Scrutinizing Confessions in a New Era of Juvenile Jurisprudence
The landmark trilogy of United States Supreme Court juvenile sentencing decisions over the last decade is well known. Starting with the Roper v. Simmons ruling in 2005 that abolished the death penalty for offenders under the age of 18, the Court has developed what might be called a “kids are different” Eighth Amendment jurisprudence. The last three years has seen the Court first outlaw life without parole sentences for juvenile non-homicide offenders and then prohibit the mandatory imposition of this sentence on any offender under the age of 18.3

During this same time period, and utilizing a similar rationale, the high Court applied this “kids are different” approach to its Fifth Amendment jurisprudence in the constitutional consideration of custodial interrogations. In J.D.B. v. North Carolina, the U.S. Supreme Court held that law enforcement must consider a suspect’s age when weighing whether he is in custody and entitled to Miranda warnings. The decision marked a reversal of sorts, as only seven years earlier the Court had rejected the proposition that clearly established U.S. Supreme Court law required a consideration of age in the Miranda custody calculus.6 In J.D.B., however, the Court saw no need to “blind [itself] to the commonsense reality” that children “will often feel bound to submit to police questioning.”7 It so held, in part, based on a concern about the “frighteningly high percentage of people who confess to crimes that they never committed” as a result of the “inherently compelling pressures” of custodial interrogation—a problem “all the more troubling” and “acute,” the Court warned, when the subject is a juvenile. Even the four dissenting justices did “not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult.”9

Scholars have remarked that the J.D.B. decision represents a reinvigoration of the high Court’s jurisprudence of half a century ago that required special protections for youth in the interrogation room.10 Indeed, long-ago U.S. Supreme Court decisions like Haley v. Ohio, Gallegos v. Colorado, and In re Gault explicitly recognized the differences between youth and adults in this context. While these cases are from another era, J.D.B. has given renewed meaning to several oft-repeated quotations from them, including: “[W]e cannot believe that a lad of tender years is a match for the police [during custodial interrogations],”11 and “[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children.”12

In light of J.D.B. and the revitalization of a “kids are different” approach to custodial interrogations, this article highlights and examines issues that judges should carefully scrutinize when faced with a juvenile confession given as a result of police questioning. These considerations include Miranda-related issues, the confession’s voluntariness under a due-process analysis, and the heightened risk of unreliable or false confessions from youth.

**POLICE INTERROGATIONS, FALSE CONFESSIONS, AND THE NEW JUVENILE JURISPRUDENCE**

Before considering the particular issues faced by judges in cases in which juveniles are interrogated, a brief synopsis of some of the common, modern-day tactics used during custodial interrogations is appropriate. Almost five decades ago, in Miranda v. Arizona itself, the U.S. Supreme Court explained that police interrogations entail “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”16 To elucidate the “heavy toll” of custodial interrogation, the Court cited several police interrogation training manuals, including Fred E. Inbau and John E. Reid’s Criminal

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**Footnotes**

5. Id. at 2399–40, 2408.
6. Yarborough v. Alvarado, 541 U.S. 652 (2004). The majority in J.D.B. explained that its decision was not constrained by the Alvarado decision, in that Alvarado simply held that failing to consider age in the analysis was not “objectively unreasonable under the deferral standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.” J.D.B., 131 S. Ct. at 2405. After J.D.B., of course, the failure of a court to make this consideration would be clear error.
7. J.D.B., 131 S. Ct. at 2398.
9. Id. at 2413 (Alito, J., dissenting).
15. Gault, 387 U.S. at 52.
Interrogation and Confessions. Now in its fifth edition, Criminal Interrogation and Confessions promotes the Reid Technique—which to this day markets itself as “the most widely used approach to question subjects in the world.”

