea bargain advantage. Police made these *Scales* recordings during custodial interrogation, and the files do not include unrecorded, non-custodial interviews. The felony cases in which prosecutors charged that contained transcripts may differ in some ways from those in which juveniles invoked *Miranda* or which police did not forward for charging, those cases that prosecutors did not charge, or those that they charged but which did not contain transcripts. Minnesota excludes cases of sixteen- or seventeen-year old youths charged with Murder 1 from juvenile court jurisdiction, Minn. Stat. 260B.007(6)(B) (2011); *see also* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1051–57 (1995), and prosecutors filed transfer motions against some other youths charged with the most serious offenses. Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 462–468 (1996) [hereinafter Podkopacz & Feld, *The End of the Line*]. As a result, the sample under-represents some of the most serious crimes: murder, criminal sexual conduct and armed offenses.

[129] *See generally* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 397 (2007) [hereinafter Kassin et al., *Police Interviewing and Interrogation*] ("In an era of electronic re-

fifty agencies interviewed these suspects.[130] I interviewed police, prosecutors, defense lawyers, and juvenile court judges to elicit their views, learn from their experience, and validate my findings.[131]

IV. REAL INTERROGATION

These analyses focus on three aspects of routine felony interrogation. After describing characteristics of the youths in this study, I examine youths who invoked or waived *Miranda*. I analyze how police questioned the vast majority of youths who waived. Finally, I focus on how long police questioned them and the outcomes of interrogations.

A. *Characteristics of Juveniles Whom Police Interrogated*

As Table 1 indicates, males comprised the vast majority (89.3%) of the 307 youths whom police questioned. Prosecutors charged more than half (55.0%) with felony property offenses—burglary, larceny, and auto-theft. They charged nearly one-third (31.6%) the youths with crimes against the person—murder, armed robbery, aggravated assault, and criminal sexual conduct. They charged the remaining youths with drug crimes (6.2%), firearm offenses (5.5%), and other felonies (1.6%).

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cording, the ideal way for scholars to measure and study actual police practices and their outcomes . . . is to observe large numbers of videotaped interrogations . . . involving a full range of crimes.").

[130] The variability of interrogation strategies reflect officers' training and experience, on-the-job learning, and personal styles rather than scientifically evaluated techniques. *See* Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS AND ENTRAPMENT 37 (G. Daniel Lassiter ed., 2004); Allison D. Redlich & Christian A. Meissner, *Techniques and Controversies in the Interrogation of Suspects: The Artful Practice Versus Scientific Study*, *in* PSYCHOLOGICAL SCIENCE IN THE COURTROOM: CONSENSUS AND CONTROVERSY 124 (Jennifer L. Skeem et al. eds., 2009). We do not know how community contexts, police department cultures, or interrogation practices vary or how those variations affect suspects' waivers or invocations. *See* EVANS, THE CONDUCT OF POLICE INTERVIEWS, *supra* note 118, at 21–22. Police likely adjusted their interrogation tactics to accommodate *Scales*' recording requirement. *See, e.g.*, NELSON, *supra* note 111, at 11–12 ("Before *Scales*, minimizing was a standard technique, part of your work product; cops used it as a tactic to get bad guys to confess; since *Scales*, a defense attorney can attack every misleading thing you say to the suspect because it has been recorded.").

[131] I interviewed nineteen police officers, six juvenile prosecutors, nine juvenile defense lawyers, and five juvenile court judges from both urban and suburban counties. The police officers averaged 18.4 years of professional experience; the prosecutors averaged 14.5 years; the public defenders averaged 13.3 years; and the juvenile court judges, 16 years. I interviewed sergeants, detectives or investigators, and school resource officers, of the ranks and specialties that conduct most custodial interrogations of juveniles. The recorded interviews lasted between 30 and 80 minutes, averaged about 45 minutes, and provided thick descriptions of the process. I conducted saturation interviews until no new data, themes, or conceptual relationships emerged. See FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 280–81, for a more complete description of the methodology.

TABLE 1
CHARACTERISTICS OF JUVENILES INTERROGATED

		N	%
Gender			
	Male	274	89.3
	Female	33	10.7
Age			
	16	171	55.7
	17	132	43.0
	18	4	1.3
Race			
	White	160	52.1
	Black	107	34.9
	Asian	17	5.5
	Hispanic	15	4.9
	Native American	5	1.6
Offense			
	Property[1]	169	55.0
	Person[2]	97	31.6
	Drugs[3]	19	6.2
	Firearms[4]	17	5.5
	Other[5]	5	1.6
Prior Arrests			
	None	94	30.6
	Status	47	15.3
	Misdemeanor	70	22.8
	One Felony	43	14.0
	Two or More Felonies	37	21.1
Prior Juvenile Court Referrals			
	None	126	43.0
	One or More	167	57.0
Court Status at Time of Interrogation			
	None	142	46.3
	Prior Supervision	61	19.9
	Current Probation/ Parole	75	24.4
	Current Placement	17	5.5

[1]Crimes against property include: burglary, theft of a motor vehicle, arson, receiving stolen property, possession of stolen property, possession of burglary tools, criminal damage to property, theft, forgery, theft by swindle, and credit card fraud.
[2]Crimes against the person include: aggravated and simple robbery, aggravated assault, murder and attempted murder, criminal vehicular homicide, criminal sexual conduct, and terroristic threats.
[3]Drug crimes include: sale or possession of a controlled substance—crack, methamphetamine, marijuana, codeine, ecstasy, heroin—possession of a forged prescription, and tampering with anhydrous ammonia equipment (methamphetamine).
[4]Firearm crimes include: possession of a firearm, discharge of a firearm, theft of a firearm, possession of an explosive device, and drive-by shooting.
[5]Other offenses include fleeing from a police officer.

Nearly one-third (30.6%) of the juveniles had no prior arrests. Police previously had arrested more than one-third for status offenses (15.3%) or misdemeanors (22.8%). About one-third of these youths (35.1%) had one or more prior felony arrests. More than half (57%) of these youths had prior juvenile court referrals. Nearly one-third (29.9%) were under juvenile court supervision—probation, placement, or parole status—when police questioned them. About half of the youths were white (52.1%) and the remainder (47.9%) members of ethnic and racial minority groups—Black, Hispanic, Native American, and Asian. Black juveniles accounted for more than one-third (34.9%) of the sample. Compared with the counties' sixteen- and seventeen-year-old felony caseloads, this group included more males and youths charged with property and violent crimes, fewer charged with drug offenses, and more with prior court referrals.[132]

B. To Waive or Not to Waive: That is the Question

When police take suspects into custody and interrogate them, *Miranda* requires police to warn them to dispel the inherent coercion of custodial questioning.[133] Police had formally arrested the vast majority (86.6%) of these juveniles prior to questioning, and made a *Scales* recording of all of these interviews.[134] Police detained nearly two-thirds (61.7%) of the youths whom they questioned and released the others to their parents.[135] More than half (55.7%) of interrogations took place in police stations and another quarter (23.1%) at juvenile detention centers.[136] Thus, police questioned more than three-quarters (78.8%) of youths in interrogation rooms.[137] Nearly one-tenth (8.1%) of interrogations took place in a police car at the place of arrest and the others in juveniles' homes (6.2%) or schools (6.2%).[138]

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132 I compared characteristics of these interrogated youths with older youths charged with felonies in the counties. Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography*, 9 CRIMINOLOGY & PUB. POL'Y 327, 340–42 (2010); Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor at Disposition*, 27 JUST. Q. 713, 726 (2010).

133 *Miranda* assumed that the coercive pressures of interrogation arose when a person was in custody, "deprived of his freedom of action in any significant way," and questioned. Miranda v. Arizona, 384 U.S. 436, 444 (1966); *see also* Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (defining interrogation).

134 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 62.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

1. *Miranda* Framework: Custody + Interrogation = Warning

Decades of court-approved formulae have reduced *Miranda* to a litany that officers read from a card or waiver form.[139] Researchers report many versions of *Miranda* whose length and complexity vary considerably.[140] Although some jurisdictions use a juvenile *Miranda* warning, paradoxically these may be more complex than adult versions.[141] Every juvenile in this study received a proper *Miranda* warning and one-fifth (19.5%) of the files contained an initialed and signed warning form.

Although *Miranda* requires police to warn suspects, officers have no incentive to encourage them to invoke their rights. One of *Miranda*'s root contradictions is that "it assumes that these suspects can receive adequate advice and counseling about their constitutional rights from adversaries who would like nothing more than to see those rights surrendered."[142] This inherent contradiction requires officers to engage in a quasi-confidence game—"systematic use of deception, manipulation, and the betrayal of trust in the process of eliciting a suspect's confession."[143]

Police used several tactics to predispose suspects to waive *Miranda* without alerting them to its significance or consequences—admonishing her to tell the truth, minimizing the warning, or telling the suspect that it is "his only opportunity to tell his side of the story."[144] An interrogator must establish rapport, develop trust, and maintain a positive relationship to obtain a waiver.[145] The initial stages of an interrogation often provide

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139 The Court has disavowed any rigid *Miranda* formulation as long as a warning conveys the substance of the suspect's rights. Duckworth v. Eagan, 492 U.S. 195, 202 (1988).

140 Although warnings necessarily convey the basic constitutional information, one survey of 560 *Miranda* warnings reported 532 unique wordings. Rogers et al., *An Analysis of* Miranda *Warnings*, *supra* note 63. A second survey of 385 warnings reported 356 unique versions. Rogers et al., *The Language of* Miranda *Warnings*, *supra* note 64, at 126; *see also* Rogers, *A Little Knowledge*, *supra* note 72, at 778–79 (examining variation in length and reading level of *Miranda* warnings).

141 *See* Rogers et al., *Comprehensibility and Content*, *supra* note 64, at 71 (reporting that warnings are longer and require higher level of reading ability). Even "dumbed-down" versions of *Miranda* are "problematic for younger adolescents, ages 13 to 15, who lack sufficient reading comprehension." Rogers et al., *Comprehensibility and Content*, *supra* note 64, at 72. Vocabulary and concepts make it more difficult for youth to understand an oral warning than a written one. *See* Rogers, *A Little Knowledge*, *supra* note 72, at 780.

142 Patrick A. Malone, *"You Have the Right to Remain Silent":* Miranda *After Twenty Years*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 75, 84–85 (Richard A. Leo & George C. Thomas III eds., 1998).

143 Leo, Miranda*'s Revenge*, *supra* note 11, at 261. Leo compared an officer eliciting a *Miranda* waiver and confession to a confidence man manipulating his victim "through false representations, artifice, and subterfuge." *Id.* at 265.

144 *Id.* at 272.

145 INBAU ET AL., *supra* note 102, at 91.

an opportunity to soften-up a suspect and allay his fears.[146] The Court in *Pennsylvania v. Muniz* allowed police to ask booking questions before they warn,[147] and these conversations may predispose suspects to waive.[148] In about half of the cases (52.8%), police gave the *Miranda* warning immediately after identifying the suspect.[149] In the other half of cases (47.2%), police first asked booking questions—name, age and date of birth, address and telephone number, grade in school, and the like—and sometimes used juveniles' responses to engage in casual conversations, to put youths at ease, and to accustom them to answering questions.[150]

2. Negotiating *Miranda* Warnings

Police can comply with *Miranda and* predispose suspects to waive.[151] They may nod while reading the warning to cue the suspect to agree or tell the person that the interview provides his only opportunity to tell his story.[152] They may warn in a way that obscures their adversarial relationship with the suspect.[153] Training manuals instruct police to blend the warning into the conversation, to describe it as a formality,

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[146] In discussing the role of the interrogator, Leo notes, "They must first establish a rapport with him. The interrogator asks background questions, engages in small talk, and may even flatter or ingratiate the suspect to create the illusion of a nonthreatening, non-adversarial encounter." LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 26.

[147] 496 U.S. 582, 601–02 (1990) (opinion of Brennan, J.) (recognizing a "booking exception" to *Miranda*); *id.* at 608 (Rehnquist, C.J., concurring in the result in part) (finding that a suspect's responses to booking questions were not testimonial); *see also* Rhode Island v. Innis 446 U.S. 291, 301 (holding that police only need give warnings before taking "words or actions . . . [they] should know are reasonably likely to elicit an incriminating response").

[148] *See* Leo, *The Impact of* Miranda *Revisited*, *supra* note 113, at 661 ("[T]he detective . . . makes pleasant small talk with the suspect . . . as he goes through the routine booking questions . . . to disarm the suspect, to lower his anxiety levels, to improve his opinion of the detective and to create a social psychological setting conducive both to a *Miranda* waiver as well as to subsequent admissions."); Weisselberg, *Mourning* Miranda, *supra* note 90, at 1562; *see also* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 122; Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH. L. REV. 1239, 1258–59 (2007) (describing the difficulty courts have ruling on deceptive police conduct that occurs after *Miranda* warnings have been given but before suspects have clearly waived their rights).

[149] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 77.

[150] *Id.* at 77–78. For example, a question about a youth's grade in school might lead to a side conversation about favorite subjects, academic progress, or the like.

[151] LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 126–30; Weisselberg, *Mourning* Miranda, *supra* note 90, at 1548 ("Officers sometimes use 'softening up' tactics—such as conditioning suspects to waive their rights or describing the evidence against them and making their situation appear hopeless—before giving warnings or obtaining waivers.").

[152] Redlich & Drizin, *Police Interrogation of Youth*, *supra* note 123, at 65.

[153] Leo & White, *supra* note 90, at 432; *see also* WELSH S. WHITE, *Miranda*'s Waning Protections: Police Interrogation Practices after Dickerson 81–82 (2003) [hereinafter WHITE, *Miranda*'s Waning Protections].

or to summarize the evidence, which a suspect can explain only if he waives.[154] *Dickerson v. United States* noted that *Miranda* is "embedded in routine police practice to the point where the warnings have become part of our national culture."[155] Officers regularly refer to suspects' familiarity with *Miranda* from television and movies.[156] *Miranda*'s cultural ubiquity may detract from youths' distinguishing its protections from background noise or meaningless ritual.[157]

Police conveyed to juveniles the value of talking—"telling their story" and "telling the truth"—before they gave a warning.[158] They characterized it as an administrative formality to complete before the suspect can talk.[159] They sometimes referred to it as "paperwork" to emphasize its bureaucratic quality.[160] A waiver form provides a vehicle to convert *Miranda* into a bureaucratic exercise.[161] Officers sometimes preceded the warning with a recital of evidence against a youth, which created a pressure to waive and explain it.[162]

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154 *See* Weisselberg, *Mourning* Miranda, *supra* note 90, at 1562.

