THE STATE OF CONFESSION LAW AFTER *MIRANDA*'S DEMISE

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INTRODUCTION

Most American law enforcement agencies interrogate suspects using a set of practices called the Reid Method. That method, which was first developed in the 1940s, aims more at extracting confessions than at gathering information.[1] Rather than treating an interrogation as an opportunity to figure out what happened, the Reid Method presumes a suspect's guilt and seeks to push the suspect to confess.[2] Indeed, the Reid Method instructs interrogators not to let suspects give exculpatory explanations, because "the more often a person says they didn't do it, the more difficult it becomes for us to get a confession."[3] But in its determination to extract confessions, the Reid Method too often produces *false* confessions, which then underwrite wrongful convictions.[4]

That outcome should not be surprising. "[T]he drumbeat theme of the Reid method," one judge has written, "is that resistance is futile and confession is the only rational choice."[5] Police isolate the suspect in a small room to make them anxious.[6] They confront the suspect with evidence of guilt — sometimes real, sometimes manufactured. They press accusatory questions for hours to wear the suspect down.[7] They threaten suspects with harsh consequences if they fail to confess,[8]

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[1] RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 242 (2008).

[2] Proponents of the Reid Method minimize the problems with their approach by claiming that the method is only used to interrogate those whose guilt is "definite or reasonably certain." FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 201 (5th ed. 2011). But the reality is otherwise. Police are trained to use the Reid Method when they believe that suspects are lying (and, by implication, guilty). But not every suspect who lies to the police is guilty — and in any event careful social science has demonstrated that humans are bad lie detectors and that the specific lie-detecting techniques the Reid Method recommends are unreliable. Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 OHIO. ST. J. CRIM. L. 803, 816-21 (2014) (collecting studies). Indeed, the Reid Method manual itself acknowledges that if its approach to choosing when to conduct Reid Method interrogations were followed, about a third of all innocent suspects canvassed would be interrogated. *Id.* at 818-19.

[3] LAW ENFORCEMENT RESOURCE CENTER, THE REID TECHNIQUE: NINE STEPS OF INTERROGATION (1991).

[4] Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. FOR SOC. JUST. 301 (2016); Saul Kassin, *Coerced Confessions and the Jury*, 21 LAW & HUM. BEHAV. 460 (1997); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L., POL., & SOC'Y 189 (1997).

[5] State v. Griffin, 262 A.3d 44, 92 (Conn. 2021) (Ecker, J., concurring in part and dissenting in part).

[6] Saul M. Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 6-7 (2010).

[7] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 948 (2004) ("More than 80% of the false confessors were interrogated for more than six hours, and 50% [were] interrogated for more than twelve hours. The average length of interrogation was 16.3 hours, and the median length of interrogation was twelve hours.").

[8] LEO, *supra* note 1, at 230.

while offering sympathy and justifications or rationalizations for the suspect's alleged conduct, thus suggesting that the consequences of confession will not be so bad.[9] In effect, they encourage suspects to see confession as an easy way to escape the ordeal of interrogation. If that doesn't work, police may falsely assert that there is other evidence clearly establishing the suspect's guilt, thus making the suspect think that refusing to confess is pointless.[10] And once suspects believe that conviction and punishment are inevitable, they will be motivated to confess for both rational and non-rational reasons: rationally in the hopes of leniency, and non-rationally because "once people see an outcome as inevitable, cognitive and motivational forces conspire to promote their acceptance, compliance with, and even approval of that outcome."[11]

The step from false confession to wrongful conviction is short. Once a suspect confesses, subsequent investigation focuses on confirming the confession, rather than testing its reliability. Police stop investigating other suspects.[12] Prosecutors routinely assume, incorrectly, that "an innocent person would not falsely confess to a serious crime unless he is physically tortured or mentally ill."[13] Judges and jurors think similarly.[14] As a result, false confessions are among the leading causes of wrongful convictions.[15]

There are better alternatives. Some jurisdictions have recognized these problems with Reid Method interrogations and begun to use better approaches. England, Australia, Canada, Denmark, Germany, New Zealand, Norway, and Sweden have adopted less confrontational models, which treat suspects as sources of information rather than targets of accusation.[16] Officers using these

[9] Kassin et al., *supra* note 6, at 18-19.

[10] Frazier v. Cupp, 394 U.S. 731, 737-79 (1969) (holding that a confession was voluntary even though the police falsely told suspect his companion had confessed).

[11] Kassin et al., *supra* note 6, at 17.

[12] *Id.*; *see also* SAUL M. KASSIN, DUPED: WHY INNOCENT PEOPLE CONFESS – AND WHY WE BELIEVE THEIR CONFESSIONS 271 (2022) ("[E]xperiments show that the presence of a confession can bias professional polygraph examiners, latent-fingerprint experts, DNA analysis of complex mixtures, mock eyewitnesses, mock alibis, and laypeople's judgments as to whether a suspect's handwriting matches that found on a bank robbery note handed to the teller.").

[13] Drizin & Leo, *supra* note 7, at 910; Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger Case*, 30 NYU REV. OF LAW & SOCIAL CHANGE 209, 213 (2006) ("It was simply impossible for many [prosecutors] to believe that anyone could be compelled to falsely admit to having participated in such a vicious attack.").

[14] Richard A. Leo & Brian L. Cutler, *False Confessions in the Twenty-First Century*, 40-MAY CHAMPION 46 (2016); Drizin & Leo, *supra* note 7, at 995–96; *see also* Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL. INSIGHTS FROM BEHAV. & BRAIN SCI. 112, 117 (2014) (finding that jurors do not discount confessions, even when it is legally and logically appropriate to do so).

[15] Nat'l Registry of Exonerations, *% Exonerations by Contributing Factor* (2023), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (noting that false confessions are one of the top five contributing factors to wrongful convictions); Innocence Project, DNA Exonerations in the United States, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (finding that 29% of the 375 post-conviction DNA exonerations in the United States involved false confessions).

[16] Kozinski, *supra* note 4, at 334. For example, England adopted the PEACE approach – a nonconfrontational interrogation model that focuses on asking suspects open-ended questions in order to obtain information. Michael Bret Hood & Lawrence J. Hoffman, *Current State of Interview and Interrogation*, LAW ENFORCEMENT BULLETIN: FBI (Nov. 6, 2019), https://leb.fbi.gov/articles/featured-articles/current-state-of-interview-and-interrogation. PEACE is an acronym that stands for Planning and preparation, Engage and explain, obtain an Account, Closure, and Evaluation.

alternatives to the Reid Method do not threaten suspects or assert their guilt, nor do they encourage confession by promising leniency or minimizing the wrongfulness of the crimes under investigation. Instead, they ask open-ended questions designed to get suspects to provide comprehensive narratives which, when checked against other evidence, could either suggest a suspect's guilt or else furnish investigators with alternative leads.[17] Empirical studies indicate that these nonconfrontational approaches produce more information than the Reid Method and are less likely to cause false confessions.[18]

Moving away from the Reid Method would have highly desirable effects beyond the crucial avoidance of false confessions. Training in the Reid Method teaches police officers that lies and intimidation are justified parts of police work. That lesson is not confined to the interrogation room. Officers taught to believe that lying is an acceptable interrogation technique are more likely to lie on warrant applications,[19] on the witness stand,[20] or in other domains, if they believe that doing so is necessary to get "bad guys."

Officers taught to believe that threats and intimidation are acceptable parts of police work will use threats and intimidation on the street—and they will predictably do so in ways that disproportionately target poor and nonwhite Americans, who are less likely to be able to respond. Research shows that Black and brown people are disproportionately targeted by police.[21] They are more likely to experience "a sense of racial constraint" in the context of police interactions and are "less likely to know or feel empowered to exercise their rights."[22] The additional pressure that

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Delia C. Gavin, *Coming to Peace with Police Interrogations: Abandoning the Reid Technique and Adopting the Peace Method*, 22 LOY. J. PUB. INST. L. 159, 179-81 (2020).

[17] Hood & Hoffman, *supra* note 16.

[18] Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1162–64 (2017); *see also* Lucy DeHaan, *Building on a Shaky Foundation: The Argument for Changing Investigation Procedures in Shaken Baby Syndrome Cases*, 2019 MICH. ST. L. REV. 555, 584 (2019) ("[S]tudies of the PEACE method's inaugural twenty years show that the information-gathering technique is more diagnostic of truth than its accusatory counterpart – that is, it effectively secures a greater proportion of true confessions while reducing the incidence of false confessions").

[19] *E.g.*, L. Joe Dunman, *Warrant Nullification*, 124 W. VA. L. REV. 479, 510-11 (2022); Jelani Jefferson Exum, *Presumed Punishable: Sentencing on the Streets and the Need to Protect Black Lives Through a Reinvigoration of the Presumption of Innocence*, 64 HOW. L.J. 301, 341 (2021) (noting that police officers lied about facts supporting probable cause in their warrant application to search Breonna Taylor's home); Nicholas Bogul-Burroughs & Surge F. Kovaleski, *Breonna Taylor Raid Puts Focus on Officers Who Lie For Search Warrants*, NEW YORK TIMES (August 6, 2022), at https://www.nytimes.com/2022/08/06/us/breonna-taylor-police-search-warrants.html.