The Reid Technique teaches a nine-step interrogation method that is used to extract confessions—a process that it cautions should only be used when the police are confident the suspect is responsible for the crime being investigated. At the outset, interrogators are taught to isolate the suspect from family or support. The interview then begins with a rapport-building period, during which investigators will often allow the suspect to provide a narrative of his activities on the day of the crime. After a short break, the investigator is trained to re-enter the interrogation room and directly accuse the suspect of the crime. During this period, the officer is taught to assert unwavering confidence in the suspect’s guilt and discount any claims of innocence asserted. The goal of this portion of the interrogation is to make the suspect feel hopelessly trapped. When this is accomplished, confession is offered as a “carrot” to the suspect—in other words, as a way out of the suspect’s predicament. Through a process scholars call minimization, interrogators indicate that the benefits of confessing outweigh the costs of maintaining innocence. They may ask a murder suspect, for example, whether the murder was the unplanned result of a moment of anger or an “accident”—which are, they intimate, different from a premeditated murder (although it’s never said how the two differ). Ultimately, if an interrogator successfully obtains an admission of responsibility from the suspect, he is taught to elicit a narrative and detailed version of the criminal act.

While no doubt effective in eliciting true confessions, the U.S. Supreme Court has recognized that these interrogation tactics can be so psychologically powerful as to elicit false confessions at a “frighteningly” high rate. The false confession stems from law enforcement’s mischaracterization of an innocent person as guilty and its decision to use these powerful tactics on that factually innocent person. The “inherently compelling pressures” described above can then convince even an innocent person to admit responsibility. Ultimately, the resulting false confession can often sound convincing and detailed, particularly if crime scene facts are made known to the suspect through media reports, local gossip, or, most often, the inadvertent, suggestive questioning of the interrogator. From national reports like CBS’s 60 Minutes to countless local newspaper articles, stories of false confessions—and resulting wrongful convictions—have become ubiquitous in the news cycle.

Interrogators employ these and [other] psychologically coercive tactics on even the youngest of suspects. While officers may generally recognize that juveniles are more vulnerable or suggestible, in practice, many officers simply do not alter their methods when interrogating a young suspect. Concrete examples abound. In the last few months alone, Tennessee law enforcement officers were caught on tape threatening several teenage suspects with the death penalty—or a lifetime of prison rape—during interrogations. The appropriateness of these tactics is highly debatable for any suspect, but it is particularly difficult to stomach their use when the person being questioned is only a teenager.

Due to juveniles’ “vulnerability” or susceptibility to . . . outside pressures, their “difficulty in weighing long-term consequences,” and their “limited understandings of the criminal justice system and the roles of the institutional actors within it,” the J.D.B. court acknowledged what the research supports: children and teenagers are particularly vulnerable during custodial interrogations. And this country’s high

17. Id. at 440, 448–49, fn. 1, 9–10.
21. Id. at 999.
22. Id. at 1108.
25. Id. at 17–19.
26. Id. at 19–21.
30. See Northwestern Law, Bluhm Legal Clinic, Wrongful Convictions of Youth, Spotlight (Sept. 11, 2013), http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/news/spotlight/index.html (highlighting the Tennessee cases of People v. Brendan Barnes, People v. Carlos Campbell, and In re C.R. where these tactics were employed).
32. Graham, 560 U.S. at 77–79.
33. Id.
34. J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (citing Brief for Center on Wrongful Convictions of Youth et al. as Amici Curiae Supporting Petitioner-Appellant 21–22 (collecting empirical studies that “illustrate the heightened risk of false confessions from youth”)).

“[I]nterrogation tactics can be so psychologically powerful as to elicit false confessions at a ‘frighteningly’ high rate.”
Given this backdrop, it is essential that judges carefully scrutinize all aspects of a juvenile's confession. The sections below outline some of the particular issues for consideration.

**PRETRIAL SUPPRESSION ISSUES**

When dealing with a case involving a confession from a juvenile, judges may face a variety of arguments from the defense as to why the confession should be kept from the jury. Given the evidentiary power of confession evidence, a judge's ruling on these pretrial motions might determine the entire outcome of the case. Indeed, one leading legal evidence treatise has remarked that "the introduction of a confession makes the other aspects of a trial in court superfluous." Examples abound of innocent confessors being convicted even in light of overwhelming evidence of innocence, such as seminal DNA from a juvenile sexual assault and murder victim that excludes the confessor.