155 530 U.S. 428, 430 (2000); *see* Leo & White, *supra* note 90, at 434–35 ("Interrogators may also de-emphasize the significance of the *Miranda* warnings by referring to their dissemination in popular American television shows and cinema, perhaps joking that the suspect is already well aware of his rights and probably can recite them from memory."); *see also* Baldwin, *supra* note 1, at 337 ("The [English and Welsh] police caution (like, say, the wording of an oath in court or the Lord's Prayer) can easily take on the form of an empty ritual or an unthinking recitation.").

156 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 81 ("'I'll read it out loud to ya and then I'll let you read it through if you want. It's a Warning and Consent to Speak. Basically you've heard the *Miranda* warning on *Cops* and TV and stuff. I'm gonna read you your rights like you see on TV.'").

157 *See* Naomi E. Sevin Goldstein et al., *Juvenile Offenders' Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions*, 10 ASSESSMENT 359, 366 (2003) ("[D]espite increased exposure to the *Miranda* warnings from depictions in television and movies, juvenile offenders today understand their rights in much the same way adolescents did generations ago.").

158 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 80. One officer prefaced the advisory by saying:

> "I just started investigating yesterday, and what I've learned over the years is there's always two sides to every story and this is your opportunity to give your side of the story. Under law, I have to advise you of your *Miranda*, your legal rights, per *Miranda*, and I'll read those now."

Id.

159 *Id.* ("'Okay, due to the fact that you are in custody, I have to advise you of your *Miranda* rights before I do any questioning. I do want you to listen to these rights, because these are your rights.'").

160 *Id.* ("'We can go through a little bit of paperwork. Let me explain a few things to you, and then if you want to, you can sign right there.'")

161 *Id.* at 81 ("'I need you to initial down the side and when I'm all done reading 'em to ya, sign your full name at the bottom. And that's just for your rights. That's just all this covers right here is your *Miranda* advisory, okay?'").

162 *Id.* at 81–82. In one interview, the officer prefaced *Miranda* with some circumstantial evidence:

3. Waive or Invoke *Miranda*

After police warn a suspect, she may either waive or invoke their rights. The Supreme Court requires suspects to unambiguously invoke their rights to silence and to counsel.[163] Police establish that juveniles understand their rights by reading the warning and then eliciting an affirmative response.[164] After officers have read the rights to a youth, they asked, "Do you understand that?" Juveniles acknowledged the warnings on the record—the *Scales* tape—and, in some departments, signed a *Miranda* form. Every juvenile claimed to understand *Miranda*, and those who waived indicated a willingness to do so.

Despite youths' apparent understanding, researchers question whether juveniles grasp the warning.[165] Juveniles lack adults' competence to understand and appreciate important legal terms.[166] Their appearances of comprehension—a claim to understand, a failure to question, or absence of signs of confusion—may reflect compliance with

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> ["]Let me just explain a few things to you, okay? The CDs you had, the victim identified them as stolen. My partner just went down to the underground garage where the car was broken into. Your shoe prints matched exactly with the prints on the ground. I have a witness that saw you in the underground garage, okay? . . . My whole thing is obviously, you're in possession of stolen property. I wanna know the whole story. If you know some stuff, that's what I wanna know. I want the truth, that's what I want. Let me read something to you real quick, okay?["] [Officer reads *Miranda* warning]

Id.

[163] *See* Davis v. United States, 512 U.S. 452, 459 (1994) (right to counsel); Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (right to silence); *see also* Fare v. Michael C., 442 U.S. 707, 723–24 (1979) (finding that a juvenile's request to speak with his probation officer was not an invocation).

[164] *See* WHITE, *Miranda*'s Waning Protections, *supra* note 153, at 81 ("[T]he government can establish a valid *Miranda* waiver by simply demonstrating that the suspect understood the meaning of the *Miranda* warnings; it need not show that he understood the consequences of waiving . . . .").

[165] GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 38; *supra* notes 67–78 and accompanying text; *see also* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 22, at 1166; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 67, at 356.

[166] *See, e.g.*, Regina M. Huerter & Bonnie E. Saltzman, *What Do "They" Think? The Delinquency Court Process in Colorado as Viewed by the Youth*, 69 DENV. U. L. REV. 345, 353 (1992) (reporting that, of the juvenile defendants interviewed, only half understood their court proceedings); Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 LAW & HUM. BEHAV. 523 (1990) (showing that children often mishear legal terms and do not know the terms' definitions); Trudie Smith, *Law Talk: Juveniles' Understanding of Legal Language*, 13 J. CRIM. JUST. 339 (1985) ("[J]uveniles' grasp of certain legal words and phrases suggests that . . . their understanding of legal language is moderate and is confined to procedural terms. They do not understand technical terms."); Rogers, *A Little Knowledge*, *supra* note 72, at 779 ("In 45.1% of the jurisdictions, younger juvenile offenders . . . could not be expected to have adequate comprehension of [*Miranda*] Component 4 [the right to free counsel] even if they read above their expected grade levels."); *see also supra* notes 64–78 and accompanying text.

authority or passive acquiescence.[167] However, judges rely on objective indicators—*Scales* tapes, signed forms, and police testimony—rather than clinical assessments of subjective understanding to evaluate juveniles' waivers.

a) Waiving *Miranda*

Although *Berghuis v. Thompkins* approved implied waivers,[168] police in this study consistently obtained express waivers.[169] After they asked juveniles whether they understood the warning, they concluded the waiver process, "Bearing in mind that I'm a police officer and I've just read your rights, are you willing to talk to me about this matter?"[170] Another version of the waiver formula ended, "Having these rights in mind, do you wish to talk to us now?"[171]

Miranda reasoned that police must warn a suspect to dispel the inherent coercion of custodial interrogation.[172] Justice White's *Miranda* dissent asked why those same compulsive pressures do not coerce a waiver as readily as an unwarned statement.[173] Research confirms White's intuition that, after police isolate suspects in a police-dominated environment, a warning cannot adequately empower them.[174] Post-*Miranda* studies reported that most suspects waived and confessed. The Yale–New Haven study concluded, "[W]arnings had little impact on sus-

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[167] Bull, *Investigative Interviewing of Children*, *supra* note 109, at 17 ("Vulnerable witnesses can spend much of their lives trying to appear competent and, therefore, may be especially unwilling to admit 'I don't know' . . . ." (citation omitted)); Rogers, *A Little Knowledge*, *supra* note 72, at 781 (arguing that suspects may pretend to understand *Miranda* warnings to avoid appearing ignorant).

[168] Berghuis v. Thompkins, 130 S. Ct. 2250, 2262 (2010); *see also* Weisselberg, *Mourning* Miranda, *supra* note 90, 1582 nn.356–57 (listing decisions upholding admission of statements based on implied *Miranda* waivers in every federal court and appellate courts in forty-two states and the District of Columbia, all predating *Berghuis*).

[169] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 93; *see supra* Table 2.

[170] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 93.

[171] *Id.*

[172] 384 U.S. 436, 458, 476–77 (1966).

[173] Miranda v. Arizona, 384 U.S. 436, 536 (1966) (White J., dissenting) ("The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney.").

[174] *See* Godsey, *supra* note 7, at 528–29 (observing how continued questioning can lead a suspect to "feel harassed" and how, even after a *Miranda* warning has been given and understood, an interviewer may impose penalties on suspects to "provoke speech or punish silence"); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 119–20 (1997) [hereinafter White, *False Confessions and the Constitution*] ("[E]ven when a suspect has nothing to conceal, he may experience anxiety because of the dynamics of the interrogation process."); *see also* Weisselberg, *Mourning* Miranda, *supra* note 90, at 1537–38 ("[I]nterrogation . . . works by increasing suspects' anxiety, instilling a feeling of hopelessness, and distorting suspects' perceptions of their choices by leading them to believe that they will benefit by making a statement.").

pects' behavior."[175] Leo reported that more than three-quarters (78%) of suspects waived their rights.[176] Observers of police–prosecutor charging conferences reported that 83.7% of adult suspects waived.[177] A survey of police estimated that 81% of adult suspects waived.[178] Research in England reported that half to two-thirds of people whom police questioned confessed, a more stringent outcome measure than simply waiving.[179]

Juveniles waive *Miranda* at higher rates than do adults—around 90%.[180] Juveniles' higher waiver rates may reflect lack of understanding, inability to invoke effectively, or less experience or prior involvement with the justice system.[181] Table 2 reports that the vast majority of youths (92.8%) waived *Miranda*.[182] Interviews with justice system personnel confirmed the validity of this finding—nearly all delinquents waived *Miranda*.[183]

People waive and talk for a variety of reasons. From childhood on, parents teach their children to tell the truth—a social duty and a value in itself. The compulsion inherent in the interrogation room amplifies social pressure to speak when spoken to and to defer to authority. Justice personnel suggested that juveniles waived to avoid appearing guilty, to

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175 Wald et al., *supra* note 115, at 1563.

176 Leo, *Inside the Interrogation Room*, *supra* note 93, at 276.

177 Cassell & Hayman, *supra* note 113, at 859.

178 Kassin et al., *Police Interviewing and Interrogation*, *supra* note 129, at 389.

179 Pearse et al., *Police Interviewing and Psychological Vulnerabilities*, *supra* note 118, at 1–2 (reporting confession rates of 55–62% in several studies).

180 *See* GOLDSTEIN & GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda*, *supra* note 65, at 50 (stating that studies conducted in the 1970's found rates of waiver by juveniles to be over 90% and a study in 2005 found the rate of waiver to be 87%); GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 36 (reporting that juveniles refused to talk during interrogations at a "considerably smaller" rate than adults); Grisso & Pomiciter, *Interrogation of Juveniles*, *supra* note 67, at 333–34 (finding 90.6% of juvenile felony suspects chose to talk when interrogated); Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants*, *supra* note 73, at 261 (reporting that, in a retrospective study of delinquents held in detention, 13.15% reported they had asserted their right to silence).

181 *See* Viljoen & Roesch, *Competence to Waive Interrogation Rights*, *supra* note 70, at 736–37.

182 Because this sample represents youths whom police questioned *and* prosecutors charged, the waiver rate may be inflated somewhat. Some justice system personnel suggested that prosecutors are more likely to charge suspects who waived than those who invoked.

183 When asked how many juveniles waived *Miranda*, one officer said, "Almost all of them. I couldn't even tell you the last time a kid told me he didn't want to talk." FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 95. Another estimated 90% talk: "[N]ot very many kids that don't talk to you." *Id.* Another police officer said, "I haven't had very many not speak to me. I would have to say 95% of them or more talk." *Id.* A second confirmed, "I'd say better than 95%." *Id.* And a third said, "Vast majority. I'd say high 90s." *Id.* A suburban prosecutor observed, "We don't have very sophisticated criminals. Maybe 10% refuse to talk." *Id.* Almost all personnel thought that 90% or more of youths waived *Miranda*, and none estimated that fewer than 80% waived. *Id.*

tell their story, or to minimize responsibility.[184] Some thought they waived because they did not expect severe sanctions or believed that they could mitigate negative consequences.[185] Others ascribed waivers to naïve trust and lack of sophistication.[186] Others attributed waivers to a desire to escape the interrogation room—the compulsive pressures *Miranda* purported to dispel.

b) Invoking *Miranda*

Fare v. Michael C. cited the defendant's prior experience with police to find a valid waiver.[187] Criminologists report a relationship between prior arrests and *Miranda* invocations.[188] Post-*Miranda* research reported that defendants with prior arrests gave fewer confessions than did those with less experience.[189] About one-third (35.1%) of the

[184] One officer said, "They want to look cooperative. If they didn't do it, why would they invoke? Even those who've been in prison think they're going to outsmart us." *Id.* Another officer explained, "Kids always talk. Whether they think they can outtalk you or outsmart you, most of them realize, they got to talk." *Id.* at 95–96. Another officer said, "Some kids just can't wait to tell you exactly their side of the story. They're used to telling teachers and parents their side of the story, and they want their side heard." *Id.* at 96. A prosecutor concurred that juveniles waive "because it's their opportunity to either admit and mitigate any of the negative outcomes they see will happen, or to spin the story in a way that makes it appear that their role is less culpable." *Id.*

[185] *Id.* As one officer observed:

> "Most kids are generally honest, especially the ones that are new to the system. Most of them understand that they're not going to get thrown away for life. If they confess they took the car, they're going to be on probation. I think most of them understand that. They want to tell you, get it done, get it over with, and move on."

Id.

[186] A public defender explained:

> "They're much more likely to talk because they think, 'I can get out of my situation if I just explain and I'm truthful. I'm going to get some help. They're not going to prosecute me. This is what my parents want me to do.' I mean their mind-set is much more trusting of adults, so they're not as aware of the sense of danger from talking."

Id.

[187] 442 U.S. 707, 726 (1979); *see also* GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 64 ("[A] juvenile's . . . extensive prior experience has sometimes been cited by judges as suggesting greater understanding of *Miranda* warnings due to more frequent exposure to them and familiarity with court processes.").

[188] *See* Leo, *Inside the Interrogation Room*, *supra* note 93, at 286 ("[A] suspect with a felony record . . . was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record.").

[189] *See, e.g.*, Kassin, *On the Psychology of Confessions*, *supra* note 119, at 218 ("[I]ndividuals who have no prior felony record are more likely to waive their rights than are those with a history of criminal justice 'experience'."); Leiken, *supra* note 114, at 21 tbl.4 (reporting that defendants with more prior arrests and felony convictions gave fewer confessions than did defendants with fewer arrests or convictions). Research on juveniles is consistent. GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 42, at 37 (reporting that juveniles' rate of refusal to talk increased with the number of prior felony referrals they had experienced).