[20] The practice of "testilying"—that is, of police officers misrepresenting evidence or other facts about their investigations in order to secure convictions of suspects that police believe to be guilty—is well documented. *E.g.*, Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, NEW YORK TIMES (March 18, 2018); *Police Perjury: It's Called "Testilying,"* CHICAGO TRIBUNE (July 5, 2015); *see also* I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 868-71 (2008).

[21] United States v. Mateo-Medina, 845 F.3d 546, 553 (3d Cir. 2017) (citing research showing that "police are more likely to stop, and arrest, people of color due to implicit bias.").

[22] Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 141-42 (2017). Most Black men have been given "the Talk" by their parents, telling them to cooperate with police at all costs out of fear that they will be beaten or shot if they do not. *See* Utah v. Strieff, 579 U.S. 232 (2016) (Sotomayor, J., dissenting). As Professor I. Bennett Capers has explained, "police violence is merely the most visible and final byproduct of a system of unequal policing." I. Bennett Capers, *Citizenship Talk in* THE CAMBRIDGE HANDBOOK OF POLICING IN THE UNITED STATES 473-90 (T. Lave & E. Miller eds. 2019).

Black and brown people feel in police encounters (including in interrogation rooms) "is inextricably linked to the almost unfettered discretion the Court has given police."[23]

In short, reforming police interrogation practices would not merely reduce the incidence of false confessions. It could be an important part of policing reform more broadly, one that helps reduce the gap between the reality of law enforcement and the ideal of the rule of law.

Unfortunately, the American legal system's preeminent rule-of-law institution—the federal judiciary—has indicated that, at least for the foreseeable future, it will play no part in police interrogation reform. Once upon a time, in the age of *Miranda v. Arizona* and *Massiah v. United States*, the Supreme Court intervened to prevent abusive interrogation techniques.[24] For the last thirty years, however, the Court has consistently chipped away at the constitutional limits on interrogation.[25] In *Vega v. Tekoh*, decided in 2022, the Court suggested that the *Miranda* warnings themselves might no longer be constitutionally required.[26] After two generations during which the limits of acceptable police interrogation regularly presented litigable issues in federal court, the regulation of police interrogation may soon be almost entirely a matter of state law. As a result, it is crucial for state-level actors to think about what police interrogation should and should not do—and also how to move their jurisdictions from here to there.

This Article explains what state-level actors can and should do to regulate police interrogation. Part I briefly shows the need for state-level action by charting the Supreme Court's systematic abandonment of constitutional limits in this field. Part II then canvasses current approaches to interrogation regulation in the states, categorizing them into four groups: (1) procedural protections designed to help suspects assert their rights, (2) substantive restrictions on police conduct in the interrogation room, (3) rules of adjudication that state courts use to provide police with feedback about their behavior, and (4) shifts in police training. Part II does not simply list what states already do to address police interrogation practices; it also draws on what states do in related criminal procedure contexts and explains how states could apply those same principles to confession regulation.

Part III then draws conclusions about the relative effectiveness of these different kinds of reforms. The most useful kinds, where they can be achieved, are substantive restrictions on police conduct and changes in police training. Given the varied political cultures of American states, however, it is not possible to pursue the best possible reforms everywhere; effective reform movements must adapt their programs in light of what is feasible in particular jurisdictions. Accordingly, Part III also provides a graduated menu of possible reforms. Among other possibilities, I suggest the importance of reforms that focus on police interrogation of especially vulnerable populations, such as children and the intellectually disabled. Reid Method interrogations are especially likely to yield false confessions when applied to juveniles or the intellectually disabled.[27] Reforms protecting suspects in those categories are likely to be politically

[23] *Id.* at 478.

[24] Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964).

[25] *E.g.*, Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 10-22 (2015) (describing the collapse of confession law); Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965 (2012); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519 (2008); *infra* Part I.B.

[26] 142 S. Ct. 2095 (2022).

[27] Kassin et al., *supra* note 6, at 19 ("[O]f the first 200 DNA exonerations in the U.S., 35% of the false confessors were 18 years or younger and/or had a developmental disability.").

palatable even in states that are relatively unsympathetic to police reform. And once achieved, such reforms can act as beachheads for further reform, as local stakeholders come to appreciate that the Reid Method is not necessary for effective police work.

I. SUPREME ABDICATION

In this Part, I chart the rise and fall of constitutional limits on police interrogation. Part I.A describes how the Warren Court relied on three constitutional sources to protect suspects in the interrogation room from police overreach: the Due Process Clauses, the Sixth Amendment right to counsel, and the Fifth Amendment privilege against self-incrimination. Part I.B explains how the Supreme Court subsequently retreated from the regulation of police interrogation practices along all three dimensions.

A. Three Overlapping Layers of Constitutional Protection

In one of the Supreme Court's earliest confession law cases, *Brown v. Mississippi*, the police hung a Black murder suspect from a tree, repeatedly letting him down and hanging him again.[28] He still did not confess, so they whipped him until he said what the police wanted to hear. His co-defendants, who were also Black, were stripped, laid over chairs, and whipped until they confessed. All three were convicted of murder solely upon the strength of their confessions. Relying on the Due Process Clause of the Fourteenth Amendment, the Supreme Court held that when the police use interrogation methods that are "revolting to the sense of justice," any use of the resulting confessions is unconstitutional.[29]

As the Court would later explain, the Due Process Clauses require a suspect's confession to be voluntarily given to be admissible. To determine when a confession is voluntary, the Court relied on a totality-of-the-circumstances test that asked whether a suspect's will was overborne,[30] whether the confession was obtained in a fundamentally unfair way,[31] whether it was likely false and unreliable,[32] and whether the suspect's decision to confess was the product of a rational intellect and free will.[33] That voluntariness standard was amorphous and difficult for lower courts to apply.[34] After years of struggling with the application of such an open-ended standard, the Court turned to the Fifth and Sixth Amendments to provide better defined protections for suspects.

First, in *Massiah v. United States*, the Court held that once a person is formally charged with a crime, the Sixth Amendment guarantees a right to have counsel present at all critical pretrial

[28] 297 U.S. 278 (1936).

[29] *Id.* at 286.

[30] Spano v. New York, 360 U.S. 315, 323 (1959).

[31] Lisenba v. California, 314 U.S. 219, 236-37 (1941).

[32] Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

[33] Columbe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion).

[34] Primus, *supra* note 25, at 1-14 (discussing these problems); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1094 (2010) (describing *Miranda* as "forgiving and vague"); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It – And What Happened To It*, 5 OHIO ST. J. CRIM. L. 163, 168 (2007) (describing the voluntariness test as "too amorphous, too perplexing, too subjective and too time-consuming to administer effectively").

stages of the prosecution, including any police interrogations.[35] Next, in *Miranda v. Arizona*, the Court recognized that the inherent pressure of the custodial interrogation environment can be overwhelming.[36] To honor a suspect's Fifth Amendment privilege against compelled self-incrimination, the Court required police to read suspects who are in custody the *Miranda* warnings before interrogating them.[37] Those warnings, it was thought, would dispel the inherent compulsion in the environment and empower suspects to make an informed and voluntary choice about whether to speak to the police.

Many believed that *Miranda* would protect suspects from coercive interrogation. After all, *Miranda* did not just require the police to read the now-famous warnings; it also prohibited them from questioning a suspect unless the suspect knowingly, intelligently, and voluntarily waived their *Miranda* rights.[38] And the *Miranda* Court made it clear that waiver could not be presumed from silence. The state would bear "a heavy burden" to demonstrate waiver.[39] If a suspect did not affirmatively waive and instead asked for an attorney, *Edwards v. Arizona* required the police to leave and not return unless counsel was present.[40] The police could not try to get the suspect to waive their rights again unless the suspect re-initiated contact with the police by indicating a willingness to discuss the criminal investigation.[41] The *Edwards* prohibition on re-initiation by the police extended to questioning about another offense[42] and even to questioning after the suspect had met with an attorney.[43]

Finally, if the police violated a suspect's rights under *Miranda* and its progeny, many thought any evidence obtained from that violation would be suppressed at trial.[44] Under the fruit-of-the-poisonous-tree doctrine – which had been applied to Fourth Amendment violations and involuntarily obtained confessions – derivative statements or physical evidence that the police obtain from an initial constitutional violation must be suppressed unless the state can establish that (a) it also discovered the evidence independent of the constitutional violation through a legitimate means (independent source doctrine); (b) it had begun a legal investigative process that would have inevitably led it to the contested evidence (inevitable discovery doctrine); or (c) the ultimate discovery of the evidence was so attenuated in time, place, and circumstances from the initial illegality that it should be admissible (attenuation doctrine).[45]

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[35] 377 U.S. 201 (1964); *see also* Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008).

[36] 384 U.S. 436 (1966).

[37] *Id.* at 444.

[38] *Id.* at 444-45.

[39] *Id.* at 475.

[40] 451 U.S. 477 (1981).

[41] *Id.* at 485; *see also* Oregon v. Bradshaw, 462 U.S. 1039, 1044–46 (1983) (plurality opinion) (establishing the standard for re-initiation).

[42] Arizona v. Roberson, 486 U.S. 675, 687 (1988).

[43] Minnick v. Mississippi, 498 U.S. 146, 155–56 (1990).

[44] *E.g.*, Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 993–1000 (1995).

[45] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 374–81 (6th ed. 2013).

B. Cutting Back on Federal Constitutional Oversight

For a time, these cases seemed to provide real protection against coercive interrogations. But the Burger, Rehnquist, and Roberts Courts consistently cut back on that protection.

