

## Article

# Juveniles' Competence to Exercise *Miranda* Rights: An Empirical Study of Policy and Practice

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The United States Supreme Court has decided more cases involving the interrogation of juveniles than any other aspect of juvenile justice administration.<sup>1</sup> Although it has cautioned trial judges to be especially sensitive to the effects of youthfulness and immaturity on a defendant's ability to waive or to invoke her *Miranda* rights and to make voluntary statements, the Court has not mandated any special procedural protections for immature suspects. Instead, it endorsed the adult waiver standard—"knowing, intelligent, and voluntary" under the "totality of the circumstances"—to gauge the validity of a juvenile's waiver of *Miranda* rights.<sup>2</sup>

At the same time, developmental psychologists have examined adolescents' adjudicative competence and their capacity to exercise or waive *Miranda* rights. These psychological studies strongly question whether juveniles possess the cognitive abil-

1. See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 661–65, 666–68 (2004) (defining "custody" and discussing the impact of youthfulness on whether a "reasonable person" would feel free to leave); *Fare v. Michael C.*, 442 U.S. 707, 727–28 (1979) (endorsing an adult standard of knowing, intelligent, and voluntary under the totality of the circumstances to gauge the validity of a juvenile's waiver of *Miranda* rights); *In re Gault*, 387 U.S. 1, 55 (1967) (recognizing juveniles' Fifth Amendment privilege against self incrimination); *Gallegos v. Colorado*, 370 U.S. 49, 52–55 (1962) (assessing the voluntariness of a juvenile's confession); *Haley v. Ohio*, 332 U.S. 596, 598–601 (1948) (same).

2. *Fare*, 442 U.S. at 724–27.

ity, maturity, and judgment necessary to exercise legal rights. The psychological research convincingly indicates that younger and mid-adolescent youths are *not* equal to adults in the interrogation room and that they require procedural protections beyond *Miranda* to protect them and to enable them to exercise their rights. However, the developmental psychological research also suggests that youths sixteen and seventeen years of age appear to function on par with adults.<sup>3</sup>

Police, prosecutors, defense attorneys, and trial judges who deal regularly with the products of interrogation—confessions, admissions, denials, and leads to other evidence—do not have the luxury to analyze the interrogation process systematically. By contrast, the appellate court judges who frame the rules of interrogation and the law professors and criminologists who write about the practice lack ready access to the interrogation rooms where police routinely interview criminal suspects. As a result, most of what appellate judges, criminologists, legal scholars, policy makers, and the public think we know about interrogation derives from anecdotal cases involving egregious abuses or false-confessions and from popular television drama programs—*NYPD Blues* and *Law & Order*—and “reality” shows—*Cops*—that depict police questioning suspects. Although four decades have passed since the Supreme Court decided *Miranda v. Arizona*,<sup>4</sup> remarkably little more observational empirical research exists now than did then about what actually occurs inside an interrogation room. Additionally, we have no naturalistic observational research about the ways that police routinely question juveniles or how these juveniles respond.

This Article begins to fill that empirical void by analyzing quantitative and qualitative data—interrogation tapes and transcripts, police reports, juvenile court filings, and probation and sentencing reports—of the routine police interrogations of sixty-six juveniles sixteen years of age or older whom prosecutors charged with a felony offense. Part I analyzes “the law” of juvenile interrogation and how courts and legislatures have responded to youthfulness and immaturity during interrogation. Part II examines developmental and social psychological research on adolescents’ competence to exercise legal rights and their vulnerabilities in the interrogation room. Part III reviews

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3. See *infra* Part II.

4. See 384 U.S. 436 (1966).

the Supreme Court's perception of police interrogation at the time of *Miranda*, how interrogation manuals and techniques have evolved in response to *Miranda*, and the limited empirical research on contemporary interrogation practices. Part IV describes the data and methodology used in this study. Part V analyzes quantitative and qualitative data about the routine police interrogation of sixty-six juveniles sixteen years of age or older whom prosecutors charged with felony-level offenses.<sup>5</sup> This Article provides the first empirical test of adolescents' capacity to understand and to waive or invoke their *Miranda* rights. The Article concludes with a discussion of findings, policy implications, and a call for further research.

### I. INTERROGATING JUVENILES: THE LAW "ON THE BOOKS"

After the Supreme Court in *In re Gault* applied the privilege against self-incrimination to delinquency proceedings,<sup>6</sup> the right to a warning prior to interrogation previously developed in *Miranda v. Arizona* applied to juveniles.<sup>7</sup> Under current law, when gauging the validity of a juvenile's waiver of Fifth Amendment rights, courts must decide whether she made a "knowing, intelligent, and voluntary" waiver under the "totality

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5. See also Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY (forthcoming 2007) (examining the responses of the fifty-three juveniles who waived their rights).

6. *In re Gault*, 387 U.S. 1, 42–57. See generally Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 152–57 (1984) [hereinafter Feld, *Criminalizing Juvenile Justice*] (analyzing the Supreme Court's rationale for incorporating the constitutional privilege against self-incrimination in state delinquency proceedings); 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, 111–20 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter Feld, *Juveniles' Waiver of Legal Rights*] (analyzing the inadequacy of the *Miranda* framework to safeguard juveniles' ability to exercise the privilege against self-incrimination).

7. Although the Supreme Court has never explicitly held that *Miranda* applies to juvenile proceedings, the Court, in *Fare v. Michael C.*, "assume[d] without deciding that the *Miranda* principles were fully applicable to the present [juvenile] proceedings." 442 U.S. at 717 n.4; see Larry E. Holtz, *Miranda in a Juvenile Setting: A Child's Right to Silence*, 78 J. CRIM. L. & CRIMINOLOGY 534, 534–35 (1987) (discussing whether a police officer must modify *Miranda* warnings when they are administered to juveniles).

of the circumstances,” and whether she made any ensuing statements voluntarily.<sup>8</sup>

Long before *Miranda*, the Supreme Court cautioned trial judges to closely scrutinize the impact of youthfulness and inexperience on the voluntariness of juveniles’ confessions in *Haley v. Ohio*<sup>9</sup> and in *Gallegos v. Colorado*.<sup>10</sup> In *Gault*, it reiterated

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8. *Fare*, 442 U.S. at 724–27; Feld, *Criminalizing Juvenile Justice*, *supra* note 6, at 169–90.

9. 332 U.S. 596 (1948). In *Haley*, police interrogated a fifteen-year-old “lad” in relays beginning shortly after midnight, denied him access to counsel, and confronted him with confessions by co-defendants until he finally confessed at five o’clock a.m. *Id.* at 600. The Court reversed his conviction and ruled that a confession obtained under these circumstances was involuntary:

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.

*Id.* at 600–01. In so doing, the Court emphasized Haley’s youth and inexperience as factors that increased his vulnerability to coercive interrogation techniques:

What transpired would make us pause for careful inquiry if a mature man was involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy. . . . He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. . . . [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.

*Id.* at 599–600.

10. 370 U.S. 49 (1962). In *Gallegos*, the Court identified the factors that rendered a fourteen-year-old juvenile’s confession involuntary:

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.

*Id.* at 55 (citation omitted). Again, the Court emphasized the vulnerability of youth and reiterated that the age of the accused constituted a special circumstance that affects the voluntariness of confessions:

[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. . . . A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. . . . 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.

its concerns about the effects of youthfulness on the voluntariness of statements.<sup>11</sup> Thus, the Court had long recognized that children are not the equals of adults in the interrogation room and that they require greater procedural safeguards, such as the presence of a parent or an attorney, to compensate for their vulnerability and susceptibility to coercive influences.

However, in *Fare v. Michael C.*, a more conservative Court considered the validity of a *Miranda* waiver given by a 16½-year-old who had several prior arrests, considerable experience with the police, and had “served time” in a youth camp and repudiated its earlier concern that youthfulness increased juveniles’ vulnerability to coercion.<sup>12</sup> In *Fare*, the juvenile repeatedly requested access to his probation officer prior to interrogation.<sup>13</sup> However, the Court ruled that requesting to speak with a probation officer did not invoke the *Miranda* privilege against self-incrimination or constitute the functional equivalent of a request to consult with counsel, either of which would have required police to cease questioning.<sup>14</sup> *Fare* held that the “totality of the circumstances” test used to evaluate the validity of adult waivers governed the validity of juveniles’ waivers as well as the admissibility of their confessions.<sup>15</sup> *Fare* refused to provide children with greater procedural protections than those afforded adults.<sup>16</sup> The Court rejected the view that

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*Id.* at 54.

11. *In re Gault*, 387 U.S. at 45 (repeating that “admissions and confessions of juveniles require special caution”).

12. 442 U.S. 707, 726–27.

13. *Id.* at 710.

14. *Id.* at 722–24; *cf.* *Edwards v. Arizona*, 451 U.S. 477, 485 (1981) (holding that police may not interrogate an accused after the person has requested an opportunity to consult with counsel). Earlier, the California Supreme Court had held in *People v. Burton* that when a child who is in custody and who is interrogated without the presence of counsel requests to see one of his or her parents, further questioning must cease. 491 P.2d 793, 798 (Cal. 1971). In *In re Michael C.*, the California Supreme Court extended *Burton*’s “parental request” rule to a youth’s request to consult with his probation officer. 579 P.2d 7, 11 (1978), *rev’d sub nom.* *Fare v. Michael C.*, 442 U.S. 707 (1979). The Supreme Court in *Fare* rejected this position and distinguished the role of counsel from that of probation officers in the *Miranda* process. *Fare*, 442 U.S. at 722–24.

15. *Fare*, 442 U.S. at 725.

16. *Id.*; see Feld, *Criminalizing Juvenile Justice*, *supra* note 6, at 171; 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).

developmental or psychological differences between juveniles and adults required different rules or special procedural protections during interrogation.<sup>17</sup> Instead, the Court required children to assert their legal rights clearly and unambiguously, just like adults, and rebuffed the argument that trial courts cannot adequately measure young peoples' exercise or waiver of *Miranda* rights against the adult standard.<sup>18</sup>

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17. *Fare*, 442 U.S. at 725.

18. *Id.* at 725–26. Most states adhere to *Fare*, allow juveniles to waive their *Miranda* rights under the “totality of the circumstances,” and do not require parental or legal assistance. See Kimberly Larson, *Improving the “Kangaroo Courts”: A Proposal for Reform in Evaluating Juveniles’ Waiver of Miranda*, 48 VILL. L. REV. 629, 645–46 (2003) (summarizing the majority of states’ use of the “totality of circumstances” test and the factors they consider); see, e.g., *Quick v. State*, 599 P.2d 712, 720 (Alaska 1979) (concluding that juveniles may waive *Miranda* rights without consulting a parent or other adult); *Carter v. State*, 697 So. 2d 529, 533–34 (Fla. 1997) (affirming the “totality” approach and upholding the trial court’s exclusion of the “Grisso Test,” which is used to measure a juvenile’s ability to comprehend *Miranda* warnings); *Dutil v. State*, 606 P.2d 269 (Wash. 1980) (declining to adopt a per se rule requiring presence of a parent, guardian, or counsel). The California Supreme Court held that

a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.

*People v. Lara*, 432 P.2d 202, 215 (Cal. 1967).

Appellate courts identify a multitude of factors that bear on the validity of a juvenile’s waiver of *Miranda* rights. However, they do not assign controlling weight to any particular factor and instead rely on the discretion of trial courts to weigh the various combinations of factors. In practice, trial judges only exclude confessions obtained under the most egregious circumstances. See Feld, *Criminalizing Juvenile Justice*, *supra* note 6, at 176; see, e.g., *In re W.C.*, 657 N.E.2d 908, 913, 922–23 (Ill. 1995) (upholding the validity of a waiver by a thirteen-year old who was “illiterate and moderately mentally retarded with an IQ of 48, . . . the equivalent developmentally of a six- to eight-year old. . . . [and] possessing the emotional maturity of a six- to seven-year old”); Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1902 (1996) (explaining that at a hearing to determine the admissibility of statements, “police officers frequently relate that they read the *Miranda* warnings and that the child agreed to talk”). Overtly coercive police interrogation techniques, very young age, and significant mental deficiencies do not prevent trial judges from finding “voluntary” waivers. See, e.g., *W.M. v. State*, 585 So. 2d 979, 980, 983 (Fla. Dist. Ct. App. 1991) (affirming the trial judge’s admission of the confession of a ten-year old boy with an IQ of seventy, who had been placed in a learning disability program, and whom police had questioned for six hours without any adult present). Courts routinely admit confessions extracted from illiterate, mentally retarded juveniles with IQs in the sixties, whom psychologists characterize as

When trial judges evaluate the validity of waivers of *Miranda* rights under the “totality of the circumstances,” they consider a multiplicity of factors, including characteristics of the offender—for example: age, education, IQ, and prior contacts with law enforcement—and circumstances surrounding the interrogation, such as the location, methods, and lengths of interrogation.<sup>19</sup> The discretionary “totality” approach purportedly enables trial judges to protect youths who lack the ability to exercise their rights or who succumb to police coercion, without unduly limiting police ability to interrogate juveniles.<sup>20</sup>

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incapable of abstract reasoning. *See, e.g.*, *People v. Cheatham*, 551 N.W.2d 355, 370 (Mich. 1996) (upholding the validity of a waiver by an illiterate juvenile with an IQ of sixty-two because “[l]ow mental ability in and of itself is insufficient to establish that a defendant did not understand his rights”); *State v. Cleary*, 641 A.2d 102 (Vt. 1994) (upholding the validity of a waiver by a juvenile with limited ability to read or write and an IQ of sixty-five).

19. *See, e.g.*, *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968); *Lara*, 432 P.2d at 217–19. Several leading cases provide extensive lists of factors for trial judges to consider when they assess the validity of juveniles’ waiver decisions:

Factors considered by the courts in resolving this question include: 1) age of the accused; 2) education of the accused; 3) knowledge of the accused as to both the substance of the charge, if any has been filed, and the nature of his rights to consult with an attorney and remain silent; 4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; 5) whether the accused was interrogated before or after formal charges had been filed; 6) methods used in interrogation; 7) length of interrogations; 8) whether vel non the accused refused to voluntarily give statements on prior occasions; and 9) whether the accused has repudiated an extra judicial statement at a later date. Although the age of the accused is one factor that is taken into account, no court, so far as we have been able to learn, has utilized age alone as the controlling factor and ignored the totality of circumstances in determining whether or not a juvenile has intelligently waived his rights against self-incrimination and to counsel.

*West*, 399 F.2d at 469; *see also Fare*, 442 U.S. at 725 (listing factors); *Riley v. State*, 226 S.E.2d 922, 926 (Ga. 1976); *State v. Benoit*, 490 A.2d 295, 302 (N.H. 1985).

20. *See Fare*, 442 U.S. at 725. *Fare* concluded that there are no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile’s age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of those rights.

*Id.* at 725–26.



Recently, in *Yarborough v. Alvarado*,<sup>21</sup> the United States Supreme Court examined another aspect of the *Miranda* framework and again rejected youthfulness and inexperience as factors that merit special consideration.<sup>22</sup> The *Miranda* framework provides that when police “interrogate” a suspect who is “in custody,” they must administer the cautionary warning in order to dispel the “inherent coercion of custodial interrogation.”<sup>23</sup> In *Alvarado*, police asked the parents of a seventeen-year-old to bring him to the station for an interview, then denied the parents’ request to be present while the police questioned him and interviewed him alone for about two hours, during which time he made incriminating statements.<sup>24</sup> Because the officer did not Mirandize the juvenile prior to questioning, the issue arose of whether Alvarado was “in custody” and therefore entitled to the advisory.<sup>25</sup> The Court reviewed several prior decisions addressing the issue of custody and emphasized that the test for “custody” was an objective one—whether a reasonable person in the suspect’s position would feel that her freedom of movement was restrained to the degree associated with formal arrest.<sup>26</sup> Although certain facts pointed toward a finding that the juvenile was in custody and others pointed in the opposite direction, the Court ultimately affirmed the trial court’s conclusion that he was *not* in custody.<sup>27</sup> The Court insisted that, as an objective status, a finding of “custody” does *not* in-

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21. 541 U.S. 652 (2004).

22. *See id.* at 666–67.

23. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (noting that police must warn suspects subject to custodial interrogation because of “the compulsion inherent in custodial surroundings”). The Court explained that “custodial interrogation” meant “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444.

24. *Alvarado*, 541 U.S. at 656.

25. *Id.* at 659–60.

26. *Id.* at 661–63. The Court in *Alvarado* relied on its earlier decision in *Thompson v. Keohane*, 516 U.S. 99 (1995), which described the *Miranda* custody test:

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

*Id.* at 112 (citations omitted).

27. *Alvarado*, 541 U.S. at 664–66.

clude consideration of how the suspect's age or prior experience with law enforcement might affect his feelings of restraint.<sup>28</sup> The Court explicitly rejected the idea that youthfulness or inexperience have any bearing on objective determinations of custody.<sup>29</sup>

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28. *Id.* at 666–67. The Court noted that the *Miranda* custody test was an objective one and thus distinguishable from other legal questions, such as the voluntariness of confessions or consents to search, in which courts also considered more subjective considerations:

There is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience. The *Miranda* custody inquiry is an objective test. . . .

. . . [T]he objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect's age and experience. For example, the voluntariness of a statement is often said to depend on whether "the defendant's will was overborne," a question that logically can depend on "the characteristics of the accused." The characteristics of the accused can include the suspect's age, education, and intelligence, as well as a suspect's prior experience with law enforcement. . . . [However,] the custody inquiry states an objective rule designed to give clear guidance to the police, while considerations of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry.

*Id.* at 667–68 (citations omitted).

29. *Id.* at 666–67. In rejecting consideration of factors such as age and inexperience, the *Alvarado* majority emphasized that "[o]ur opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors." *Id.*

By contrast, the *Alvarado* dissenters argued that on the facts of the case, a reasonable person would *not* have felt free to leave the interrogation room and therefore the defendant was in custody for *Miranda* purposes:

What reasonable person in the circumstances—brought to a police station by his parents at police request, put in a small interrogation room, questioned for a solid two hours, and confronted with claims that there is strong evidence that he participated in a serious crime, could have thought to himself, "Well, anytime I want to leave I can just get up and walk out"? If the person harbored any doubts, would he still think he might be free to leave once he recalls that the police officer has just refused to let his parents remain with him during questioning?

*Id.* at 670–71 (Breyer, J., dissenting).

Moreover, the dissenters argued that a youth's age is an objective and relevant factor that the law uses to modify the objective standard of a "reasonable person" in a variety of legal contexts. *Id.* at 674–75. "Common sense, and an understanding of the law's basic purpose in this area, are enough to make clear that Alvarado's age—an objective, widely shared characteristic about which the police plainly knew—is also relevant to the [custody] inquiry." *Id.* at 676.

Approximately one dozen states mandate additional procedural requirements for juveniles beyond the “totality” approach endorsed by *Fare*.<sup>30</sup> These jurisdictions require the presence of a parent or other “interested adult” at a juvenile’s interrogation as a prerequisite to a valid waiver of *Miranda* rights.<sup>31</sup> Jurisdictions with a per se rule assume that most juveniles lack competence to exercise or waive their *Miranda* rights unaided and believe that they require an adult’s assistance to make this decision.<sup>32</sup> These states have prospectively adopted a categori-

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30. See, e.g., 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); Andy Clark, Comment, “Interested Adults” with Conflicts of Interest at Juvenile Interrogations: Applying the Close Relationship Standard of Emotional Distress, 68 U. CHI. L. REV. 903, 910–19 (2001); David T. Huang, Note, “Less Unequal Footing”: State Courts’ Per Se Rules for Juvenile Waivers During Interrogations and the Case for Their Implementation, 86 CORNELL L. REV. 437, 449–55 (2001) (summarizing variations in states’ per se rules requiring parental presence or an “interested adult” at a juvenile’s interrogation).