TABLE 2
JUVENILES WHO WAIVE OR INVOKE BY OFFENSE

Offense	**Total**		**Waive**		**Invoke**	
	N	%	N	%	N	%
Person	97	31.6	92	94.8	5	5.2
Property	169	55.0	157	92.9	12	7.1
Drugs	19	6.2	16	84.2	3	15.8
Firearm	17	5.5	15	88.2	2	11.8
Other	5	1.6	5	100	0	0
Total	307	100	285	92.8	22	7.2

JUVENILES WHO WAIVE OR INVOKE BY PRIOR RECORD*

Prior Arrests	**Total**		**Waive**		**Invoke**	
	N	%	N	%	N	%
Non-Felony	216	72	205	94.9	11	5.1
One or More Felony	84	28	73	86.9	11	13.1
Total	300[1]	100	278	92.7	22	7.3

**Statistically Significant at: $\chi^2(1, N = 300) = 5.7$, $p < .05$
[1]Seven juveniles (2.3%) initially waived their *Miranda* rights and subsequently invoked them during interrogation, at which point interrogation ceased. Because they were truncated interrogation, I exclude them from analyses of police interrogation tactics.

juveniles whose interrogations I studied had one or more felony arrests at the time of questioning.[190] Table 2 reports that juveniles with one or more prior felony arrests waived their rights at significantly lower rates (86.9%) than did those with fewer or less serious police contacts (94.9%).

Several factors likely contribute to more invocations by those with more extensive contacts. Youths who waived at prior interrogations may have learned that confessing redounds to their disadvantage. Spending time with lawyers enhances youths' understandings of their rights, and prior arrests also give them opportunities to learn about rights and legal proceedings.[191] Youths questioned previously may have learned to resist the pressures of interrogation. Prior felony arrests are a reasonable proxy for understanding how to navigate the justice system.[192] Prior arrests provide opportunities to hear the *Miranda* warning, experience interroga-

190 *Supra* Table 1.

191 *See* Viljoen & Roesch, *Competence to Waive Interrogation Rights*, *supra* note 70, at 737 (finding that juveniles with prior arrests had increased "appreciation of the right to counsel and understanding of adjudicative proceedings" and that juveniles' "time spent with attorneys was a[n even] stronger predictor of understanding of interrogation rights and appreciation of adjudicative proceedings").

192 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 99.

tion, consult with counsel, and learn the consequences of waiving.[193] Justice personnel described youths who invoked *Miranda* as "sophisticated," "savvy," "streetwise," "gang-involved," or the like.[194]

C. *Interrogation Tactics: On the Record*

Police question suspects to obtain incriminating admissions or leads to other evidence—physical evidence, other participants, witnesses, or stolen property—which strengthen prosecutors' cases and facilitate guilty pleas.[195] They seek suspects' statements—true or false—to pin them down, to control changes they later make in their stories, and to impeach their credibility.[196] Police described their roles to the 285 juveniles who waived as dispassionate fact-finders.[197] Minnesota trains officers to describe themselves as neutral report writers who want to learn what happened to put in a statement for prosecutors and judges to evaluate.[198] They advise suspects that the interview is their opportunity to "tell their story."[199]

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[193] *Id.*

[194] *Id.* A police officer described youths who invoke as "more streetwise. They've been in the system. They know that talking to us isn't going to help them; it's just going to help us get them convicted. They're more streetwise, they're tougher kids. They know the game." *Id.* at 100. A public defender described them similarly:

> ["They're] the ones who have been through the system before and are more savvy, are a little more streetwise. They've dealt with police officers before. Probably they've had either a lawyer or somebody give them advice that it's not a good idea to talk to police in previous cases. Or if they've given a statement before and it's turned around and used against them actually. Savviness or experience with the criminal justice system. The kids who have experience tend not to give up their rights as easily as first-timers.["]

Id. at 99–100. A prosecutor attributed youths' invocations "largely [to] prior exposure to the system. . . . Certain juveniles develop street smarts, savvy about the system. Those are the juveniles—repeated customers—who develop resistance to talking to the police because they've learned." *Id.* at 100. A judge described youth who invoked as "kids who've been through the system before, are more sophisticated. They're sometimes gang involved. They know more about the criminal justice system. It's not necessarily the severity of the crime, it's more their own level of sophistication." *Id.* at 99–100.

[195] *Id.* at 104.

[196] *Id.* at 104–05.

[197] *Id.* at 105–06.

[198] *Id.* at 105.

[199] *Id.* at 108. Several officers gave similar descriptions of their standard opening to an interrogation:

> ["]You just go in and tell them that this is your opportunity to tell me your side of the story. I've already got the other side of the story. I just want to hear what you say happened, and then I'm going to write it up and send it on. And they'll decide. But if you don't want to tell me your side of the story, then they're just going to believe what this guy is telling them.["]

Id.

1. Maximization Techniques

Police may use a double-barreled approach to overcome resistance and elicit confessions: maximization and minimization.[200] Maximization strategies overstate the seriousness of a crime, exaggerate the strength of the evidence, and emphasize the futility of denials.[201] Minimization techniques offer sympathy, provide neutralizing themes and moral justifications, offer face-saving alternatives, or shift blame to others to induce a confession.[202]

Police reported that they used maximization techniques regularly.[203] They initially encouraged a suspect to commit to a story—true or false—and then used confrontational tactics to challenge the version. Table 3 summarizes maximization strategies police used: confront with evidence (54.4%); accuse of lying (32.6%); exhort to tell the truth (29.5%); ask Behavioral Analysis Interview questions (28.8%); challenge inconsistencies (20.0%); emphasize seriousness (14.4%); and accuse of other crimes (8.4%).

In nearly one-third (30.9%) of interrogations, police did not use any maximization tactics. In another quarter (23.1%), they used only one. This suggests that most juveniles did not require a lot of persuasion or intimidation to talk. Police used three or more maximization tactics in fewer than one-third (31.6%) of cases.

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200 *See* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 110; Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 12; Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 223; *see also* Leo, *Inside the Interrogation Room*, *supra* note 93, at 278–79 ("[Interrogators] use . . . negative incentives (tactics that suggest the suspect should confess because of no other plausible course of action) and positive incentives (tactics that suggest the suspect will in some way feel better or benefit if he confesses)."). *See generally* Kassin & Gudjonsson, *supra* note 89, at 42–44 (describing the interrogation process, including the use of minimization).

201 *See* Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 12 ("Maximization [is] designed to convey . . . that the suspect is guilty and that all denials will fail."); Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 223 ("[*M*]*aximization*[ ] . . . uses 'scare tactics' designed to intimidate a suspect believed to be guilty.").

202 Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 223 ("[*M*]*inimization*[ ] is a 'soft sell' technique in which the detective tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and moral justification; by blaming the victim or an accomplice; and by underplaying the seriousness or magnitude of the charges.").

203 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 110.

TABLE 3
MAXIMIZATION QUESTIONS: TYPES AND FREQUENCY

Interrogation Strategy	**N**	**Percentage of Cases**
Confront with Evidence	155	54.4
Accuse of Lying	93	32.6
Tell the Truth	84	29.5
BAI Questions	82	28.8
Confront	57	20.0
Trouble	41	14.4
Accuse Other Crimes	24	8.4
Number per Interrogation		
None	95	30.9
One	71	23.1
Two	44	14.3
Three	38	12.4
Four	24	7.8
Five	24	7.8
Six	9	2.9
Seven	2	.7

Research involving adult suspects in England and Wales shows that detectives typically confront a suspect with evidence.[204] In about half (54.4%) of the interrogations I studied, police confronted juveniles with evidence.[205] They most often referred to statements from witnesses or co-offenders or physical evidence. In most cases, DNA, fingerprint, or other forensic evidence will not be available in the short time between an arrest and interrogation. Police sometimes described an investigation as

204 *See* EVANS, THE CONDUCT OF POLICE INTERVIEWS, *supra* note 118, at 33 ("[I]nterviewers stat[e] or hint[ ] that [scientific] evidence, for example finger print evidence, would be or had been found and that therefore there was no point in denying the offence."); MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 78 (reporting that police pointed out contradictions between suspects' and co-defendants' or witnesses' accounts, confront them with evidence, and urge them to tell the truth); Soukara et al., *What Really Happens*, *supra* note 108, at 495 ("[P]olice interviewers devoted most of their interviewing time to telling the suspects about the evidence against them and then accusing the suspects . . . ."); *see also* Leo, Miranda*'s Revenge*, *supra* note 11, at 277 (describing how U.S. interviewers similarly appeal to "the weight of the incriminating evidence . . . against the suspect").

205 *See generally* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 139 ("Evidence ploys are used to make a suspect perceive that the case against him is so overwhelming that he has no choice but to confess because no one will believe his assertions of innocence.").

if they already had evidence.[206] In other instances, they questioned youths about potential evidence that investigation would reveal.[207] They asked how a juvenile would respond to hypothetical evidence—"what if I told you that" someone had identified him or police found his fingerprints.[208] In another version, officers asked juveniles "is there any reason why" his DNA might be on a gun or he would appear on surveillance video.[209]

In about one-third (32.6%) of cases, officers accused juveniles of lying. They equally often (29.5%) urged juveniles to be honest and tell the truth. "You gotta give up the truth, the whole thing. The only thing that can help you is the truth."[210] Officers reaffirmed their roles as objective fact-gatherers and neutral conduits who would convey juveniles' statements to prosecutors and judges.[211] Police intimated that their recommendations could affect prosecutors' charge evaluations and judges' decisions.[212] They cautioned that prosecutors and judges reacted negatively to an implausible story and predicted that judges responded more favorably to truthful defendants.[213]

The Reid Method instructs police to ask emotionally-charged Behavioral Analysis Interview (BAI) questions early in an interview to provoke a reaction and to distinguish between innocent and guilty people.[214] They posit that innocent and guilty people respond differently to emo-

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[206] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 115. For example, an officer might describe the process that would lead to evidence as if it had already occurred: "What if I said we've got a witness that saw you take it [the car]?" *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at 119.

[211] *Id.* One officer reassured a suspect:

> "That's all I want is the truth. You tell me you're telling the truth and I'll put that in the report. Because I can't add anything. It's on the recorder. So if you tell me what you're saying is the truth, then I'll put it in there. Simple as that. All I want to know is what happened."

Id.

[212] *Id.* at 124.

[213] *Id.* at 124, 133–34. An interviewer warned one juvenile:

> ["]You have got to think about what the judge is going to say to you, because we're going to do a detailed report on what happened during this interview that is being taped. If I'm a judge and I'm listening to somebody that is cooperative with the police, willing to help them out, I'm going to be a little more lenient if I was a judge. If I'm a judge and I hear a guy doing what you're doing, saying you know what—'I'm not giving that up'—what do you think the judge is going to do? Do you think he's going to give you a harder punishment?["]

Id.

[214] *See* INBAU ET AL., *supra* note 102, at 173–206 (recommending investigators begin interrogations with a BAI, giving illustrations of response-provoking questions and examples of how they work from actual interviews, explaining how to analyze suspects' responses, and describing specialized BAI questioning techniques).

tionally provocative questions, which enables investigators to classify them appropriately.[215] Leo reported BAI questions in about 40% of interrogations.[216] In this study, BAI questions occurred in about one-quarter (28.8%) of interviews, most frequently: "Do you know why I have asked to talk to you here today?"[217]

In one-fifth (20%) of cases, officers challenged suspects' assertions. They pointed out inconsistencies, disputed claims, and questioned youths' credibility to increase their anxiety.[218] Officers regularly described juveniles' claims of innocence as "bullshit."[219] Although many interviews began with an invitation to "tell his story," police warned that it was time-limited—take it or leave it.[220] If youths did not take advantage of this opportunity to explain their involvement, they might regret it later if other co-offenders tried to shift responsibility or make a deal at their expense.[221]

2. Minimization Techniques

Minimization tactics use themes to reduce or neutralize guilt by offering excuses or justifications, by suggesting a less odious motivation, or by shifting blame to a victim or accomplice.[222] Police used minimiza-

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215 *Id.*; *see, e.g.*, *id.* at 180 ("[T]he motivation question should be asked. . . . In most crimes, an innocent suspect can be expected to offer a reasonable motive for the crime. . . . Conversely, the motive question is very threatening to the guilty suspect because he knows exactly why he committed the crime . . . ."). Despite Inbau and Reid's claims of diagnosticity, *see supra* note 101 and accompanying text, police cannot accurately distinguish between truth-tellers and liars, *see* Kassin & Gudjonsson, *supra* note 89, at 37 ("[P]sychological research . . . has failed to support the claim that groups of individuals can attain high average levels of accuracy in judging truth and deception. . . . [T]raining programs produce, at best, small and inconsistent improvements[,] and . . . police investigators . . . perform only slightly better than chance, if at all." (citation omitted)), and BAI questions do not provoke expected responses from liars and truth-tellers. *See* Aldert Vrij, et al., *An Empirical Test of the Behavior Analysis Interview*, 30 LAW & HUM. BEHAV. 329 (2006) ("[T]he BAI questioning led to differences between liars and truth-tellers but the difference was in the opposite direction to that anticipated by Inbau et al.").

216 Leo, *Inside the Interrogation Room*, *supra* note 93, at 278 tbl.5.

217 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 120.

218 *Id.* at 121.