1. Miranda. – First, the Supreme Court made clear that police are not always required to give *Miranda* warnings. *Miranda* only applies to individuals who are "in custody," but a person is not in custody when the police stop that person on the street to ask them a few questions.[46] A person is not in custody if the police ask them to come to the police station and they go "voluntarily" (even though suspects feel immense pressure to go when asked).[47] A person is not even in custody if they are serving a state prison sentence and armed deputies take them from their cell at night, bring them to an interrogation room, and question them for five to seven hours about another offense while ignoring their repeated requests to stop the questioning.[48] As long as they are not physically restrained or threatened during that interrogation, the door is left open, and the officers tell them that they can go back to their cell if they want, *Miranda* does not apply.[49]

Miranda also only applies if the police "interrogate" a suspect. But the Court later held that it is only "interrogation" if the police should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect.[50] Indirectly appealing to a suspect's conscience does not trigger *Miranda*,[51] nor does putting two suspects in a room together with a recording device.[52] The Supreme Court has held that *Miranda* does not apply when the police are asking routine booking questions[53] or questions aimed at public safety concerns,[54] and lower courts have construed those rules to mean that police may ask all sorts of questions of suspects in custody without having to *Mirandize* them first, including questions about gang affiliation,[55] drug and alcohol abuse,[56] and open-ended questions about whether they have "anything in [the] vehicle that shouldn't be there or that [the police] should know about."[57]

In addition to sharply restricting when *Miranda* protections apply, the Supreme Court

[46] Berkemer v. McCarty, 468 U.S. 420, 439–41 (1984).

[47] California v. Beheler, 463 U.S. 1121, 1123–24 (1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977); *see also* Minnesota v. Murphy, 465 U.S. 420 (1984) (holding that a probationer is not in custody when he "voluntarily" goes to meet with his probation officer at her request even though refusing to go would violate the terms of probation).

[48] Howes v. Fields, 565 U.S. 499, 502-03 (2012).

[49] *Id.* at 503.

[50] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[51] *Id.* at 302.

[52] Arizona v. Mauro, 481 U.S. 520, 524-25 (1987).

[53] Pennsylvania v. Muniz, 496 U.S. 582 (1990).

[54] New York v. Quarles, 467 U.S. 649 (1984).

[55] *E.g.*, United States v. Washington, 462 F.3d 1124 (9th Cir. 2006).

[56] *E.g.*, Colon v. State, 568 S.E.2d 811 (Ga. App. 2002).

[57] *E.g.*, United States v. Luker, 395 F.3d 830 (8th Cir. 2005); *see also* United States v. Are, 590 F.3d 499 (7th Cir. 2009) (permitting non-*Mirandized* questioning of handcuffed suspect when "officers had no specific reason to believe that [he] had a gun, only that he had prior weapons convictions and was involved in drug trafficking, which often involves weapons"); United States v. Carillo, 16 F.3d 1046 (9th Cir. 1994) (not applying *Miranda* to officer's post-arrest question asking if suspect (who had been arrested on drug charges) had any drugs or needles).

watered down what *Miranda* requires when it does apply. The police don't need to read the actual *Miranda* warnings to suspects; as long as they say something that basically informs people of their rights, it's enough.[58] The police can suggest that the right to a lawyer only applies to the pre-interrogation phase of the process[59] or that it doesn't actually guarantee a suspect the assistance of counsel until they go to court.[60] And the state's "heavy burden" for demonstrating a waiver of *Miranda* rights turns out to be pretty light: as long as "a *Miranda* warning was given and [was] understood by the accused, an accused's uncoerced statement establishes an implied waiver."[61] Contrary to what *Miranda* itself said, a suspect's waiver can be inferred from his silence. Basically, any confession given after the police read *Miranda* warnings (or something like them), is admissible, assuming that the suspect has at least a rudimentary ability to comprehend the warnings,[62] and provided that the confession satisfies the flabby Due Process voluntariness test.

In sharp contrast to its permissive attitude toward suspects' waivers of their *Miranda* rights, the Court has taken a strict approach toward what suspects must do to *invoke* those rights. In *Davis v. United States*, the Court held that a suspect does not invoke their right to counsel under *Miranda* (and thus does not trigger the *Edwards* protections) unless they clearly and unambiguously ask for a lawyer.[63] And the following requests for the assistance of counsel have all been deemed ambiguous: "I'll be honest with you, I'm scared to say anything without talking to a lawyer."[64] "I think I want a lawyer."[65] "Could I call my lawyer?"[66] "I'd rather have my attorney here if you're going to talk stuff like that."[67] "Well I mean, I'd still like to have my lawyer here."[68] "[I] want[] a lawyer if [my] statements [are] going to be used against [me]."[69] Under *Davis*, police faced with any of those statements may simply proceed with their questions.[70] And social science research has shown that many people—especially women and members of racial minority groups—hesitate

[58] Florida v. Powell, 559 U.S. 50, 60 (2010); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); California v. Prysock, 453 U.S. 355, 361 (1981).

[59] *Powell*, 559 U.S. at 63.

[60] *Duckworth*, 492 U.S. at 197.

[61] Berghuis v. Thompkins, 560 U.S. 370, 384 (2010).

[62] This does not require much. *E.g.*, United States v. Sanchez-Chaparro, 392 F. App'x 639, 644 (10th Cir. 2010) (holding that a Spanish speaker could understand the warnings even though they were given in English and he appeared to have trouble understanding them); State v. Moses, 702 S.E.2d 395, 401–02 (S.C. Ct. App. 2010) (finding no error with judgment that seventeen-year-old suspect with a third grade reading level could meaningfully understand *Miranda* warnings).

[63] 512 U.S. 452, 461 (1994).

[64] Midkiff v. Commonwealth, 462 S.E.2d 112, 114–15 (Va. 1995).

[65] Diaz v. Senkowski, 76 F.3d 61, 63–65 (2d Cir. 1996).

[66] Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001).

[67] State v. Mills, No. CA96-11-098, 1997 Ohio App. LEXIS 5232, at *20 (Ohio Ct. App. Nov. 24, 1997).

[68] State v. Stover, No. 96CA006461, 1997 Ohio App. LEXIS 1493, at *4 (Ohio Ct. App. Apr. 16, 1997).

[69] United States v. Hsin-Yung, 97 F. Supp. 2d 24, 32 (D.D.C. 2000).

[70] Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011, 1040–41, 1055 (2007) (examining hundreds of cases and explaining that courts overwhelmingly find invocations ambiguous).

to use more assertive language in intimidating custodial environments.[71]

A similar unambiguous-invocation rule applies to the *Miranda* right to silence,[72] and the rule is even more absurd in that context. After all, suspects might reasonably think that the most appropriate way to exercise their right to remain silent is by, well, remaining silent. But that will not trigger invocation protections for them. To assert the right to remain silent in a way that will suspend an interrogation even temporarily, a suspect is required to speak. And even those who have the resolve to resolve to speak clearly and unambiguously get only limited protection. In *Maryland v. Shatzer*, the Supreme Court held that fourteen days after a suspect clearly and unequivocally invokes the right to counsel, the police may try again to elicit an incriminating statement—and they may do so regardless of whether the suspect's request for counsel was honored in the interim.[73]

Finally, the Supreme Court has limited the remedies available for *Miranda* violations. Statements obtained in violation of *Miranda* are admissible in court to impeach defendants who testify at trial.[74] Physical evidence obtained as a result of a *Miranda* violation is admissible as direct evidence of guilt.[75] And people whose *Miranda* rights are violated may not sue for civil damages.[76] Given the weakness of these remedies, interrogators' incentives to avoid *Miranda* violations are not terribly robust.

All in all, not much remains of *Miranda*—and what does remain might not remain for long. In 2022, the Court in *Vega v. Tekoh* branded *Miranda* "a bold and controversial claim of authority" and noted that "[w]hether this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts has been the subject of debate among jurists and commentators."[77] That language, from a Court that has overruled leading precedents about abortion,[78] affirmative action,[79] and the First Amendment,[80] could easily indicate an appetite for overruling *Miranda* entirely.[81] But whether or not the Court takes that final step, *Miranda* is not going to be much of a check on police behavior in the interrogation room.

2. The Sixth Amendment. – The Sixth Amendment right to counsel has always been a more limited check on police interrogations than *Miranda* and the Due Process voluntariness standard.

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[71] Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

[72] Berghuis v. Thompkins, 560 U.S. 370, 381 (2010); Salinas v. Texas, 570 U.S. 178, 190 (2013).

[73] Maryland v. Shatzer, 559 U.S. 98, 110 (2010).

[74] Oregon v. Hass, 420 U.S. 714, 722–24 (1975); Harris v. New York, 401 U.S. 222, 225–26 (1971).

[75] United States v. Patane, 542 U.S. 630 (2004); Oregon v. Elstad, 470 U.S. 298 (1985); *see also* Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert*, the 2004* Miranda *"Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97, 98, 114 (2004) (describing *Patane* as "a bullet in the shoulder" of *Miranda*).

[76] Vega v. Tekoh, 142 S. Ct. 2095 (2022); Chavez v. Martinez, 538 U.S. 760 (2003).

[77] *Tekoh*, 142 S. Ct. at 2106.

[78] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

[79] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College & Univ. of North Carolina, 143 S. Ct. 2141 (2023).