31. See, e.g., *People v. Saiz*, 620 P.2d 15, 18 (Colo. 1980); *Freeman v. Wilcox*, 167 S.E.2d 163, 167 (Ga. Ct. App. 1969); *Lewis v. State*, 288 N.E.2d 138, 142 (Ind. 1972); *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657 (Mass. 1983) (requiring the state to show that “a parent or interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights”); *In re E.T.C.*, 449 A.2d 937, 940 (Vt. 1982) (holding, as a matter of state constitutional law, that in order to establish a valid waiver by a juvenile, the youth “must be given the opportunity to consult with an adult . . . that adult must be one who is not only genuinely interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and . . . the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile”). Some states require a juvenile below the age of fourteen years actually to consult with an interested adult, but provide older juveniles only with an opportunity to consult with an interested adult as a prerequisite to a valid waiver. See *In re B.M.B.*, 955 P.2d 1302, 1312–13 (Kan. 1998); *State v. Presha*, 748 A.2d 1108, 1114–15 (N.J. 2000). Other states have enacted statutes to require the presence of a parent or interested adult. See, e.g., COLO. REV. STAT. § 19-2-511(1) (1996) (requiring a parent to be present at interrogation and advised of the juvenile’s *Miranda* rights); IND. CODE § 31-32-5-1 (1998). Analysts note, however, the difficulty courts confront in determining whether a particular person is an “interested adult” or has conflicts with the juvenile that prevent her from fulfilling her advisory functions. See Farber, *supra* note 30, at 1289–98 (noting that courts lack criteria by which to determine which adults can function adequately as a parent/guardian advisor and summarizing cases in which courts approved advisors even though the interests of juvenile and adult manifestly conflict).

32. 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, 370 (2002). States that require parental presence as a prerequisite to a valid waiver by a juvenile make two assumptions about parents’ role and competence, both of which may be problematic. States that require parental presence or consulta-

cal policy to prevent invalid waivers, rather than trying to assess after-the-fact the impact of immaturity on the validity of each individual waiver under the "totality of the circumstances." Some states employ "two-tiered" rules that reflect gradations of youths' competence, for example, by requiring parental presence for juveniles younger than fourteen years of age, but creating only a presumption of incompetence for those fourteen or sixteen years of age or older.<sup>33</sup> Most commentators

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tion assume that an identity of interests exists between the parent and child, and that parents possess the competence that their children lack to provide them with legal assistance. Parents typically would provide the medium through which a child actually might contact an attorney and could provide some psychic support. Robert E. McGuire, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1382 (2000) (arguing that without adult assistance, juveniles will comply with authority figures, misunderstand the warnings given, and fail to assert their rights).

33. In Massachusetts, for example, police must afford a juvenile younger than fourteen years of age an opportunity to consult with a parent prior to waiver, and must allow a juvenile over fourteen years of age to consult with a parent unless the court finds the youth to be highly intelligent. *Commonwealth v. A Juvenile*, 449 N.E.2d at 657. Similarly, Kansas requires juveniles younger than fourteen years of age to consult with a parent or counsel prior to custodial interrogation in order to assure the validity of subsequent waivers and the admissibility of any statements obtained. *In re B.M.B.*, 955 P.2d at 1312–13. These policies are consistent with developmental psychological research that reports that juveniles fourteen years of age or younger consistently failed to meet the standards of competence exhibited by older juveniles or adults. See THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 202 (1981) [hereinafter GRISSO, JUVENILES' WAIVER OF RIGHTS]; Larson, *supra* note 18, at 648 (describing a "two-tiered" approach to waivers with enhanced protections for juveniles younger than fourteen years of age).

Larson argues that if the purpose of the procedural safeguards is to provide a level of protection for juveniles functionally equivalent to that of adults' competence, then the "interested adult" provided to juveniles younger than sixteen years of age should be an attorney. *Id.* at 661.

This proposal would remedy the problems of allowing parents, who often do not comprehend *Miranda* themselves or who provide no guidance, to serve as advisors to their children during interrogation. Further, consultation with a lawyer would not hinder interrogation any more than the current standard, which provides the option of consultation with a lawyer.

*Id.* Because political support for mandatory consultation with counsel is unlikely, Larson's fall-back proposal is to provide juveniles younger than sixteen years of age with access to "a child advocate familiar with the interrogation process who would discuss *Miranda* with the child." *Id.* at 662.

Illinois provides for the presence of counsel when police interrogate the youngest juveniles for the most serious offenses. See 705 ILL. COMP. STAT. 405/5-170 (2003) (requiring an attorney's presence during the custodial interrogation of juveniles under thirteen years of age suspected of murder or sexual

endorse parental presence and “interested adult” safeguards,<sup>34</sup> even though empirical research and experience provide substantial reason to question the validity of the policy assumptions and the utility of the rule.<sup>35</sup>

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assault). Commentators note, however, the extraordinarily limited applicability of such protections and the political forces arrayed against providing such protections more broadly to juveniles. See Jennifer J. Walters, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 509–15 (2002) (describing political opposition to extending the right to counsel for juveniles during interrogation).

34. See, e.g., Raymond Chao, *Mirandizing Kids: Not as Simple as A-B-C*, 21 WHITTIER L. REV. 521, 547 (2000) (proposing adoption of the “interested adult” standard); 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 typically cause parents to be passive participants when they question juveniles); Krzewinski, *supra* note 32, at 370–83 (advocating adoption of a per se rule of parental presence); McGuire, *supra* note 32, at 1359 (advocating modification of the *Miranda* advisory to include a warning to a juvenile that she has the right to consult with and to have a parent present during interrogation); Huang, *supra* note 30, at 471.

35. Parents' interests may conflict with their child, for example, if the parent is a victim of their child's assault or theft. Parents also may experience an “unhelpful” emotional reaction to their child's arrest or may increase the pressure on their child to confess through the natural parental inclination to urge their child to “tell the truth.” See GRISSE, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 180 (finding that most parents encourage their child to cooperate with police and to tell the truth); Barbara Kaban & Ann E. Tobey, *When Police Question Children, Are Protections Adequate?*, 1 J. CENTER FOR CHILD. & CTS. 151, 154 (1999) (“[P]arents often push their children to ‘talk’ to authorities and to ‘tell the truth.’”); Larson, *supra* note 18, at 654 (“[T]he presence of an interested adult may not help the child and may actually hurt the child's chances of understanding and asserting his or her rights.”). Finally, parents may lack adequate understanding or appreciation of the juvenile's legal rights or the consequences of waiver. See Thomas Grisso & Melissa Ring, *Parents' Attitudes Toward Juveniles' Rights in Interrogation*, 6 CRIM. JUST. & BEHAV. 211, 213–14 (1979) (conducting a survey of middle class parents and reporting that most would provide little or no advice to juveniles, and that of those who did offer advice, “60% advis[ed] waiver of rights to silence and counsel and about 16% (about 4% of the total sample) advis[ed] against waiver”).

Police strategies to obviate parents' assistance may provide one reason why most parents fail to adequately protect their children's rights. For example, FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 301 (4th ed. 2004), recommends that officers assure parents that no one blames them for their child's misconduct; acknowledge that all children sometimes disappoint their parents; concede that everyone, including the officer, does things they should not have done; and emphasize that the officer's role is to learn the truth. *Id.* Thereafter,

[a] parent who is present during the interrogation should be advised

States offer several justifications for requiring the presence of a parent or other "interested adult" at a child's interrogation. The presence of a parent may enhance juveniles' understanding of their rights and the options available to them, mitigate the dangers of unreliable statements, and reduce the possibility of coercive influences during interrogation.<sup>36</sup> Also, because the vast majority of states do not systematically record all interviews, a parent may serve as an independent witness as to what occurs in the interrogation room and may help to assure the accuracy of any statements obtained.<sup>37</sup> To the extent that the validity of a waiver hinges on a juvenile's cognitive capacity, a parent's presence may relieve police of the need to make a subjective determination about a youth's competency.<sup>38</sup> Some courts acknowledge the more punitive role of contemporary juvenile courts and the need to provide an additional safeguard to protect juveniles' rights in order to achieve functional parity with adult defendants.<sup>39</sup> More practically, children depend on

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to refrain from talking, confining his or her function to that of an observer. The parent should be asked to sit in the chair set aside for an observer. . . . The investigator should then proceed with the interrogation as though he were alone with the suspect.

*Id.*

36. See Feld, *Juveniles' Waiver of Legal Rights*, *supra* note 6, at 117 (summarizing states' rationales for requiring presence of a parent). Some commentators rightly question the validity of these assumptions. See, e.g., GRISSO, *JUVENILES' WAIVER OF RIGHTS*, *supra* note 33, at 166 (questioning the assumptions underlying arguments that parents reduce juveniles' feelings of isolation and fear and provide advice about matters beyond their comprehension); Farber, *supra* note 30, at 1278 (observing that parental presence requirements anticipate that parents will provide additional protections for juveniles during interrogation, but noting that "data regarding parental attitudes toward a child's right to withhold information from the police and statistics concerning adult comprehension of *Miranda* requirements both serve to challenge the assumption that parents can adequately advise juveniles regarding the waiver of their right against self-incrimination").

37. See *In re Dino*, 359 So. 2d 586, 592 (La. 1978) (noting that parental presence serves several functions).

If the juvenile decides to talk to his interrogators, the assistance of an adult can mitigate the dangers of untrustworthiness. With an adult acting in his interest present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the adult can testify to it in court.

*Id.*

38. See Huang, *supra* note 30, at 467 ("[P]er se rules dispel uncertainty among police officers over whether a confession will later be admissible in court.").

39. See, e.g., *State v. Presha*, 748 A.2d 1108, 1114 (N.J. 2000) (concluding that because "punishment has now joined rehabilitation as a component of the State's core mission with respect to juvenile offenders," a parent or legal

their parents for information about and the money with which to obtain the assistance of counsel. To the extent that a *Miranda* warning includes the right to counsel, parents provide the practical mechanism by which juveniles can actually exercise that right.<sup>40</sup>

Minnesota, like most states, uses the “totality of the circumstances” standard to determine the validity of juveniles’ waiver of *Miranda* rights.<sup>41</sup> The Minnesota Supreme Court has consistently rejected juveniles’ arguments that it should adopt a per se rule of parental presence as an absolute prerequisite to the admissibility of statements obtained from juveniles:

Although we recognize that the presence of parents and their guidance during interrogation of a juvenile is desirable, we reject the absolute rule that every minor is incapable and incompetent as a matter of law to waive his constitutional rights. In determining whether a juvenile has voluntarily and intelligently waived his constitutional rights, parental presence is only one factor to consider and is not an absolute prerequisite.<sup>42</sup>

Indeed, a juvenile must repeatedly request access to a parent, both prior to and after the administration of a *Miranda* warning, in order for the Minnesota Supreme Court to regard the absence of a parent as a significant factor undermining the voluntariness of a juvenile’s waiver of rights.<sup>43</sup>

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guardian should be present in the interrogation room whenever possible to provide a “buffer” between the child and the police); see also *In re B.M.B.*, 955 P.2d 1302, 1312 (Kan. 1998) (“We cannot ignore the immaturity and inexperience of a child under 14 years of age and the obvious disadvantage such a child has in confronting a custodial police interrogation.”).

40. See *Presha*, 748 A.2d at 1113 (“[T]he parent serves as advisor to the juvenile, someone who can offer a measure of support in the unfamiliar setting of the police station”); see also *In re Dino*, 359 So. 2d at 594 (“Because most juveniles are not mature enough to understand their rights and are not competent to exercise them, the concepts of fundamental fairness . . . require that juveniles not be permitted to waive constitutional rights on their own.”).

41. See *In re M.A.*, 310 N.W.2d 699, 701 (Minn. 1981); *State v. Nunn*, 297 N.W.2d 752, 755 (Minn. 1980) (quoting *Fare v. Michael C.*, 442 U.S. 707 (1979), with approval and reaffirming its own adherence to the “totality” approach in determining the validity of a waiver of *Miranda* rights by a juvenile); *State v. Loyd*, 212 N.W.2d 671, 677 (Minn. 1973) (noting that as long as the questioning by authorities did not lull juveniles into confessions, the confidential and informal atmosphere of juvenile courts posed no special danger during interrogation).

42. *State v. Hogan*, 212 N.W.2d 664, 671 (Minn. 1973); see also *Nunn*, 297 N.W.2d at 755 (rejecting the argument that no juvenile’s confession should be admitted unless a parent or guardian was present when the juvenile waived his rights, and endorsing application of *Fare*’s “totality” approach).

43. See, e.g., *State v. Burrel*, 697 N.W.2d 579, 595 (Minn. 2005) (holding that a juvenile’s request to speak with his mother three times prior to admini-

As a result of *Fare* and *Alvarado*, federal and Minnesota constitutional law is clear and regards juveniles as the functional equivalent of adults in the interrogation room. Just as with an adult, a Minnesota trial judge must determine whether a youth has invoked or waived her rights “knowingly, intelligently, and voluntarily” under the “totality of the circumstances.” Youthfulness, inexperience, and a parent’s presence are simply some of the many factors that judges consider on a discretionary basis when they evaluate the validity of any waiver of rights.

## II. JUVENILES' COMPETENCE TO EXERCISE MIRANDA RIGHTS

Although “the law” of juvenile interrogation uses the adult “totality of the circumstances” test, developmental and social psychologists strongly question whether a typical juvenile has the capacity to make “knowing, intelligent, and voluntary” waiver decisions. The foremost research, by Thomas Grisso, reports that most juveniles simply do not understand a *Miranda* warning well enough to invoke or waive their rights in a “knowing and intelligent” manner.<sup>44</sup> This lack of understanding places juveniles at a comparative disadvantage with adults in their ability to exercise their rights.<sup>45</sup> Of the components of the

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stration of the *Miranda* warning and ten times after the *Miranda* warning rendered the juvenile’s waiver invalid).

44. See GRISSO, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 106–07 (reporting that only about half of mid-adolescents understand the *Miranda* warning, a rate lower than that of adults); Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1152–54 (1980) [hereinafter Grisso, *Juveniles' Capacities to Waive*] (reporting that a majority of juveniles who received *Miranda* warnings did not understand them well enough to waive their rights; that only 20.9% of the juveniles, as compared with 42.3% of the adults, exhibited understanding of all four components of a *Miranda* warning; and that 55.3% of juveniles, as contrasted with 23.1% of the adults, manifested no comprehension of at least one of the four warnings); Thomas Grisso, *Juveniles' Consent in Delinquency Proceedings*, in CHILDREN'S COMPETENCE TO CONSENT 131, 138-41 (Gary B. Melton et al. eds., 1983) [hereinafter Grisso, *Juveniles' Consent*].

45. See Larson, *supra* note 18, at 648–49; see also Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28 (2000) (reporting that more than half of juveniles did not understand the words of the *Miranda* warning); A. Bruce Ferguson & Alan Charles Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 53 (1970) (reporting that over 90% of the juveniles whom police interrogated waived their rights, that a similar percentage did not understand the rights they waived, and that even a simplified version of the language in the *Miranda* warning failed to cure these defects); Thomas Grisso & Carolyn Pomicter, *Interrogation*



*Miranda* warning, juveniles most frequently misunderstood that they had the right to consult with an attorney and to have one present when police questioned them.<sup>46</sup> Grisso reports that younger juveniles exhibited even poorer understanding of their *Miranda* rights than did mid-adolescents:

As a class, juveniles younger than fifteen years of age failed to meet both the absolute and relative (adult norm) standards for comprehension. . . . The vast majority of these juveniles 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.<sup>47</sup>

Even though juveniles sixteen years of age and older exhibited a level of understanding comparable with adults, substantial minorities of both groups failed to comprehend at least some components of the standard warning.<sup>48</sup>

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of *Juveniles: An Empirical Study of Procedures, Safeguards, and Rights Waiver*, 1 L. & HUM. BEHAV. 321, 339 (1977) (reporting that about 10% of juveniles invoked their rights during interrogation, compared to 40% of adults).

46. GRISSE, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 115–20 (reporting that juveniles did not understand the role of defense counsel and thought that defense counsel worked for the juvenile court); Grisso, *Juveniles' Capacities to Waive*, *supra* note 44, at 1158; *see also* Beyer, *supra* note 45, at 28 (reporting that juveniles misunderstood the role of defense counsel).

47. Grisso, *Juveniles' Capacities to Waive*, *supra* note 44, at 1160.

48. *Id.* at 1157. A replication of Grisso's research in Canada reported that very few juveniles fully understood their warnings and that the youths who lacked comprehension waived their rights more readily. *See* Rona Abramovitch et al., *Young Persons' Comprehension of Waivers in Criminal Proceedings*, 35 CANADIAN J. CRIM. 309, 320 (1993) (“[I]t seems likely that many if not most juveniles who are asked by the police to waive their rights do not have sufficient understanding to be competent to waive them.”). Another study reported that youths interpreted the warning that “anything can and will be used against you in a court of law” to mean that “any disrespectful words directed toward police would be reported to the judge.” Ellen R. Fulmer, Note, *Novak v. Commonwealth: Are Virginia Courts Providing a Special Protection to Virginia's Juvenile Defendants?*, 30 U. RICH. L. REV. 935, 956–57 (1996) (quoting Brief of Amicus Curiae on Behalf of Youth Advocacy Clinic and Mental Disabilities Clinic University of Richmond Law School at 3, *Novak v. Commonwealth*, 457 S.E.2d 402 (Va. Ct. App. 1995) (No. 1416-92-1)); *see also* Shavaun M. Wall & Mary Furlong, *Comprehension of Miranda Rights by Urban Adolescents with Law-Related Education*, 56 PSYCHOL. REP. 359, 372 (1985) (reporting that urban, black high school students' participation in a year-long “Street Law” course that included education about *Miranda* rights did not improve their understanding or comprehension in ways that would enable them to assert their rights). *But see* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL. & L. 3, 11 (1997) [hereinafter Grisso, *The Competence of Adolescents*] (summarizing research on adolescents' understanding of *Miranda* warnings and reporting a “good understanding for a majority of 16- to 19-year-olds,” both delinquents and non-delinquents).

Although the *Miranda* process focuses primarily on factual understanding of the words of the warning, a waiver of rights also involves the ability to make rational decisions and to appreciate the consequences of relinquishing them.<sup>49</sup> Simply understanding the abstract words of a *Miranda* warning may not enable a person to exercise the rights effectively. Juveniles, in particular, often fail to appreciate the significance and function of rights.<sup>50</sup> Psychological research suggests that adolescents have difficulty grasping the basic concept of a “right” as an absolute entitlement that they can exercise without adverse consequences.<sup>51</sup> They are more likely than adults to conceive of a “right” as something that authorities allow them to do, but which those in power also may unilaterally retract or withhold.<sup>52</sup> Research also indicates that children from poorer and ethnic-minority backgrounds anticipate that law enforcement officials will punish them if they exercise their rights.<sup>53</sup>

Moreover, social science research conducted under laboratory conditions approved by institutional review boards cannot begin to capture the social context, stressful conditions, and psychological pressures exerted during the course of actual po-

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49. See *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (holding that a *Miranda* waiver must be “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it”).

50. GRISSEO, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 130; Grisso, *The Competence of Adolescents*, *supra* note 48, at 11 (distinguishing between understanding words of warning and appreciating the functions of the rights that a warning conveys); Larson, *supra* note 18, at 649–53 (reviewing social psychological research and juveniles' limited understanding of the concept of “rights” as entitlements to be exercised).

51. Grisso, *The Competence of Adolescents*, *supra* note 48, at 11 (noting adolescents' difficulty in grasping a right as an entitlement and arguing that “comparisons of delinquent adolescents with adults suggest that 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 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*]; Larson, *supra* note 18, at 651–52.

52. Grisso, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 130 (reporting that juveniles conceive of rights as allowances granted by authority figures, but which authority figures may also revoke); Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, in YOUTH ON TRIAL, *supra* note 6, at 148–49 (reporting that juveniles perceive rights to be conditional rather than absolute).