A confession must be suppressed where it is obtained in violation of *Miranda v. Arizona* or is otherwise involuntary. For a statement to be admitted into evidence in compliance with *Miranda*, a suspect must knowingly, intelligently, and voluntarily waive his rights to remain silent and to counsel when subjected to a custodial interrogation. The voluntariness of a confession is evaluated using a totality of the circumstances test that considers both the individual vulnerabilities of the suspect and law enforcement's tactics in eliciting the confession while in police custody because of an increased risk of coerced or false confession. Given this backdrop, it is essential that judges carefully scrutinize all aspects of a juvenile's confession. The sections below outline some of the particular issues for consideration.

**THE MIRANDA QUESTION: WHAT IS “CUSTODIAL INTERROGATION”?**

Sometimes, a law enforcement officer will elicit a confession from a juvenile without ever giving *Miranda* warnings at all, reasoning that the warnings were not required because the child was either not in custody or was not interrogated. The custody inquiry asks courts to consider whether an objective person would have felt free to leave under the circumstances.

This custody question was at the forefront of *J.D.B.* In that case, a 13-year-old seventh grader suspected of burglary was in a social studies classroom when an investigator arrived at the school and informed administrators—including the assistant principal and a uniformed school resource officer—that he needed to question the boy. The resource officer then went into the social studies classroom and removed the student, taking him into a closed-door room where he was met by the assistant principal and the investigator. After some small talk, the investigator, with aid from the assistant principal, questioned the boy, leading him to confess to the burglaries. No *Miranda* warnings were ever read.

The admissibility of the schoolhouse confession became the centerpiece of the litigation: three North Carolina courts affirmed its admissibility by ruling that *J.D.B.* was not in custody at the time of the admissions while refusing to consider the child's age as part of the inquiry. The High Court, however, disagreed, reversing and ordering a reconsideration of the custody determination to account for all relevant circumstances, including the suspect's age.

The import of a consideration of age in this custody calculus cannot be understated. The average young person likely has no idea that he could ever, under any circumstances, choose to terminate an encounter with a law enforcement officer. Kids are taught from birth to respect the authority of adults and are punished when they don't—even more so when the elder is a police officer. Unless he clearly understands his right to do so, it is difficult to imagine any juvenile would ever comprehend that he could choose to simply ignore an officer's wishes to speak to him and unilaterally end the encounter.

After *J.D.B.*, judges must rigorously question any admission obtained by police without *Miranda* warnings regardless of where, when, or how it was obtained. Traditional questions regarding whether the suspect was handcuffed, or whether an adult concerned with the welfare of the child was present, remain important but may be secondary to the simple fact that the suspect is a kid. Any *Miranda*-less confession at a school is clearly problematic after *J.D.B.*, as such a child would have to muster not only the wherewithal to withstand the investigator but also, in all likelihood, the orders of school administrators or resource officers to cooperate—all in an environment where students are prohibited from leaving their classroom unless they have an adult's permission. Even police...
questioning of a young person in the living room of his own home, with his mother by his side, raises the question of whether a reasonable child has the practical ability to say to the officer: “I don’t want to answer your questions and would like you to leave.”

The question of what constitutes an “interrogation” of a juvenile suspect also deserves new attention after J.D.B. An interrogation occurs when police should know that their words or actions are likely to elicit an incriminating response. Therefore, even if a suspect is in custody, any Miranda-less confession he makes is admissible if it was not made in response to an interrogation. Where an officer knows he is dealing with a juvenile, the question becomes whether words or actions that would not constitute an interrogation of an adult suspect might when the person being questioned is a juvenile.