[80] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[81] Jordan Nathaniel Fenster, *SCOTUS Ruling "Takes Teeth Out" of* Miranda, *Local Advocates Say: "The Writing is on the Wall,"* CT INSIDER (June 24, 20202), https://www.ctinsider.com/news/article/SCOTUS-ruling-takes-teeth-out-of-Miranda-17262199.php

The Sixth Amendment is only triggered once the government officially begins a prosecution through a first formal hearing, indictment, information, or other formal process,[82] and in most cases, the police have already interrogated suspects before that stage.[83]

Once the Sixth Amendment right is triggered, the police may not deliberately elicit incriminating information from a suspect unless defense counsel is present or the suspect has waived their right to the presence of defense counsel.[84] Defense lawyers typically encourage their clients not to speak with the police, so at first blush the Sixth Amendment rule would seem to cut off most police questioning. But in *McNeil v. Wisconsin*[85] and *Texas v. Cobb*,[86] the Supreme Court held that the Sixth Amendment right to counsel is offense-specific, meaning that the Sixth Amendment right to counsel only applies in the interrogation room if the police question a suspect about an offense for which the suspect has been formally charged. If the police want to question a suspect about some *other* offense, they may do so. The police can even ask about an offense that is factually related to the charged offense, so long as it is not a lesser-included offense. For example, if the state formally charges someone with arson and the police want to question that person about insurance fraud, the Sixth Amendment imposes no restriction, even if the insurance fraud was the motive for the arson. And with respect to waivers and the scope of protections, the Sixth Amendment's protections roughly parallel those of *Miranda*.[87] The courts take a generous attitude toward waivers and a permissive attitude toward introducing evidence obtained in violation of the rule.[88] All in all, the Sixth Amendment right to counsel as presently construed provides little protection for suspects facing criminal prosecution.

3. Voluntariness. – Even the Due Process voluntariness test, which the Supreme Court used regularly in the 1950s and 60s to regulate police practices in the interrogation room, has become a weak tool of constitutional regulation. In 1984, the Supreme Court announced that once the police issued *Miranda* warnings, only the "rare" suspect would be able to show that a resulting confession was coerced.[89] And even in cases where police fail to give *Miranda* warnings at all, the Supreme Court is hesitant to find voluntariness violations. It has not found a statement to be involuntary in over thirty years,[90] and it has had a number of opportunities to do so.

Consider, for example, the Court's 2003 decision in *Chavez v. Martinez*.[91] During an

[82] Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008).

[83] Eve Brensike Primus, *Disentangling* Miranda *and* Massiah: *How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U. L. REV. 1085, 1098 (2017).

[84] United States v. Henry, 447 U.S. 264 (1980); Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980).

[85] 501 U.S. 171 (1991).

[86] 532 U.S. 162 (2001)

[87] Patterson v. Illinois, 487 U.S. 285, 292-93 (1988) (finding that a *Miranda* waiver is sufficient for the Sixth Amendment as well); Michigan v. Mosley, 423 U.S. 96, 104-05 (1975) (discussing scope of protection when right is invoked); Kansas v. Ventris, 556 U.S. 586, 594 (2009) (finding that statements obtained in violation of the Sixth Amendment are admissible to impeach a defendant).

[88] Primus, *supra* note 83, at 1105-07 (collecting cases).

[89] Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984); *see also* Dickerson v. United States, 530 U.S. 428, 444 (2000) (same).

[90] Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (finding statement involuntary after a threat of physical violence but describing the case as "close").

[91] 538 U.S. 760 (2003).

altercation, officers shot Oliverio Martinez several times, leaving him permanently blinded and paralyzed from the waist down.[92] After being shot, Martinez was transported by ambulance to the hospital. At the hospital, Patrol Supervisor Ben Chavez questioned Martinez. Chavez never read Martinez his *Miranda* rights. In the recorded exchanges, Martinez was screaming in pain, yelling that he was choking, and saying that he felt he was dying.[93] He was in and out of consciousness.[94] He begged the officer to stop asking questions, even saying at one point that he didn't want to say anything, but Officer Chavez persisted.[95] When the case reached the Supreme Court, Justice Stevens described the police methods as "torturous,"[96] but a majority of the Court was unwilling to find that Mr. Martinez's statements were involuntarily given.[97]

As the Supreme Court has cut back on Fifth and Sixth Amendment protections, scholars have suggested different ways to revive and reinvigorate the voluntariness test.[98] But the federal courts have shown no interest. One study of thousands of lower-court decisions involving challenges to confessions over a twenty-year period concluded that "judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects."[99] In sum, under current law, the voluntariness test – like *Miranda* and *Massiah* protections – is not a serious check on police interrogations.

II. FOUR CATEGORIES OF STATE-BASED REFORM

If the federal courts will not regulate interrogations, local jurisdictions must decide what regulations to impose. Different states have different politics; in the absence of federal regulation, we should expect different regulatory regimes to emerge in different places. The production of those varying regimes is how states play their role as laboratories of democracy in the federal

[92] *Id.* at 764.

[93] *Id.*; *id.* at 784-86 (Stevens, J., concurring in part and dissenting in part) (quoting the transcript); *id.* at 798 (Kennedy, J., concurring in part and dissenting in part).

[94] *Id.* at 798 (Kennedy, J., concurring in part and dissenting in part).

[95] *Id.* at 784-86 (Stevens, J., concurring in part and dissenting in part); *id.* at 798 (Kennedy, J., concurring in part and dissenting in part).

[96] *Id.* at 783 (Stevens, J., concurring in part and dissenting in part).

[97] *Id.* at 779-80 (remanding to lower court to address voluntariness).

[98] *E.g.*, Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 515–39 (2005) (proposing an "objective penalty" approach under which courts have a baseline understanding of what suspects should reasonably expect and ask whether police moved below that baseline); Primus, *supra* note 25, at 55 (advocating a reinvigorated due process analysis with different tests to address reliability and offensive police methods); Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889, 889 & 960 (2017) (arguing for a test that defines compulsion as "an official undertaking to induce a witness to provide evidence by threat of punitive sanctions"); GEORGE C. THOMAS & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 226 (2012) (positing a "moral choice theory" under which courts ask "whether [the alternative to talking that the suspect faced] is something that society believes police ought to be able to force on suspects").

[99] Paul Marcus, *It's Not Just About* Miranda: *Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 643 (2006).

system.[100] By observing the operation of different regulatory approaches in different states, reformers can learn what sorts of reforms might be possible and how well they are likely to work.

This Part canvasses current state and local approaches to regulating police interrogation and discusses state regulations in other criminal procedure contexts that logically should be extended into the confession realm. These state and local approaches fall into four different reform categories: (1) procedural restrictions on interrogators, such as rules requiring that interrogations be recorded or that officers go through additional steps to obtain an adequate waiver before questioning suspects; (2) substantive restrictions on interrogators, like prohibitions on threats and promises; (3) rules of adjudication that state courts use to provide police with feedback and give them incentives to avoid abusive interrogation practices, like stronger exclusionary remedies or permitting experts to educate factfinders about false confessions; and (4) changes to police training and the methods of interrogation that police use.

A. Procedural Protections

The most common state reforms to date have been procedural. For example, states have required that interrogations be recorded, established the steps police must take to obtain valid waivers of rights, capped the number of officers in the interrogation room, limited the duration of interrogations, and prescribed when and how police must provide suspects with access to counsel. These measures do not squarely address the most problematic police interrogation tactics, but they are nonetheless valuable reforms. They shed light on what happens in interrogation rooms, and they can set a rights-protective tone that may help check abuses in ways that go beyond what the specific procedures require.

1. Recordings. – The most widely adopted reform is a requirement to record police interrogations. More than half of the states require police to record at least some custodial interrogations.[101]

Recording requirements affect the interrogation environment in multiple ways. First, they document what happens, thus enabling judicial review. Second, they reduce the fear that suspects experience—fear that sometimes engenders false confessions. As the *Miranda* Court noted, a person who believes that nobody will see what is happening to him during an interrogation is more likely to feel vulnerable and endangered.[102] Third, and relatedly, an interrogator's sense that their work is invisible emboldens them to push farther than law or decency might permit, because there will be no repercussions. As one observer put the point, "[t]he mere presence of the camera force[s] law enforcement subjects to dial down the intensity of the interrogations."[103] And the benefits of recordings do not accrue only to suspects. Many law enforcement agencies support recording requirements because recordings provide protection for officers who do their job well by documenting their proper behavior. They also enable officers to focus on the substance of their

[100] *E.g.*, Arizona v. Evans, 514 U.S.1, 8 (1995) (noting that states "are free to serve as experimental laboratories").

[101] *See* TOM SULLIVAN, NACDL COMPENDIUM: ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS (Jan. 2019), https://www.nacdl.org/electronicrecordingproject (noting that twenty-three states and D.C. require recording for serious crimes and six require it for all crimes).

[102] Miranda v. Arizona, 384 U.S. 436, 445-46 (1966).