219 *Id.*

220 *Id.*

221 *Id.*

222 *See* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 153 ("[M]inimizing . . . 'themes' . . . work by shifting the blameworthiness of the act from the suspect to another person; by attributing the blameworthiness to the social circumstances that allegedly led to the act; or by redefining the act in a way that appears to minimize, reduce, or even eliminate the suspect's culpability because the act now seems less criminal or no longer criminal at all."); Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 223; *see also* INBAU ET AL., *supra* note 102, at 232 ("[T]he investigator should . . . present[ ] a 'moral excuse' for the suspect's commission of the offense or minimiz[e] the moral implications of the conduct."). *See generally* Kassin et al., *Police-Induced Confessions*, *supra* note 39, at

tion tactics in less than one-fifth (17.3%) of interrogations,[223] far less frequently than they used maximization tactics (69.1%).[224] Even though prosecutors charged all these youths with felonies, one officer explained that "most of these are fairly minor, so you don't have to do a whole lot of minimizing."[225] Table 4 reports that officers used themes to reduce suspects' guilt in 15.4% of cases; appealed to self-interest in one-tenth (11.9%) of cases; and expressed empathy in one-tenth of cases (10.5%). The relative absence of minimizing statements is consistent with English and Welsh research showing such tactics are rarely used in recorded interviews[226] and with Minnesota police training, which discourages their use.[227]

TABLE 4
MINIMIZATION QUESTIONS: TYPES AND FREQUENCIES

Interrogation Strategy	N	Percentage of Cases
Neutralization	44	15.4
Appeal to Self Interest	34	11.9
Empathy	30	10.5
Appeal to Honor	25	8.8
Minimize Seriousness	15	5.3
Third Parties	10	3.5
Number per Interrogation		
None	254	82.7
One	33	10.7
Two	14	4.6
Three	5	1.6
Four	1	.3

The Reid Method teaches police to develop a theme to neutralize suspects' guilt and minimize their responsibility, making it easier for them to confess.[228] Criminologists explain how youths rationalize delin-

29–30 (discussing how minimization techniques' implicit promises of leniency can lead innocents to confess and suggesting possible solutions to limit this danger).

[223] *Infra* Table 4.

[224] *Supra* Table 3.

[225] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 127.

[226] *See* Soukara et al., *What Really Happens*, *supra* note 108, at 502 ("The tactics deemed by several psychologists to be the most problematic (i.e. intimidation, minimisation, situational futility, and maximization) never or almost never occurred.").

[227] NELSON, *supra* note 111, at 11–12.

[228] *See* INBAU ET AL., *supra* note 102, at 232 n.6 ("Psychologists refer to this internal process as techniques of neutralization. Those classifications are remarkably similar to what

quent behavior using similar neutralizations and minimizations.[229] Many themes derive from responsibility-reducing criminal defenses: provocation, intoxication, duress, and insanity.[230] For example, delinquents may reject mental illness—insanity—as an excuse, but embrace the idea of "going crazy" or "being mad" to rationalize conduct.[231] Police sometimes suggested that getting mad, losing control, or excitement accounted for youths' misconduct.[232] Intoxication explains bad behavior and drinking alcohol or using drugs lessened a juvenile's responsibility for his behavior.[233] Juveniles are more likely than adults to commit crimes in groups,[234] and police diffuse responsibility by suggesting they succumbed to negative peer influences, shifting blame to others.[235] Parents

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we refer to as themes (for example, 'denial of responsibility,' 'denial of injury,' 'denial of victim,' and 'condemnation of the condemners').").

229 *E.g.*, Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957) (arguing that neutralizations defuse guilt and reduce culpability, allowing youths to lessen their own responsibility, blame victims, or provide mitigating justifications).

230 DAVID MATZA, DELINQUENCY AND DRIFT 69–98 (1964) (arguing that juveniles drift into delinquency by using rationales that resemble legal justifications for crimes and that release them from moral constraints). Matza states, "The major bases of negation and irresponsibility in law rest on self-defense, insanity, and accident; so, too, in the subculture of delinquency. The restraint of law is episodically neutralized through an expansion of each extenuating circumstances beyond a point countenanced in law." *Id.* at 74.

231 *Id.* at 83–85.

232 Officers regularly used themes of being "out of control":

> ["]I can understand you're whipped up. You're adrenalized. You've seen this going on. You're in a frenzy, that sometimes you just do stuff and you don't remember what happened. Could it have been that things just kind of got out of control and that you just got wrapped up in it and kicked him a couple of times?["]

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 129.

233 *See* MATZA, *supra* note 230, at 84 ("From the delinquent viewpoint, however, the offense is certainly mitigated and often negated. Being under the influence of alcohol is likened to losing one's mind, going crazy."). Officers offered intoxication as a face-saving explanation for juveniles' misconduct:

> "There was probably a lot of people drinking down there. I'm not saying you were the only one and I'm not trying—don't worry about minor consumption and that kind of stuff, because I'm not worried about that. I just wanna get your mind frame here when you picked up the knife. I'm not saying it was right if you were drinking, but what I'm saying is, was alcohol a factor?"

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 129.

234 HOWARD SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 123 (2006).

235 Officers regularly suggested that youths succumbed to peer-pressure to mitigate their responsibility:

> ["]Rick [the suspect] knew he made a mistake. Maybe Rick was forced to do it. I know how peer pressure goes. You know, I went along to be with the crowd, because I thought it was cool at the time. . . . 'Come on, let's be cool and do it. Come on, let's do it. Let's do it for the dare.' Right? . . . Rick, we want your side of the story. How did you do it? Why did you do it? Did someone make you do it? Did someone bully you into doing it or dare you to do it?["]

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 130.

regularly refer to errant children's behavior as a mistake, and police regularly described juveniles' delinquency as a mistake to mitigate responsibility.[236] Police appealed to juveniles' self-interest in one-tenth (11.9%) of cases.[237] They told them they would feel emotional relief,[238] prosecutors and judges would view them more favorably,[239] and intimated they might deal with them more leniently.[240] Officers minimized a youth's crime by comparing it with more serious offenses.[241] Even a serious crime—a drive-by shooting—could have been worse if the shooter had

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[236] *Id.* An interrogator explained away juvenile's suspected crime by characterizing it as a mistake:

> "Now I can understand that at your age, you don't think about the future too much; you think about today. Because of that, you're young and you make mistakes. I can understand because you're human and you're young and you make mistakes. But you have to be man enough to face up to it here and tell the system that 'Yeah, I made a mistake and I'm sorry for it, and I'm going to change.'"

Id.

[237] *Supra* Table 4.

[238] Interrogators referred to a juvenile's burden of emotional guilt and, as part of the youth's emotional expiation, assured they would convey the youth's feelings of remorse about the crime to the authorities:

> "[Y]ou got a boulder on your shoulder about the size of Mt. Everest. I mean, you gotta feel like the whole weight is on your shoulders. . . . But you gotta trust me when I tell you . . . I need the whole truth and I'll write the truth as you give it. And if after you tell me the truth, you tell me you're sorry, I'm gonna write down that you said you're sorry. That you never wished it would have happened."

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 133.

[239] Police told juveniles that the prosecutors and judge reacted more favorably to youths who cooperated, told the truth, or assisted officers:

["]'[Y]ou're cooperative. You're helping us get stuff back. You're showing us something. . . . You're making a step in the right direction.' How do you think that looks? Rather than sitting there like a hard-ass: 'No, I didn't do it.' And then you wait to be convicted. You wait to be found guilty of something with a bad attitude.["]

Id.

[240] Interrogators advised juveniles that judges viewed suspects who confessed and assumed responsibility more positively:

> ["]If you did something that you know you shouldn't have, and you 'fess up to it and tell me everything that happened, and you express remorse, and you acknowledge that it was a stupid kid thing to do, a mistake, that is going to be seen way more favorably than sticking with this story that you have come up with and making me put that down on the report and presenting it to a judge. Put yourself in the judge's shoes. If you were going to give leniency, do you think that you would give it to the guy who is obviously lying through his teeth . . . or would you rather give a little leniency to the guy who is stepping up to the plate, acknowledging the stupid kid mistake that he did, and is willing to acknowledge that he screwed up?["]

Id. at 134.

[241] Police questioning a juvenile about a burglary told him:

> ["Y]ou've already said that you went into your neighbor's house. All we need to know is your side of the story—I mean, error in judgment? People make it all the time. Now, it's not like you went in and robbed some old lady and beat her to death, okay? You went into someone [sic] house.["]

Id. at 137.

hit the intended target.[242] The rationale of juvenile courts—treatment rather than punishment—provides a theme with which to minimize seriousness.[243]

D. *Interrogation Outcomes and Lengths*

This section examines how the 285 youths who waived *Miranda* responded to police. It describes how their attitudes affected the information they provided. It reports the evidentiary value of statements they gave. And it examines how long interrogations take.

1. Outcomes: Confessions, Admissions, and Denials

Table 5 reports the outcomes of interrogations—confess, admit, or deny[244]—based on their evidentiary value.[245] A majority (58.6%) of juveniles confessed, most within a few minutes of waiving *Miranda*. One officer said, "A lot of kids seem to admit right away. It seems like the majority of kids admit right away."[246] Similarly, researchers John Pearse and Gisli Gudjonsson analyzed police interviews recorded in London, England, and found about half of the suspects confesssed and, of those who did, "almost all did so very near to the beginning of the interviews."[247] Their research suggested "suspects enter a police interview having already decided whether to admit or deny the allegations

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[242] Officers minimized the seriousness of what happened, compared with what could have happened:

> "The big thing is nobody got hurt here. I mean, this is a serious matter, but it could—it could be a lot worse. It really could. . . . Nobody, nobody got killed, nobody got hurt. I mean, this is still a serious thing. Everybody makes mistakes. But now is your time for you to tell your version of it."

Id.

[243] Officers sometimes reminded juveniles, "This is juvenile not adult. You're not going to prison. The purpose of juvenile is rehabilitation, not punishment. We want to get you help." *Id.*

[244] *See* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 144–45. Police elicited a confession when a juvenile admitted that he committed the crime with supporting details or his cumulative responses satisfied all of the elements of an offense, i.e., act and intent. *Id.* at 145–46. Questioners received an admission when it linked a youth to a crime or provided direct or circumstantial evidence of one or more elements of the offense. *Id.* at 146. Admissions often occurred when a get-away driver, look-out, or co-defendant admitted participating, but minimized her role. *See id.* Denials occurred when a juvenile disavowed knowledge or participation or gave an explanation that did not include any incriminating admissions. *Id.* at 147.

[245] *See generally* Cassell & Hayman, *supra* note 113, at 862 (observing that evaluating the outcomes of interrogations involves a degree of subjectivity); Wald et al., *supra* note 115, at 1643–47 (categorizing interrogations as "successful" or "unsuccessful" based on whether suspects talked and on whether they confessed).

[246] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 145.

[247] Soukara et al., *What Really Happens*, *supra* note 108, at 495 (citing John Pearse & Gisli H. Gudjonsson, *Police Interviewing Techniques at Two South London Police Stations*, 3 PSYCHOL., CRIME & L. 63 (1996)).

against them"[248] and interrogation tactics have little impact on whether they subsequently admit.[249]

TABLE 5
OUTCOME OF INTERROGATION AND YOUTHS' ATTITUDE

Outcome of Interrogation			**Youths' Attitude***			
			Cooperative		**Resistant**	
Outcome	N	Percent	N	Percent	N	Percent
Confession	167	58.6	162	71.4	5	8.6
Admission	85	29.8	57	25.1	28	48.3
Denial	33	11.6	8	3.5	25	43.1
			227	79.6	58	20.4
Corroborating Evidence	52	18.2				

*Statistically Significant at: $\chi^2(1, N = 285) = 7.84$, $p < .001$

Other studies report similar high rates of success. The Yale–New Haven study reported that more than half (57%) of interrogations preceded by *Miranda* warnings produced some evidence.[250] Leo reported three-quarters (78%) of adult suspects waived *Miranda*[251] and two-thirds (64%) made an incriminating statement or a partial or full confession.[252] Police investigators estimated that two-thirds (68%) of suspects made incriminating statements.[253] Psychologists Rebecca Milne and Colin Clarke, a police officer at the time of the study, evaluated interrogations by six English and Welsh police forces and reported confessions in 40% of cases and partial admissions in another 25%.[254] Another English and Welsh study concluded juvenile suspects "readily confessed" in three-quarters (77%) of cases.[255]

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248 John Pearse & Gisli H. Gudjonsson, *Police Interviewing Techniques at Two South London Police Stations*, 3 PSYCHOL., CRIME & L. 63, 73 (1996), *quoted in* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 81.

249 MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 81.

250 Wald et al., *supra* note 115, 1565 tbl.11 (showing that 50 warned interrogations out of 87 produced evidence).

251 Leo, *Inside the Interrogation Room*, *supra* note 93, at 276 tbl.3.

252 *Id.* at 280 tbl.7. If interrogations terminated upon a suspect's invocation of *Miranda* are excluded, the amount of successful interrogations rises to over three-fourths (76%). *Id.* at 281.

253 Kassin et al., *Police Interviewing and Interrogation*, *supra* note 129, at 392.

254 Bull & Milne, *Attempts to Improve the Police Interviewing of Suspects*, *supra* note 105, at 189 (citing COLIN CLARKE & REBECCA MILNE, NATIONAL EVALUATION OF THE PEACE INVESTIGATIVE INTERVIEWING COURSE (2001)).

255 EVANS, THE CONDUCT OF POLICE INTERVIEWS, *supra* note 118, at 29 ("[T]his open admission usually occurred in the first sentence or so of the interview.").

About one-third (29.8%) of juveniles provided statements of some evidentiary value—for example, admitting that they served as a look-out during a robbery or participated in a burglary, even if they did not personally steal property.[256] Justice personnel agreed that most juveniles made some incrimination admissions.[257] Only a small proportion (11.6%) of juveniles gave no incriminating information.[258] Forms of resistance included non-cooperation, steadfast denial of knowledge or participation, lying, evasion, silence, or blame shifting.[259]

2. Attitudes and Outcomes

Juveniles' attitudes affect the exercise of police discretion.[260] For less serious crimes, a deferential attitude reduces likelihood of arrest, and a contumacious one increases it.[261] Youths' attitudes affect how police

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256 *Supra* Table 5.

257 A police officer said, "'Most of them will pretty much tell you the whole truth, but not necessarily all the truth. They may still want to hide a little bit of what they did because they know they were wrong. It could be very embarrassing for them.'" FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 146. A judge observed,

> "[Juveniles] just talk [when police question them]. They just cough it up. Some of them are deceitful and more clever, but they still talk. Some of them think they can talk their way out of it, but they're dealing with a professional investigator, and that normally doesn't end well for them."

Id.

258 *Supra* Table 5.

259 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 147.