This very question is at issue in the Michigan case of People v. White. Seventeen-year-old armed-robbery suspect Kadeem White was taken into custody and given his Miranda warnings. He asserted his right to remain silent. Shortly thereafter, the officer said: “Okay. The only thing I can tell you is this, and I’m not asking you any questions, I’m just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right.” Kadeem responded with a brief admission that the State successfully sought to introduce into evidence.

While a five-judge panel of the Michigan Supreme Court affirmed the admissibility of the statement, it did so over the vigorous dissent of two justices. Citing J.D.B. and other authority, Justice Kelly argued that the investigator “should have recognized that defendant’s age made him especially susceptible to subtle compulsive efforts and that such conduct would likely elicit an incriminating response.”

Justice Cavanaugh explained that Kadeem’s youth and inexperience increased the likelihood that he would feel compelled to respect the officer and perceive the officer’s statements as requiring a response.

Other cases are likely to arise where judges will be asked to consider claims by law enforcement that officers’ words or actions that led to statements by juveniles were not “interrogations.” Whether the police words or actions took place without Miranda warnings—or if they occurred after an invocation of rights by the minor, as in White—J.D.B. suggests that there may be a distinction regarding what constitutes an “interrogation” when the suspect is a child as opposed to an adult.

THE MIRANDA QUESTION: WHAT IS A PROPER WAIVER OF MIRANDA RIGHTS?

The question of whether a suspect knowingly, intelligently, and voluntarily waives his Miranda rights is a separate inquiry that is governed by a “totality of the circumstances” test that has long included consideration of the suspect’s age.

But after J.D.B.’s express concern about the unique susceptibility of youth during custodial interrogation, judges would be well served to pay careful attention to the methods by which police obtain waivers from juvenile suspects.

Three decades ago, in a renowned study, psychologist Thomas Grisso concluded that the majority of juveniles under 15 simply did not understand at least one of their Miranda rights even when properly read to them. Even with the increased repetition of Miranda warnings on television shows and in pop culture, more recent studies have replicated these findings.

And so-called “juvenile Miranda warnings,” which law enforcement often claims are simpler, more kid-friendly warnings that ensure a proper waiver, generally use language that still requires at least an eighth-grade level of comprehension, far above the intelligence level of many young confessors.

Consider the case of an 11-year-old Florida murder suspect, who was administered Miranda warnings slowly and carefully before his questioning and admission. Three experts, including one retained by the State, all independently concluded that despite these precautions, this boy simply could not understand his rights. Or consider the case of a 12-year-old honor roll student in Arkansas, who initially signed a Miranda waiver and made a confession even though he later made clear that he had no idea what the word “waiver” meant. When the law enforcement officer misinformed the boy of the word’s meaning, his confession was suppressed and the murder charges eventually dropped.

Even older juveniles, such as almost 17-year-old Nga Truong, have given confessions that were later suppressed despite properly read Miranda warnings when officers downplayed the rights’ significance.

The lessons of these cases and the Grisso study is that for certain juveniles, judges should consider starting with a pre-

49. Id. at 331.
50. Id. at 354 (Kelly, J. dissenting).
51. Id. at 341–52 (Cavanaugh, J. dissenting).
54. See, e.g., Naomi Goldstein et al., Juvenile Offenders’ Miranda Rights Comprehension and Self-Reported Likelihood of Offering False Confessions, 10 ASSESSMENT 399 (2003).
“[J]udges should take to heart a true ‘totality of the circumstances’ approach when it comes to juvenile waivers.”

practices for Miranda have been recently modernized in a juvenile interview and interrogation guide entitled Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation, developed by the International Association of Chiefs of Police (“IACP”) in conjunction with the Office of Juvenile Justice and Delinquency Adjudication and the authors of this article. The guide advises officers to “read each warning slowly, stopping to ask the child after each individual warning to explain it back in his or her own words.” The guide also offers proposed language for administering the rights, including a requirement to inform young suspects of the possible adult criminal consequences of the crime. Judges should be concerned when officers stray from these guidelines, especially for younger juveniles or those without prior law enforcement experience. However, even for those juveniles who do have significant previous interactions with police, judges should carefully consider what that experience entailed. So, for example, if a juvenile had prior interactions with police for minor offenses—and these interactions resulted in a confession followed by a diversion out of the court system—this experience may have actually taught the child that a confession would only help secure his release and would not, in fact, “be used against him,” despite what he may have told.