[103] KASSIN, *supra* note 12, at 145.

interrogations without having to worry about taking notes along the way.[104]

Despite these benefits, recording requirements are not universal. Many jurisdictions do not require recordings.[105] Many states require recordings only for investigations of felonies or violent crimes. Some states require only audio rather than video recording, such that threatening expressions and gestures are not recorded.[106] Many states only require police to record custodial interrogations that take place at the stationhouse, which neglects the many interrogations that take place at crime scenes, in squad cars, or in other locations.[107] Many jurisdictions only require police to record "when feasible."[108] Given the current ubiquity of smartphones with video recording technology,[109] that requirement ought to be nearly tantamount to a general requirement to record interrogations. But in practice, interrogators who are only required to record interrogations "when feasible" often claim that recording was impractical, that the recording equipment malfunctioned, or that some exigent circumstance prevented them from recording—and courts routinely accept these excuses.[110] Moreover, the sanctions for violating a recording requirement vary widely. Some states exclude the resulting confession; others admit it with a special jury instruction or a civil penalty.[111] But some states allow the uncorroborated testimony of an officer that he gave complete *Miranda* warnings and obtained a waiver despite a failure to record, which gives police little incentive to abide by the recording requirements.[112]

2. Invocations and Waivers. – As described in Part I, the Supreme Court has taken a demanding approach on the question of what suspects must do to invoke their *Miranda* rights and a permissive view of what counts as a waiver of those rights. Some states have pushed back. For example, in contrast to the Supreme Court's view that an individual in custody must clearly and ambiguously assert the right to counsel,[113] some states require interrogating officers to clarify ambiguous requests for counsel before proceeding with interrogations.[114] Similarly, the Supreme Court has held that the prosecution need only prove a waiver of *Miranda* rights by a preponderance of the evidence[115] and that waiver can be inferred from the fact that police obtain a confession after

[104] Rebecca Brown et al., *Attacking the False Confession: Advocacy in the State Forum*, 44 CHAMPION 22, 23-24 (June 2020).

[105] KASSIN, *supra* note 12, at 106.

[106] *Id.* at 25.

[107] *Id.* at 24.

[108] Brown et al., *supra* note 104, at 25.

[109] *See* Pew Research Center, *Mobile Fact Sheet: Mobile Phone Ownership Over Time* (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/ (noting that 97% of Americans have cell phones and 85% have smartphones); *see also* Federica Larrichia, *Average Number of Connected Devices Residents Have Access to in U.S. Households in 2020, By Device* (June 1, 2022), https://www.statista.com/statistics/1107206/average-number-of-connected-devices-us-house/ (noting the average American has access to more than ten connected devices)

[110] Brown et al., *supra* note 104, at 25.

[111] *Id.* Missouri has a statute that permits the governor to withhold state funds from a law enforcement agency if that agency is not trying in good faith to record interrogations. V.A.M.S. § 590.700 (2017).

[112] Brown et al., *supra* note 104, at 25.

[113] Davis v. United States, 512 U.S. 452 (1994).

[114] *E.g.*, Commonwealth v. Clarke, 960 N.E.2d 306, 350-51 (Mass. 2012); State v. Hoey, 881 P.2d 504 (Haw. 1994); State v. Alson, 10 A.3d 880 (N.J. 2011); State v. Risk, 598 N.W.2d 642 (Minn. 1999).

[115] Colorado v. Connelly, 479 U.S. 157 (1986).

reading the warnings,[116] but some states require the prosecution to prove beyond a reasonable doubt that a *Miranda* waiver was knowing, intelligent, and voluntary.[117] Others impose strict limits on the ability of police to undermine the *Miranda* warnings with language designed to persuade suspects to waive their rights.[118] Some states reject the Supreme Court's view that people who waive their *Miranda* rights also waive their Sixth Amendment *Massiah* rights,[119] holding instead that individuals cannot waive their Sixth Amendment rights to counsel without counsel present, or at the very least without a judicial advisement of their rights.[120] Similarly, some states have held that any waiver of the Sixth Amendment right to counsel must be explicit, thus rejecting any attempt to import implied waiver doctrines from *Miranda* into the Sixth Amendment context.[121]

3. Ganging Up. – One way to address the power dynamics of interrogations is to limit the number of number of interrogators who can be present and asking questions. Some states have imposed such limits in a particular context: when the person begin interrogated is a law enforcement officer suspected of wrongdoing.[122] Presumably, most police suspects are more savvy and knowledgeable about law enforcement than civilian suspects are, and, as a consequence, are less likely to be tricked or pressured into waiving their rights. So if limiting the number of interrogators is a sensible reform where police suspects are concerned, it is probably worth implementing that reform for other suspects as well.[123]

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[116] Berghuis v. Thompkins, 560 U.S. 370 (2010).

[117] *E.g.*, State v. Wiley, 61 A.3d 750, 755 (Me. 2013); People v. Crespo, 958 N.Y.S.2d 309 (Sup. Ct. 2010); State v. Janis, 356 N.W.2d 916, 918 (S.D. 1984).

[118] *E.g.* State v. Bullock, 292 A.3d 503 (N.J. 2023) (holding that police undermined *Miranda* warnings by telling suspect that "he was not in trouble"); In re S.W., 124 A.3d 89, 103 (D.C. 2015) (prohibiting police from saying "I stand between you and lions out there"); People v. Dunbar, 24 N.Y.3d 304 (2014) (prohibiting police from saying "this is your opportunity to tell us your story" and "this will be your only opportunity to speak with us before you go to court on these charges").

[119] Patterson v. Illinois, 487 U.S. 285 (1988); Montejo v. Louisiana, 556 U.S. 778 (2009).

[120] *E.g.*, People v. Grice, 794 N.E.2d 9, 10 (N.Y. 2003); State v. Sanchez, 609 A.2d 400, 408 (N.J. 1992); State v. Liulama, 845 P.2d 1194, 1203 (Haw. Ct. App. 1993); State v. Lawson, 297 P.3d 1164, 1171-74 (Kan. 2013); Keysor v. Kentucky, 486 S.W.3d 273, 281-82 (Ky. 2016); State v. Bevel, 745 S.E.2d 237, 247 (W. Va. 2013).

[121] *E.g.* In re Darryl P., 63 A.3d 1142, 1191 (Md. Ct. Sp. App. 2013).

[122] *E.g.*, R.I. GEN. LAWS § 42-28.6-2(3) ("All questions directed to the officer under interrogation shall be asked by and through one interrogator."); FLA. STAT. ANN. § 112.532(1)(C) (stating questions must be asked by one investigator unless officer waives requirement); MD. CODE ANN., PUB. SAFETY § 3-104(h)(1) ("All questions ... shall be asked by and through one interrogating officer ...."); CITY OF LAS CRUCES, AGREEMENT BETWEEN THE CITY OF LAS CRUCES AND FRATERNAL ORDER OF POLICE, LAS CRUCES POLICE OFFICER'S ASSOCIATION § 32(D)(4) (2013) (limiting the number of interrogators to two); CAL. GOV'T CODE § 3303(B) ("All questions ... shall be asked by and through no more than two interrogators at one time."); DEL. CODE ANN. TIT. 11, § 9200(C)(3) ("All questions ... shall be asked by and through no more than 2 investigators."); N.M. STAT. ANN. § 29-14-4(D)(4) ("[T]here shall not be more than two interrogators at any given time ...."). These restrictions are part of collective bargaining agreements with police unions and are often reflected in statutory enactments that police have obtained in approximately twenty states as part of Law Enforcement Officers' Bills of Rights ("LEOBORs"). Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1224-26 (2016) (discussing LEOBOR protections); Kate Levine & Stephen Rushkin, *Interrogation Parity*, 2017 U. ILL. L. REV. 1685, 1686 (2018); Stephen Rushkin & Atticus DeProspo, *Interrogating Police Officers*, 87 G.W. L. REV. 646 (2019).

[123] Levine, *supra* note 122, at 1202 (arguing that some of the protections given to police suspects in LEOBORs should be extended to other suspects).

4. Wearing Down. Fatigue, hunger, and lack of access to basic necessities can contribute to breaking a person's will, thus undermining the voluntariness of any resulting confession.[124] Nonetheless, interrogators sometimes wear suspects down by conducting interrogations over the course of many hours without breaks or in the middle of the night. In the specific context of interrogating law-enforcement officers, some states have imposed limits on these tactics. In those states, interrogations of police suspects are required to proceed during reasonable daytime hours,[125] must involve regular breaks to let the suspects use the restroom or address other physical necessities, and include required rest periods between questioning sessions.[126] In at least one state

[124] Ashcraft v. Tennessee, 322 U.S. 143, 150 n.6 (1994) ("It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired."); United States v. Gaddy, 532 F.3d 783, 788 (8th Cir. 2008) (noting that sleeplessness is a factor in a voluntariness analysis); Matter of Welfare of M.E.P., 523 N.W.2d 913, 920 (Minn. Ct. App. 1994) ("Physical deprivations such as a lack of food are a factor to consider in determining the voluntariness of a confession.").