260 *See* Egon Bittner, *Policing Juveniles: The Social Context of Common Practice*, *in* PURSUING JUSTICE FOR THE CHILD 69, 82 (Margaret K. Rosenheim ed., 1976) ("[P]olice judgment of substantive misconduct will be mitigated by expressions of diffidence on the part of young people and aggravated by their arrogance." (citation omitted)). *But see* John P. Clark & Richard E. Sykes, *Some Determinants of Police Organization and Practice in a Modern Industrial Democracy*, *in* HANDBOOK OF CRIMINOLOGY 455, 488 (Daniel Glaser ed., 1974) ("[D]isrespect may increase the chances of arrest somewhat, but it is a much less powerful predictor than type of offense.").

261 *See* Bittner, *supra* note 260, at 82. For research on the impact of adults' demeanor on arrest decisions, see generally WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 146–47 (1965) ("[A]n officer . . . might arrest a person who ordinarily would not be arrested . . . solely because he has incurred the disfavor of a particular officer[ ] . . . ."); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 89–90 (1966) ("[W]hen [the street patrolman] encounters arrogance or hostility on the part of the citizenry, he may be tempted to make strong claims of authority . . . ."). For research on how youths' demeanor affects arrest decisions, see generally AARON V. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (Transaction Publishers 1995); Bittner, *supra* note 260, at 81–83 ("The decision of what has to be done takes shape in a relationship to how the young people act toward the intervening patrolmen."); Irving Piliavin & Scott Briar, *Police Encounters with Juveniles*, 7 AM. J. SOC. 206 (1964) (observing the influence of juveniles' attitudes and police prejudice on officers' decisions to arrest, cite, or admonish apprehended juvenile offenders).

and probation officers perceive them, impute moral character, and respond to them.[262]

Juveniles' attitudes during interrogation ranged the gamut—"some are scared to death, and others, it's almost a joke."[263] Many officers described youths as scared, especially "the kids that are new to the process."[264] Although police described some youths as confrontational, justice system personnel viewed most youths as compliant or submissive: "I would say that 90% or more would probably be cooperative, and the other percentage would be the frequent fliers, so to speak."[265] Several officers used the same expression—"deer in the headlights"—to describe youths' demeanor.[266] Public defenders described their clients as humbled or defeated.[267]

Police reports frequently describe juveniles' demeanor and behavior during interrogation. Officers documented whether they believed sus-

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[262] *See* CICOUREL, *supra* note 261, at 40 ("The decision to arrest, file a petition, and recommend, for example, probation, a foster home, a boys' ranch, or the youth authority seemed directly influenced by oral remarks and physical gestures which are difficult to document and may never appear on official records."); *see also* Bittner, *supra* note 260, at 81–85 ("[P]olicemen tend to be sensitive concerning respect[ ] . . . . They apparently believe that anyone who would risk being rebellious and unruly in their presence can be counted on to go even further if left alone."); *cf.* Robert M. Emerson, *Role Determinants in Juvenile Court*, *in* HANDBOOK OF CRIMINOLOGY 621, 626 (Daniel Glaser ed., 1974) ("[T]he power to arrest and to initiate court action becomes a strategic weapon used to . . . threaten[ ] the youth into better behavior. . . . [C]ourt action may be initiated when a policeman has his authority assaulted or challenged in what otherwise might be an inconsequential encounter with a youth."). *Compare* WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY 85–86 (1970) ("[W]ith the quiet, repentant, fearful child . . . , the police will attempt to deal with the problem themselves. . . . The older delinquents[ ] . . . become a threatening group for the policeman. Many find that they can no longer treat [these] delinquents . . . as children, since boys of this age are particularly obnoxious to the policeman."), *with* Donald J. Black & Albert J. Reiss, Jr., *Police Control of Juveniles*, 35 AM. SOC. REV. 63 (1970) ("When the suspect behaves antagonistically toward the police, the [arrest] rate is higher . . . . [H]owever, . . . the arrest rate for encounters involving very deferential suspects is . . . the same as that for the antagonistic group. . . . [J]uveniles who are . . . particularly liable to arrest may be especially deferential toward the police as a . . . self-defense.").

[263] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 150. One officer used the term "felony mouth" to describe "kids trying to be men who have no men in their lives." *Id.* at 151. One consequence, the officer explained, was that "cops take them to jail to teach them who is boss. Felony mouth will get you a ride to the jail." *Id.*

[264] *Id.* at 150.

[265] *Id.* at 151.

[266] *Id.*

[267] One explained:

> ["]Most of the time, they're just sort of very monotone. I almost feel like I'm watching someone that's just given up. There's kind of a hopelessness to being interviewed by police. Occasionally, you get the really conduct disordered kids who really cop an attitude, but they're the exception to the rule. Most of the kids are fighting off the tears, maybe trying to act tough, but very monotone. On the videos, their heads are down. They just feel like they've already been beat.["]

Id.

pects told the truth or lied and whether suspects cooperated or resisted.[268] Reports described youths' emotional or behavioral responses to their interrogators.[269] Based on my impressions and officers' reports, I characterized youths' attitudes as either cooperative or resistant.[270] As Table 5 reports, the vast majority of juveniles (79.6%) exhibited a cooperative demeanor, and only one-fifth (20.4%) appeared resistant. Not surprisingly, the vast majority (96.5%) of cooperative juveniles confessed or made incriminating admissions.[271] By contrast, fewer than than one in ten (8.5%) resistant juveniles confessed, and almost half (43.1%) provided no useful admissions.[272] One-tenth (11.6%) of youths denied involvement, but those who exhibited resistant attitudes accounted for more than three-quarters of them (75.8%).[273]

3. Corroborationg Evidence

Police question suspects to elicit incriminating statements or leads regarding other evidence: witnesses, co-offenders, or property. "[A] principal purpose—if not the primary purpose—of interrogation is to obtain information such as the location of physical evidence."[274] Some commenters, however, have contended "police rarely obtain[ ] incriminating fruits" from interrogations.[275]

Table 5 reports how often interrogations yielded corroborating evidence. I defined corroborating evidence as evidence police did not possess prior to questioning—e.g. leads to physical evidence, a crime scene

[268] *Id.* at 151–52. One report noted the juvenile "was cooperative. He stated he was sorry he stole the items." *Id.* at 152. Another officer's report described the juvenile whom he questioned as "cooperative and forthright throughout the interview." *Id.* An officer described another youth as "not very cooperative. He was kind of just sit there and stare down at his legs [sic]." *Id.* Police implied that youths' attitudes and cooperation would affect how the justice system treated them: "For what it's worth, two people were arrested. If that guy spills the beans, tell [sic] me everything I ask him—because you won't—if he does, he looks more cooperative than you. And you're okay with that? Because I'm going to mark you down as uncooperative." *Id.*

[269] "Marvin's demeanor during my interview showed no remorse. Marvin at times had a flat affect and at other times appeared to be slightly amused by my questions." *Id.* Police described youths' behavior as well. An officer depicted a juvenile who became "increasingly agitated during the interview": "His demeanor varied between sarcastic and angry. [He] became increasingly hostile and asked for a lawyer, and I ended the interview. As he was leaving the room, he turned in the doorway and glared at me and was yelling obscenities." *Id.*

[270] Other research, using similar categories, described 80% of suspects as "cooperative" or "remorseful." Baldwin, *supra* note 1, at 332 tbl.1.

[271] *Supra* Table 5.

[272] *Id.*

[273] *Id.*

[274] Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV., 929, 1000 (1995).

[275] Cassell & Hayman, *supra* note 113, at 880–81. *But see* Wald et al., *supra* note 115, at 1593–95 (explaining that the analyzed interrogations produced information which implicated accomplices and solved other crimes committed by the suspect).

diagram, identity of a co-offender or unknown witness. By this standard, fewer than one-fifth (18.2%) of interviews yielded information that police did not already have.[276] Some police attributed the relatively low-yield of corroborating evidence to time pressure and volume of cases under which they labored.[277] Once they obtained an admission, which they did quickly, they seldom pressed youths for additional evidence.[278] Prosecutors confirmed interrogations did not often lead to corroborating evidence but attributed that to good preliminary investigation.[279]

4. Length of Interrogation

Police typically interrogate innocent suspsects for six hours or longer before eliciting false confessions.[280] Are lengthy interrogations common? Or are lengthy interrogations and the concommitant risk of false confessions outliers from routine questioning? If the latter, then should policy makers limit the length of interrogations to preserve the integrity of the justice process?

Table 6 reports the length of interrogations, the length of time by type of offense, and the length of time by whether the offense involved a firearm.[281] Routine felony interrogations are brief. Police completed three-quarters (77.2%) of felony interviews in less than fifteen minutes and nine-tenths (90.5%) in less than thirty minutes.[282] In the longest interviews, police questioned three youths (1.1%) for more than one and one-half hours.[283] Although prosecutors charged all the interviewed

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[276] *Supra* Table 5.

[277] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 154.

[278] One officer said, "They're used to, 'Alright you gave it to me. I don't need anything else. We're out of this room.' If, had the cop asked one more question down the road—'Did you tell anyone else about that?'—that does not show up because it's not part of those cases." *Id.*

[279] A prosecutor said, "I don't see that very often. I don't know if that's because by the time the police talk to that suspect they have done such a good job with their investigation that they have everything else, but I don't see very often that it leads to other evidence." *Id.*

[280] *See* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 948 ("[I]nterrogation-induced false confessions tend to be correlated with lengthy interrogations in which the innocent suspect's resistance is worn down[ ] . . . ."); *infra* notes 363–368 and accompanying text.

[281] To measure length of interrogation, in some cases, I directly timed the tape. In most transcripts, officers stated the times at the beginning and ending of an interrogation. In other cases, to approximate the length of interrogations for which I had only transcripts, I estimated the duration of interrogation from the length of the transcript by cross-tabulating the transcript pages and length of interrogations in cases in which I had both. FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 155.

[282] *Infra* Table 6.

[283] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 156.

youths with felonies, these brief interrogations are unlikely to elicit false confessions.[284]

TABLE 6
LENGTH OF INTERROGATION BY TYPE OF OFFENSE* AND WEAPON**

	Overall		**Person**		**Property**		**Drug**		**Firearms**		**Other**	
Time (minutes)	N	%	N	%	N	%	N	%	N	%	N	%
1 - 15	220	77.2	62	67.4	131	83.4	15	93.8	9	60	3	60
16 - 30	38	13.3	20	21.7	13	8.3	1	6.3	3	20	1	20
31+	27	9.5	10	10.9	13	8.3	0	0	3	20	1	20
Total	285		92		157		16		15		5	

Cases Involving Firearms

	Overall		**No Gun**		**Gun**	
Time (minutes)	N	%	N	%	N	%
1 - 15	220	77.2	192	80.3	28	60.9
16 - 30	38	13.3	29	12.1	9	19.6
31+	27	9.5	18	7.5	9	19.6
Total	285		239		46	

*Statistically Significant at: $\chi^2(1, N = 285) = 32.3$, $p < .05$
**Statistically Significant at: $\chi^2(1, N = 285) = 9.4$, $p < .01$

The brevity of these interviews was initially surprising, but interrogations of even two or three hours are exceptional.[285] Various studies have reported that interrogations lasted less than one hour in 85% of cases,[286] one hour in about three-quarters (71.3%) of cases,[287] thirty minutes in 87% of cases,[288] fifteen minutes in 71.4% of cases,[289] and 30 minutes in 80% of cases and one hour in 95%.[290] Inbau and Reid advise against interrogations that last longer than four hours,[291] a duration substantially longer than observed in any research.

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[284] *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1225 (2001) [hereinafter White, Miranda*'s Failure*] ("[I]nterrogations conducted in low profile cases . . . would be much less likely to produce a false confession. In low profile cases, interrogators are generally disinclined to expend the time or employ the range of tactics likely to produce an untrustworthy confession.").

[285] *See* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 948 ("[M]ore than 90% of normal interrogations last less than two hours."); Kassin et al., *Police Interviewing and Interrogation*, *supra* note 129, at 384 ("[R]outine interrogations tend to be relatively brief encounters, with the modal duration ranging from 20 minutes to an hour." (citation omitted)).

[286] Wald et al., *supra* note 115, at 1542 tbl.1.

[287] Leo, *Inside the Interrogation Room*, *supra* note 93, at 279 tbl.6.

[288] Cassell & Hayman, *supra* note 113, at 892 tbl.7.

[289] EVANS, THE CONDUCT OF POLICE INTERVIEWS, *supra* note 118, at 26.

[290] Kassin & Gudjonsson, *supra* note 89, at 46.

[291] INBAU ET AL., *supra* note 102, at 597. *But see id.* at 237 ("After three or four hours, *unless the suspect is showing clear potential for telling the truth* . . . , the investigator should

I asked justice professionals to estimate the lengths of interviews, and they all agreed that interviews were "very short."[292] Justice system personnel attributed the brevity of felony interrogations to several factors. Many referred to police workload pressures.[293] Police conducted a form of triage and questioned suspects longer in more serious cases but did not regard most juvenile felonies as serious crimes.[294] Several officers attributed brief interrogations to the relative simplicity of most youth crime and their ability to elicit admissions quickly.[295]

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consider terminating the interrogation session and perhaps re-interrogating the suspect at a later time using a different technique." (emphasis added)).

[292] FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 157. Their estimates of the average length only ranged from ten to thirty minutes. *Id.* A veteran officer recollected, "My longest has maybe been an hour." *Id.* One judge guessed "fifteen or twenty minutes," a second judge confirmed "usually ten to twenty minutes," and a third agreed, "It doesn't take very long to get them to 'fess up; twenty minutes." *Id.* A prosecutor said the length of interrogations are "very short, usually": "I would say under ten minutes, the vast majority, under ten minutes." *Id.* Public defenders thought that typical interrogations took thirty minutes at most. *Id.* The longest estimate of average interrogation time was "thirty to forty-five minutes." *Id.* These responses confirmed my findings are reasonable and consistent with the experience of legal professionals.