To that end, judges should take to heart a true “totality of the circumstances” approach when it comes to juvenile waivers. A body of case law is developing that demonstrates the importance of considering the entirety of the interrogation, not just the admonitions and the waiver itself, when it comes to this analysis. In Hart v. A.G., for example, the interrogator “went to great lengths” to explain the Miranda warnings to the suspect; the confession was suppressed, however, when the interrogator later told the suspect that “honesty wouldn’t hurt him,” which the court recognized was incompatible with Miranda. Other videotaped interrogations have shown investigators telling a suspect that “he is going to talk” immediately before reading warnings that were supposedly meant to relay to the suspect he had a right not to talk.

The “kids are different” approach to custodial interrogation also may call into question seemingly established U.S. Supreme Court precedents like Davis v. U.S. and Berghuis v. Thompkins. Those cases require suspects to unambiguously invoke their rights to silence or an attorney. Both cases, however, involve adult suspects, and recent categorical statements about juveniles made by the high Court referencing their “limited understanding[] of the criminal justice system and the roles of the institutional actors within it”—not to mention the obvious fact that many youth simply do not speak in such a clear or assertive manner—are incompatible with rules that require kids to make steadfast, savvy demands for counsel. Therefore, if a juvenile says almost nothing for hours on end before folding under questioning—like 17-year-old Jonathan Doody did—or makes an equivocal request for counsel, judges may be forced to grapple with whether Davis or Thompkins still applies to a young confessor in a post-J.D.B. “kids are different” world. The same may hold true when a juvenile asks for and is denied the guidance of a trusted adult like a parent during interrogation; Fare v. Michael C., which held that a teenager’s request to speak with his probation officer during interrogation was not an invocation of Miranda, is now four decades old and arguably obsolete in light of the high Court’s new juvenile jurisprudence.

THE VOLUNTARINESS QUESTION: HOW TO CONSIDER INDIVIDUAL VULNERABILITIES AND QUESTIONABLE TACTICS WITH KIDS

Separate and apart from Miranda questions, if there is coercive police activity, due process requires the suppression of a confession when the totality of circumstances, taking into account the individual vulnerabilities of the suspect, renders the confession involuntary. The recent juvenile jurisprudence affects both the inquiry into individual vulnerabilities and coercive police activity when it comes to young suspects.

As to the former, young age has always been considered a vulnerability during interrogation, but the J.D.B. decision and sentencing jurisprudence reinvigorates the fact that age is more than a number. Even the four J.D.B. dissenters agreed


60. The recommended language is as follows:

1. You have the right to remain silent. That means you do not have to say anything.
2. Anything you say can be used against you in court.
3. You have the right to get help from a lawyer right now.
4. If you cannot pay a lawyer, we will get you one here for free.
5. You have the right to stop this interview at any time.
6. Do you want to talk to me?
7. Do you want to have a lawyer with you while you talk to me?

8. Do you want to talk to me.

The officer should stop between each of the seven steps to assure that the child can adequately explain back the admonition in his own words.

61. Hart v. A.G., 323 F.3d 884 (11th Cir. 2010).
63. Berghuis v. Thompkins, 560 U.S. 370 (2010) (applying North Carolina v. Butler, 441 U.S. 369 (1979), which is also a case where the suspect was an adult).
64. Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011).
Critics Corner

Indeed, so does law enforcement, including the proprietors of the Reid Technique: They explain that juveniles are more suggestible and advise interrogators to exercise “extreme caution and care” when interrogating them. Judges should thus inquire as to what special precautions officers took when questioning a youth. And it is not adequate if the only special precautions taken amounted to securing the presence of a “youth officer” or obtaining parental consent. Courts have recognized that a police officer who is forced to alter roles and suddenly act in the best interest of a child as a “youth officer” may be no more helpful than a “potted plant.” At the same time, scholars have persuasively argued that the presence of even a well-meaning parent can actually add to the coercive nature of the interrogation for a child.