[125] *E.g.*, CAL. GOV'T CODE § 3303(A)-(D) (West 2018) ("The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer ...."); DEL. CODE ANN. TIT. 11, § 9200(C)(1) (2015) (requiring interrogation occur at reasonable hour unless "gravity of investigation" makes "immediate questioning" necessary); FLA. STAT. ANN. § 112.532(1)(a) (West 2014) (calling for interrogations at reasonable hour--preferably while officer is on duty--unless immediate action is required); 50 ILL. COMP. STAT. ANN. 725/3.3 (West 2006) ("All interrogations shall be conducted at a reasonable time of day. Whenever the nature of the alleged incident and operational requirements permit, interrogations shall be conducted during the time when the officer is on duty."); KY. REV. STAT. ANN. § 15.520(1)(C) (LexisNexis 2013) (requiring interrogation take place while officer is on duty); MD. CODE ANN., PUB. SAFETY § 3-104(f) (LexisNexis 2011) (requiring interrogation to take place at reasonable hour and if possible, while officer is on duty); MINN. STAT. ANN. § 626.89(7) (West 2009) ("When practicable, sessions must be held during the officer's regularly scheduled work shift."); NEV. REV. STAT. ANN. § 289.060(3) (LexisNexis 2013) (requiring interrogation occur during officer's regular shift or rescheduled shift or officer must receive compensation if off duty); N.M. STAT. ANN. § 29-14-4(A) (2013) ("[A]ny interrogation of an officer shall be conducted when the officer is on duty or during his normal working hours, unless the urgency of the investigation requires otherwise."); R.I. GEN. LAWS § 42-28-6-2(1) (2007) ("The interrogation shall be conducted at a reasonable hour, preferably at a time when the law enforcement officer is on duty."); VA. CODE ANN. § 9.1-501(1) (2012) (requiring questioning occur at reasonable time and place); W. VA. CODE ANN. § 8-14A-2(1) (LexisNexis 2012) (requiring interrogation occur while officer is on duty if possible and that officer receive compensation if interrogation occurs while officer is off duty).

[126] *E.g.*, CAL. GOV'T CODE § 3303(d) (West 2018) (allowing officers to take care of physical necessities like bathroom breaks during interrogations); DEL. CODE ANN. TIT. 11, § 9200(c)(5) (requiring police suspect be granted time for "personal necessities and rest periods"); FLA. STAT. ANN. § 112.532(1)(e) (same); 50 ILL. COMP. STAT. § 725/3.5 (2018) (stating that an officer under interrogation may rest and tend to "personal necessities"); LA. STAT. ANN. § 40:2531(B)(2) (requiring interrogation "allow for reasonable periods for the rest and personal necessities" of officer); MD. CODE ANN., PUB. SAFETY § 3-104(h)(2)(ii) (requiring interrogation "allow for personal necessities and rest periods"); MINN. STAT. ANN. § 626.89(7) (requiring interrogators "must give the officer reasonable periods for rest and personal necessities."); N.M. STAT. ANN. § 29-14-4(D)(1)-(3) (establishing time limitations and requiring "rest periods"); R.I. GEN. LAWS § 42-28.6-2(6) ("Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities and rest periods as are reasonably necessary."); STATE OF HAWAII, AGREEMENT BETWEEN STATE OF HAWAII, CITY & COUNTY OF HONOLULU, COUNTY OF HAWAII, COUNTY OF MAUI, COUNTY OF KAUAI AND STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS BARGAINING UNIT 12, at 21 (2011), https://perma.cc/6GCR-KW4J (giving officers access to personal necessities and limiting inhumane abuses during interrogation); CITY OF SAN DIEGO, MEMORANDUM OF UNDERSTANDING BY AND BETWEEN CITY OF SAN DIEGO AND SAN DIEGO POLICE OFFICERS ASSOCIATION 49 (2015), https://perma.cc/H7D8-BW9H (ensuring officers can tend to personal necessities like bathroom use and providing the kind of limits described in this Part); CITY OF WICHITA, MEMORANDUM OF AGREEMENT BY AND BETWEEN THE CITY OF WICHITA, KANSAS AND FRATERNAL ORDER OF POLICE LODGE #5, WICHITA, KANSAS, INC. 3838 (2017), https://perma.cc/3X7X-7S7H (stating that "the interview shall be completed as soon as possible. Time may be provided for personal necessities, meals, telephone calls, and rest periods,

— Connecticut — procedural protections like these extend to all suspects, rather than only to police officers.[127] Given that fatigue, hunger, and so forth do not affect civilian suspects less than police suspects, that extension makes a lot of sense.

5. Time Limits. – The police interrogations that produce false confessions tend to be atypically long. According to one of the most widely used police training manuals in the United States, a police interrogation should not need to last more than four hours in order to elicit a confession from a guilty suspect.[128] More than ninety percent of police interrogations take two hours or less.[129] But in one leading study of false confessions, the median length of the police interrogation was twelve hours.[130] In one of the most famous false confession cases in American history – the Central Park Jogger case in New York – the five teenage suspects who falsely confessed to beating and raping a woman had each been interrogated for between fourteen and thirty hours.[131]

There are two basic reasons why false confessions tend to emerge from especially long interrogations. First, police interrogating a suspect whom they believe to be guilty are likely to grow more frustrated over time if the suspect refuses to confess. That frustration can make interrogators more likely to give in to temptations to secure confessions through threats, promises, deception, or other problematic tactics. Second, an innocent suspect's resistance is worn down over time. The longer a suspect is held, the more likely they are to feel that the only escape from the interrogation room is to appease the interrogator by saying what he wants to hear – whether it is true or not. The Supreme Court long ago recognized this basic point. In *Ashcraft v. Tennessee*, it held that a confession procured after thirty-six hours of continuous relay questioning was per se involuntary, because the interrogation was "inherently coercive" and tantamount to "mental torture."[132]

Preventing false confessions calls for setting time limits on interrogation substantially shorter than thirty-six hours. To date, no jurisdiction has imposed a general time limit on all police interrogations.[133] But in some states, there are time limits when police interrogate police-officer

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as appropriate" and further explaining that "[n]o offensive language, coercion or promise of reward as an inducement to answering questions shall be directed at the employee").

[127] Connecticut presumes that any statement obtained through coercive police tactics to be involuntary, and it defines as a coercive police tactic "unreasonably depriv[ing] the person being interrogated of physical or mental health needs that were known, or should have been known to exist, including, but not limited to, food, sleep, use of the restroom or prescribed medications." C.G.S.A. P.S. 23-27, § 1 (2023).

[128] FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 597 (4th ed. 2001) ("[R]arely will a competent interrogator require more than approximately four hours to obtain a confession from an offender, even in cases of a very serious nature."). There is a range of opinion about exactly how long a successful interrogation should be expected to take, but most experts agree that the figure is six hours or less. LEO, *supra* note 1, at 311-12 (four hours); WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS 204 (2001) (six hours); Primus, *supra* note 25, at 37 (five hours).

[129] Drizin & Leo, *supra* note 7, at 948; *see also* Kassin et al., *supra* note 6, at 28 ("The vast majority of interrogations last from 30 minutes up to 2 hours.").

[130] Drizin & Leo, *supra* note 7, at 948.

[131] Susan Saulny, *Why Confess to What You Didn't Do?*, NEW YORK TIMES (Dec. 8, 2002).

[132] Ashcraft v. Tennessee, 322 U.S. 143, 154-55 (1994).

[133] The Innocence Project is collecting data about the length of interrogations to lobby for legislative mandates to limit the permissible length of interrogations. Brown et al., *supra* note 104, at 27.

suspects. In New Mexico, for example, the questioning of police officers can last no more than two hours at any given session, with only two sessions permitted in any twenty-four hours.[134] And if time limits are important for police suspects – who are trained in interrogation and savvy about police interrogation tactics – they are probably just as important for civilian suspects who do not have that background and training.

6. Access to Counsel. – Formally, *Miranda* guarantees suspects the right to have an attorney present during questioning. But the police can comply with that guarantee simply by declining to question a suspect who asserts their rights. There is no affirmative requirement for the police to supply a lawyer within any particular amount of time after a suspect invokes their *Miranda* right to counsel.[135] (As a general matter, public defenders do not represent suspects when they are first interrogated, because the Sixth Amendment right to counsel—as opposed to *Miranda*'s Fifth Amendment right to counsel—has not yet attached.[136]) A suspect without access to a lawyer, and to whom the police do not promptly provide one, might grow weary of waiting and start talking to the police. As a result, it matters a great deal whether lawyers are in practice easily accessible to suspects detained at police stations—and, if lawyers are in fact available, whether the suspects *know* that the lawyers are available. Nonetheless, the Supreme Court has held that interrogators are permitted to make a suspect believe that consulting with a lawyer would be more difficult than it really would be. Indeed, the Court has held that even if a lawyer called by a suspect's family member is affirmatively trying to speak to a suspect, the police are not obligated to tell the suspect. And if a suspect who does not know that a lawyer really is available waives his rights and confesses, the confession is admissible.[137]

Some states take a different view, requiring the police to tell suspects that attorneys are trying to speak with them before later *Miranda* waivers are deemed valid.[138] Moreover, some states require affirmative steps to make counsel both be and appear to be more practically available than suspects might otherwise imagine. In Illinois, for example, state law requires the posting of signs in police stations notifying individuals in custody of their right to have a private consultation, free of charge, in person or by phone, with an attorney "as many times and for such period each time as is reasonable…as soon as possible upon being taken into police custody" and "no later than 3

[134] N.M. STAT. ANN. § 29-14-4(D)(1)-(3); *see also* CITY OF MUNCIE, AGREEMENT BETWEEN FOP LODGE #87 AND THE CITY OF MUNCIE § 41.01(D) (2009), https://perma.cc/M4WF-TV6T (providing a two-hour limit on the length of each interrogation). In other states, the length of such interrogations is limited not to a specific number of hours but with a reasonableness standard. CAL. GOV'T CODE § 3303(D) (requiring interrogation occur in "reasonable period" taking "into consideration gravity and complexity of issues"); 50 ILL. COMP. STAT. § 725/3.5 (1983) (using the reasonable period of time standard); LA. REV. STAT. ANN. § 40:2531(B)(2) (2017) (limiting interrogations to a "reasonable duration"); DEL. CODE ANN. TIT. 11, § 9200(C)(5) ("Interview sessions shall be for reasonable periods of time."); MINN. STAT. ANN. § 626.89(7) ("Sessions at which a formal statement is taken must be of reasonable duration ...."). There is no case law explaining what constitutes a reasonable length of time for the interrogation of a police suspect, but such a standard could be informed by the police training manual's own statements that four hours should be enough.