53. See generally Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 158 (1989) (arguing that immaturity, inexperience, and lower verbal competence than adults render youths especially vulnerable to police interrogation tactics).

lice interrogation.<sup>54</sup> In addition, the typical samples of public school youths who participate in laboratory studies to measure adolescents' ability to comprehend and exercise rights do not directly compare with delinquents who come from poorer households and who have more limited verbal skills and greater difficulty understanding legal abstractions.<sup>55</sup>

Children's lower social status, along with societal expectations of their obedience to authority, makes juveniles more vulnerable to police interrogation techniques than adults.<sup>56</sup> When people from traditionally disempowered communities—females, African-Americans, and youth—deal with authority figures, they often speak less assertively and use indirect patterns of

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54. Abramovitch et al., *supra* note 48, at 319 (noting that responses to hypothetical questions in a relaxed atmosphere do not replicate adequately the conditions created by police who "can be gentle or tough, can explain the rights well or poorly, and in many ways can exert varying amounts of pressure to comply"); Grisso, *The Competence of Adolescents*, *supra* note 48, at 18 (noting that juveniles appear less able to use the cognitive skills they possess in novel, ambiguous, or stressful conditions); Grisso, *Juveniles' Consent*, *supra* note 44, at 139; Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141, 154 (2003) (acknowledging limitations of ethically constrained laboratory experiments and noting that "the interrogation procedures used in the present study were very mild compared to those used in real interrogations").

55. See, e.g., Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 LAW & HUM. BEHAV. 253, 256 (2005) (examining the legal competencies of 152 delinquents held in pretrial detention and reporting that the majority came from the lowest socioeconomic levels and had an average IQ of eighty-two); see also Grisso, *The Competence of Adolescents*, *supra* note 48, at 13 (reviewing psychological research and reporting poorer understanding of legal information and concepts "for delinquent youths with lower intelligence test scores, lower scores on a verbal ability test, remedial or problematic educational histories, and learning disabilities"). Grisso further notes that the "real-world" outcomes for delinquents likely are poorer because many of the research studies "did not examine delinquent youths who are most likely to become defendants. Those that did, however, usually found levels of performance that were no better (and often poorer) than the performance found in studies using nondelinquent samples." *Id.* at 14. He further emphasizes that studies of "normal" or of "average" adolescent populations are of limited utility for justice system policy makers "if their findings are not replicated with delinquent youths who, as a group, are not average in their cognitive, psychosocial, and cultural characteristics." *Id.* at 21.

56. See Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1992) (noting that children are socialized to obey authority figures); Larson, *supra* note 18, at 657 (summarizing psychological research reporting that "children are more compliant and suggestible than adults").

speech to avoid conflict.<sup>57</sup> During interrogation, they respond more passively and acquiesce to police suggestions more easily.<sup>58</sup> As a result, *Davis's* and *Fare's* requirement that youths invoke *Miranda* rights with adult-like technical precision<sup>59</sup> conflicts with the normal social responses and verbal styles of most delinquents.

Developmental psychological research on adolescents' adjudicative competence raises further doubts about juveniles' ability to exercise legal rights. Fundamental fairness requires a defendant to be able to understand the proceedings, to make rational decisions, and to assist counsel.<sup>60</sup> To be legally competent, a defendant must have the capacity to understand the legal proceedings; to provide, receive, and understand information from counsel; and to make rational decisions.<sup>61</sup> When

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57. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 315 (1993); Beyer, *supra* note 45, at 35 (reporting that children of color and victims of abuse fear police and feel they have to confess because "[h]aving been powerless when adults abused them in the past, these young people probably could not do anything but comply with police").

58. Ainsworth, *supra* note 57, at 320. Barbara Kaban and Ann E. Tobey argue that juveniles are especially susceptible to the coercive pressures of authority figures because of their social disadvantage:

From early childhood on, children are taught to answer questions directed to them by adults. Police officers often occupy an elevated position of power relative to children. . . . [W]hen a "status differential" exists in the interview context, lower-status individuals are more likely to defer to the authority of higher-status individuals. . . . [W]hen an adult interviewer presents himself or herself as authoritarian or unfriendly, children have more difficulty disagreeing with the adult.

Kaban & Tobey, *supra* note 35, at 155.

59. *Davis v. United States*, 512 U.S. 452, 452 (1994) (holding that police may "continue questioning until and unless a suspect clearly requests an attorney"); *Fare v. Michael C.*, 442 U.S. 707, 727-28 (1979) (requiring a clear and unambiguous assertion of rights).

60. See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he 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.").

61. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 335 (explaining that adjudicative competence entails "a basic comprehension of the purpose and nature of the trial process (Understanding), the capacity to provide relevant information to counsel and to process information (Reasoning), and the ability to apply information to one's own situation in a manner that is neither distorted nor irrational (Appreciation)"). Trying only competent defendants assures the legitimacy of the criminal process, reduces the risk of erroneous convictions, and protects the dignity and autonomy of the accused:

judges make competency evaluations, mental illnesses or developmental disabilities are sources of impairment that ordinarily call into question a defendant's competence to stand trial.<sup>62</sup>

Developmental psychologists argue that immaturity *per se* produces the same deficits of understanding, impairment of judgment, and inability to assist counsel as does mental illness, and renders many juveniles legally incompetent.<sup>63</sup> The generic

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The dignity of the criminal process is undermined if the defendant lacks a basic moral understanding of the nature and purpose of the proceedings against him or her. The accuracy or reliability of the adjudication is threatened if the defendant is unable to assist in the development and presentation of a defense. Finally, to the extent that decisions about the course of adjudication must be made personally by the defendant, he or she must have the abilities needed to exercise decision-making autonomy.

Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL*, *supra* note 6, at 73, 76.

62. See *Dusky v. United States*, 362 U.S. 402 (1960) (requiring a defendant to possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him").

63. See Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, *CRIM. JUST.*, Fall 1997, at 7–9 (questioning youths' ability to understand trial process, to assist counsel, and to make strategic legal decisions); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 356; Richard E. Redding & Linda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 *V.A. J. SOC. POL'Y & L.* 353, 374–78 (2001); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 *N.C. L. REV.* 793, 796 (2005).

About half the states address juveniles' competency to stand trial as delinquents, and statutes and case law conclude that juveniles have a fundamental right not to be tried while incompetent. See, e.g., *FLA. STAT. ANN.* § 985.223 (West 2006) (current version *FLA. STAT. ANN.* § 985.19 (forthcoming 2006)) (providing for assessments of competency in juvenile delinquency cases); *KAN. STAT. ANN.* § 38-1637 (1997) (describing proceedings to determine competency in delinquency proceedings); *In re Charles B.*, 978 P.2d 659, 660 (Ariz. 1998) ("Although the Juvenile . . . has no mental disorder or disability, he fits the definition of 'incompetent' . . . because he lacks a present ability to consult with his attorney with a reasonable degree of rational understanding, and he does not have a rational and factual understanding of the proceeding against him."); *Golden v. State*, 21 S.W.3d 801, 803 (Ark. 2000) (holding that a juvenile has a due process right to a competency determination prior to adjudication and that such evaluation should apply an "age-appropriate" capacity standard to juveniles which is different from the capacity standard used for adults); *In re J.M.*, 769 A.2d 656, 662 (Vt. 2001) (holding that the "evaluations of a particular juvenile's competency are to be made with regard to juvenile [developmental] norms"). See generally *In re S.H.*, 469 S.E.2d 810, 811 (Ga. Ct. App. 1996) (stating that providing juveniles with procedural rights in delinquency proceedings would be meaningless if the defendant were not capable of exercising them).

developmental limitations of juveniles, rather than mental illness or mental retardation, adversely affect youths' ability to understand legal proceedings, to assist counsel, and to make rational decisions.<sup>64</sup> The existence of a separate juvenile court reflects youths' diminished competence, limited understanding, impaired reasoning ability, and lessened decision-making ability.<sup>65</sup>

Grisso's recent research evaluated adolescents' and young adults' adjudicative competence.<sup>66</sup> Like his earlier research on juveniles' competence to exercise *Miranda* rights, he found significant age-related developmental differences in understanding and judgment.<sup>67</sup> Most juveniles younger than thirteen or fourteen years of age exhibited the same degree of impairment as severely mentally ill adult defendants and lacked even basic competence to understand or to participate in their defense.<sup>68</sup> A significant proportion of juveniles younger than sixteen years of age lacked competence to stand trial, to make legal decisions, and to assist counsel, and many older youths exhibited sub-

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64. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 359–61; Scott & Grisso, *supra* note 63, at 811–27.

65. 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, *False Confessions*] (“[J]uvenile suspects share many of the same characteristics as the developmentally disabled, notably their eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision-making, and appear to be at greater risk of falsely confessing when subjected to psychological interrogation techniques.”).

66. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51.

67. *Id.* at 343–46; see Redding & Frost, *supra* note 63, at 374–78 (summarizing research on adjudicative competence of adolescents and reporting younger age, lower IQ, and mental illness combine to detract from juveniles' ability to understand proceedings and to assist counsel).

68. See Bonnie & Grisso, *supra* note 61, at 87–88 (“Some youths, especially those who are nearer to the minimum age for waiver to criminal court, may have significant deficits in competence-related abilities due not to mental disorder but to developmental immaturity. . . . Formalistic, disorder-oriented application of current standards, therefore, may result in unfair jeopardy for youths whose developmental incapacities impair their ability to participate in their defense.”); 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) (reporting that a majority of juveniles fifteen years of age and younger failed to meet the adult standard of competence); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 61, at 344 (“30% of 11- to 13-year-olds, and 19% of 14- to 15-year-olds, were significantly impaired on one or both of these subscales [measuring understanding and reasoning].”); Redding & Frost, *supra* note 63, at 374–78.

stantial impairments.<sup>69</sup> Grisso reported that

[A]pproximately one fifth of 14- to 15-year-olds are as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial by clinicians who perform evaluations for courts. . . . Not surprisingly, juveniles of below-average intelligence are more likely than juveniles of average intelligence to be impaired in abilities relevant for competence to stand trial. Because a greater proportion of youths in the juvenile justice system than in the community are of below-average intelligence, the risk for incompetence to stand trial is therefore even greater.<sup>70</sup>

Even adolescents who may be legally competent in terms of formal understanding often make poorer legal decisions than do adults because of adolescents' more limited time-perspective, emphasis on short-term versus long-term consequences, and concerns about peer approval.<sup>71</sup> Similar limitations affect the quality of their decisions to waive *Miranda* rights as well.

To summarize, developmental psychological research assessing several domains of legal and adjudicative competence consistently indicates that adolescents as a class are at a significant disadvantage in the interrogation room and at trial compared with adults. For youths fifteen years of age and younger, these disabilities emerge clearly in the research. While juveniles sixteen and seventeen years of age also exhibit some degree of impairment, they appear to function at levels more comparable with adults.

### III. POLICE INTERROGATION TECHNIQUES

By the time the Supreme Court decided *Miranda*, psychologically oriented interrogation techniques already had supplanted physical coercion and greatly increased the Court's difficulty in distinguishing between voluntary and involuntary confessions.<sup>72</sup>

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69. Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 356.

70. *Id.* Moreover, age and intelligence interact, such that juveniles with low IQs perform more poorly than do adults of limited intelligence. *See id.*

71. Bonnie & Grisso, *supra* note 61, at 91; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 156-57 (1997); 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, 409 (1999).

72. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221 (1997); Richard A. Leo, *From Coercion to Deception: The*

A. POLICE INTERROGATION AT THE TIME OF *MIRANDA*

The Supreme Court in *Miranda* noted that its inability to evaluate what transpires during police interrogations stemmed “from the fact that in this country [interrogations] have largely taken place incommunicado.”<sup>73</sup> While the Court recognized that modern interrogation practices employed psychological manipulation, rather than physical coercion, it emphasized its inability to discern directly the nature or impact of those practices.<sup>74</sup> The Court lacked empirical studies or direct observations of police interrogation practices to form a basis against which to evaluate interrogation practices. As a result, it relied heavily on police interrogation manuals and training programs to identify the procedures that police used to obtain incriminating statements and to identify those which it found objectionable.<sup>75</sup>

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*Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 37 (1992); Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 34, at 37, 56 (2004) [hereinafter Leo, *The Third Degree*] (describing the evolution of interrogation tactics from physical brutality to psychological manipulation during the twentieth century).

73. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

74. *Id.* at 448 (“Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. . . . 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.”); 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) (“The *Miranda* opinion’s description of interrogation techniques contained in police manuals indicated that long before *Miranda*, police interrogators had developed sophisticated strategies for overcoming the obstacle of a suspect’s resistance to providing information to them.” (citations omitted)).

75. *Miranda*, 384 U.S. at 448. Paul G. Cassell and Bret S. Hayman criticize the Court because

[t]he police interrogation manuals became the centerpiece of what real-world support there was for the majority opinion in *Miranda*. . . . [A]side from a passing nod acknowledging ‘a gap in our knowledge as to what in fact goes on in the interrogation rooms,’ the decision rested on the supposed representativeness of police manuals—not scholarly investigation.

Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 844 (1996) (citations omitted). However, Chief Justice Warren determined the distribution and extent of use by police of the leading police manuals prior to relying on those manuals as evidence of interrogation practices. See Charles D. Weissberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 119 n.48 (1998) (describing



The Court quoted extensively from Fred E. Inbau and John E. Reid's *Criminal Interrogation and Confessions*<sup>76</sup> to identify the techniques and procedures that police themselves advocated for successful interrogation.<sup>77</sup> *Miranda* repeatedly emphasized that the "inherent coercion of custodial interrogation" stemmed from the interaction of physical isolation and psychological manipulation that the "Reid Method" prescribed.<sup>78</sup> The

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research conducted by the Supreme Court Librarian to determine dissemination and representativeness of interrogation manuals).

76. FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962).

77. *Miranda*, 384 U.S. at 449 n.9. The Court characterized the techniques advocated in Inbau & Reid as "the most enlightened and effective means presently used to obtain statements through custodial interrogation." *Id.* at 449. The successor edition of this text, INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (4th ed. 2004), remains the leading treatise in the field and provides the framework employed to analyze interrogation practices in this study.

78. *See Miranda*, 384 U.S. at 449–55. Quoting extensively from INBAU & REID, *supra* note 76, and other interrogation texts, the Court noted that

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." . . .

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. . . . In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. . . . The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. . . .

"Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. . . ."

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. . . .

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One play often used has been termed the 'friendly-unfriendly' or the 'Mutt and Jeff' act. . . .

“Reid Method,” summarized in *Miranda*, remains a primary technique of interrogation and provides a framework by which other researchers, as well as this study, evaluate interrogation practices.<sup>79</sup> It prescribes physical isolation and psychological manipulation to overcome a suspect’s resistance to admitting responsibility and to neutralize a suspect’s feelings of guilt.<sup>80</sup> Interrogators systematically use these techniques of influence, manipulation, and persuasion to break down the suspect’s resistance and denials and to increase her desire to confess.<sup>81</sup> So-

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The interrogators sometimes are instructed to induce a confession out of trickery. . . .

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. . . .

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must “patiently maneuver himself or his quarry into a position from which the desired objective may be attained.” When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

*Miranda*, 384 U.S. at 449–55 (quoting INBAU & REID, *supra* note 76, at 1, 58–59; FRED E. INBAU & JOHN E. REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953); CHARLES E. O’HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99, 104, 112 (1956)).

79. See GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 10–21 (2003) (summarizing the elements of the “Reid Technique” and commenting on its underlying psychological principles); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 293 (1996) [hereinafter Leo, *Inside the Interrogation Room*] (describing Behavioral Analysis Interview questions recommended by Inbau and Reid).

80. See GUDJONSSON, *supra* note 79, at 10–21.

81. See Kassin, *supra* note 72, at 222 (“[T]his technique leads many suspects to incriminate themselves by reducing the perceived negative consequences of confessing while increasing the anxiety associated with deception.”); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 42–43 (2004) (summarizing the “Reid technique” and describing it as designed to elicit incriminating statements from suspects by “increasing the anxiety associated with denial, plunging them into a state of despair, and minimizing the perceived consequences of confession”); J. Pearse et al., *Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession*, 8 J. COMMUNITY & APPLIED SOC. PSYCHOL. 1, 4 (1998) (describing the “Reid

cial psychologists describe these manipulations as “maximization” and “minimization” techniques.<sup>82</sup> The *Miranda* Court recognized, and social psychologists argue, that many of the “Reid Method” techniques are inherently coercive because they implicitly communicate threats and promises, and thus suspects require procedural safeguards to protect against such techniques.

#### B. EMPIRICAL RESEARCH ON INTERROGATION

Four decades after the Supreme Court decided *Miranda*, we still know remarkably little about what actually transpires when police interrogate suspects.<sup>83</sup> Several studies conducted

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model” as a strategy to “break down the reluctant suspect” and in which interrogation provides an “opportunity to manipulate the suspect psychologically in order to overcome any resistance”); GUDJONSSON, *supra* note 79, at 8 (noting that all psychologically sophisticated interrogation practices rely on a mix of processes of influence and persuasion).

82. See GUDJONSSON, *supra* note 79, at 21; Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions*, 15 LAW & HUM. BEHAV. 233, 233 (1991); Kassin, *supra* note 72, at 221.

Interrogators use “maximization” techniques to scare or intimidate a guilty suspect. Kassin, *supra* note 72, at 223 (describing the “maximization” technique as the use of “scare tactics’ designed to intimidate a suspect believed to be guilty”).

This intimidation is achieved by overstating the seriousness of the offense and the magnitude of the charges and even by making false or exaggerated claims about the evidence (e.g., by staging an eye-witness identification or a rigged lie-detector test, by claiming to have fingerprints or other types of forensic evidence, or by citing admissions that were supposedly made by an accomplice).

*Id.*

Interrogators use “minimization,” or “soft-sell,” techniques 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.” *Id.*

83. Leo, *Inside the Interrogation Room*, *supra* note 79, at 266–67 (“[T]he gap in our knowledge between legal ideals and empirical realities remains as wide as ever in the study of police interrogation. . . . [T]here exist no contemporary descriptive or analytical studies of routine police interrogation practices in America.”). Several studies conducted in the late 1960s evaluated the impact of the *Miranda* decision on the ability of police to obtain confessions. See *infra* note 84 and accompanying text (surveying *Miranda* studies). However, Leo correctly notes that “we 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*.” Leo, *Inside the Interrogation Room*, *supra* note 79, at 267–68; see also Cassell & Hayman, *supra* note 75, at 840 (“[W]e have little knowledge about what police interrogation looked like shortly after *Miranda*, much less what it looks like today. . . . Even the most informed observers can offer little beyond speculation on these fundamental subjects.”); Richard Leo, *The Impact of Miranda Revisited*, 86 J. CRIM.

in the immediate aftermath of *Miranda* attempted to gauge compliance with the warning requirements and to assess the impact of warnings on subsequent rates of confessions.<sup>84</sup> The general consensus of the immediate post-*Miranda* impact research was that police complied with the letter, if not the spirit, of *Miranda*: they administered the standard warnings, and, following the warnings, most criminal suspects waived their constitutional rights.<sup>85</sup> Once police obtained a waiver, their interrogation tactics and techniques did not change significantly and "*Miranda* did not appear to undermine the effectiveness of criminal investigation in the way that the law enforcement

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L. & CRIMINOLOGY 621, 631 (1996) [hereinafter Leo, *The Impact of Miranda*] ("[E]verything we know to date about the impact of *Miranda* comes from research that was undertaken when *Miranda* was still in its infancy.").

84. See Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L. J. 1 *passim* (1970) (interviewing jailed defendants about whether or not they received a *Miranda* warning prior to interrogation); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1348-49 (studying "the effect of *Miranda* on the role played by defense counsel") (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."); Michael Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1613 (1967) (observing police interrogation of suspects in the aftermath of *Miranda* and concluding that "[n]ot much has changed after *Miranda*"); 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, 332 (1973) (suggesting a marginal impact of *Miranda* warnings on collateral functions of interrogation, such as implicating accomplices, but finding "very little indication that the *Miranda* requirements had materially affected the outcome of formal police interrogation, or any other factors such as the recovery of stolen property").