[293] One officer explained, "These guys are in the meat grinders. We got to get out of here. I got ten cases I got assigned today. Either you're going to give this up today—they don't ask the extra questions, once you told me you did it." *Id.*

[294] An officer described how police prioritized their caseloads:

> ["]When you get to a lot of the minor stuff—the shoplifting, the fights in school, and stuff like that—we get too many of them. The cops are trying to push through those. We've got two dozen cases sitting on our desk. You're not going to spend an hour an hour and half with an assault in school. With an ag[gravated] robbery, you're going to take the time and effort—just more complexity to the crime. It doesn't take much time for Joe to tell me, 'He said my girlfriend is ugly, so I punched him.'["]

Id. at 157–58. Prosecutors agreed that volume of cases and police staff reductions precluded extensive interviews with most juveniles:

> "It's a lack of resources now. They just don't have as much time to devote to juvenile cases unless they're really serious. I've kind of noticed that there isn't as much effort to try to—I'm not saying coerce a confession—but trying to get to the truth, not calling them on inconsistencies."

Id. at 158. A juvenile court judge confirmed that workload pressures, a high-level of successful questioning, and the diminishing marginal utility of longer interrogations contributed to the brevity of questioning:

> "Police are busy, and they're moving on with what they need to do. They're not there to socialize. They're there to get their job done and move on. They've got a ton of work to do in that case and lots of others. So they're trying to be efficient, and a longer interrogation probably wouldn't produce more than what they've already got."

Id.

[295] Officers attributed brief interrogations to suspects confessing without much prompting:

> "If you get them to tell you the truth, there ain't nothing else to talk about. Once you get the statement from them, once you get the story from them, that's all you need. You're not going to sit around and hold their hand all day. Here's the statement. Let's move on."

a) Interrogation and Guns

Detectives question suspects longer about more serious crimes.[296] In this study, a statistically significant relationship appeared between length of interrogation and type of offense. Police questioned a higher percentage of youths charged with property and drug crimes for fifteen minutes or less than they did youths charged with other, more serious offenses.[297] Crimes involving physical evidence—drugs, stolen property, automobiles—may provided more leverage with which to quickly extract confessions.

Cases involving firearms produced longer interrogations.[298] Although police questioned only 9.5% of suspects for longer than thirty minutes, they interrogated twice as many (20%) juveniles whose offenses involved firearms—armed robbery, assault with a gun, firearms possession, or burglary in which youths stole guns—for longer than thirty minutes.[299] Guns provide an indicator of offense seriousness.[300] Police wanted to recover guns and questioned juveniles involved with them longer and more aggressively.[301] Interviewers made implied promises of benefits to induce youths to help recover guns.[302] Police used tactics like those described in *Rhode Island v. Innis*[303] to impress upon suspects the danger guns pose to those in possession of them and to those near them.[304] Officers threatened youths, warning them they could be held

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Id.

296 *See* Leo, *Inside the Interrogation Room*, *supra* note 93, at 297 (reporting that detectives were twice as likely—42% vs. 20%—to question suspects for more than one hour in high seriousness crimes and about three times as likely to conclude low seriousness interviews in less than thirty minutes).

297 *Supra* Table 6.

298 *Id.*

299 *Id.*

300 *See* Podkopacz & Feld, *The End of the Line*, *supra* note 128, at 474 tbl.3 (showing that judges were more likely to transfer juveniles to adult court if they were charged with felonies involving use of a weapon).

301 FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 159.

302 For example, one interrogator hinted at leniency if a suspect helped locate a gun:

> "Now if you made a goodwill effort and if I got the gun, certainly I would mention that to the county attorney that you helped out in retrieving that gun. Will that help you? I say that Sam helped me out getting the gun, and I don't think I could have found the gun without his help. You tell me, does that help you? Yeah, it would help you a lot."

Id. at 160.

303 *See* 446 U.S. 291, 294–95 (1980) (explaining how two arresting officers convinced a suspect in custody to reveal the location of a hidden gun by discussing aloud that it "would be too bad" if a little girl "would pick up the gun, maybe kill herself").

304 An officer questioned one youth and warned of the dangers the gun posed to innocent bystanders:

> "We know that that gun is out there. That gun hasn't been recovered. At least help me find where the gun is, so a young, innocent kid doesn't pick that up and hurt himself or someone else. Just imagine if that is your younger brother or sister, just

responsible for any crimes committed by others using guns they had stolen or hidden.[305] Two interrogations in this study raised constitutional issues of voluntariness, and both involved guns.[306] The questioning of the juveniles implicated in both offenses lasted longer than any other interrogation in this study, used more maximization techniques, and included explicit quid pro quo promises of leniency in exchange for recovering the guns.[307]

Justice system personnel agreed that guns provide a proxy for seriousness and affected the length of interrogations.[308] Police associated guns with gangs—another indicator of seriousness.[309] Police questioned youths to learn who else had contact with the weapon.[310] Youths knew that guns garnered serious consequences, raised the stakes, and gave them greater incentive to resist interrogators.[311]

> imagine if that was your brother or sister: how would you feel if that gun got into their hands?"

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 160.

[305] Immediately after the *Miranda* warning, an officer gave a gun burglary suspect an extended monologue with several themes about the dangers of guns:

> ["]The biggest thing that I don't want to see happen is to see you get in any worse trouble than you're in right now. Does that make sense? . . . [B]ecause of that rifle that's out there, and if somebody uses that rifle now, a year from now, and kills somebody, that's coming right back to your mailbox. . . . [N]ow there's a weapon involved, and we've got to get that weapon back. . . . [I]s that something that you're gonna help us get done or not? Because I wouldn't want to see you end up spending the next—you know, God forbid that someone gets killed with that in the near future. I'd hate to see you end up in prison for thirty years.["]

Id. at 160–61.

[306] *See* Feld, *Police Interrogation of Juveniles*, *supra* note 11, at 295–304 (discussing voluntariness of statements, quid-pro-quo offers of leniency, and interrogations focused on recovering guns).

[307] *Id.* at 298.

[308] One judge said guns are "an indicator to almost everybody in the system that things are going to the serious level. So much of adult and juvenile criminal conduct is really chicken shit, but when a weapon shows up, that opens the door to much more serious conduct." FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12 at 165.

[309] One officer observed:

> "It's more than likely a gang member, so not only is their own offense history going to play into their sophistication, but they're around offenders all the time, sharing stories and teaching each other about how it works. Once your bring firearms into it, it jumps way up in sophistication."

Id.

[310] Public defenders attributed longer interrogations about guns to police desire to get guns off the streets:

> "There is a definite attitude of wanting to get guns off the street, wanting to track them down: where did they come from? [W]ho else had the gun? Tracking guns down and getting them off the street is a high priority for police, and I see their interrogations being focused on that."

Id.

[311] *Id.* at 165–66.

V. POLICY IMPLICATIONS

Theoretically, defendants enjoy the protections of the Due Process Model, an adversarial system in which procedural safeguards force the state to prove its case.[312] In reality, the justice system more closely resembles the Crime Control Model, an inquisitorial system in which defendants' confessions lead to guilty pleas. Confessions greatly tilt the balance of advantage to the state.[313] Prosecutors charge defendants who confess with more crimes and more serious crimes, set higher bails, and offer fewer plea concessions than they do with defendants who remain silent.[314] Defense attorneys pressure clients who confessed to accept guilty pleas because of reduced negotiating leverage.[315]

Scales recordings have virtually eliminated suppression motions to challenge juveniles' statements.[316] The paucity of suppression motions

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[312] PACKER, *supra* note 13, at 154–73. The Due Process Model represents a commitment to an adversarial process, whereas the Crime Control Model envisions a more inquisitorial justice system. *Id.* at 157. The Due Process model relies on formal fact-finding at trial buttressed by procedural safeguards to assure reliable findings of legal guilt. *Id.* at 163, 166–67. The Crime Control Model relies on informal, administrative procedures to separate innocent suspects from probably guilty ones. *Id.* at 159–60. It envisions an inquisitorial process, views the accused as a primary source of evidence, and relies heavily on interrogation and confessions to fuel guilty pleas. *Id.* at 187–90, 222–223.

[313] *See* Richard A. Leo, *False Confessions: Causes, Consequences and Implications*, 37 J. AM. ACAD. PSYCHIATRY & L. 332, 340–41 (2009) [hereinafter Leo, *False Confessions*] ("Confessions exert a strong biasing effect . . . because most people assume that a confession[ ] . . . is, by its very nature, true.").

[314] *See* Cassell, Miranda*'s Social Costs*, *supra* note 114, at 443–44 ("[D]efendants who had confessed were less likely to receive a reduction in the number of counts charged against them[ ] . . . [and] were less likely to receive concessions in plea bargaining."); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984 (1997) ("Defendants who have confessed are likely to experience greater difficulty making bail[ ] . . . . If a person has confessed, prosecutors are likely to file charges[and] 'charge high' . . . ."); *see also* Cassell & Hayman, *supra* note 113, at 909 ("Defendants who confessed were more likely to be convicted—and more likely to be convicted of more serious charges—than those who did not."); David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L & CRIMINOLOGY 103, 109 (1974) ("When a case is pleaded out, those individuals who have confessed receive fewer concessions from the state than those who have not.").

[315] *See* Ofshe & Leo, *supra* note 314, at 984 ("[D]efense attorneys are more likely to pressure their clients [who confessed] to plead guilty because of the high risk of conviction."); *see also* Neubauer, *supra* note 314, at 109 ("A confession makes it unlikely that a defendant will be found not guilty at a jury trial. As such, defense attorneys generally recommend against a trial.); *cf.* Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 23 ("Upon confession, prosecutors tend to charge suspects with the highest number and types of offenses, set bail higher, and are far less likely to initiate or accept a plea bargain to a reduced charge."). *See generally* PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS 319–28, 355–59 (1988) (analyzing the effect of defense attorneys on the guilty plea process).

[316] *See* FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 167–68. *See generally* Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 131–32 ("The use of recordings . . . relieves trial judges from . . . hearing arguments and ruling on admissibility of evidence . . . .").

may be attributed to defense lawyers' heavy caseloads, lack of resources, or courtroom cultures hostile to adversarial litigation.[317] Even when defense counsel file motions, judges rarely exclude statements.[318] Interviews with justice system personnel confirmed that defenders filed few motions to suppress evidence for *Miranda* violations[319] and that *Scales* recordings obviated hearings.[320]

Justice system personnel attributed *Scales*'s reduction of suppression motions to several factors. Police act professionally.[321] There is no ambiguity about warnings and waivers.[322] Most juveniles confess, and the tapes provide unimpeachable evidence.[323] Juveniles' statements limited defense options and fostered a system of plea bargains, rather than

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[317] *See* GOLDSTEIN & GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda*, *supra* note 65, at 53 ("When explaining the reasons for not filing pretrial motions or aggressively trying cases, attorneys cited large caseloads, limited time, inadequate training, lack of professional support . . . , and courthouse culture."); *see also* PATRICIA PURITZ ET AL., ABA JUVENILE JUSTICE CTR., A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY REPRESENTATION IN DELINQUENCY PROCEEDINGS 51 (1995) ("In one jurisdiction, . . . attorneys do not file motions in order to maintain a 'friendly' atmosphere in the courthouse . . . .").

[318] *See* GOLDSTEIN & GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda*, *supra* note 65, at 54 ("[M]otions to suppress confessions under *Miranda* are rarely raised, rarely affect convictions, and rarely serve as the basis of successful appeals."); Cassell, Miranda*'s Social Costs*, *supra* note 114, at 393 ("[S]uppression motions are rarely granted . . . .").

[319] A prosecutor estimated that she encountered "maybe one or two a year." Another prosecutor recalled "six omnibus [suppression] hearings which involved statements, none of which involved suppression, in two and a half years." One judge reported "maybe one in the last year," and another described them as "very infrequent, maybe a couple of times a year." One defense lawyer said she only filed "a couple a year," another said, "In this year, I filed about three of them," and a third said, "I've had years where I haven't done it at all, because I haven't had anything that's right for trial."

FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 167.

[320] An urban judge attributed the paucity of *Miranda* suppression motions to *Scales* recordings:

> "We haven't had all that many cases involving full-scale trials that would involve *Scales* tapes. . . . When I was a defense attorney, these cases went to trial regularly. . . . Since *Scales* tapes, I'm finding these cases settle more often than not, so I'm not seeing it very often. It's usually resolved, and I'm not getting those kinds of cases."

Id. at 167–68.

[321] *Id.* at 168.

[322] A prosecutor observed:

> ["]When the issue regarding the *Scales* interview comes up, there isn't much to fight about. There is a protocol that the police follow, and they read it verbatim. . . . It's a standardized protocol. It's written, and they follow it fairly tightly. It's tight. We rely on it. They rely on it. The juvenile investigators are extremely careful.["]

Id.

[323] *See supra* notes 246–259 and accompanying text. One public defender said, "I don't file them [suppression motions] very often, because our kids do such a good job at hanging themselves." FELD, KIDS, COPS, AND CONFESSIONS, *supra* note 12, at 168. A judge commiserated with public defenders over the obstacles they confront: "I think down here it's real hard being a public defender, because if your kid has been in custody, he's likely cooked his own goose by the time you get to him." *Id.* at 168–69.

trials, in which the crucial issues involved dispositions rather than guilt or innocence.[324] *Scales* enables professionals to administer an inquisitorial model of justice "on the record," expedites processing of routine cases, and reserves court resources for complex cases.[325]

A. *Protecting Youth in the Interrogation Room*

Miranda purported to bolster the adversary system and protect citizens,[326] but warnings have failed to achieve those goals.[327] Post-*Miranda* decisions have limited its applicability[328] and the exclusionary consequences when police fail to comply.[329] *Miranda*'s protection only comes into play after police isolate a suspect.[330] It requires only an understanding of the words of the warning,[331] and does not extend to collat-

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324 One judge observed, "Most of our young people are represented by public defenders who are real busy. I think that it's fair to say that the culture and process down here is sort of slanted toward making a deal." *Id.* at 169. Another judges confirmed that, in the vast majority of cases, prosecutors and defense lawyers negotiate dispositions, rather than litigate admissibility of a statement or guilt or innocence:

> ["T]hey've decided to expend their energy focusing more on settlement and what's an appropriate disposition and how to best situate things for their clients. . . . [I]n a very large portion of the cases, the focus of things is on can we work out a disposition that everyone can live with or that particularly the child and defense attorney can live with.["]

Id.