[135] Michigan v. Mosley, 423 U.S. 96, 104 (1975) (describing *Miranda* as providing a "right to cut off questioning").

[136] Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008).

[137] Moran v. Burbine, 475 U.S. 412 (1986).

[138] *E.g.*, State v. McAdams, 193 So.3d 824, 830 (Fla. 2016); Commonwealth v. McNulty, 937 N.E.2d 16, 37 (Mass. 2010); State v. Reed, 627 A.2d 630, 643 (N.J. 1993); Bryan v. State, 571 A.2d 170, 176-77 (Del. 1990); State v. Stoddard, 537 A.2d 446, 452 (Conn. 1988).

hours [after] arrival at the first place of detention."[139] In Chicago, a 2017 court order designed to implement this law granted the Cook County Public Defender Office permission to represent people arrested and brought to the station for interrogation, effectively expanding the public defenders' role from providing the counsel guaranteed by the Sixth Amendment to providing counsel guaranteed by the Fifth Amendment under *Miranda* during initial questioning.[140] To execute that broader function, the Public Defender Office created a "Police Station Representation Unit" (PSRU) and ensured that signs were posted throughout police stations giving suspects a phone number to call to PSRU attorneys.[141] Practical steps like these cannot eliminate the cases in which police use abusive tactics to prevent suspects from getting legal representation, but they can reduce the incidence.

In one specific context—that of juvenile suspects—a few states have gone further, requiring that the police provide attorneys for consultation before any interrogation begins and before the police ask the suspects to waive their rights.[142] This system of automatic representation provides a much stronger form of protection than systems requiring people in custody to assert their rights affirmatively. To be sure, that protection comes at a cost: stationhouse lawyers would go a long way toward ameliorating false confession and legitimacy concerns, but many policymakers fear that they would stop police interrogations altogether, thus preventing police from solving crimes.[143] Among other things, the practices of those states providing automatic stationhouse representation to juveniles furnish experience against which that hypothesis can be tested. If in fact police have been able to solve crimes even in cases involving automatic representation, the case for extending automatic representation beyond juveniles would be that much stronger.

B. Substantive Restrictions

Some states have focused on banning, or at least restricting, some of the most problematic police interrogation tactics that have been connected to false confessions. These include threats of harsh consequences, promises of leniency, deception and psychologically manipulative

[139] 725 ILCS 5/103-4; *see also* 725 ILCS 5/103-3.5 (providing that persons in custody "shall have the right to communicate free of charge with an attorney ... as soon as possible upon being taken into police custody" and "no later than 3 hours [after] arrival at the first place of detention").

[140] Email from Aaron Goldstein, Law Office of the Cook County Public Defender (Jan. 25, 2023) (on file with author).

[141] *Id.*

[142] *E.g.*, West's RCWA § 13.40.740 (Wash. 2022); Md. Code, Courts & Jud. Proceedings, § 3-8A-14.2 (2002). Other states require the presence of a parent, custodian, *or* attorney before they will permit a juvenile to waive their *Miranda* rights and speak to interrogators. *E.g.*, CO. REV. STAT. § 19-2.5-203(1); IND. CODE ANN. § 31-32-5-1(2); IOWA CODE ANN. § 232.11(1)(A); OKLA. STAT. ANN. TIT. 10A, § 2-2-301(A); MONT. CODE ANN. § 41-5-331(1); N.C. GEN. STAT. § 7B-2101(b). Another handful of states require the presence of a parent or guardian during an interrogation, but only if the juvenile asks for one. *E.g.*, ALA. CODE § 12-15-202(A)(2), (B)(4); ARK. CODE ANN. § 9-27-317(i)(2)(C). But the presence of a parent or guardian is quite different from the presence of a lawyer. Parents often don't understand the legal system and will sometimes act contrary to their child's interests – effectively acting like another interrogator who is pressuring the child to speak. Caitlin N. August & Kelsey A. Henderson, *Juveniles in the Interrogation Room: Defense Attorneys as a Protective Factor*, 27 PSYCHOL. PUB. POL'Y & L. 268, 270 (2021) ("[A] parent's presence in the interrogation room may be detrimental to the juvenile suspect."); *see also* KASSIN, *supra* note 12, at 155 (noting that research shows that parental presence does not lead to greater protection of constitutional rights).

[143] *E.g.*, Escobedo v. Illinois, 378 U.S. 478, 488 (1964) ("[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.").

interrogation practices, and abusive language (including language predicated on racist and sexist stereotypes). These substantive restrictions have real potential to improve the conduct of interrogations.

1. Threats and Promises. – Even the Reid Method training materials acknowledge that explicit promises of leniency in exchange for a confession and explicit threats of inevitable harm absent a confession are impermissible, because they could induce an innocent person to confess.[144] Nonetheless, the Reid Method permits *implicit* threats and promises. It is hard to see what would justify this difference, other than an interest in being able to deny that threats and promises were at work. Unsurprisingly, psychological literature has shown that threats and promises have similar effects on suspects whether they are implicit or explicit.[145] After all, a suspect who confesses falsely as the result of a threat or a promise is making a calculation based on expected consequences. As the Oregon Supreme Court put the point, "confessions are unreliable when rendered under circumstances in which the confessor perceives that he or she may receive some benefit or avoid some detriment by confessing, regardless of the truth or falsity of the confession."[146] If a confessor believes they know what benefits or detriments will come, it might not matter much whether the information was given to them explicitly or only implicitly.

On the theory that such tactics produce unreliable confessions, several states have banned police reliance on threats of harm or promises of leniency, whether explicit or implicit. Oregon, for example, requires the exclusion of any confession "made under the influence of fear produced by threats"[147] or, for similar reasons, under the influence of hope produced by promises of leniency.[148] The Oregon statute is not a total ban on interrogators' saying that confession would be good for the suspect: interrogators may tell suspects, for example, that the suspects will feel better after confessions, because confession would relieve a psychological or spiritual burden.[149] But interrogators may not suggest that the suspect could avoid prosecution by confessing[150] and they may not threaten a lengthy prison sentence.[151] Similarly, a Georgia statute provides that admissible confessions must not be "induced by another by the slightest hope of benefit or remotest fear of injury,"[152] and the Georgia Supreme Court has interpreted this statute to prohibit police officers from promising a suspect that he will "never be charged or will face reduced charges or a reduced sentence based on what he tells the officers during the interview."[153] Maryland relies on

[144] INBAU ET AL., *supra* note 2, at 344-45, 422.

[145] Kassin et al., *supra* note 6, at 29-30.

[146] State v. Powell, 282 P.3d 845, 852 (Or. 2012).

[147] O.R.S. § 136.425 (2010).

[148] State v. Powell, 282 P.3d 845, 850 (Or. 2012).

[149] State v. Jackson, 430 P.3d 1067, 1080 (Or. 2018) (en banc).

[150] *Powell*, 282 P.3d at 853.

[151] *Jackson*, 430 P.3d at 1079-81.

[152] GA ST. § 24-8-824 (2013).

[153] Brown v. State, 725 S.E.2d 320, 321 (Ga. 2012). But Georgia's limitation is qualified, for it also statutorily provides that "[t]he fact that a confession has been made under a spiritual exhortation, a promise of secrecy, or a promise of collateral benefit shall not exclude it." GA ST. § 24-8-825 (2013). For this reason, the Georgia Supreme Court has held that police may tell a suspect that he will be able to return home after questioning regardless of what he says without rendering a subsequent statement *per se* inadmissible. *Brown*, 725 S.E.2d at 321.

its common law to prohibit "improper threats, promises, or inducements,"[154] including officer statements that they will "go to bat" for suspects,[155] or "help" and "protect" suspects.[156]

A recent Connecticut statute requires courts to presume that any statement is involuntary if it is procured through threats of (1) "physical force upon the person being interrogated or another person;" (2) "the unlawful arrest of another person;" (3) "the imposition of unlawful penalties upon the person being interrogated or another person;" or (4) "the imposition of unlawful administrative or immigration sanctions upon the person being interrogated or another person."[157] Hawaii's Supreme Court has held that a confession induced by a promise of release on bail is impermissibly coercive even if the defendant is in fact released on bail after confessing: the "relevant inquiry," the court explained, was not the accuracy of the promise but whether it was "reasonably likely to procure an untrue statement or influence an accused to make an involuntary confession."[158] New Hampshire's Supreme Court has held that confessions made in reliance on promises of confidentiality or promises of immunity are invalid under the state constitution.[159] Iowa relies on its evidentiary rules to exclude confessions obtained through threats or promises that range widely in their severity, from a case in which a suspect was told that unless he cooperated his sixteen-year-old nephew would be tried as an adult and sent to prison[160] to a case where the interrogators simply suggested to a suspect that his confession was necessary for the case to get wrapped up and to keep his name out of the newspaper.[161] And many more states have banned the use of threats and promises when interrogators are questioning members of specific subpopulations, with police

[154] Lee v. State, 12 A.3d 1238, 1253 (Md. 2011).