85. See Leiken, *supra* note 84, at 47 (reporting strict police compliance with *Miranda*'s formal warning requirements); Leo, *The Impact of Miranda*, *supra* note 83, at 632; Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 503 (1996) (reanalyzing *Miranda* studies and concluding that "*Miranda*'s empirically detectable harm to law enforcement shrinks virtually to 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) (reviewing the post-*Miranda* impact research and concluding "there is no proof of a *Miranda* effect on the confession rate"). Schulhofer attributes the minimal impact of *Miranda* to the fact that "[o]fficers learned how to avoid mistakes that would create admissibility problems; they adapted interviewing methods so they could honor constitutional rights and still get confessions; and they altered investigatory practices so they could bolster the evidence in cases where no confession was obtained." Schulhofer, *supra*, at 507.

community had initially feared.”<sup>86</sup> Although some scholars contend that *Miranda* warnings have adversely affected the ability of police to elicit incriminating evidence and to obtain convictions, most studies conclude that the advisory has had only a modest impact, if any.<sup>87</sup> However, only the 1967 study in New Haven conducted by the student editors of the *Yale Law Journal* actually observed police interrogation practices and measured compliance with *Miranda* warning requirements.<sup>88</sup>

Few contemporary observational studies of what actually occurs in the interrogation room exist. Prior to this study, Richard Leo conducted and reported the *only* interrogation research in the United States in the last three decades, based on

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86. Leo, *The Impact of Miranda*, *supra* note 83, at 645 (reviewing *Miranda* impact studies and reporting that the *Miranda* requirements did not appear to significantly affect clearance and conviction rates, but noting that several studies attributed a significant decline in confession and conviction rates to *Miranda*).

87. *Id.* at 632. Professor Paul Cassell is the foremost academic critic of the *Miranda* decision and its impact on the police’s ability to successfully interrogate suspects. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1063–66 (1998) (attributing the drop in police clearance rates following the *Miranda* decision to its negative impact on law enforcement effectiveness). Cassell’s own empirical study and reanalyses of the earlier *Miranda* research conclude that *Miranda* has had a deleterious impact on police interrogation practices and the ability to convict guilty defendants. Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 417 (1996) (arguing that the costs of *Miranda* include lost confessions, i.e. statements not obtained, rather than simply those suppressed because of *Miranda* violations and concluding, based on review of studies, that the “best estimate is that *Miranda* results in a lost confession in roughly one out of every six criminal cases in this country”); *see* Cassell & Hayman, *supra* note 75, at 917–18.

A number of scholars have responded to Cassell’s claims about the substantial social costs and minimal benefits of *Miranda* and have offered both substantive and methodological critiques of his arguments. *See, e.g.*, Floyd Feeney, *Police Clearances: A Poor Way to Measure the Impact of Miranda on the Police*, 32 RUTGERS L.J. 1 *passim* (2000) (criticizing Cassell and Fowles’ claim that a sharp fall in clearance rates occurred after *Miranda*, questioning the validity of clearance rates as a proxy for ability to obtain confessions, and arguing that no reason exists to attribute changes in clearance rates to the Court’s decision); Schulhofer, *supra* note 85, at 502 (arguing that even Cassell’s extravagant claim of a 3.8% reduction in lost convictions after *Miranda* derives from “data . . . cited selectively, sources . . . quoted out of context, weak studies showing negative impacts . . . uncritically accepted, and small methodological problems . . . invoked to discredit a no-harm conclusion”).

88. *See* Wald et al., *supra* note 84, at 1519 (reporting the systematic observations of interrogations by several editors of the *Yale Law Journal* who spent the summer after the *Miranda* decision in the New Haven police department).

his observations of 122 interrogations in an urban California police department and his review of sixty audio and videotapes of interrogations from two other police departments.<sup>89</sup> Leo's research from the mid-1990s is the only naturalistic field study of custodial interrogation practices in the criminological literature in the United States. Paul Cassell and Bret Hayman collected indirect data about some aspects of police interrogation by attending prosecutorial screening sessions in 1994 in Salt Lake County, Utah, and relying on police officers' descriptions of what occurred during questioning.<sup>90</sup> In addition, Charles Weisselberg used the Supreme Court's original *Miranda* methodology and analyzed police training manuals to assess contemporary interrogation practices.<sup>91</sup>

For more than a decade, England's Police and Criminal Evidence Act 1984 (PACE) has required police to record interrogations of suspects arrested for indictable offenses.<sup>92</sup> Gisli Gudjonsson and his associates have developed sophisticated techniques to code and analyze tapes and transcripts of British interrogations.<sup>93</sup> They enjoyed extensive access to police de-

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89. Leo, *Inside the Interrogation Room*, *supra* note 79, at 268.

90. Cassell & Hayman, *supra* note 75, at 850–52. The Salt Lake County District Attorney's office evaluates felony cases for prosecutorial merit. "The screening session is a forty-five-minute interview by the prosecutor of the police officer concerning the evidence supporting the filing of charges. Screenings take place soon after the officer completes investigation of the case." *Id.* at 851. A law student researcher completed a survey form during the screening session. It included data on the suspect, the nature of the offense, whether police reported trying to question the suspect, whether the suspect was in custody, whether the suspect invoked or waived *Miranda* rights, what types of information police obtained as a result of questioning, and the officer's estimate of the length of interrogation. They conducted a case follow-up to determine whether the prosecutors charged the suspect and the ultimate outcome of the case. *Id.* at 923–25.

91. Weisselberg, *supra* note 75, at 132–40 (analyzing police training manuals that encourage officers to continue questioning suspects even after they have invoked their *Miranda* rights in order to obtain impeachment evidence or leads to other witnesses and physical evidence).

92. Police and Criminal Evidence Act, 1984, § 60(1)(a)–(b) (Eng.) ("It shall be the duty of the Secretary of State—(a) to issue a code of practice in connection with the tape-recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations; and (b) to make an order requiring the tape-recording of interviews of persons suspected of the commission of criminal offences . . . ."); GUDJONSSON, *supra* note 79, at 22 (noting that substantial literature exists on police interrogation practices in England because "[s]ince 1991 there has been mandatory tape-recording of any person suspected of an indictable offence who is interviewed under caution").

93. See, e.g., GUDJONSSON, *supra* note 79, at 59–60, 79–80.

partments and to suspects prior to, during, and after interrogation.<sup>94</sup> This extraordinary research access has enabled them to assess the types of interrogation techniques British police employ and the impact of these practices on suspects with various personal and psychological characteristics.<sup>95</sup> Moreover, PACE requires the presence of an “Appropriate Adult” at the interrogation of vulnerable suspects, such as juveniles and persons with mental illness or mental retardation.<sup>96</sup> The research on the role played by “appropriate adults” during interrogation provides an analogue to the performance of parents or “interested adults” required by a few states during the questioning of juveniles.<sup>97</sup> In addition, Roger Evans analyzed PACE tapes and transcripts in order to examine some aspects of British police interrogations of juveniles.<sup>98</sup>

Furthermore, a substantial body of social psychological experimental laboratory research, conducted primarily by Saul Kassin and his associates, analyzes the social psychology of interrogation, the impact of social influences on susceptible subjects, characteristics of individuals that place them at risk for false confessions, and the types of settings and practices conducive to false confessions.<sup>99</sup> Finally, research by Steven Drizin, Richard Leo, and others examines documented cases of false confessions and DNA exonerations in order to identify the cir-

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94. *Id.*

95. *See id.*; Pearse et al., *supra* note 81.

96. *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005).

97. *See supra* notes 36–43 and accompanying text (describing state rules requiring presence of a parent or “interested adult”); *see, e.g.*, Roger Evans, *Police Interrogations and the Royal Commission on Criminal Justice*, 4 POLICING & SOC’Y 73, 77 (1994) (noting the failure of a vast majority of parents and social workers to provide any assistance or support to juveniles during interrogation); Jacqueline Hodgson, *Vulnerable Suspects and the Appropriate Adult*, CRIM. L. REV. 785 (1997) (U.K.) (noting the problems of implementing protections for vulnerable suspects including: inability to identify which suspects require assistance; lack of social workers, parents or volunteers to fulfill the role of appropriate adult; and failure of appropriate adults to appreciate their role or to protect vulnerable suspects).

98. *See* ROGER EVANS, THE ROYAL COMM’N ON CRIMINAL JUSTICE, THE CONDUCT OF POLICE INTERVIEWS WITH JUVENILES (1993).

99. *See, e.g.*, Saul M. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCHOLOGIST 215, 219–22 (2005) (summarizing a number of his laboratory studies and simulations of police interrogation); Kassin, *supra* note 72, at 221 (1997) (describing “maximization” and “minimization” techniques); Kassin & Gudjonsson, *supra* note 81, at 33 (referencing nineteen articles by Kassin and associates on various aspects of the psychology of interrogation).

cumstances surrounding the elicitation of untrue confessions and wrongful convictions.<sup>100</sup>

Social psychologists and legal analysts contend that youths' diminished competence, as compared to adults', heightens their susceptibility to interrogation techniques and increases the likelihood that they will waive *Miranda* rights without adequately appreciating the consequences.<sup>101</sup> Juveniles' lesser understanding of rights and appreciation of legal consequences enhances their vulnerability to interrogation tactics,<sup>102</sup> and their limited ability to think strategically renders

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100. See, e.g., Drizin & Leo, *False Confessions*, *supra* note 65; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 429 (1998) ("Because a confession is universally treated as damning and compelling evidence of guilt, it is likely to dominate all other case evidence and lead a trier of fact to convict the defendant. A false confession is therefore an exceptionally dangerous piece of evidence to put before anyone adjudicating a case. In a criminal justice system . . . police-induced false confession ranks amongst the most fateful of all official errors.").

101. See, e.g., Bonnie & Grisso, *supra* note 61, at 86–93; Deborah K. Cooper, *Juveniles' Understanding of Trial-Related Information: Are They Competent Defendants*, 15 BEHAV. SCI. & L. 167, 178 (1997) (reporting research that concludes that "children are functioning differently from adults within the court system, and do not have an understanding of the legal process necessary for competence to stand trial, even after their factual understanding is significantly and substantially increased by educational training"); Grisso, *supra* note 52, at 141 (arguing that, quite apart from adjudicative competence, the effectiveness of a juvenile's ability to participate may affect trial outcomes); Allison D. Redlich et al., *The Police Interrogation of Children and Adolescents*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT *supra* note 34, at 107, 114 (reviewing psychological research on the inverse relationship between age and suggestibility); Redlich & Goodman, *supra* note 54, at 147–51 (reporting results of a psychological study in which juveniles were more likely than adults to accept responsibility when presented with false evidence that appeared to implicate them); Ann Tobey et al., *Youths' Trial Participation as Seen by Youths and Their Attorneys: An Exploration of Competence-Based Issues*, in YOUTH ON TRIAL *supra* note 6, at 223, 231–34 (arguing that juveniles are less effective as clients than adults because of differences in understanding, memory, attention, and motivation).

102. See, e.g., Kassin & Gudjonsson, *supra* note 81, at 52 (summarizing research and concluding that "juvenile suspects are highly vulnerable to false confessions, particularly when interrogated by police and other figures of authority"); Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 129 (1996); Krzewinski, *supra* note 32, at 356 (questioning juveniles capacity to understand the privilege against self-incrimination or to give reliable statements voluntarily); Patrick M. McMullen, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992–99 (2005) (reviewing social science research



them more likely than adults to waive rights and to assume responsibility out of a misguided feeling of loyalty to peers.<sup>103</sup> Youths' waiver decisions reflect a greater tendency than adults to comply with authority figures and to acquiesce to police officials.<sup>104</sup> Interrogation techniques designed for adults may prove especially problematic when deployed against young suspects.<sup>105</sup> This study provides an opportunity to empirically as-

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of the impact of juveniles' skewed time perspective, inability to evaluate risks and consequences, and emotionalism and impulsivity on their vulnerability in the interrogation room).

103. See, e.g., Beyer, *supra* note 45, at 29–30; Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 28; Kaban & Tobey, *supra* note 35, at 155–56 (“A failure to consider consequences may be due to a lack of understanding of the consequences as well as a failure to consider them. For instance, a child may be more easily led into making damaging statements under the pretense that if he or she tells the police what they want to know the child can go home.”).

104. See GUDJONSSON, *supra* note 79, at 381 (“[A]dolescents are clearly more responsive to negative feedback than adults. This suggests that they do not cope as well with interrogative pressure as adults and it links this type of suggestibility with a social rather than an intellectual and memory process.”); GRISSE, *JUVENILES' WAIVER OF RIGHTS*, *supra* note 33, at 18 (assessing claims that “police interrogations of juveniles are inherently coercive because of the authoritative position of police and the threatening aura of police stations, in contrast to the powerlessness and potential vulnerability of many juveniles”); Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 51, at 353; Gisli H. Gudjonsson, *Suggestibility and Compliance Among Alleged False Confessors and Resisters in Criminal Trials*, 31 *MED., SCI. & L.* 147, 149 (1991) (reporting that low IQ subjects erroneously believe that false confessions have minimal consequences and therefore comply more readily with police suggestibility); Matthew B. Johnson & Ronald C. Hunt, *The Psycholegal Interface in Juvenile Miranda Assessment*, 18 *AM. J. FORENSIC PSYCHOL.* 17, 24 (2000) (noting compliance as a “tendency to go along with instructions and directions without actual acceptance of the premises”); Krzewinski, *supra* note 32, at 360 (describing interrogation technique by which “juveniles will readily agree to an officer's words without understanding the significant implications of these words”); 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, 671–89 (2003) (summarizing three homicide interrogation cases demonstrating police use of leading questions, suggesting answers, and drafting confessions for very young offenders).

105. See Kaban & Tobey, *supra* note 35, at 158 (“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.”); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 *MICH. L. REV.* 1168, 1169 (2001) (“*Miranda* offers suspects little protection from deceptive interrogation techniques.”); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 *HARV. C.R.-C.L. L. REV.* 105, 118–21 (1997) [hereinafter White, *False Confessions and the Constitution*] (summarizing standard interrogation techniques especially likely to elicit false confessions from suspects with particular char-

sess some of the social psychologists' hypotheses and concerns about juveniles' competence to waive or to invoke their *Miranda* rights.

#### IV. METHODOLOGY AND DATA

The state supreme courts of Alaska and Minnesota have long required police to electronically record interrogation of all criminal suspects.<sup>106</sup> In 1985, the Alaska Supreme Court in *Stephan v. State* held that an unexcused failure to record a custodial interrogation violated a defendant's due process rights under the state constitution.<sup>107</sup> In 1994, the Minnesota Supreme Court in *State v. Scales* declined to find a state constitutional basis for a recording requirement, but held that "[i]n the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations."<sup>108</sup> The Minnesota Supreme Court adopted the reasoning in *Stephan* and found

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acteristics such as mental retardation and youth); Welsh White, *False Confessions in Criminal Cases*, 18 CRIM. JUST. 5, 5-7 (2003).

106. *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985); *State v. Scales*, 518 N.W.2d 587, 589 (Minn. 1994). The legislatures in the District of Columbia, Illinois, Maine, and Texas recently adopted laws requiring police to record interrogations under some circumstances. See D.C. CODE ANN. § 5-133.20 (LexisNexis 2003); 20 ILL. COMP. STAT. 3930/7.2(a) (2001 & Supp. 2006) (requiring recording of first-degree murder interrogations); ME. REV. STAT. ANN. tit. 25, § 2803-B (2005); TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3 (Vernon 2004).

107. 711 P.2d at 1158.

108. 518 N.W.2d at 589. The court based its decision on its inherent supervisory authority, rather than the Minnesota Constitution:

We choose not to determine at this time whether under the Due Process Clause of the Minnesota Constitution a criminal suspect has a right to have his or her custodial interrogation recorded. Rather, in the exercise of our supervisory power to insure the fair administration of justice, we hold 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. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.

*Id.* at 592.

The court endorsed the recommendations of the American Law Institute Model Code of Pre-Arrest Procedure Section 150.3(2) and (3), which exclude statements that involve a "substantial" violation of the recording requirement. *Id.* at 592. "Substantial violations" included willful or prejudicial violations, those likely to cause the accused to misunderstand his or her rights, or those which create a significant risk of false confessions. *Id.* at 593 n.2(a).

that

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 appellate [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, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial." A recording requirement also discourages unfair and psychologically coercive police tactics and thus results in more professional law enforcement.<sup>109</sup>

Since *Stephan* and *Scales*, a few states have begun to require systematic recording of all or some custodial interrogations,<sup>110</sup> other states are considering such a requirement,<sup>111</sup> and many police departments do so regularly as a matter of departmental policy.<sup>112</sup> The Wisconsin Supreme Court in *In re*

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109. *Id.* at 591.

110. See, e.g., 20 ILL. COMP. STAT. 3930/7.2(a) (requiring Illinois police to record custodial interviews of suspects investigated for first-degree murder) § 5/103-2.1(b); TEX. CODE CRIM. PROC. ANN. art. 38.22. § 3(a)(1)–(2) (barring admission in any criminal proceeding of any statement made during custodial interrogation unless "an electronic recording . . . is made of the statement" and "prior to the statement but during the recording the accused is given the [*Miranda*] warning . . . and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning").

In *Commonwealth v. DiGiambattista*, 813 N.E.2d 516 (Mass. 2004), the Supreme Judicial Court of Massachusetts held that when police do not record an interrogation, the defendant may request a jury instruction "advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable," that the jury "should weigh evidence of the defendant's alleged statement with great caution and care," and that the "absence of a recording permits (but does not compel) them to conclude that the Commonwealth has failed to prove voluntariness beyond a reasonable doubt." *Id.* at 553–54.

111. In *State v. Cook*, the New Jersey Supreme Court created a Special Committee on the Recordation of Custodial Interrogations. 847 A.2d 530, 539 (N.J. 2004). The chief justice appointed the members of the Special Committee in August 2004. See SUPREME COURT OF N.J., SPECIAL COMMITTEE ON THE RECORDATION OF CUSTODIAL INTERROGATIONS, REPORT OF THE SPECIAL COMMITTEE ON THE RECORDATION OF CUSTODIAL INTERROGATIONS (2005), [http://www.nacdl.org/sl\\_docs.nsf/freeform/MERI\\_attachments/\\$FILE/NJ\\_MERI\\_Rule\(10-14-05\).pdf](http://www.nacdl.org/sl_docs.nsf/freeform/MERI_attachments/$FILE/NJ_MERI_Rule(10-14-05).pdf), for a summary of the Special Committee's recommendations.

112. See THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/>

*Jerrell C.J.* recently required police to record interrogations of juveniles to provide an independent basis by which to assess the “voluntariness” of their waivers of rights.<sup>113</sup> Access to *Scales* tapes and transcripts provides the basis for this study of police interrogation practices.

I collected the data that form the basis of this study from the Ramsey County Attorney’s office because of its proximity and the willingness of the Ramsey County Attorney and her prosecutorial staff to cooperate with this study. Ramsey County is an urban and suburban county in the Twin Cities metro area that includes St. Paul, the Minnesota state capital, and several other smaller cities. With more than a half-million total residents, it is the second most populous county in the state. About 11.5% of the county’s population falls within the age jurisdiction of the juvenile court.<sup>114</sup> About 69% of the juveniles are white, 18% Asian, 12% black, and less than 2% Native American.<sup>115</sup> The St. Paul Police, the Ramsey County Sheriff, and seven suburban police departments provide law enforcement services for the county’s residents.<sup>116</sup> In 2002, the Ramsey County Attorney’s Office filed 3415 delinquency petitions and 682 status offense petitions.<sup>117</sup>

In Minnesota, sixteen- and seventeen-year-old juveniles who are charged with a felony are subject to public delinquency hearings.<sup>118</sup> Because other delinquency proceedings are closed

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SullivanReport.pdf (reporting the results of a nationwide survey of police departments regarding their interrogation recording practices in conjunction with recommendations submitted by the Illinois Commission on Capital Punishment).

113. *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005). Wisconsin requires police to electronically record all custodial interrogations of juveniles “where feasible, and without exception when questioning occurs at a place of detention.” *Id.* at 113.

114. Nat’l Ctr. for Juvenile Justice, Nat’l Council of Juvenile & Family Court Judges (2004), Easy Access to Juvenile Populations: 1990–2004, <http://www.ojjdp.ncjrs.org/ojstatbb/ezapop/> (follow “County Comparisons” hyperlink).