The question of whether certain police tactics are acceptable for adult suspects yet too coercive for a child is perhaps the more robust inquiry. To this end, judges should look to the International Association of Chiefs of Police best-practices guide described earlier. This executive police manual provides a detailed account of how (and how not) to question juvenile suspects, with special attention given to ensuring that police do not draw faulty conclusions from common adolescent behaviors, limiting juvenile questioning sessions to an hour during the daytime, advising police to use only open-ended questions, and instructing interrogators to refrain from making even indirect suggestions of “help” in exchange for a confession. When officers stray from these guidelines, judges should question their tactics. Judges also should be open to hearing from an expert on police interrogations of juveniles as they consider the police tactics used and the ultimate voluntariness of the confession.

Additionally, judges should pay special attention to any use of deception by police officers during an interrogation of a youth. Although the U.S. Supreme Court has suggested (in a case involving a 20-year-old Marine) that interrogators are not prohibited from using deception on suspects during questioning—and the Reid Technique also allows interrogators to lie as a last resort—even Reid draws a line at using this tactic with children. If evidence surfaces that police used deceptive tactics on the young suspect—whether it be false claims that other witnesses have named him or even suggestions that the consequences of confessing are less because of the suspect's youth—judges should pay special heed and strongly consider suppressing the confession.

REASONABLE DOUBT DESPITE A CONFESSION

J.D.B.'s assertion that the risk of false confession is “all the more acute” with a juvenile suspect is well based in research. The Court relied on a brief submitted by the authors of this article as part of our work with the Center on Wrongful Convictions of Youth (“CWCY”), wherein we pointed to a series of empirical and laboratory studies that show juveniles falsely confess at a significantly greater rate than adults. These confessions, moreover, can be startlingly detailed. Nearly one-fifth of DNA exonerations, for example, include false confessions, and 95% of those confessions included descriptive facts that seemingly only the true perpetrator would know.

Determining the reliability—or truth—of the actual confession in the context of bench trials should be done systematically and carefully. Judges should begin by closely examining the confession itself to determine if it “fits” with the physical evidence, other witness statements, and the State's overall theory of the crime. Every detail, big and small, should be scrutinized. For instance, the Texas Court of Criminal Appeals recently ordered a new trial for 16-year-old confessor Daniel Villegas, in part because his confession named co-perpetrators whose participation was impossible because they were in custody at the time of the crime. In other questionable confessions, however, even smaller details, such as the location in the house of the crime, were inconsistent with the physical evidence. In these cases, when faced with adjudicating the truth of the confession, judges must force themselves to come up with adequate answers to tough questions before convicting—questions like, why would a true confessor be unable to accurately relay facts about the crime scene? or, is there an adequate explanation as to why the suspect would truly confess to a heinous crime yet lie about mundane details such as the exact location of the offense?

After determining which facts do not “fit,” judges should closely examine the accurate details. This process involves

68. Critics Corner, supra note 28.
69. Hardaway v. Young, 302 F.3d 757, 765 (7th Cir. 2002).
71. INT'L ASS'N OF CHIEFS OF POLICE, supra note 9.
72. Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that telling a suspect that another suspect had already confessed and implicated him in the crime does not alone render a confession involuntary).
73. INBAU ET AL., supra note 19, at 255.
76. In a law review article, the authors provide a detailed explanation as to how practitioners can examine and apply the fit and contamination analysis described below. See Laura H. Nirider, Joshua A. Tepfer, & Steven A. Drizin, Combating Contamination in Confession Cases, 79 U. Chi. L. Rev. 837, 849–61 (2012). The charts and other suggested tactics outlined in this article could also be utilized by judges and their clerks when tasked with evaluating a confession's reliability.
“It can often be very difficult even for experienced and skeptical judges to recognize when a confession is problematic.”