325 *Id.* at 170.

326 *See* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) ("Unless adequate protective devices are employed to dispel the compulsion inherent in custedial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

327 *See* Weisselberg, *Mourning* Miranda, *supra* note 90, at 1577 ("A central assumption of the *Miranda* Court was that suspects would understand the warnings and be able to act on them. . . . Today's evidence strongly suggests the contrary . . . .").

328 *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984) (recognizing a "public safety" exception to *Miranda* when an emergency need for answers outweighs *Miranda*'s prophylactic Fifth Amendment protection); *see also* Weisselberg, *Mourning* Miranda, *supra* note 90, 1577–78 ("[T]he *Miranda* Court's high standards for waiver have largely been abrogated by *Davis v. United States* and lower court cases extending *Davis*, as well as by decisions finding implied waivers of rights if suspects simply answer questions during interrogation.").

329 *See, e.g.*, United States v. Patane, 542 U.S. 630 (2004) (declining to extend the "fruit of the poisonous tree" doctrine to the non-testimonial fruits of *Miranda* violations). *Dickerson* recognized the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement." Dickerson v. United States, 530 U.S. 428, 443 (2000).

330 *E.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (holding that police did not need to warn a suspect before questioning him at a police station because the suspect was free to leave). *See generally* Weisselberg, *Mourning* Miranda, *supra* note 90, at 1592 ("[W]e have a *Miranda* rule that is somewhat limited in reach, which sometimes locates warnings and waivers within the heart of a highly structured interrogation process, provides admonitions that many suspects do not understand, and appears not to afford many suspects a meaningful way to assert their Fifth Amendment rights. As a prophylactic device to protect suspects' privilege against self-incrimination, . . . *Miranda* is largely dead.").

331 *See* United States v. Hasan, 747 F. Supp. 2d 642, 670 (E.D. Va. 2010), *aff'd sub nom.*, United States v. Dire, 680 F.3d 446 (4th Cir. 2012) ("[F]rom the case law of several Courts of Appeals[,] . . . the inquiry as to whether a defendant understood the recitation of the Fifth

eral facts—seriousness of the crime[332] or an attorney seeking access[333]—or the consequences of waiver.[334] A suspect must assert the right to remain silent by speaking and making a clear invocation.[335]

Miranda assumed that a warning would enable suspects to resist the inherent coercion of custodial interrogation.[336] That assumption is demonstrably false. Post-*Miranda* research reports that eighty percent of adults and ninety percent of juveniles waive their sole protection in the interrogation room.[337] Although *Miranda* recognized that those compulsive pressures threaten the adversarial process,[338] waivers provide police with a window of opportunity to conduct an inquisitorial examination. Perversely, judges focus on ritualistic compliance with a procedural formality rather than on assessing the voluntariness or reliability of a statement.[339] *Miranda* remains

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Amendment rights focuses . . . on whether the defendant could, merely as a linguistic matter, comprehend the words spoken to him."); *cf.* Collins v. Gaetz, 612 F.3d 574, 588 (7th Cir. 2010) ("It is only when the evidence in the case shows that the defendant could not comprehend even the most basic concepts underlying the Miranda warnings that the courts have found an unintelligent waiver."). *See generally* Dickerson v. United States, 530 U.S. 428, 442 (2000) ("*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.").

[332] *See* Colorado v. Spring, 479 U.S. 564, 577 (1987) ("[T]he failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.").

[333] *See* Moran v. Burbine, 475 U.S. 412, 422–24 (1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right").

[334] Oregon v. Elstad, 470 U.S. 298, 316 (1985) ("This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.").

[335] Berghuis v. Thompkins, 130 S. Ct. 2250, 2263 (2010) (holding that a suspect who speaks has impliedly waived their Fifth Amendment protection).

[336] *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (requiring warnings to bolster the privilege against self-incrimination—"the mainstay of our adversary system"—and to protect "the dignity and integrity of [U.S.] citizens").

[337] *See supra* notes 174–181 and accompanying text.

[338] 384 U.S. at 457–58. The Court explained:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself.

Id. (footnote omitted).

[339] *See, e.g.*, Missouri v. Seibert, 542 U.S. 600, 608–09 (2004) ("[G]iving the warning and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and a voluntary waiver or rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."); Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled'

a necessary, but not sufficient, predicate to assure admissible statements.[340]

Miranda is especially problematic for younger juveniles. Earlier, I distinguished between youths' cognitive ability—capacity to understand—and maturity of judgment—proficiency to make decisions and exercise rights. *Miranda* requires only the ability to understand a warning's words, which developmental psychologists conclude most sixteen- and seventeen-year-old youths possess. In this study, *Scales* tapes, waiver forms, and express waivers provide objective evidence that older delinquents purported to understand warnings, and corroborate developmental psychological research that older juveniles function similarly to adults. This consistency inferentially bolsters psychologists' research that many, if not most, children fifteen or younger do not understand *Miranda* or possess competence to exercise rights.[341] Research on false confessions underscores the unique vulnerability of juveniles, especially younger ones.[342]

Analysts attribute younger juveniles' over-representation among false confessors to reduced cognitive ability, immaturity, and increased susceptibility to manipulation.[343] They have fewer life experiences, and

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despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.").

340 *See generally* Dickerson v. United States, 530 U.S. 428, 444 (2000) ("*Miranda* announced a constitutional rule . . . .").

341 *See* Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, *supra* note 22, at 1153 tbl.2; *see also* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 67, at 356 ("[J]uveniles aged 15 and younger are significantly more likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants in a criminal proceeding.").

342 *See generally* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 945 (reporting that youths aged sixteen and seventeen accounted for 16% of false confessions, while youths aged fifteen or younger accounted for 19%, even though they commit fewer serious crimes); Gross et al., *supra* note 120, at 545 (reporting that in a study of exonerations, 42% of juveniles gave false confessions, compared with only 13% of adults, and among juveniles fifteen years of age and younger, 69% confessed falsely); Garrett, *Judging Innocence*, *supra* note 39, at 88–89 (reporting that false confessions occurred in 16% of cases and that juveniles accounted for 39% of false confessors); Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (studying factors associated with wrongful convictions of 103 youths—defined as those under the age of twenty—and reporting that one-third (31.1%) of youthful exonerees gave false confessions, a rate of false confessions that was almost double that of adult DNA exonerees (17.8%)).

343 Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260 (2007); *see* Bonnie & Grisso, *supra* note 76, at 86–93 ("[Y]ouths[ ] . . . may have significant deficits in competence-related abilities due . . . to developmental immaturity."); Redlich et al., *The Police Interrogation of Children and Adolescents*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 107, 114 (G. Daniel Lassiter ed., 2004) [hereinafter Redlich et al., *The Police Interrogation of Children*] (examining research showing an inverse relationship between age and suggestibility); Ann Tobey et al., Youths' *Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE

societal expectations of obedience to authority create pressures to waive.[344] They are more likely than adults to tell police what they think the police want to hear.[345] The stress of interrogation intensifies their desire to extricate themselves by waiving and confessing without considering long-term consequences.[346] When interrogating juveniles, police do not make allowances for these developmental differences.[347] Instead, the tactics employed against youths are those designed to manipulate adults: aggressive questioning, presenting false evidence, and leading

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225, 231–34 (Thomas Grisso & Robert G Schwartz eds., 2000) (discussing how juveniles are difficult clients for attorneys because they have difficulty remembering information, maintaining attention, and making decisions appropriatly).

344 Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 944 (summarizing reasons why juveniles exhibit unique vulnerabilities when interrogated); Drizin & Luloff, *supra* note 343, at 260; *see* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 77 ("[M]any juvenile suspects may find arrest and detention at the police station a distressing and frightening experience which may render them psychologically vulnerable . . . ."); Redlich et al., *The Police Interrogation of Children*, *supra* note 343, at 114 ("[I]t is likely that suggestible persons are more apt to confess in response to psychologically oriented interrogation tactics.").

345 *See* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 233 ("Many juveniles . . . are highly compliant. They tend to be . . . acquiescent[ ] and eager to please . . . when questioned by police."); *see also* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS *supra* note 80, at 381 (summarizing research which showed juveniles are "markedly more suggestible than adults" when subjected to interrogative pressure). *See generally* Bull, *Investigative Interviewing of Children*, *supra* note 109, at 13 (discussing how interviewers are more likely to produce accurate responses from children if they ask questions in a supportive manner rather than a formal or authoritative manner); Thomas D. Lyon, *The New Wave in Children's Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004 (1999) (examining and critiquing research into children's suggestibility in the context of sexual abuse allegations).

346 *See* EVANS, THE CONDUCT OF POLICE INTERVIEWS, *supra* note 118, at 4 ("[J]uveniles find arrest and detention a distressing and frightening experience. This may render suspects psychologically vulnerable . . . [to] readily admit to offences in order to obtain as quick a release as a possible . . . ."); GOLDSTEIN & GOLDSTEIN, EVALUATING CAPACITY TO WAIVE *Miranda*, *supra* note 65, at 63 ("[Y]outh may be particularly willing to risk the potential long-term negative consequences of waiving rights for the positive consequence of ending an unpleasant interrogation and potentially being released."); Owen-Kostelnik et al., *supra* note 17, at 295 ("[T]o the extent that adolescents value the present more than the future and are stressed in the current [interrogation] condition, the likelihood that they will confess in exchange for the hoped-for departure from the situation increases."); *see also* Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, *in* POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 49, 53 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (identifying juveniles' "inability to consider long-term consequences" as a factor increasing their likelihood of falsely confessing in interrogations).

347 Owen-Kostelnik et al., *supra* note 17, at 294.

questions[348]—tactics that may create unique dangers in the juvenile interrogation context.[349]

The Supreme Court in *Haley*, *Gallegos*, *Gault*, *Michael C.*, *Alvarado*, and *J.D.B.* either excluded or reversed and remanded judgments affirming the admittance of statements taken from youths fifteen years of age[350] or younger[351] and admitted those obtained from sixteen-[352] and seventeen-year-olds.[353] *Haley* and *Gallegos* recognized that children's immaturity and inexperience increased the likelihood of involuntary confessions.[354] *J.D.B.* reaffirmed that youthfulness heightened susceptibility to coercion.[355] The Court's decisions create a de facto line that distinguishes between youths fifteen and younger and those sixteen and older and closely tracks psychologists' research about youths' cognitive ability and competence. State courts, legislatures, and policy makers should formally adopt that functional line between older and younger juveniles.

More than three decades ago, the American Bar Association recommended, "The right to counsel should attach *as soon as the juvenile is taken into custody* by an agent of the state, when a petition is filed against the juvenile, or when the juvenile appears personally at an intake

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348 *See* Owen-Kostelnik et. al, *supra* note 17, at 291, 295 (discussing the use of adult interrogation tactics on children and adolescents); *see also* Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER FOR CHILD. & CTS. 151, 156–57 (1999) (comparing the unacceptability of leading questions in interviews of child victims with their common use in interrogations of child suspects); *cf.* INBAU ET AL., *supra* note 102, at 298 (asserting that the principles of adult interrogation may be applied to juvenile suspects).

349 *See* Barbara Kaban & Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER FOR CHILD. & CTS. 151, 158 (1999) ("Interrogation procedures designed for adults but used with children increase the likelihood of false confessions and may even undermine the integrity of the fact-finding process."); Owen-Kostelnik et al., *supra* note 17, at 291–96 (discussing the effects of adult interrogation tactics on children and adolescents); *see also* David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L & CRIMINOLOGY 641, 671–77 (2002) (relating the case of Lacresha Murray, an eleven-year-old charged with homicide in 1996 based on her confession following a "controversial" two-and-a-half-hour interrogation). *See generally* Allison D. Redlich, *Double Jeopardy in the Interrogation Room: Young Age and Mental Illness*, 62 AM. PSYCHOL. 609, 610 (2007) (arguing that the risk of false confessions by juveniles is heightened by the prevalence of mental-health issues in juvenile arrestees).

350 *In re* Gault, 387 U.S. 1, 4–6, 56 (1966); Haley v. Ohio, 332 U.S. 596, 600–01 (1948) (plurality opinion).

351 J.D.B. v. North Carolina, 131 S. Ct. 2394, 2399–400, 2408 (2011); Gallegos v. Colorado, 370 U.S. 49, 54–55 (1962).

352 Fare v. Michael C., 442 U.S. 707, 726–28 (1979).

353 Yarborough v. Alvarado, 541 U.S. 652, 656–58, 668–69 (2004).

354 *Gallegos*, 370 U.S. at 54–55; *Haley*, 332 U.S. at 599–600; *see also* King, *supra* note 29, at 458 ("[C]hildren are different from adults and require protection from their youth when enmeshed with law enforcement. This is the teaching of *Haley* and *Gallegos*.").

355 *J.D.B.*, 131 S. Ct. at 2402–03 ("[A] child's age 'would have affected how a reasonable person' in the suspect's position 'would perceive his or her freedom to leave.' " (quoting Stansbury v. California, 511 U.S. 318, 325 (1994))).

conference, whichever occurs first."[356] The ABA endorsed mandatory, non-waivable appointment of counsel because it recognized "[f]ew juveniles have the experience and understanding to decide meaningfully that the assistance of counsel would not be helpful."[357] Contemporary analysts argue that younger juveniles "should be accompanied and advised by a professional advocate, preferably an attorney, trained to serve in this role."[358] Requiring a child to consult an attorney assures an informed and voluntary waiver.[359]

If youths fifteen or younger consult with counsel, it will somewhat limit police's ability to secure confessions. However, if younger juveniles cannot understand or exercise rights without legal assistance, then to treat them as if they do denies fundamental fairness and enables the state to exploit their vulnerability. Constitutional rights exist to assure factual accuracy, promote equality, and protect individuals from governmental over-reaching, and inevitably diminish somewhat the state's ability to fight crime.[360] *Michael C.* emphasized lawyer's unique role in the *Miranda* framework,[361] and *Haley*, *Gallegos*, and *Gault* recognized younger juveniles' exceptional need for their assistance.[362]

B. Limiting the Length of Interrogations

The Court has recognized that lengthy interrogations produce involuntary confessions[363] and that prolonged questioning of juveniles can co-

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[356] CHARLES Z. SMITH ET AL., IJA–ABA JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, STANDARDS RELATING TO PRETRIAL COURT PROCEEDINGS 89 (1980) (emphasis added).