115. *Id.*

116. Suburban police departments include: Maplewood, Mounds View, New Brighton, North St. Paul, Roseville, St. Anthony, and White Bear Lake. USACops.com, Minnesota Police Department, Ramsey County, <http://www.usacops.com/mn/ramsey.html> (last visited Sept. 17, 2006).

117. Nat’l Ctr. for Juvenile Justice, Nat’l Council of Juvenile & Family Court Judges, Minnesota Juvenile Court Case Counts, 2000 (2003), <http://www.ojjdp.ncjrs.org/ojstatbb/ezaco/asp/TableDisplay.asp>.

118. MINN. STAT. § 260B.163(1)(c)(2) (2003 & Supp. 2006) provides that “[t]he court shall open the hearings to the public in delinquency . . . proceedings where the child is alleged to have committed an offense . . . that would be

and confidential, the Ramsey County Attorney's Office and I agreed to restrict this study to older juveniles charged with serious, felony-level crimes. In "deep-end" cases such as these, the police are likely to employ the full range of interrogation techniques.

Initially, a paralegal in the Ramsey County Attorney's Office generated a list of cases of sixteen- and seventeen-year-old youths charged with felonies. We restricted the search further to resolved cases that had not yet been archived. These case files included interrogations conducted between 1997 and 2004. She then individually inspected every file to find those containing an interrogation transcript or tape.<sup>119</sup> In addition, she identified files that contained a standard *Miranda* form and no confession as well as police reports indicating that the juvenile had invoked his or her rights, so we could compare juveniles who waived or asserted their *Miranda* rights. Each time she found a tape or transcript, or a report that a juvenile had invoked her rights, she copied the file associated with that offense, including police reports, *Miranda* waiver forms, transcripts or tapes of interrogation, court petitions, certification studies, and probation sentencing reports. She then redacted references to other juveniles in those reports to protect their anonymity.

In all of the files containing tapes or transcripts, the Ramsey County Attorney's Office exercised no additional censoring or withholding of files based on their content. She did not hand-pick or select only "good" cases, but provided me with all the available files.<sup>120</sup> I obtained a total of sixty-six files of juveniles

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a felony if committed by an adult and the child was at least sixteen years of age at the time of the offense." Even though delinquency adjudications of juveniles sixteen and seventeen years old charged with a felony are public proceedings, in the course of the research I anticipated that I would inevitably encounter confidential information regarding other juvenile co-defendants whose identity remained confidential. At the request of the Ramsey County Attorney's Office, I obtained a court order from the Ramsey County District Court authorizing my access to the closed files, with a number of stipulations to protect the identity of all juveniles I encountered. A copy of the court order is on file with the author.

119. Although interrogations of juveniles occur far more frequently than indicated in these files, in the vast majority of these cases, the *Scales* tapes are not transcribed. The physical tapes remain in the police evidence locker until the case is resolved, and then the cassette tapes are destroyed. Without access to these tapes, it is impossible to know how the recorded interrogations found in the Ramsey County Attorney's files differ from that larger universe of cases.

120. Thirty files contained only transcripts of interviews or invocations. I obtained an additional six cases in which police reports indicated that juveniles had invoked their rights. I personally transcribed half the sample. The

who met the search criteria—sixteen or seventeen years of age, charged with a felony level offense in a certification, an Extended Jurisdiction Juvenile Prosecution (EJJ),<sup>121</sup> or delinquency matter—and whose file contained an interrogation record. I personally transcribed thirty tapes of interviews, both to preserve confidentiality and to immerse myself in the tenor of the interrogation room. In addition to the approval and access provided by the Ramsey County Attorney's Office and the Ramsey County District Court, the University of Minnesota Institutional Review Board approved the study protocols and procedures.

Following methodologies employed in other recent interrogation research, I read and coded each case file for two primary purposes. First, I reviewed police reports, witness statements, property inventories, and any other documents contained in the file to understand the circumstances of the offense, the evidence available to the police at the time they questioned the suspect, and the context within which each interrogation occurred. Second, adapting instruments used by other researchers,<sup>122</sup> I created a detailed coding form to classify and analyze whether juveniles invoked or waived their *Miranda* rights, what took place during the interrogation, how the officers conducted the interrogation, and how the juveniles responded. In cases in which suspects initially denied involvement, I identified the techniques interrogators used to encourage them

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fact that no one else had transcribed or listened to the tapes since they were recorded further bolsters my confidence that no censorship of files occurred to withhold "bad" interrogations.

121. See MINN. STAT. § 260B.130 (authorizing judges to impose juvenile "blended sentences" in lieu of certification); see also Barry C. Feld, *Violent Youth and Public Police: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1038–51 (1995) (describing the genesis of the EJJ prosecution statute); Marcy R. Podkopacz & Barry C. Feld, *The Back-Door to Prison Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997 (2001) (evaluating implementation of Minnesota's EJJ statute in Hennepin County and concluding that it had a "net-widening" effect).

122. Richard Leo and John Pearse generously provided me with the coding instruments that they used in their research on interrogation. See John Pearse & Gisli H. Gudjonsson, *The Identification and Measurement of "Oppressive" Police Interviewing Tactics in Britain*, in *THE PSYCHOLOGY OF INTERROGATION AND CONFESSIONS: A HANDBOOK* 75, 76–114 (2003); Leo, *Inside the Interrogation Room*, *supra* note 79. Leo's coding form followed the protocols used in Wald's New Haven research three decades earlier. See Wald et al., *supra* note 84, apps. A, H. A copy of the coding form used in the present study is on file with the author and available upon request.

to change their minds and give a statement. Finally, I assessed how juveniles' invocation or waiver of *Miranda* rights and subsequent statements or denials affected their case processing and sentencing. While this study reports on juveniles' competence to invoke or waive their *Miranda* rights, forthcoming articles will examine police interrogation techniques and the impact of *Miranda* waivers on case outcomes.

This study suffers from several significant methodological limitations. There is a major problem of sample selection bias. I could not randomly select the files I analyzed from a larger universe of interrogations cases because such an array of cases simply does not exist. The study includes only juveniles whom prosecutors actually charged with serious crimes and whose files contained a record of their interrogation.<sup>123</sup> This restriction significantly biases the sample if compared with the larger number of cases in which police attempted to or did question juveniles, but in which the Ramsey County Attorney did not file charges. Moreover, the fact that the Ramsey County Attorney's juvenile division files contained these transcripts and tapes suggests that these cases differ in some unknown ways from the much larger number of cases in which police interrogated juveniles whom prosecutors subsequently charged, but whose tapes were stored in the police evidence lockers and eventually destroyed. Because the sample contains only cases of sixteen- and seventeen-year-old juveniles charged with a felony-level offense, many of whom had prior experience with law enforcement, it cannot address how police obtain waivers from and interrogate younger or less sophisticated juveniles who may be more vulnerable.<sup>124</sup>

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123. Cassell and Hayman, *supra* note 75, at 849, criticized Leo, *Inside the Interrogation Room*, *supra* note 79, because his *in vivo* observations focused only on questioning by detectives in the police station. "Because of the study's narrow focus on station house interrogation by detectives, however, it provides no information on the broader course of police questioning (or nonquestioning) in cases outside the station house by officers other than detectives." *Id.* Because this study relies on actual interrogation records created primarily during custodial interrogation, it does not encompass the larger universe of non-custodial police questioning or interrogation that does not result in the filing of a delinquency petition.

124. The Central Park jogger case provides one of the most notorious recent cases of multiple false confessions extracted by police from five youths aged fourteen to fifteen. See Kassin & Gudjonsson, *supra* note 81, at 52 (describing the special vulnerability of younger juveniles during interrogation). See generally Drizin & Leo, *False Confessions*, *supra* note 65, at 963–95 (sum-

St. Paul Police Department officers conducted about three-quarters of the interviews in the sample. The Department's interrogation practices may not be representative of procedures used by other police departments in Minnesota or elsewhere.<sup>125</sup> Reviewers of an earlier draft of this article suggested that Minnesota police practices probably differ from those in other states because *Scales* has required them to record interrogations for more than a decade. It is widely recognized that taping requirements increase the transparency and visibility of police practices.<sup>126</sup> Furthermore, the St. Paul Police Department enjoys a reputation for high professional standards.<sup>127</sup> Reviewers pointed out, for example, that unlike Leo's research, none of the officers in this study continued "questioning outside of *Miranda*" after a juvenile had invoked her rights.<sup>128</sup>

In addition, because of confidentiality restrictions on data access, I personally coded all of the interrogations.<sup>129</sup> As a re-

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marizing cases of proven false confessions, many of which involved younger juveniles with no prior contact with police).

125. This is no systematic analysis of how different police departments' interrogation practices vary or how those differences affect rates of invocations of rights or admissions by suspects. The limited research available suggests how and why departmental practices might vary and produce different results. See EVANS, *supra* note 98, at 21 ("[T]here are significant differences in admission rates depending on the [police] subdivision in which the interview takes place. . . . [I]nterview styles may vary from station to station and have an impact on outcomes. This would be consistent with the thesis that police stations have their own ethos and culture. It would also be consistent with the thesis that police interviewing techniques take place on the job. If individual police stations develop their own distinctive approaches then the dominance of on-the-job training might ensure that these are passed on to new recruits to the station.").

126. *State v. Scales*, 518 N.W.2d 587, 591 (Minn. 1994).

127. See CATHERINE COLES, NATIONAL COPS EVALUATION ORGANIZATIONAL CHANGE CASE STUDY: ST. PAUL, MINNESOTA, [http://www.ncjrs.gov/nij/cops\\_casestudy/stpaul2.html](http://www.ncjrs.gov/nij/cops_casestudy/stpaul2.html) (last visited Oct. 16, 2006).

128. I am grateful to Frank Zimring for pointing out that St. Paul Police Department interrogation practices may differ from those of other law enforcement agencies. Compare Leo, *Inside the Interrogation Room*, *supra* note 79, at 276 (reporting that in four percent of cases in which suspects invoked *Miranda* rights, officers continued to question suspects even after an invocation in the hope of obtaining statements with which to impeach the defendant or leads to other evidence), with *infra* note 189 and accompanying text (reporting that in every instance in which juveniles invoked their *Miranda* rights, police immediately ceased interrogation and conducted no further questioning "outside of *Miranda*").

129. The Ramsey County Attorney's Office and the Chief Judge of Second Judicial District Court (Ramsey County) imposed several conditions under which I obtained access to confidential juvenile court data. One of the Court's conditions was that



sult, I could not use multiple coders or obtain interrater reliability scores and, therefore, more rigorous experimental psychologists properly could characterize some aspects of this study as “impressionistic.” Finally, I only have sixty-six cases, both because of the limited number of interrogation tapes or transcripts available and the financial costs of identifying, copying, and redacting each file. As a result of the problems of sample selection bias and small sample size, I can make no claims that this study represents how police interrogate juveniles more generally or in other jurisdictions.

Despite these caveats, this study represents the largest and only aggregation of routine police interrogation of juveniles in the criminological literature. Although other scholars have focused on instances of notorious and serious cases of juvenile “false confessions”<sup>130</sup>—e.g., the Ryan Harris case, the Central Park Jogger case, the case of Michael Crowe, et al.—they also concede that they have no way to estimate how representative those egregious cases are of the larger universe of police interrogation or how frequently such cases occur.<sup>131</sup> While not necessarily representative, this study provides some insights into routine police questioning of older juveniles.

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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).

130. *E.g.*, Kassin, *supra* note 99 (describing the false confessions elicited during investigation of the Central Park jogger case); Drizin & Leo, *False Confessions*, *supra* note 65, at 968–70 (reporting the case of Michael Gayles); Drizin & Colgan, *supra* note 34, at 127–62 (describing psychological manipulation and interrogation tactics police used to elicit false confessions in several high-profile juvenile interrogations); Tanenhaus & Drizin, *supra* note 104, at 671–77 (detailing the false confession of Lachresha Murray).

131. *E.g.*, Kassin, *supra* note 99, at 215 (“[T]he incidence of false confessions is unknown.”); Leo & Ofshe, *supra* note 100, at 431–32 (“[N]o one knows precisely how often false confessions occur in the United States, how frequently false confessions lead to wrongful convictions, or how much personal and social harm false confessions cause. . . . [N]o one can authoritatively estimate the rate of police-induced false confessions or the annual number of wrongful convictions caused by false confessions.”).

## V. JUVENILES' COMPETENCE TO INVOKE OR WAIVE *MIRANDA* RIGHTS<sup>132</sup>

This Part presents the quantitative and qualitative data on juveniles' competence to invoke or waive their *Miranda* rights. It examines the approaches and strategies police use to advise youths of their rights, the ability of juveniles to understand the warnings, and their decisions to waive their rights. Part V.A describes the demographic characteristics of youths whom police interrogated. Part V.B reports where police interrogated juveniles, how they administered the *Miranda* warning, and how they predisposed juveniles to waive their rights. Part V.C examines juveniles' decisions to waive or invoke their *Miranda* rights.

### A. DEMOGRAPHIC CHARACTERISTICS OF JUVENILES WHOM POLICE INTERROGATED

Table 1 describes characteristics of the juveniles whom police interrogated and the Ramsey County Attorney's Office charged. The characteristics of these juveniles differ from the general caseload of the Ramsey County Attorney's Office. Although the Ramsey County Attorney's office could summarize the overall volume of delinquency petitions filed in 2004 (3986), they could not readily provide separate breakdowns of the number of felony petitions filed, the number of sixteen- and seventeen-year-old juveniles charged with felonies, or the racial profiles or prior records of older felony delinquents.<sup>133</sup> However, the distribution of offenses in these interrogation cases is more serious than the typical Ramsey County Attorney Juvenile Division's felony caseload.<sup>134</sup>

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132. This Part is based on data from unpublished confidential materials that are on file with the author.

133. Letter and attachments from Kathryn S. Richtmann, Assistant Ramsey County Attorney, Office of the Ramsey County Attorney, to Barry C. Feld (July 22, 2005) (on file with author).

134. Based on data collected for another study, in 1999 the Ramsey County Attorney charged a total of 808 juveniles with felony offenses of whom 404 were sixteen or seventeen years of age. Prosecutors charged a total of 236 of these youths with felonies comparable to those examined in this study: person, 27%; property, 48%; drugs, 15%; and weapons, 10%.

**Table 1: Characteristics of Juveniles Interrogated**

	N=	%age
Sex of Juvenile		
Male	57	86
Female	9	14
Age		
16	43	65
17	21	32
18	2	3
Race		
White	18	27
Black	28	42
Hispanic	10	15
Asian	7	11
N/A	5	5
Offense		
Person *	34	52
Property†	22	33
Drugs‡	5	8
Firearms§	5	8
Prior Arrests		
None	8	12
Status/Truancy/Traffic	10	15
Misdemeanor Only	20	30
One Felony	11	17
Two or More Felony	17	26
Prior Juvenile Court Referrals		
None	25	38
One or More	41	62
Juvenile Court Status at Time of Interrogation		
None	37	56
Prior Supervision	12	18
Current Placement—Probation or Placement	17	26

\* Crimes against the person include: aggravated and simple robbery, aggravated assault, murder and attempted murder, criminal sexual conduct, and terroristic threats.

† Crimes against property include: burglary, theft of a motor vehicle, receiving stolen property, possession of burglary tools, and criminal damage to property.

‡ Drug crimes include possession of a controlled substance and tampering with anhydrous ammonia equipment (methamphetamine).

§ Weapons crimes include possession of a firearm and discharge of a firearm.

Not surprisingly, males comprised the vast majority (86%) of youths whom police questioned.<sup>135</sup> About two-thirds (65%) of the juveniles were sixteen years old at the time of their questioning.<sup>136</sup> I attribute some under representation of seventeen-year-old juveniles to the fact that prosecutors filed certification (transfer) motions against more of the older youths charged with serious offenses. If the juvenile court waived a youth for trial as an adult, then the County Attorney transferred his file to the criminal division which made it unavailable for inclusion in this study. In addition, more of these older juveniles had "aged out" of the juvenile court's dispositional jurisdiction and the County Attorney transferred their files to archives for storage which rendered them inaccessible.

Prosecutors charged over half (52%) of the youths with crimes against a person, such as murder, armed robbery, aggravated assault, and criminal sexual conduct.<sup>137</sup> They charged an additional one-third (33%) with felony property offenses, such as burglary and auto-theft.<sup>138</sup> Moreover, this was a criminally sophisticated group of delinquents: nearly half (42%) of these juveniles had one or more felony arrests prior to their current felony referrals.<sup>139</sup> Nearly two-thirds (62%) of these youths had prior juvenile court referrals. Finally, more than one-quarter (26%) of these youths were under current juvenile court supervision—probation, placement, or parole status—at the time of their interrogation.<sup>140</sup> The majority of youths whom police questioned were members of ethnic and racial minority groups (68%)—black, Hispanic, and Asian—and black juveniles accounted for the largest group (42%) in the sample.<sup>141</sup> By contrast, the largest study of proven false confessions emphasizes the particular vulnerability of younger, naive suspects who dif-

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135. *See supra* p. 68, tbl.1.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. In my 1999 database, the racial composition of sixteen- and seventeen-year-old juveniles charged with felonies was as follows: white, 38%; black, 28%; Hispanic, 14%; Asian, 4%; Native American, 3%; and data missing, 14%. I attribute the overrepresentation of black juveniles in the interrogation sample to the larger number of juveniles charged with crimes against the person.

fer in several respects from the older, more criminally sophisticated youths in this study.<sup>142</sup>

B. *MIRANDA* FRAMEWORK: CUSTODIAL INTERROGATION REQUIRES WARNING.

When police take a suspect into custody<sup>143</sup> and interrogate her,<sup>144</sup> *Miranda* requires them to administer a warning to dispel the inherent coercion of custodial interrogation.<sup>145</sup> Police arrested the vast majority (88%) of juveniles prior to interrogating them. In a few cases, a juvenile's parent initially brought her to the police station for an interview, and police arrested an additional 5% of those youths following questioning. A parent was actually present during only one interview, and police arrested and detained that juvenile at the conclusion of the questioning.

When police took these youths into custody, they placed the vast majority (88%) in detention. However, police released about 5% of youths whom they had previously arrested and detained after they questioned them. Nearly two-thirds (66%) of the interviews occurred at juvenile detention centers or other correctional facilities. Police conducted almost one-third (30%) of the remaining interviews at police stations, sheriff's departments, or at the time of arrest.<sup>146</sup> Police conducted only 5% of

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142. See Drizin & Leo, *False Confessions*, *supra* note 65, at 945 (indicating that police obtained more proven false confessions from juveniles fifteen years of age and younger than they did from sixteen- and seventeen-year-old youths).

143. See *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (defining circumstances constituting custody as being "based on how a reasonable person in the suspect's situation would perceive his circumstances").

144. See *Rhode Island v. Innis*, 446 U.S. 291, 292 (1980) (defining interrogation under *Miranda* to include "not only . . . express questioning, but also . . . any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect").

145. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring the administration of a warning to protect the right to avoid self-incrimination against the inherent coercion of custodial interrogation).

146. Thomas Grisso reported the only other data about where police conduct interrogations and found that police question the largest pluralities of juveniles either at a police station or in the juveniles' homes. GRISSE, *JUVENILES' WAIVER OF RIGHTS*, *supra* note 33, at 29–30. Apart from convenience, he suggested that these venues provided police with tactical advantages because questioning at a police station increases the coerciveness of the environment, while the informality of questioning at home may lull a juvenile into letting down her defenses. *Id.* at 31.

the interviews in non-custodial settings, such as the juveniles' homes or high schools.

Officers from the St. Paul Juvenile Division conducted about two-thirds (68%) of all interviews, and officers from the St. Paul Homicide Division performed an additional 8% of interviews. Law enforcement personnel from three suburban St. Paul police departments, six county sheriff's departments, the Minnesota State Highway Patrol, and investigators with the Minnesota Department of Corrections carried out the remaining interviews. Twenty-one different officers conducted the sixty-six interrogations in this study; therefore, the results do not reflect just a few officers' idiosyncrasies.