Analyzing the confession for contamination—or the disclosure of crime scene facts to the suspect before the confession. A confession can be contaminated by neighborhood gossip, or, in more high-profile cases, through media reports. A judge should consider (and allow into evidence) what information was in the public domain; if the confession only contains details already known to the general public, the confession may prove little. The same holds true for accurate details that could be explained through innocent knowledge: a young confessor who was also the first person to come upon a dead body and report it to police, for example, would be able to describe the deceased’s clothes or body position even if he did not commit the murder.

By far the most common source of contamination, however, comes from the interrogators themselves. During a pressure-packed interrogation, police investigators may unintentionally reveal crime scene facts to the suspect, despite training not to do so. The improper use of leading or forced choice questions enables the suspect to infer the answers the interrogator is seeking. A suspect’s confession may also be contaminated if the interrogator shows a suspect crime scene photos or takes him to the location of the crime.

Finding this source of contamination can be done accurately only when the interrogation is recorded in full. In such a case, judges should examine the confession to determine if the source of each detail truly and originally came from the confessor or the interrogator. Some confessions literally include no details that were not first proffered by the questioner, and appellate courts have held the burden on the State to prove a lack of contamination in order to uphold a conviction based mostly on a confession. A highly contaminated confession is wholly unreliable.

When the interrogation is unrecorded, an accurate evaluation of the reliability of the confession is more difficult. At the outset, however, given the national trend toward laws requiring the electronic recording of custodial interrogations—a policy recommended by the IACP and one that certainly benefits law enforcement officers who are conducting legal and proper custodial interrogations—it is fair for judges to have a heightened level of suspicion when the technology to record was available yet not utilized by police. Appellate judges, including Chief Judge Kozinski of the Ninth Circuit, have articulated these suspicions when interrogations go unrecorded. Ultimately, the failure to record the entire interrogation in such circumstances should be given great weight in assessing both the admissibility and reliability of the confession.

But even without a recording, judges can examine the issue of contamination by allowing into evidence police reports, medical examinations, witness interviews, and any other information that reveals what details the police knew before the interrogation and the source of those details. Such evidence is not hearsay because it is not being offered for the truth of the facts known to police, only as evidence that the police knew this information before the interrogation. If the only accurate details in the final confession were already known by law enforcement, this is, at least, circumstantial evidence of contamination and an unreliable confession.

Finally, in assessing a confession’s reliability, judges should give great weight when confessors lead the police to accurate information or evidence that they did not know at the time of the interrogation. This kind of corroboration—the name of an accomplice, the location of the murder weapon or the bloody clothes, the fruits of an armed robbery—is what the Reid Technique refers to as “independent corroboration” and is the most convincing evidence that a confession is true.

CONCLUSION

It can often be very difficult even for experienced and skeptical judges to recognize when a confession is problematic. In his study of the first 40 proven false-confession cases amongst those in which defendants were later exonerated by DNA evidence, Professor Brandon Garrett found that in virtually every case, judges denied defendants’ pretrial motions to suppress, decisions which were then upheld by appellate courts. After all, it is hard for even judges to imagine that anyone would confess to a serious crime they did not commit. But the evidence continues to grow that false confessions happen with a level of frequency—especially in cases involving teenagers and children—that demands close scrutiny from our judicial system. It is the hope of the authors that this article will guide judges in their efforts to scrutinize such cases, ultimately ensuring both that juvenile confessions were lawfully obtained and that they are reliable evidence of guilt.

79. See Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).
80. See, e.g., 725 ILL. COMP. STAT. ANN. 5/103-2.1(b), (d), (f) (West 2013) (explaining that there is a presumption of inadmissibility of a confession to certain offenses that was the result of an unrecorded interrogation that can only be overcome by a finding by the preponderance of the evidence that the statement was both voluntary and reliable).
81. See infra note 19, at 355.
82. GARETT, supra note 75, at 36–40.
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