[357] *Id.* at 92.

[358] Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 30 (citation omitted).

[359] *See* Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 149 (2007) ("[Y]outhfulness supports a per se rule prohibiting juveniles from waiving either the Fifth Amendment privilege against self-incrimination in the interrogation room or the Sixth Amendment right to counsel in delinquency proceedings. In both contexts, the assistance of counsel should be mandatory."); Drizin & Luloff, *supra* note 343, at 313 ("The best practice to ensure accuracy in confessions and knowing and intelligent waivers of counsel is to require a per se rule that children cannot waive their *Miranda* rights without first consulting an attorney.").

[360] *See* Escobedo v. Illinois, 378 U.S. 478, 490 (1964) ("No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (footnote omitted)).

[361] Fare v. Michael C., 442 U.S. 707, 719 (1979) ("[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.").

[362] *See In re* Gault, 387 U.S. 1, 45 (1967); Gallegos v. Colorado, 370 U.S. 49, 54 (1962); Haley v. Ohio, 332 U.S. 596, 600-01 (1948).

[363] *See* Ashcraft v. Tennessee, 322 U.S. 143, 153–55 (1944) (holding involuntary a confession obtained only after thirty-six hours of nearly continuous interrogation).

erce a statement.[364] Policy-makers should create a sliding-scale presumption of involuntariness or examine more closely a confession's reliability as length of questioning increases. Police concluded ninety percent of these felony interrogations in less than thirty minutes.[365] Every study reports that police complete most interrogations in less than an hour, and few take as long as two hours.[366] By contrast, interrogations that elicit false confessions are typically lengthy proceedings that wear down an innocent person's resistance.[367] Prolonged interrogation, especially in conjunction with youthfulness, mental retardation, or other psychological vulnerabilities, is strongly associated with false confessions and may reach a tipping point after more than a few hours.[368]

I cannot prescribe outer time limits because I did not encounter either lengthy or factually problematic interrogations. However, states should create a sliding-scale presumption that police elicited involuntary confession as the length of questioning increases. If police complete nearly all felony interrogations in less than one hour and extract most false confessions only after grilling suspects for six hours or longer,[369] then these times provide parameters to limit interrogations and strengthen the presumption of coercion.[370] Four hours provides ample opportunity to obtain true confessions from guilty suspects willing to talk

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[364] Haley v. Ohio, 332 U.S. 596, 599–601 (1948).

[365] *Supra* Table 6.

[366] *See* Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 16; *supra* notes 282–291 and accompanying text.

[367] *See* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 948–49 ("Of the [false confessions] in which the length of interrogation was either reported or could be determined[,] . . . [t]he average length of interrogation was 16.3 hours, and the median length of interrogation was twelve hours."); Ofshe & Leo, *supra* note 314, at 998 ("Some persons are not able to withstand the intensity of interrogation. [I]ts length may fatigue and debilitate an otherwise normal individual[ ] . . . ."); *supra* note 280 and accompanying text; *cf.* INBAU ET AL., *supra* note 102, at 597 ("[R]arely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature. . . . Most cases require considerably fewer than four hours.").

[368] *See* White, *False Confessions and the Constitution*, *supra* note 174, at 143 ("[A]n interrogation's length seems directly related to its likelihood of producing a false confession. In nearly all of the documented cases involving false confessions by suspects of normal intelligence, the interrogation proceeded for several hours, generally more than six."); *see also* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 944–45, 948–49 (finding that "[m]ost false confessions in our sample come from the young" and only 16% lasted less than six hours); GARRETT, CONVICTING THE INNOCENT, *supra* note 120, at 21 ("These forty false confessions are unique and unusual. . . . [A]lmost all of [their] interrogations were prolonged affairs, lasting many hours or even days. Fourteen of these exonerees were mentally retarded, three were mentally ill, and thirteen were juveniles.").

[369] Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 16.

[370] *See, e.g.*, *id.* at 28 (recommending police departments set interrogation time limits and require periodic breaks); White, Miranda*'s Failure*, *supra* note 284, at 1233 ("Regardless of the interrogation practices employed, an interrogation should not be allowed to extend beyond some prescribed limit, say six hours.").

without increasing the risk of eliciting false confessions from innocent people.

C. *On the Record*

Within the past decade, legal scholars, psychologists, law enforcement, and justice system personnel have reached a consensus that recording reduces coercion, diminishes dangers of false confessions, and increases reliability.[371] Since Alaska and Minnesota mandated recordings, thirteen more states and the District of Columbia have required police to record interrogations,[372] although some only under limited circumstances.[373] Many police departments have policies to record interrogations for some crimes.[374]

An objective record provides an independent basis to resolve disputes between police and defendants about *Miranda* warnings, waivers, or statements.[375] A complete record enables the fact finder to decide

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[371] *See* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 639–45 (2004) (gathering positive support for mandatory interrogation taping from state commissions, the ABA, state legislatures, state supreme courts, and law enforcement agencies); Sullivan, *The Time Has Come*, *supra* note 123, at 178 ("Of the hundreds of experienced detectives to whom we have spoken who have given custodial recording a fair try, we have yet to speak with one who wants to revert to non-recording. . . . [M]any state prosecutors in communities where recordings are made[ ] . . . too are outspoken supporters of custodial recordings."); *see, e.g.*, GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS *supra* note 80, at 22 ("[T]ape-recording, or video-recording, of police interviews protects the police against false allegations as well as protecting the suspect against police impropriety."); MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 183–84; Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 553–55 [hereinafter Cassell, *Protecting the Innocent*]; Garrett, *Judging Innocence*, *supra* note 39, at 91, at 122; Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1113–15 (2010) [hereinafter Garrett, *The Substance of False Confessions*]; Kassin et al., *Police-Induced Confessions*, *supra* note 39, at 25–27; LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 296–303; Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 130–32.

[372] Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 127–28; *see also* LEO, POLICE INTERROGATION AND AMERICAN JUSTICE, *supra* note 92, at 320–21; SULLIVAN, POLICE EXPERIENCES, *supra* note 123, at 27–28; Sullivan, *The Time Has Come*, *supra* note 123, at 176–77.

[373] Illinois originally only recorded interrogations in homicide investigations, Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 22, at 128, but has recently begun recording interrogations of people suspected of other violent crimes. Dan Hinkel, *Recording of Cop Interrogations Widened: Quinn Signs Bill in Wake of False Confessions, Wrongful Convictions*, CHI. TRIB., Aug. 27, 2013, at C5.

[374] *See* Sullivan, *The Time Has Come*, *supra* note 123, at 182–87. Departmental policies may limit recordings to certain classes of felonies like homicides, violent crimes, or serious felonies. *Id.* at 178.

[375] *See* Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 130–31 ("[P]retrial motions to suppress statements and confessions are drastically reduced because there is usually no room for dispute as to what happened. Police officers . . . are spared hostile

whether a statement contains facts known to a guilty perpetrator or supplied by police to an innocent suspect during questioning.[376] Recordings protect police from false claims of abuse.[377] It enables police to focus on suspects' responses, to review details of an interview not captured in written notes, and to test them against subsequently discovered facts.[378] It avoids distortions when interviewers rely on memory or notes to summarize a statement.[379] Police officers who have switched to recording interviews unanimously express no desire to revert to non-recording.[380] A recorded confession enables prosecutors to avoid suppression hearings, negotiate better pleas, and obtain convictions.[381] It allows defense lawyers to review recordings, rather than rely on clients' imperfect recollection of a stressful event. It generates substantial savings because police, prosecutors, and defense counsel do not have to prepare for suppression hearings and judges do not have to conduct them.[382]

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cross examinations about failing to give Miranda warnings[ ] . . . ."); *see also* Drizin & Leo, *The Problem of False Confessions*, *supra* note 81, at 997 ("[T]aping leads to a higher level of scrutiny (by police officials as well as others) that will deter police misconduct during interrogation, improve the quality of interrogation practices, and thus increase the ability of police to separate the innocent from the guilty."); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 316 (2003) [hereinafter Slobogin, *Toward Taping*] ("[A]n exact accounting of interrogation events—from the way the warnings are given to the precise nature of any threats, promises, and deceptions that occur—is needed to determine whether statements are voluntary in the totality of the circumstances.").

376 *See* Garrett, *The Substance of False Confessions*, *supra* note 371, at 1058 ("When custodial interrogations are not recorded in their entirety, one cannot easily discern whether facts were volunteered by the suspect or disclosed by law enforcement."); White, *False Confessions and the Constitution*, *supra* note 174, at 153–55 (arguing for recording to evaluate whether police communicated critical facts to suspect); *see, e.g.*, GARRETT, CONVICTING THE INNOCENT, *supra* note 120, at 28–31 (describing how police can contaminate suspects' statements unknowingly).

377 *See* Sullivan, *The Time Has Come*, *supra* note 123, at 178 ("[R]ecordings protect officers from claims of misconduct, and practically eliminate motions to suppress based on alleged police use of overbearing, unlawful tactics[ ] . . . ."); *see, e.g.*, Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 134 (quoting one police officer as saying that recordings have disproved many false allegations by suspects).

378 Leo, *The Impact of* Miranda *Revisited*, *supra* note 113, at 683; Sullivan, *The Time Has Come*, *supra* note 123, at 178–79; *see, e.g.*, Drizin & Reich, *supra* note 371, at 625 (discussing how Charles O'Hara, a criminal investigator and police investigation manual author, would obtain voluntary confessions by interrogating suspects and then confronting them with recordings of their alibis' inconsistencies and contradictions).

379 *See* Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 130; *cf.* MILNE & BULL, INVESTIGATIVE INTERVIEWING, *supra* note 10, at 26–30 (describing how the cognitive demands of questioning can hinder and distort interviewers' memory of information learned in interrogations).

380 Sullivan, *The Time Has Come*, *supra* note 123, at 178–79; *see, e.g.*, Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 133–34.

381 Cassell, Miranda*'s Social Costs*, *supra* note 114, at 489 (arguing that recording does not adversely affect any legitimate law enforcement interests and provides prosecutors with more convincing evidence with which to negotiate better pleas and obtain convictions); Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 131.

382 Sullivan, *The Wisdom of Custodial Recordings*, *supra* note 123, at 130–32.

Police must record *all* conversations—including preliminary interviews and interrogations, not just suspects' final statements—for it to be an effective safeguard.[383] Otherwise, police may conduct pre-interrogation interviews, elicit incriminating information, and then record a final confession after the "cat is out of the bag"[384]—a variation of the practice condemned in *Missouri v. Siebert*.[385] Only a complete record of every interaction can protect against a final statement that ratifies an earlier coerced one or against a false confession contaminated by non-public facts that police supplied a suspect.[386]

CONCLUSION

Recordings provide an opportunity to systematically examine what happens in the interrogation room and to adopt policies based on knowledge rather than surmise. The Supreme Court repeatedly insists that American criminal and juvenile justice is an adversary system.[387] Such repeated assertions do not alter the reality that states decide most defendants' guilt in an inquisitorial setting. Most defendants seal their fate in the interrogation room, rendering trial procedures a nullity. Interrogation elicits confessions, and confessions produce guilty pleas.[388] Concern about reliability requires procedures to prevent miscarriages of justice such as false confessions and wrongful convictions. Because states do not provide full adversarial testing in every felony case, we need stronger mechanisms to assure factual reliability of inquisitorial justice and elicit true confessions from guilty people.

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[383] *See* GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS *supra* note 80, at 23 (arguing that recording all questioning is necessary to understand what really occurred during interrogation); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2026 (1998) [hereinafter White, *What Is an Involuntary*] (proposing that police record all communications between suspects and interrogators to enable judges to determine whether the police provided suspects with unique facts during untaped interactions).

[384] *See* Slobogin, *Toward Taping*, *supra* note 375, at 315.

[385] 542 U.S. 600, 609–10 (2004) (opinion of Souter, J.) (describing "two-stage interrogations," where an officer questions an unwarned suspect, obtains an incriminating statement, then reads the suspect a *Miranda* warning and asks them to repeat the statement).

[386] *See* GARRETT, CONVICTING THE INNOCENT, *supra* note 120, at 22–33 (describing the process of contamination that can occur during interrogation); White, *False Confessions and the Constitution*, *supra* note 174, at 132 n. 192 ("[I]n the absence of . . . the complete transcript . . . , courts generally should not accept the government's assertion that a confession is reliable because of the facts about the defendant's knowledge that it reveals."); *see also* Kassin, *The Psychology of Confession Evidence*, *supra* note 94, at 230 (explaining how even objective videos of interviews can create bias in the viewer); White, *What Is an Involuntary*, *supra* note 383, at 2024–26 (endorsing a requirement that suspects' confessions be corroborated by independent evidence to assure the trustworthiness of taped confessions).

[387] For instance, *Miranda* required the warning "to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." Miranda v. Arizona, 384 U.S. 436, 469 (1966).

[388] *See* PACKER, *supra* note 13, at 161 (explaining how the Crime Control Model of criminal justice's "informal administrative fact-finding" creates a presumption of guilt).

For more than half a century, the Court's limited and ineffectual forays into this arena have allowed public officials to evade their responsibility to assure the fairness and accuracy of the justice system. The judicial and legislative abdication reflects the "recognition that virtually any alternative that meets *Miranda*'s concerns about custodial pressures will impose infinitely greater burdens on law enforcement than do the *Miranda* rules themselves."[389] Recording imposes no great burden on police, illuminates the inner-workings of the interrogation room, and provides an objective record on which a defendant may appeal to a judge. Because the vast majority of defendants will not receive a trial, judicial review of the record provides an alternative means to assure the fairness and reliability of routine felony justice.

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[389] Schulhofer, Miranda*'s Practical Effect*, *supra* note 114, at 560.