#### 1. Administering a *Miranda* Warning

Decades of experience and court-approved formulae have reduced the *Miranda* warning to a standardized litany that officers routinely read to a suspect from a card or waiver form.<sup>147</sup> Every juvenile in the sample received a proper *Miranda* warning, and nearly three-quarters (73%) of the files contained a standard warning form that the juvenile initialed and signed. In addition to the *Scales* interrogation tapes, these initialed and signed forms provide police and prosecutors with an additional, objective basis by which to prove that police properly administered a *Miranda* warning and that the juvenile purported to understand her rights.

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147. See Cassell & Hayman, *supra* note 75, at 888 (“[P]olice almost always followed the *Miranda* requirements. It appeared that officers generally read *Miranda* warnings and waivers from a card.”); see also Leo, *The Impact of Miranda*, *supra* note 83, at 659 (“By providing police with a clear rule that allows for mechanical compliance and by providing courts with an objective standard with which to judge the admissibility of confession evidence, the Warren Court effectively formalized American custodial police questioning procedures.”).

Figure 1: Miranda Form

CN _____		
<b>SAINT PAUL POLICE DEPARTMENT</b>		
DATE _____	TIME OF INTERVIEW _____	
NAME _____	AGE _____	DOB _____
ADDRESS _____	MARITAL STATUS _____	PHONE _____
EMPLOYED BY _____	ADDRESS _____	PHONE _____
EDUCATION: LAST GRADE COMPLETED ____ SCHOOL _____		
<p>You have the rights to protection against self-incrimination listed below. Please read along with the Officer, and initial each statement if you understand it.</p> <ol style="list-style-type: none"> <li>1. You have the right to remain silent and refuse at anytime to answer any questions asked by a police officer. _____</li> <li>2. Anything you do or say can be used against you. _____</li> <li>3. You have the right to talk to a lawyer and to have the lawyer with you during any questioning. _____</li> <li>4. If you cannot afford a lawyer, one will be appointed for you, and you may remain silent until you have talked to the lawyer. _____</li> </ol>		
<p>The above rights have been read to me. I have initialed each paragraph to show that I understand each of my rights. I have received a copy of this form.</p>		
<b>SIGNATURE OF RECEIPT</b>		
OFFICER _____	DATE _____	TIME COMPLETED _____

Despite the administration of a *Miranda* warning, Leo contends that police interrogation shares the characteristics of a confidence game—“systematic use of deception, manipulation, and the betrayal of trust in the process of eliciting a suspect’s confession.”<sup>148</sup> Trust is the basis of social relationships, and the essence of a successful “con-game” is the exchange of trust for

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148. Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 261 (1996). Leo notes that several individual and structural features also affect the use of deception, manipulation, and betrayal of trust during interrogation. These features include: “the motivation, acting ability, and intelligence of the detective; the sophistication of the suspect; the perceived seriousness of the case; and the police organization’s support for in-depth interrogation practices.” *Id.*

hope.<sup>149</sup> Leo likens a police officer's ability to elicit a *Miranda* waiver and to obtain a confession to a con-man manipulating the psychological vulnerabilities of his victim "through false representations, artifice, and subterfuge."<sup>150</sup> The first task the officer confronts is to successfully "cultivate" the suspect to negotiate a *Miranda* warning and to elicit a waiver.<sup>151</sup> Leo describes a variety of psychological ploys officers use to predispose a suspect to waiving her rights.<sup>152</sup> The law of interrogation applied to juveniles and adults—"knowing, intelligent, and voluntary" under the "totality of the circumstances"—essentially allows officers to employ the same techniques to "con" a juvenile as to "con" an adult into waiving *Miranda* rights.

Police interrogation manuals emphasize the importance of establishing and maintaining a positive relationship with a suspect as a prelude to obtaining a waiver from and questioning her.<sup>153</sup> The timing and administration of the *Miranda* warning itself provides officers with opportunities to build rapport and subtly to predispose the suspect to waive her rights and talk with police.<sup>154</sup> For example, the Supreme Court's decisions in *Miranda*,<sup>155</sup> *Rhode Island v. Innis*,<sup>156</sup> and *Pennsylvania v. Muniz*<sup>157</sup> allow police officers to ask suspects routine "booking questions" without first administering a *Miranda* warning.<sup>158</sup> In the majority of cases (56%), police did not administer

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149. *Id.* at 264.

150. *Id.* at 265.

151. *Id.* at 270.

152. *Id.* at 271–73 (describing psychological strategies an officer uses to elicit *Miranda* waivers, such as admonishing the suspect of the importance of telling the truth, nodding her head up and down during the reading of the warning, minimizing the significance of the warning, and telling the suspect that this is his only opportunity to tell her side of the story).

153. See, e.g., INBAU & REID, *supra* note 76, at 93–94 (emphasizing the importance of developing rapport with a suspect and "establishing a level of comfort or trust").

154. *Id.*

155. 384 U.S. 436 (1966).

156. 446 U.S. 291 (1980).

157. 496 U.S. 582 (1990).

158. See *id.* (holding that questions regarding name, address, height, weight, eye color, date of birth, and current age are not custodial interrogation because they fall under *Miranda*'s booking exemption); *Innis*, 446 U.S. at 301 (acknowledging that *Miranda* does not refer to words or actions normally attendant to arrest and custody, such as booking questions); *Miranda*, 384 U.S. at 481 (recognizing that the requirements imposed in *Miranda* would not unduly burden law enforcement officials and exempting routine booking questions from the requirement to administer warnings).



the *Miranda* warning immediately upon engaging a juvenile, but instead used their initial contact to build rapport while asking suspects neutral questions—name, age and date of birth, address and telephone number, grade in school, etc.—while completing the *Miranda* advisory form. Some officers used youths' responses to these "booking questions" as opportunities to engage in casual conversations unrelated to the subject of the interview to put the youths more at ease and to condition them to respond to questions.<sup>159</sup>

## 2. Predisposing Juveniles to Waive *Miranda* Rights

The manner in which an officer gives the *Miranda* warning also can influence a juvenile's likelihood of waiving her rights. Leo and White report that interrogators "de-emphasize the warnings to such an extent that suspects often perceive that waiver of their rights is the natural and expected course of action."<sup>160</sup> They suggest that police may present the *Miranda* warning in at least three different ways to elicit a waiver:

First, the police may deliver the warnings in a neutral manner; second, they may de-emphasize the warnings' significance by delivering them in a manner that is designed to obscure the adversarial relationship between the interrogator and the suspect; and third, they may deliver the warnings in a way that communicates to the suspect that waiving his rights will result in some immediate or future benefit for him.<sup>161</sup>

Like Leo, I found that a police officer can subtly attempt to influence a juvenile's likelihood of waiving her rights by the manner in which she gives a *Miranda* warning. For example, an officer may suggest to a juvenile the value of talking and "telling the truth" prior to giving the warning:

I'm Officer Smith,<sup>162</sup> one of the investigators here, and I just started investigating yesterday, and what I've learned over the years is

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159. Leo also reported that officers made small talk with suspects as they asked routine booking questions in an effort "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." Leo, *The Impact of Miranda*, *supra* note 83, at 661.

160. Leo & White, *supra* note 74, at 413; Leo, *The Impact of Miranda*, *supra* note 83, at 660 (contending that officers "delivered the *Miranda* warnings without any build-up and in a seemingly neutral tone, without any apparent strategy, as if they were indifferent to the suspect's response").

161. Leo & White, *supra* note 74, at 432.

162. To preserve confidentiality throughout the narratives, I have changed the names of interviewing officers, juveniles, and other people referred to during questioning.

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.

Officers also characterize the *Miranda* warning and waiver process as an administrative formality that they must complete prior to being able to talk with the suspects:

Okay, Susan, 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.

I'm gonna read this to you real quick. I need your initials and a signature. It says you have the right to protection against self-incrimination listed below. Please read along with me and initial each statement if you understand it.

Leo and White describe one strategy interrogators employ to de-emphasize the significance of the *Miranda* warning by portraying the advisory as "an unimportant bureaucratic ritual [that] communicates, implicitly or explicitly, that he anticipates that the suspect will waive his rights and make a statement."<sup>163</sup> For example, referring to the *Miranda* warning as "paperwork" serves to de-emphasize the significance of the warnings and to highlight their bureaucratic quality:

Q Tommy, I'm Sergeant Frances. We can go through a little bit of paperwork. Um, let me explain a few things to you, and then if you want to, you can sign right there. Okay. Did you say that you're not working anymore?

A Nope. [Further booking questions and *Miranda* warning follow.]

An obligatory manner and a mechanical tone of voice also convey the impression that the warnings are of little consequence.<sup>164</sup> Particularly for juveniles whom police have questioned in the past, officers may present the *Miranda* litany as a mere formality.

Q You've been down here before? Have yuh?

A Uhmhhh [affirmative].

Q Okay. Have you ever had these statements read to you before?

A Uhmhhh [affirmative].

Q Huh. Okay. I gotta go through these again. If you want to follow along with me. [Reading of rights form.]

Another officer simply stated: "Okay. You've been through this before, right? Gotta read you your rights."

Officers emphasize the routine nature of the *Miranda* warnings by referring to a suspect's familiarity with it from

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163. Leo & White, *supra* note 74, at 433.

164. *Id.*

seeing it on television and in movies.<sup>165</sup> The officer who questioned the juvenile accompanied by his father exemplifies the routinization of the warning process:

Okay, um, so that's a fairly serious situation that we need to resolve hopefully here tonight, but I wanna make sure you understand that you don't have to talk to me and those kinds of things, okay? Both you and your dad know how to read, right? Okay. I'll read it out loud to ya and then I'll let you read it through if you want. Ah, it's a Warning and Consent to Speak. Okay, basically and you've heard the *Miranda* warning on *Cops* and TV and stuff.

The use of the *Miranda* warning form itself provides an opportunity to convert the waiver process into an exercise in bureaucratic paper-pushing.

Q Okay. I'm going to read these rights to ya. There's a pen. If you understand these rights, um, I need you to initial stating that you understand it. If you don't understand it let me know and I'll explain it to you, okay? Okay. The first one says you have the rights to protection against self-incrimination listed below. "Please read along with the officer and initial each statement as you understand it." Okay, number one says you have the right to remain silent and refuse at any time to answer any questions asked by a police officer. You understand that?

A Yeah.

Note that the officer actually read the instructions to the officer on the warning form in addition to the actual warnings themselves. This mindless bureaucratic reading of the instructions to the warnings occurred in about one-quarter of all *Miranda* advisories given. For example, in another interview, the officer also prefaced the administration of the *Miranda* warning as an exercise in bureaucratic compliance:

I appreciate you coming down. I mean you've kind of known for a few days anyway that we've been wanting to talk to ya, okay? John, before I talk to ya and ask you any questions, I'm gonna advise you of your rights first, okay? What I'm gonna do John is I'm gonna read 'em, you see right here, it says 1-4, those are your rights, okay? I'm gonna read 'em to ya and when I'm reading them if there's something you don't understand or you gotta question, just stop and ask me, okay? As I read 'em to you, John, and you understand what I'm reading, I need you to initial down the side and when I'm all done reading 'em to ya um, 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?

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165. *Id.* at 434-35 ("[D]e-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.").

Pursuant to *Miranda*, police must advise suspects of their rights.<sup>166</sup> But they have no incentive to emphasize the warning's significance or to encourage youths to exercise their rights. And they have every reason to embed the warning in a preamble or mere litany to discourage invocation of rights. The Supreme Court requires "knowing, intelligent, and voluntary" waivers of rights, but that means only that the police have told the juvenile that she has rights that she can exercise and that the youth understands them and voluntarily relinquishes them.<sup>167</sup>

C. "KNOWING, INTELLIGENT, AND VOLUNTARY" WAIVER OR INVOCATION OF *MIRANDA* RIGHTS

Once police have advised a suspect of her rights, she may either waive or invoke them.<sup>168</sup> The Supreme Court decisions in *Fare v. Michael C.*<sup>169</sup> and *Davis v. United States*<sup>170</sup> require a suspect to invoke her rights to silence and counsel clearly and unambiguously and do not require officers to stop and clarify any ambiguous invocations.<sup>171</sup> Because a *Miranda* warning informs a suspect that she has certain rights, she bears the burden to exercise them and to communicate her intention to do so explicitly to the police.<sup>172</sup> On the other hand, developmental psychologists question whether younger offenders can even understand the meaning of the warning or the function of rights, much less invoke those rights clearly and effectively.<sup>173</sup>

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166. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

167. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (noting that the warning requirement only applies to advisory of rights and not the seriousness of the crime charged); *Moran v. Burbine*, 475 U.S. 412, 425 (1986) (explaining that *Miranda* warning suffices without informing the suspect that a family member has retained counsel who seeks access to the defendant); *Leo & White*, *supra* note 74, at 415 ("[T]he government needs only to demonstrate that the suspect understood the meaning of the *Miranda* warnings, not that he understood the consequences of waiving his rights.").

168. *Miranda*, 384 U.S. at 444.

169. 442 U.S. 707 (1979).

170. 512 U.S. 452 (1994).

171. *Id.* at 459 (holding that if a possible invocation of the right to counsel is ambiguous or equivocal to a police officer acting reasonably in light of the circumstances, questioning does not have to stop, but the suspect must unambiguously request counsel); *Fare*, 442 U.S. at 726–27 (rejecting a juvenile's request for his probation officer as a *Miranda* request for counsel and recognizing that attorneys play a special role during interrogations).

172. *Davis*, 512 U.S. at 452.

173. See *supra* notes 44–71 and accompanying text.

### 1. Juveniles' Waivers of *Miranda* Rights

Police and prosecutors may establish objectively that a juvenile understands her rights by administering the *Miranda* advisory and obtaining an affirmative response. In the simplest version, the officer reads each of the rights to the youth, followed by the question "Do you understand that?" After the juvenile affirmatively acknowledges each warning "on the record," she then initials the form. In nearly half the cases, the officer had the youth read out loud the final paragraph of the form, in which the juvenile stipulates to receiving the warnings, initials each right, and signs the form. Following administration of the *Miranda* warning, every juvenile purported to understand her rights. The fifty-three juveniles who ultimately waived their rights clearly and affirmatively indicated a willingness to do so.

Despite objective manifestations of understanding and an apparent willingness to proceed, research by Grisso and others questions whether juveniles subjectively understand the language of the advisory or the meaning of rights or possess the competence to exercise them. Several studies suggest that juveniles lack the linguistic competence of adults to comprehend the warning, to waive their rights, or to understand the legal consequences of their actions.<sup>174</sup> In short, the objective appearance of comprehension—an affirmative expression of understanding, a nodding of the head in agreement, a failure to ask questions, the absence of behavioral signs of confusion or cognitive struggle—may reflect compliance with authority rather than an actual subjective appreciation of the meaning of the warning.

In addition to formal adherence to the *Miranda* obligation, some officers took it upon themselves to elaborate on and to explain the meaning of the warnings to further clarify youths' understanding. For example, one officer undertook a simultaneous, "dumbed-down" paraphrase of the contents of the warning.

Q Okay. You've had these read to you before, your *Miranda* rights.

A Um-hmmm [affirmative].

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174. See *supra* Part II; see also Regina M. Huerter & Bonnie E. Saltzman, *What Do "They" Think? The Delinquency Court Process in Colorado as Viewed by the Youth*, 69 DEN. U. L. REV. 345 (1992); Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 LAW & HUM. BEHAV. 523 (1990); Trudie F. Smith, *Law Talk: Juveniles' Understanding of Legal Language*, 13 J. CRIM. JUST. 339 (1985).

Q Okay, I got to read them to you again. I had to read them to Alice [female co-defendant], too. Okay, follow along with me, if you understand these four, I'll have you initial this here, sign and I'll give you a copy, Okay. You have the rights to protection against self-incrimination listed below. Please read along with me, and initial each statement if you understand it. One, you have the right to remain silent and refuse at any time to answer any questions asked by a police officer. Do you know what that means? It means you don't have to talk to me if you don't wanna.

A Alright.

Q Two, anything you do or say can be used against you. That means if you make a statement, I've got to put it in a report. Okay?

A Okay.

Q Three, you have the right to talk to a lawyer and to have the lawyer with you during any questioning. That means if you wanted to have a lawyer, you could.

A Uhmmm [affirmative].

Q Four, if you cannot afford a lawyer, if you don't have the money, or your, is Leslie your mom or dad?

A Leslie is my dad.

Q If he didn't have the money for a lawyer, the court would give you one and you could remain silent until you had a chance to talk to that lawyer.

A Okay.

Another officer paraphrased the meaning of the right to appointed counsel.

Four, if you cannot afford a lawyer, one will be appointed for you, and you may remain silent until you have talked to the lawyer. That means if you don't have the money or your parents don't have the money to hire a lawyer the court will give you one. Do you understand that?

In the two cases in which juveniles expressed confusion about the contents of a warning, the officer paused to determine whether juvenile actually understood.

Q Three, you have the right to talk to a lawyer and to have the lawyer with you during any questioning. Do you understand that?

A Yeah. I think so.

Q You know what that means?

A Yeah.

In the most complete explanations of rights, officers actually requested juveniles to repeat back their understanding of

the advisory in their own words.<sup>175</sup> The following provides the best illustration of this practice:

Q Okay. Now, uh, we . . . we've already arrested and interviewed Sally [female co-defendant]. And, uh, [she] was, uh cooperative and, uh—and, uh, told the whole story and drew a little map here of the place and . . . and explained the whole thing to us. I'm now talking to you, uh, about this. So, before we go any further, obviously there are a lot of questions that need to be answered. A lot of things need to be talked about. Before we do that, I'm going to read you your rights. Okay?

A I have the right—

Q Well—

A Understand—

Q What I . . . I know you know, but just let me read them again. Okay?

A All right.

Q You have the right to remain silent. Can you explain what that means to you?

A That I can just shut up and tell you guys that I ain't talking to anybody um . . . until I speak to my lawyer. And then we can just go to court from there.

Q Okay.

A And I'd be locked up.

Q Well. Okay. I—

A [not audible]—

Q I think, I think you got the gist of what it means. Anything you say is evidence and will be used against you in court. Do you understand what that means?

A Yep.

Q Okay.

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175. Drizin and Colgan argue that in the context of *Miranda* waivers, many juveniles—for example, those with learning disabilities—may claim that they understand their rights, even when they do not. Drizin & Colgan, *supra* note 34, at 152–53. And once they indicate that they understand their rights, regardless of whether they in fact do, courts will find they have made a knowing and intelligent waiver. *Id.* Drizin and Colgan propose that rather than simply relying on a juvenile's "yes" response to the question, "Do you understand your rights?," police should require the juvenile to explain it in their own words as the example in the text provides:

Police officers and prosecutors who *Mirandize* children should make it standard practice to ask the child to explain back to them what each right means in their own words before proceeding to interrogate the child and should record verbatim these responses. Their failure to do so should be held against them by courts when evaluating whether the child "knowingly and intelligently" waived his rights.

*Id.* at 153.

A Everything here is being tape-recorded. If there's evidence . . . evidence that certainly proves that I did that thing, you guys can bring me to court and play it.

Q Right. Okay. You're entitled to talk to a lawyer now and have him present now or anytime during the questioning. Do you know what, can you explain that one to me?

A I could, uh, ask to call my lawyer and that I could be silent until my lawyer comes. And, I could talk to him in a room that ain't got no tape recorder or anything and then he could talk to you guys and I could talk to you, but he . . . he does most of the talking.

Q Okay. All right. If you cannot afford a lawyer one will be appointed for you without cost.

A Yep. [not audible] but they'll—

Q Do you understand that?

A Yeah. [not audible] them . . . them cops, I mean them attorney's uh [not audible].

Q Okay. But do you understand what I mean?

A Yes.

Q Okay. Now obviously, we need to talk. Ah, we want more than just your name.

A All right

Q So, ah, having your rights in mind, I . . . I want to tell ya that I . . . I want to talk to you about last night.

A Yeah.

Q And, are you willing to talk to me about that at this time?

A Yeah.

Following administration of the *Miranda* warning, juveniles must either waive or invoke their rights. The standard version of the waiver process was “bearing in mind that I’m a police officers, and I’ve just read your rights, are you willing to talk to me about this matter?” Again, officer clarified any ambiguity when juveniles waived their rights:

Q Having these rights in mind, do you wish to talk to us now?

A No . . . yes, I do.

Q Yes?

A I wish to talk to you right now.

Justice White’s dissent in *Miranda* identified one of the fundamental internal contradictions of the decision when he asked why a waiver of rights is any less the product of “inherent compulsion” than an unwarned statement itself.<sup>176</sup> The

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176. *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



criminological research literature buttresses Justice White's concern. The available evidence, primarily from post-*Miranda* impact studies, reports that two-thirds to three-quarters of criminal suspects whom police attempted to question waived their rights and agreed to talk with the police.<sup>177</sup> Summarizing the results of the immediate post-*Miranda* impact studies, Leo notes that "after initially adjusting to the new rules propounded in the *Miranda* decision, police have complied with the letter, but not the spirit, of the required fourfold warnings; [and] that despite these standard warnings most criminal suspects routinely waive their constitutional rights . . ."<sup>178</sup>

**Table 2: Waive or Invoke *Miranda* Rights**

	Type of Offense				Total
	Person	Property	Drugs	Firearm	
Waive					
N=	31	14	3	5	53
%age Waive	91%	58%	60%	100%	80%
Later Invoke					
N=	1	2	0	0	3
Invoke Outright					
N=	2	6	2	0	10
Total	34	22	5	5	66

Table 2 reports the number and proportion of juveniles in our study who invoked or waived their *Miranda* rights. Eighty percent of the juveniles waived their *Miranda* rights.<sup>179</sup> These rates are consistent with the high waiver rates reported by the *Yale Law Journal*—New Haven Study, Leo's California research, Cassell and Hayman's Salt Lake observations, Gudjonsson's British studies, and Grisso's earlier juvenile research.<sup>180</sup> Juveniles charged with crimes against the person

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the same chair in front of the same policemen, to waive his right to consult an attorney.").

177. See *supra* notes 84–88 and accompanying text; see also Cassell & Hayman, *supra* note 75, at 859 ("The evidence, although generally quite dated, suggests that about 20% of all suspects invoke their *Miranda* rights.").

178. Leo, *supra* note 148, at 260.

179. See *supra* tbl.2.

180. See Cassell & Hayman, *supra* note 75, at 859 (reporting that "of suspects given their *Miranda* rights, 83.7% waived them"); GRISSE, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 36 (reporting that about ninety-one per-

and firearms violations exhibited the highest rates of waivers, and those charged with property and drug crimes waived their rights somewhat less frequently.<sup>181</sup>

The Supreme Court in *Fare* emphasized Michael C's prior contacts with police as one factor supporting the validity of his waiver under the "totality of the circumstances."<sup>182</sup> Similarly, criminological research also indicates that a suspect's prior experience with law enforcement is an important factor associated with rates of *Miranda* waivers and invocations.<sup>183</sup> Recall from Table 1 that 42% of these juveniles had one or more felony arrests prior to their current arrest. As Table 3 reports, juveniles with prior felony arrests waived their rights at substantially lower rates (68%) than did those with fewer or less serious police contacts (89%).<sup>184</sup> However, the differences in rates of

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cent of juveniles waived their *Miranda* rights and agreed to talk with police); Leo, *Inside the Interrogation Room*, *supra* note 79, at 280–81 (reporting that almost two-thirds of all suspects questioned and more than three-quarters of all those who waived their *Miranda* rights made incriminating statements); Pearse et al., *supra* note 81, at 2 (reporting confession rates of 55–62% in a series of studies conducted in England); Wald et al., *supra* note 84, at 1562–66; Viljoen et al., *supra* note 55, at 261 (reporting that in a retrospective study of delinquents held in detention, only approximately thirteen percent reported that they asserted their right to silence).

181. See *supra* p. 82, tbl.2.

182. *Fare v. Michael C.*, 442 U.S. 707, 726–27 (1979). Similarly, Grisso summarized trial courts' assessment of juveniles' prior contacts with police under the "totality of the circumstances," and reported that

courts have considered a juvenile's lack of prior contacts with police . . . as weighing against sufficient understanding of *Miranda* warnings . . . [and] 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.

GRISSE, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 64.

183. See *infra* p. 84, tbl.3. See, e.g., GRISSE, JUVENILES' WAIVER OF RIGHTS, *supra* note 33, at 37 (reporting that juveniles' rate of refusal to talk increased with the number of prior felony referrals they had experienced); Kassin, *supra* note 72, at 40 ("[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.'"); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 21 (1970) (reporting that defendants with more prior arrests and felony convictions gave fewer confessions than did defendants with fewer arrests or convictions); Leo, *supra* note 148.

184. These findings are consistent with Leo, who reports that almost one-fourth of my sample (22%) exercised their right to terminate police questioning, while 78% of the suspects chose to waive their *Miranda* right. . . . [T]he only variable that exercised a statistically significant effect on the suspect's likelihood to waive or invoke his *Miranda* rights was whether a suspect had a prior criminal record. . . . [W]hile 89% of the suspects with a misdemeanor record and

waivers by type of offense reported in Table 2 do not appear to be attributable to differences in juveniles' prior records. Roughly comparable proportions of youths in each offense category had similar prior arrest records.<sup>185</sup>

**Table 3: Waive or Invoke by Prior Arrest Record**

	Non-Felony	One or More Felony
Waive	34	19
	89%	68%
Invoke	4	9

## 2. Juveniles' Invocation of *Miranda* Rights

Although the developmental psychological research cautions that many younger juveniles are unable to exercise their *Miranda* rights, at least some of the older juveniles in this study clearly appeared able to invoke their rights both initially and during interrogation. After receiving the *Miranda* warnings, fifteen percent of juveniles invoked their rights immediately. After initially waiving their rights, another five percent invoked them when officers' questioning became more challenging. Still other juveniles who did not invoke their rights during

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92% of the suspects without any record waived their *Miranda* rights, only 70% of the suspects with a felony record waived their *Miranda* rights. Put another way, a suspect with a felony record in my sample 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.

Leo, *Inside the Interrogation Room*, *supra* note 79, at 286.

Similarly, Cassell & Hayman also report that "suspects with a prior criminal record were slightly more likely to invoke their *Miranda* rights," although they acknowledge that they used too expansive a definition of "criminal record," which also included misdemeanor arrests. Cassell & Hayman, *supra* note 75, at 895; *see also* EVANS *supra* note 98, at 20 (analyzing a sample of British juveniles and reporting that "[t]hose with previous convictions are less likely to confess than those without. This may be open to a number of interpretations. For example, those with previous convictions may have more experience of police interrogation techniques and therefore may be better able to resist them and/or have a greater interest in declaring their innocence. On the other hand they may be more susceptible to arrest and questioning for offences which they have not committed.").

185. Overall, more than half (58%) of all juveniles did *not* have prior felony arrest records. Almost two-thirds of juveniles charged with crimes against the person (65%), more than half of those charged with crimes against property (55%), and 40% of those charged with drug and weapons offenses had no prior felony arrests. *See supra* p. 68, tbl.1.

interrogation exercised some degree of control over the questions they would answer.

Ten of the sixty-six juveniles invoked their *Miranda* rights after police administered the warnings. In the case of one sixteen-year-old with no prior arrests, after the officer read the *Miranda* warning, the youth invoked his right to remain silent by remaining silent:

Q Do you understand all of those rights I just read to you?

A Yes.

Q Okay, ah, having those rights in mind, do you want to answer some questions for me here?

A [no answer]

Q It's up to you.

A [no answer]

Q I'm sorry, are you waiting for me or am I waiting for you?

A [no answer]

Q Under . . . understanding your rights, you want to answer some questions for me?

A What if I don't?

Q It's entirely up to you . . . I just . . . it's all up to you. There's no, there's no what if you do and what if you don't.

A No, not really.

Q Okay, very good. We're going to conclude this statement here and now at about 5:03.

Another case provides a similar example of a youth's ability to understand and invoke his rights following administration of a *Miranda* warning:

Q Do you understand those rights?

A Um-hum [affirmative]

Q Having those rights in mind, do you wish to talk to me now?

A [inaudible] I don't have to if I don't want to?

Q No, you don't have to if you don't want to, but you need to answer out loud so I can hear ya.

A Nah, I want, I won't answer any questions.

Q You don't want to answer any questions at all?

A Nope.

Q Did you want to have a lawyer with ya?

A Um-hum. [affirmative]

Q You want to have a lawyer present, what . . . all right. The statement will then conclude. It's 0246 hours.

Further illustrating juveniles' ability to understand and exercise their rights, in several cases, juveniles invoked their

rights during the course of an interrogation. For example, when an officer interrogating a youth confronted him with an inconsistency in his story, the following exchange took place:

A I guess I was watching the movie at 1 [a.m].

Q You guess?

A Can I wait until I get a lawyer?

Q Well, you read your rights, right. You said you wanted to talk to me.

A Naw, I changed my mind.

Q Okay. Now you changed your mind and you want a lawyer?

A Yeah.

Q Okay. Time is 6:26 [interview terminated].

In another instance, an officer investigating a burglary and attempted murder confronted a juvenile with statements obtained from his cousin who drove the “get-away” car. The cousin left the scene after police questioned him as he waited for the suspect who was inside the building:

A When I got home, my cousin told me that there was police everywhere looking for somebody that had burglarized the house and they seen him. Don't they have the right to go in the house and see if someone's in there?

Q I don't understand your question, Frankie. Your cousin already told me you asked him “what happened to you” the next morning. Your cousin already told me that you didn't have any idea what happened to him until the next morning because he was already asleep when you got home.

A He was asleep? We both were asleep.

Q Well, no, he was asleep, before you got home.

A Okay, I'd like to speak to my lawyer then. [Interview terminated]

Although recording interviews provides the “best evidence” of what occurs in the interrogation room, some juveniles invoked their rights because they objected to the police officer creating that record. As an officer questioned a juvenile about a stolen car, the youth objected to recording their conversation and subsequently invoked his rights:

Q Okay. Whose car were you in?

A Do you want to tape record now, or shall I talk now and then tape record?

Q I have to, the law says I do.

A I don't want to.

Q Why?

A I don't want to.

Q I have to, the law says I have to have it on.

A I know you have to have it on, but I don't have to talk to you.

Q Well, you were in a stolen car.

A You've still got me on tape recorder.

Q I have to, I can't turn it off.

A Well, I mean, I don't have to answer your questions.

Q Okay. You're going to be charged with auto theft.

A I mean, I mean I'm going to have to go to trial, whatever but—

Q Okay, I'll conclude this interview at 9:11.

When police fail to administer the *Miranda* warning or a suspect invokes her *Miranda* rights, the Supreme Court allows prosecutors to use “voluntary” statements obtained thereafter to impeach a defendant who testifies,<sup>186</sup> or as a source of leads to other witnesses<sup>187</sup> or to obtain physical evidence.<sup>188</sup> Several scholars have argued that the Court's approval of the collateral use of non-coerced statements obtained in violation of *Miranda* creates an incentive for police to continue to question “outside of *Miranda*” when a suspect invokes her rights.<sup>189</sup> Unlike Leo's

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186. See, e.g., *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing use of statements obtained in violation of *Miranda* to be used to impeach the defendant's testimony at trial because “[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances”). Following the Court's limitation of the scope of *Miranda* in *Harris*, a number of commentators observed that the court provided police with a substantial incentive to continue to interrogate suspects who invoked their rights. See Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442–43 (1987) (arguing that *Harris* gives police incentives to ignore defendants' invocations of *Miranda* rights); Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1220 (1971) (“Under the *Harris* rule, what possible incentive would the police have to comply with *Miranda* . . . ?”).

187. See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 444–45 (1974) (allowing police to use a statement obtained in violation of *Miranda* as a lead to identify a witness whom prosecutors subsequently called to testify against the defendant).

188. See, e.g., *United States v. Patane*, 542 U.S. 630, 637 (2004) (concluding that introduction of non-testimonial physical evidence obtained as a result of voluntary statements, albeit in violation of *Miranda*, does not violate the privilege against self-incrimination).

189. See, e.g., Alschuler, *supra* note 186, at 1442–43 (arguing that the Court's decisions provide a purely instrumental police officer with every incentive to continue questioning a suspect in violation of *Miranda*); Stephen D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 451 (2002) (claiming that police have every reason to question a suspect in custody before giving *Miranda* warnings); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why We Should Care?*, 78 CAL. L. REV. 539, 583 (1990) (cautioning

research that reported some detectives continued to question suspects after they invoked their *Miranda* rights,<sup>190</sup> in every case in which juveniles invoked their rights, the officers immediately ceased questioning and no further questioning “outside of *Miranda*” occurred.

Even juveniles who did not invoke their *Miranda* rights outright still exercised some degree of control over the topics they were willing to discuss with police. For example, an officer questioning a young woman driving a stolen automobile sought the identity of the person who purportedly gave her the car to drive:

Q Who'd you get it from?

A Uh . . . uh . . . a friend of mine.

Q What's his name or her name?

A I gotta say?

Q I told you before, I'm reading you . . . I read your *Miranda* warning. If you want to speak to me you can speak to me, if you don't want to speak to me, you don't have to speak to me.

A I don't want to say the person's name.

Shortly thereafter, the officer returned to the question of the identity of the person who allegedly gave the girl the stolen car.

A Do I have to say the person's name?

Q No you don't. I'm not . . . I'm uh not coercing you to say anything. I'm advising you of your *Miranda* rights. And your *Miranda* rights are you can stay silent. Okay. So as I told you before, you don't have to answer any of my questions at all. And I gave you your rights and you advised me that you would answer some of my questions. Okay. I'm not forcing you . . . I'm not forcing you to say anything. That decision is completely yours. I'm just asking you some questions. Whether

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that admission of statements in violation of *Miranda* for purposes of impeachment supplies a considerable incentive for the police to violate *Miranda*); Leo & White, *supra* note 74, at 448 (noting that if police believe that “the suspect will soon have a lawyer present or be removed from the interrogator's custody, they might want to question suspects despite their invocation of their rights”); Weisselberg, *supra* note 75, at 132–40 (analyzing police interrogation manuals and training materials that encourage police to continue questioning a suspect after she invokes her *Miranda* rights in order to obtain evidence for impeachment or leads to other evidence).

Despite the fears of commentators about “questioning outside of *Miranda*,” Cassell and Hayman report that “in none of our cases did the police continue questioning a suspect after an invocation of *Miranda* rights.” Cassell & Hayman, *supra* note 75, at 861.

190. Leo, *Inside the Interrogation Room*, *supra* note 79, at 287 & n.59 (reporting that detectives continued to question about one-quarter of suspects after they invoked their *Miranda* rights).

you answer the questions or not are up to you. But I'm telling you is that you have . . . I mean . . . this is a felony. You're in a stolen vehicle . . . you're driving a stolen vehicle. So we're at . . . we're at a felony level here. So uh, you know . . . I'm not trying to scare you, I'm not trying to intimidate you any further. But, I'm just trying to tell you the realization of what's going on here.

Still later in the interview, when the girl again demurred, the officer again explained that the decision to provide information rested with the suspect and that the interrogator would not attempt to coerce her:

If you want to give me the name that's fine, if you don't, I can't . . . I'm not going to . . . this isn't old cops . . . where ya . . . where I beat on you and tell you give me a name. This is . . . I'm asking you questions. If you want to answer them, answer them. I can't force you to answer them. I advised you of *Miranda* warnings. And that's all I can do. So if you don't want to answer it, that's completely up to you.

We have no valid or reliable way to measure the subjective experience of custodial interrogation because it varies with each individual, with each interrogator-suspect dyad, and with each offense and offender context. We cannot know directly what thought-processes occur inside a person's mind. Despite external appearances and behavioral manifestations of understanding, we cannot gauge whether a suspect actually, subjectively comprehends the substance of the *Miranda* warning or feels able to act on it. The developmental and social psychological literature suggests that many juveniles do not understand the contents of a *Miranda* warning or its legal ramifications and cannot exercise their rights. These concerns are heightened for those youths fifteen years of age and younger. The Supreme Court in *Alvarado* reaffirmed that an inquiry into the "voluntariness" of a *Miranda* waiver or confession includes subjective elements.<sup>191</sup> However, trial judges conducting suppression hearings seldom conduct extended examinations of suspects' cognitive, emotional, or motivational characteristics, tending to rely on more objective, external behavioral indicators. By the measures on which police and courts typically rely—verbal af-

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191. See *Yarborough v. Alvarado*, 541 U.S. 652 (2004), where the Court distinguished between *Miranda*'s "objective" custody inquiry and "subjective" evaluations that examine the actual mindset of a suspect:

For example, the voluntariness of a statement is often said to depend on whether "the defendant's will was overborne," a question that logically can depend on "the characteristics of the accused;" the characteristics of the accused can include the suspect's age, education, and intelligence, as well as a suspect's prior experience with law enforcement.

*Id.* at 667–68 (citations omitted).



firmations of understanding, signed *Miranda* forms, and express agreements to waive rights—this study indicates that sixteen- and seventeen-year-old juveniles do understand their *Miranda* warnings and at least some can exercise their rights effectively.

In summary, police use the same *Miranda* warning and advisory form to interrogate all criminal suspects—juveniles and adults. As a minor concession to youthfulness and immaturity, some officers took additional steps to explain or to clarify the meaning of the warning. However, police appeared to use similar tactics to elicit *Miranda* waivers from juveniles as did those in Leo's study of interrogation of adults. Initially, most of them used "booking questions" as an opportunity to establish rapport with and to condition youths to respond. Similarly, they administered warnings in a way that suggested the benefits of "talking" and "telling the truth" or in a manner that indicated the warning was simply a bureaucratic formality that preceded a waiver and interrogation. And, as with adults, once police administered the warning, the vast majority (80%) of juveniles waived their *Miranda* rights and allowed police to question them further. In short, police appeared to question these older youths charged with serious crimes in a manner very similar to that employed with adults.

#### VI. POLICY IMPLICATIONS: THE VIRTUES OF RECORDING INTERROGATIONS

Access to *Scales* tapes and transcripts enabled me to examine adolescents' ability to understand and to exercise *Miranda* rights. The findings provide limited empirical corroboration of one aspect of developmental psychological research. Sixteen- and seventeen-year old juveniles exhibit relatively adult-like competence in the interrogation room. Given a population of older, criminally sophisticated delinquents charged with serious crimes, the evidence presented here indicates that sixteen- and seventeen-year-old juveniles *do* appear to understand the contents of the *Miranda* warnings and about the same proportions of juveniles as adults appear able to exercise their rights both prior to and during the course of questioning.

Interrogation protocols provide objective evidence that juveniles understand their rights. Police officers invariably read the *Miranda* warning to the youths. In nearly every interrogation, the juveniles read along with and initialed each advisory. At the conclusion of the warning, most youths read aloud the

final paragraph and signed the statement that they had received and understood their rights. The occasional officers' "dumbed-down" paraphrase of the advisory and some juveniles' repeating back the meaning of the warning provide further bases for inferring that these older juveniles understand the advisory.

Some may object that juveniles' reading the warnings aloud, initialing and signing forms constitute acts of mere behavioral compliance that may or may not reflect true subjective comprehension. Even if a juvenile subjectively understands the meaning of the words, she still may feel constrained from freely exercising her rights by the inherent coercion of custodial interrogation. However, a judge at a suppression hearing would need to conduct an extended and administratively burdensome inquiry into a juvenile's cognitive, emotional and motivational characteristics to make a more complete "subjective" assessment of a youth's cognition and volition. Even if a judge were inclined to undertake such an evaluation, the evidence to inform such a decision would be costly and difficult to obtain routinely.<sup>192</sup> And, if most older juveniles are as competent as adults to waive their *Miranda* rights, then it would be even more difficult for a judge to distinguish between the majority of those youths who understand their rights and the fewer who do not. In the absence of such individualized, labor-intensive inquiries, officers' reading aloud warnings to suspects, juveniles' acknowledging understanding of the warning, and their initialing and signing waiver forms provide the types of "objective" evidence upon which trial judges and appellate courts necessarily rely to decide whether a youth made a "knowing, intelligent, and voluntary" of waivers of rights.

This study provides the first empirical corroboration of the developmental psychological research that reports the relative adult-competence of sixteen- and seventeen-year-olds during interrogation, at least those who are sophisticated delinquents. The fact that about the same proportions of the older juveniles in this study waived their rights as did the adults in Leo's research and other studies provides an additional basis from

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192. See, e.g., *People v. Lara*, 432 P.2d 202, 215 (Cal. 1967) (describing the "totality of circumstances" factors). Courts typically rely on psychometric tests and IQ scores, and testimony by clinicians, teachers, social workers, and parents to try to gauge juveniles' ability to understand and exercise *Miranda* rights but, they have little legal guidance as to how to resolve disputes in each case.

which to infer that these juveniles function about on par with adults. Significantly, some of these older juveniles effectively invoked their rights at the outset of interrogation, others invoked their rights in mid-stream interrogation, and still others exercised some degree of control over the scope of questioning. Because of their similarities with adults, these performances suggest that these youths understand the substance of their rights and the measures necessary to invoke them at various stages of an interrogation.

#### A. MANDATING RECORDING OF ALL INTERROGATIONS

Based on this study of older, experienced delinquents, we should address concerns about whether police give valid *Miranda* warnings, obtain voluntary waivers, or employ problematic interrogation techniques by generally regulating police practices rather than by providing special procedural protections for sixteen- and seventeen-year-old juveniles.<sup>193</sup> For the past decade, virtually every legal analyst, criminologist, social psychologist, and policy group has advocated audio recording or videotaping of interrogations to reduce coercion, to minimize the dangers of false confessions, and to make the process more visible and transparent.<sup>194</sup> Recordings provide the most reliable

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193. Most analysts endorse either a parental presence requirement to assist juveniles during interrogation or restrictions on the types of interrogation tactics that police may employ when they question juveniles. *See, e.g.*, McMullen, *supra* note 102, at 1005 (advocating a per se ban on the use of all deceptive interrogation techniques and the use of false evidence when interrogating juveniles); *see supra* notes 30–35 and accompanying text.

194. Gudjonsson notes that

[t]he electronic recording of all police interviews and interrogations would be in the interests of justice, and it will come. It would ensure that what happens in private within the walls of the interrogation room becomes open to public scrutiny. . . . [E]lectronic recording potentially gives the defence useful material for disputing confessions at suppression hearings, although it does of course also protect the police against unfounded allegations. . . . There is no doubt that tape-recording, or video-recording, of police interviews protects the police against false allegations as well as protecting the suspect against police impropriety. It provides the court with the opportunity of hearing and seeing the whole picture relating to the interrogation.

GUDJONSSON, *supra* note 79, at 22; *see also* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 553 (1998) (arguing for videotaping interrogations unless a suspect objects to recording and simultaneously loosening *Miranda* restrictions on questioning); 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 Confes-*

evidence of what occurs during interrogation without simultaneously reducing the rates at which suspects confess.<sup>195</sup> It creates an objective record that all parties—police, prosecutors and defense lawyers, judges and juries—can review and thereby increases the transparency of the interrogation process and the accuracy of the ensuing evidence.<sup>196</sup> Recording also increases the reliability of statements obtained, avoids the credibility disputes that inhere in “swearing contests” between police and defendants,<sup>197</sup> and lessens the risks of false

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sions, 52 DRAKE L. REV. 619 (2004); Kassin, *supra* note 72, at 229–30 (advocating taping to deter lengthy interrogations and the use of abusive tactics); Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions*, 32 LOY. U. CHI. L.J. 337, 341–45, 382–89 (2001) (describing the impetus behind and the politics of Illinois adoption of limited requirements to record interrogations); Leo, *The Impact of Miranda*, *supra* note 83, at 682 (“The use of audio or videotaping inside the interrogation room creates an objective record of police questioning to which all interested and potentially interested parties may appeal—police, suspects, prosecutors, defense attorneys, and juries—in the determination of truth and in judgments of justice and fairness. The use of videotaping is thus the most viable legal intervention for resolving many of the antinomies of crime control and due process inherent in police interrogation of the accused in a democratic society.”); Lawrence Schlam, *Police Interrogation of Children and State Constitutions: Why Not Videotape the MTV Generation?*, 26 U. TOL. L. REV. 901, 902–03 (1995); *False Confessions and the Constitution*, *supra* note 105, at 153–54 (1997) (arguing that recording interrogations enables courts to scrutinize police practices, deters police from using abusive interrogation methods, facilitates courts’ judgments about the reliability and voluntariness of statements, and reduces reliance on untrustworthy confessions).

195. See Drizin & Leo, *False Confessions*, *supra* note 65, at 997 n.681 (reporting that police recorded only 2 of 125 proven false confessions in their entirety, and only partially recorded 15 of the remaining false confessions).

196. See, e.g., *id.* at 997–98 (“[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. Interrogators are less likely to resort to improper interrogation practices when the camera is rolling and thus they are less likely to coerce an innocent suspect into falsely confessing.”).

197. Leo, *The Impact of Miranda*, *supra* note 83, at 687 (noting that one of the reasons some police oppose recording is that it provides an objective independent basis on which to resolve credibility disputes).

[T]he videotaping of custodial interrogations threatens to shift the balance of advantage between police and suspects in the “swearing contest” when their accounts of the interrogation differ in court. Since they are almost always of higher status than defendants, and since they control the social production of knowledge about the interrogation and confession, police virtually always prevail in any “swearing contest.” Videotaping custodial interrogations therefore threatens to undermine their superior control over the legal construction of facts

confessions.<sup>198</sup> Recording is a neutral, non-adversarial reform proposal that protects police from false claims of coercion or abuse, protects defendants whose veracity is compromised simply by a criminal accusation, and safeguards innocent suspects against the possibility of a wrongful conviction based on a false confession.<sup>199</sup> Recording enhances the professionalism of police investigations, contributes to more effective interrogation practices, and reduces recourse to abusive practices.<sup>200</sup> This, in turn, enables police to efficiently and effectively investigate crimes and contributes to the successful identification, prosecution and conviction of guilty offenders.<sup>201</sup> And, I would add selfishly, re-

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about the suspect's interrogation. With videotaping, no longer can two officers "cleanse" their notes to tell similar accounts that may contradict a suspect's testimony; instead an objective record replaces the officers' testimony as the most authoritative account of the interrogation . . . . In short, videotaping threatens to expose the secrecy of interrogation to the scrutiny of others.

*Id.*

198. A recording provides an independent basis for resolving the "swearing contest" that inevitably occurs when police and suspects offer conflicting testimony about the administration of warnings, the voluntariness of waivers, and the content of statements. *See, e.g., Drizin & Leo, False Confessions, supra* note 65, at 997 ("With taping, it is no longer necessary to rely on subjective credibility judgments to resolve 'swearing contests' between the police and the defendant about what occurred during interrogation. Unlike the testimony of two disputants, the videotape does not suffer from the fallibility and biases of human memory and judgment, but, instead, preserves a record of the interrogation that is complete and factually accurate.").

199. Cassell, *supra* note 194, at 554 (citing instances of false confessions in which only the availability of tape recordings enabled suspects to demonstrate that police fed them the information contained in the confessions); White, *supra* note 105, at 155 (arguing that recording does not adversely affect any legitimate law enforcement interests and provides prosecutors with more convincing evidence that assists them in negotiating better pleas and obtaining convictions).

200. Leo, *The Impact of Miranda, supra* note 83, at 683. For example, a complete recording enables an officer to review the details of an interrogation that might not have been included in written notes in light of new facts. Drizin & Reich, *supra* note 194, at 624 (arguing that recording interrogations provides "the only viable way to combat the power that these confessions have in the courtroom because they allow factfinders, prosecutors, and experts the ability to determine for themselves the reliability of the confession").

201. *See, e.g., Drizin & Reich, supra* note 194, at 625 (noting that recording enables police to confront suspects "with an earlier recording containing inconsistencies and contradictions," and to induce suspects to confess after police play the statements of their co-conspirators implicating them); *see also* SULLIVAN, *supra* note 112 (surveying police departments nationwide regarding their interrogation recording practices in conjunction with the recommendations submitted by the Illinois Commission on Capital Punishment). The Commission found that recording greatly enhanced the quality of law enforcement and

ording also provides opportunities for criminologists, police professionals, and others to study systematically what actually occurs in the interrogation room. This will increase our fund of knowledge and enable us to develop more effective techniques to elicit true confessions from guilty defendants, to reduce the likelihood of extracting false confessions from innocent suspects, and to learn better to distinguish between guilty and innocent suspects.

Recordings must include the entire process—from preliminary interviews through initial interrogation to the final statement—rather than just the formal culmination of the process.<sup>202</sup> Only a complete record of the entire process can serve its salutary functions and protect against the dangers of final “voluntary” statements that ratify earlier coerced ones, or other statements in which the suspect internalizes unique knowledge of facts about the crime previously provided by the police and subsequently repeats them in a false confession.<sup>203</sup>

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criminal investigations:

[W]hen detectives recorded the entire interview and later review the recordings, they often discover significant incriminating matters they overlooked during the give-and-take of the original interview, such as false exculpatory statements and alibis, subtle changes of story, and (with video) body and eye movements indicating deception. This crucial evidence is lost forever if the sessions are not recorded in their entirety.

*Id.* at 18.

202. GUDJONSSON, *supra* note 79, at 23 (“[T]he first interrogation where the suspect’s resistance is broken down [is crucial to understanding the process, and failing to record the entire process] may give a misleading picture of what really took place during the interrogation . . .”). While no system is fool-proof, complete recording of the entire process provides one of the best protections against false confessions and wrongful convictions. By contrast, allowing police to record only the final confession lends the process to abuse, selective manipulation, and misinterpretation:

[T]he interrogator only makes an electronic recording of the part of the interrogation that favours the prosecution (i.e. after the suspect has been broken down to confess and provides a post-confession statement). The danger here is that the recording will not give the whole picture of the interrogation process and may seriously mislead the court. It is essential that all interviews are properly recorded so that the court will have the best record possible of what took place during the interrogation. Otherwise it is open to abuse by the police and can mislead the court. Indeed, without a complete record, allegations of police impropriety (e.g. threats, inducements, feeding suspects with pertinent case details) are difficult to prove or disprove.

*Id.* at 23–24.

203. See EVANS, *supra* note 98, at 28 (analyzing tapes of British interrogations and noting that many contained references to interviews conducted prior to the current recording and in which it appears that “some of this material is

In addition to the policy justifications for mandatory recording of all interrogations, the successful experience of law enforcement agencies in several states and many police departments demonstrates the administrative feasibility of a recording requirement. Given the technological ease, simplicity of recording, and relatively inexpensive investment, there are *no* legitimate objections to requiring police and prosecutors to provide an audio- or video-tape and transcript in every case in which the state seeks to introduce a defendant's admissions or confessions. Unlike the paucity of options available to the Supreme Court when it decided *Miranda*, state legislatures and state supreme courts today have viable alternatives available to ensure the adequacy of warnings and the voluntariness of waivers and subsequent statements. They should mandate complete recordings of all police interrogations to ensure that the state provides the best evidence documenting the process. Courts control the evidence they allow parties to introduce in proceedings and judges should insist on the best evidence. Police interrogation practices deliberately create the conditions— isolation, incommunicado questioning—that make after-the-fact determinations of what occurred so difficult. There simply is no justification to rely on fallible, biased, and contradictory human memories about secretive and highly stressful events that occurred several months earlier when it is so easy to obtain an objective and unimpeachable record of the same event.

Unlike other analysts who recommend recording all interrogations, I add one cautionary observation about the virtues of recording. Scholars emphasize the value of recordings for prosecutors to assess the demeanor and sophistication of a defendant, for defense attorneys to manage their case-loads by persuading guilty clients to plead guilty, and for judges and juries to assess a defendant's state of mind and the accuracy of a statement.<sup>204</sup> However, recordings are not self-executing and just because a tape exists does not mean that anyone can or will review it. For every hour of a tape, someone must devote an hour to listening to or watching it. We must multiply that

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fed into the formal interview process"); Kassir, *supra* note 99, at 225 (noting that accurate determinations of voluntariness and guilt depend on fact-finders seeing "not only the final confession but the conditions that prompted it and the sources of the details that it contained").

204. See, e.g., WILLIAM A. GELLER, U.S. DEPARTMENT OF JUSTICE, VIDEO-TAPING INTERROGATIONS AND CONFESSIONS (Mar. 1993); Leo, *The Impact of Miranda*, *supra* note 83, at 684.

burden by every defendant questioned whether or not the case ultimately goes to trial. Although the party who offers a tape in evidence has the responsibility to provide the court with a transcript,<sup>205</sup> both prosecutors and defense attorneys must review a tape prior to transcription to determine whether it has evidential value to either party. Moreover, someone must compare the transcript with the original tape recording from which it was derived to assure its accuracy.<sup>206</sup> While the reports by police who questioned a suspect may alert a prosecutor to the evidentiary value of the interrogation, their reports may not always identify instances of *Miranda* errors, coercive questioning, or exculpatory evidence that prosecutors must disclose to the defense.<sup>207</sup> Similarly, because most delinquency defendants do not know enough to advise their lawyers whether police gave inadequate warnings or used improper techniques, either a paralegal, a law clerk, or an attorney must review the tape. As I discovered while conducting this research, the quality of recording is often poor and the process of transcription can be tedious and labor intensive. These characteristics detract from the quality of transcription and increase the costs of producing

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205. The *Minnesota Rules of Criminal Procedure* provide that at the Omnibus (suppression) Hearing, "If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record." MINN. R. CRIM. PROC. § 11.02 subdiv. 1.

206. See GUDJONSSON, *supra* note 79, at 85 (noting that a bare transcript provides only a "black and white" depiction of events in the interrogation room, whereas audio-tape provides the "colour" of what transpired). Even more importantly, however, transcripts are subject to error. "The simple expedient of checking the typed transcript with the audiotape recording cannot be overlooked, for, without exception, discrepancies were unearthed. In a number of the cases these were major errors, which if left unchallenged would represent a serious example of misrepresentation." *Id.*; see also EVANS, *supra* note 98, at 47 (reporting that when cases go to court, litigants tended to rely on police reports, and "Crown Prosecution Service or defence solicitors rarely listen to taped interviews").

207. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999) (requiring prosecutors to disclose evidence to the defense that is "favorable to the accused, either because it is exculpatory, or because it is impeaching . . ."); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding a constitutional duty for the prosecution to disclose to the defendant any exculpatory evidence within its possession). Indeed, Evans' research in England involved a detailed comparison of the police records' reports of the outcomes of interrogations with the taped interviews and reported substantial discrepancies. "In some cases the police record of the interview stated that the suspect had made a confession and in others there was no clear statement about whether or not the suspect had confessed when in the researchers' judgment the suspect had clearly denied the offence." EVANS, *supra* note 98, at 47.



transcripts. Also, someone must verify the transcripts against the original recordings on which they are based. Despite these considerable burdens, a complete record of every aspect of an interrogation is indispensable in those relatively few cases in which the validity and reliability of a suspect's statement ultimately becomes critical.

### CONCLUSION

Developmental psychological research over the past quarter-century has consistently emphasized adolescents' inability to understand or to exercise their *Miranda* rights during interrogation and their adjudicative incompetence during legal proceedings. In addition, the heightened awareness of juveniles' false confessions in the past decade—exemplified by cases like Michael Crowe, the Ryan Harris youngsters, and the Central Park jogger—further underscores the unique vulnerability of youth in the interrogation room. In the largest study to date, more than one-third of proven false confessions (35%) cases involved suspects under the age of eighteen.<sup>208</sup> When I began this project, I had no idea what to expect because no one had ever studied routine police interrogation of juveniles. However, the cautionary findings of the developmental psychology and false confessions research augured ill.

The Supreme Court's decisions on interrogating juveniles treat them as the functional equals of adults, requiring them to invoke their *Miranda* rights with adult-like clarity and relying on the adult standard—"knowingly, intelligently, and voluntarily" under the "totality of the circumstances"—to assess whether they competently waived their rights. Despite creating a misplaced equivalency between juveniles and adults, the Court's decisions in those cases—*Haley*, *Gallegos*, *Gault*, *Fare*, and *Alvarado*—actually may have reached the correct results and drawn a proper line between younger and older youths. In *Gallegos*, the Court ruled involuntary the confession obtained from "a child of 14."<sup>209</sup> In *Haley*, the Court reversed the conviction of a fifteen-year-old "lad" from whom police obtained a confession at five o'clock in the morning after nearly six hours of continuous interrogation by relay teams of police officers. In *Gault*, the Court reversed the conviction of fifteen-year-old Gerald Gault and granted delinquents procedural protections at

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208. See Drizin & Leo, *False Confessions*, *supra* note 65, at 944–45, 963–73.

209. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962).

trial including the privilege against self-incrimination. By contrast, the Court in *Fare* upheld the waiver of *Miranda* rights by a sixteen-and-a-half-year-old with prior experience with the police and in *Alvarado* declined to find the circumstances surrounding the interrogation of a seventeen-year-old youth to be custodial and admitted his statement. Thus, the Court's decisions excluded statements obtained from more vulnerable youths fifteen years of age or younger and admitted those elicited from older youths. Unfortunately, while the Court adverted to the significance of youthfulness and inexperience, it did not base its decisions on specific ages as proxies for developmental competence. Without such a definitive directive, trial judges must apply the Court's "totality of the circumstances" standard to younger juveniles who manifestly lack the competence to make valid waiver decisions, and judges routinely admit uncomprehending waivers and unreliable statements.

The actual outcomes in the Court's five juvenile interrogation decisions closely track the developmental psychological research on juveniles' ability to understand and waive *Miranda* rights and their competence to participate in the legal system. Research by Grisso and others strongly indicates that juveniles fifteen years of age and younger lack the cognitive abilities and qualities of judgment necessary to exercise their *Miranda* rights or to assist their attorneys. By contrast, the developmental psychological research suggests that sixteen- and seventeen-year-old juveniles function more or less on a par with adults. Most adults waive their *Miranda* rights and incriminate themselves to their detriment, and older adolescents appear to understand and exercise their rights about as well (or as badly).

The findings in this study are very consistent with laboratory research reporting the relative competence of older adolescents. This consistency also tends to bolster the validity of developmental psychologists' experimental findings that younger juveniles do not understand their *Miranda* rights, lack adjudicative competence, and remain at greater risk to give false confessions. In short, if developmental psychologists are correct about one aspect of adolescents' competence, then they are more likely right about the other as well. In the most recent study of proven false confessions, police obtained more false confessions from youths fifteen years of age and younger than they did from sixteen- and seventeen-year-olds, even though

the latter commit a much larger proportion of all crimes and of serious crimes.<sup>210</sup>

Thus, while this study provides some comfort that the legal regime may be adequate for older adolescents, it heightens concern that the legal framework is inadequate to protect younger juveniles. While several state court decisions or statutes mandate special protections for juveniles younger than fourteen years of age, such as the presence of a parent or other “interested adult,”<sup>211</sup> those youngest juveniles account for a very small proportion of the most serious crimes.<sup>212</sup> Delinquents fourteen and fifteen years of age are far more numerous than their younger peers who receive special legal protections and much more vulnerable than their older counterparts who may not need additional procedural safeguards.

This study is only the second naturalistic empirical study of police interrogation in the United States in the past three decades, and the first involving juveniles. We need far more empirical research on interrogation practices in general, in a number of different settings, and with more knowledge about the subjective characteristics of suspects. As more jurisdictions adopt taping and recording requirements, we will have further opportunity to conduct this type of research. Many instances of false confessions and most of the developmental psychologists concerns about adolescents’ competence to exercise and waive *Miranda* rights involve juveniles younger than those studied here. Because of these serious concerns, we need empirical studies of police interrogation of fourteen- and fifteen-year-old juveniles to enable us to test the hypotheses of developmental psychologists and to compare the youngest juveniles’ performances with those of their somewhat older peers.

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210. See Drizin & Leo, *False Confessions*, *supra* note 65, at 945 (reporting that youths aged sixteen and seventeen accounted for 16% of the false confessions, while youths aged 15 or younger accounted for 19%).

211. See *supra* notes 30–40 and accompanying text.

212. See, e.g., HOWARD SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT 130 (2006) (summarizing arrest data for younger juveniles).