[155] Hillard v. State, 406 A.2d 415, 420 (Md. 1979); *see also* Knight v. State, 850 A.2d 1179, 1190 (Md. 2004) (suppressing statement after police promised to advocate on a suspect's behalf to convince the prosecutor to exercise discretion in suspect's favor).

[156] Winder v. State, 765 A.2d 97, 104 (Md. 2001); *see also* Hill v. State, 12 A.3d 1193, 1202 (Md. 2011) (suppressing a statement after officers suggested that the victim's family "did not want to see [the suspect] get into any trouble" but only wanted "an apology)."

[157] C.G.S.A. P.S. 23-27, § 1 (2023).

[158] State v. Baker, 465 P.3d 860, 871 (Haw. 2020).

[159] State v. McDermott, 554 A.2d 1302, 1305-06 (NH 1989); State v. Parker, 999 A.2d 314, 320-21 (NH 2010). The exception is a narrow one and only applies when there is a promise of confidentiality or immunity – not when the police promise not to charge a suspect with certain offenses or promise not to charge an associate. *See* State v. Rezk, 840 A.2 758, 762-63 (NH 2004).

[160] State v. Quintero, 480 N.W.2d 50, 52 (Iowa 1992).

[161] State v. Madsen, 813 N.W.2d 714, 727 (Iowa 2012); *see also* State v. Polk, 812 N.W.2d 670, 676 (Iowa 2012) (officers said the county attorneys were much more likely to work with an individual who was cooperating and suggested that the defendant would not see his kids for a long time unless he confessed); State v. Kase, 344 N.W.2d 223, 226 (Iowa 1984); (officers told a suspect that if she said what she knew about the victim's death and gave consent to search her apartment, no criminal charges would be filed against her but, if she did not cooperate, she would be charged with murder); State v. Hodges, 326 N.W.2d 345, 349 (Iowa 1982) (officers told a suspect that a lesser charge would be much more likely if he gave his side of the story).

officers[162] and juveniles[163] again being leading examples.

2. Deception. – While the federal courts have been hesitant to outlaw police deception in interrogations,[164] states have been willing to draw some lines in the sand. For example, some states have created *per se* rules prohibiting police from fabricating tangible evidence that appears to incriminate a suspect in order to elicit a confession from that suspect.[165] Consider *State v. Patton*, a New Jersey case in which the police created and played for a murder suspect an audiotape in which an officer, pretending to be an eyewitness, identified the suspect as the perpetrator.[166] After police played the tape, the suspect confessed. The fabricated audiotape was introduced as evidence at trial, and the suspect was convicted.[167] The New Jersey Superior Court reversed the conviction, holding that police officers may not fabricate evidence. In addition to expressing its concern about inducing false confessions[168] as well as the risk that fabricated evidence might erroneously be treated as authentic, the court emphasized that lying about evidence undermines the legitimacy of the system.[169] Other state courts have reached similar conclusions.[170]

Hawaii has taken a slightly different approach, holding that deceptive statements are *per se* coercive when they are about matters "extrinsic to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement or to influence an accused to make a

[162] *E.g.*, CAL. GOV'T CODE § 3303(e) (stating officers cannot be threatened with punitive action and "[n]o promise of a reward shall be made…"); DEL. CODE ANN. TIT. 11, § 9200(C)(6) ("[N]o officer shall be threatened with transfer, dismissal or other disciplinary action."); FLA. STAT. ANN. § 112.532(1)(F) (prohibiting inducements and noting that "[a] promise or reward may not be made as an inducement to answer any questions"); KY. REV. STAT. ANN. § 15.520(1)(B) (LexisNexis 2013) (prohibiting threats, promises, or coercion when officer is suspect in criminal prosecution or accused of violating law enforcement procedures and stating suspension without pay and reassignment are not coercion); MD. CODE ANN., PUB. SAFETY § 3-104(i) (stating officer cannot be "threatened with transfer, dismissal, or disciplinary action"); NEV. REV. STAT. ANN. § 289.060(4) (stating officer responses to questions under threat of punitive action are inadmissible in subsequent proceedings); N.M. STAT. ANN. § 29-14-4(D)(6) (stating officer may not be subject to illegal "coercion"); R.I. GEN. LAWS § 42-28.6-2(7) ("Any law enforcement officer under interrogation shall not be threatened with transfer, dismissal, or disciplinary action."); W. VA. CODE ANN. § 8-14A-2(3) (prohibiting threats of "punitive action" and "promise[s] of rewards."

[163] *E.g.*, WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024); U.C.A 1953 § 80–6–206 (2023); C.G.S.A. P.S. 23-27, § 1 (2023).

[164] Frazier v. Cupp, 394 U.S. 731, 737-79 (1969) (holding that a confession was voluntary even though the police falsely told suspect his companion had confessed); United States v. Haak, 884 F.3d 400, 409 (2d Cir. 2018) (noting that a "finding that police conduct is 'false, misleading, or intended to trick and cajole the defendant into confessing' does not necessarily render that confession involuntary").

[165] *E.g.*, State v. Patton, 826 A.2d 783, 802 (NJ Super. 2003) ("[W]e hold that the use of police-fabricated evidence to induce a confession that is then used at trial to support the voluntariness of a confession is *per se* a violation of due process."); State v. Cayward, 552 So.2d 971, 974 (Fla. Dist. Ct. App. 1989).

[166] 826 A.2d 783 (NJ Super. 2003).

[167] *Id.* at 784.

[168] *Id.* at 803.

[169] *Id.* at 800 ("The creation of the audiotape set in motion a confluence of events that tainted not only the interrogation process but the trial itself.").

[170] State v. Cayward, 552 So.2d 971, 974-75 (Fla. Dist. Ct. App. 1989) (expressing concern because, "[u]nlike oral misrepresentations, manufactured documents have the potential of indefinite life and the facial appearance of authenticity," which means they might be found later and used in court or given to media and could undermine respect for the system); State v. Farley, 452 So.2d 50, 60 n.13 (W. Va. 1994) (noting that manufacturing false documents "has no place in our criminal justice system").

confession regardless of guilt."[171] Examples of such extrinsic statements include telling a suspect that he has failed a polygraph test when the results were inconclusive, "assurances of divine salvation upon confession," "promises of mental health treatment in exchange for a confession," and "misrepresentations of legal principles" that would lead a suspect to miscalculate the consequences of confessing.[172]

And several states – California,[173] Colorado,[174] Connecticut,[175] Delaware,[176] Illinois,[177] Indiana,[178] Nevada,[179] Oregon,[180] and Utah[181] – have statutes that broadly prohibit deception in the interrogation of juvenile suspects. For example, Illinois's law provides that confessions made by juveniles during custodial interrogations at police stations are presumptively inadmissible if the police engage in "the knowing communication of false facts about evidence or unauthorized statements regarding leniency[.]"[182] Connecticut's statute is broader, prohibiting police from relying on false statements or misrepresentations of the law "that were known or should have been known to be false[.]"[183] And California's regime for juveniles prohibits not only false statements but "psychologically manipulative interrogation practices," including techniques designed "to scare or intimidate the person by repetitively asserting the person is guilty despite their denials, or exaggerating the magnitude of the charges or the strength of the evidence;" "minimizing the moral seriousness of the offense, a tactic that falsely communicates that the conduct is justified, excusable, or accidental;" and "[e]mploying the 'false' or 'forced' choice strategy, where the person is encouraged to select one of two options, both incriminatory, but one is characterized as morally or legally justified or excusable[.]"[184]

Some jurists have called for general and *per se* bans on police deception in interrogations.[185] As they point out, most of the bedrock cases permitting the use of deception are

[171] State v. Matsumoto, 452 P.3d 310, 316 (Haw. 2019); *see also* State v. Baker, 465 P.3d 860, 871 (Haw. 2020) (clarifying that "the relevant inquiry in determining whether deceptive interrogation tactics are improperly coercive is whether the deception is reasonably likely to procure an untrue statement or influence an accused to make an involuntary confession").

[172] *Matsumoto*, 452 P.3d at 321 & 324.

[173] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective July 1, 2024).

[174] C.R.S.A. § 19-2.5-203 (2023).

[175] C.G.S.A. P.S. 23-27, § 1 (2023).

[176] 11 DEL. C. § 2022 (2022).

[177] 705 ILL. COMP. STAT. 405/5-401.6 (2022).

[178] IND. ST. 31-30.5-1-6 (2023).

[179] N.R.S. AB 193 § 1 (effective July 1, 2024).

[180] O.R.S. § 133.403 (2022).

[181] U.C.A 1953 § 80–6–206 (2023).

[182] 705 ILL. COMP. STAT. 405/5-401.6(a) (2022).

[183] C.G.S.A. P.S. 23-27, § 1 (2023).

[184] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024).

[185] *E.g.*, State v. Griffin, 262 A.3d 44, 113 (Conn. 2021) (Ecker, J., concurring in part and dissenting in part) ("The broad societal harms caused by allowing the police to lie during interrogations, along with the risk of false confessions, may support a per se ban on this practice, whether as a matter of legislative action or the exercise of the court's supervisory authority.").

from the pre-DNA era—a time when the common sense of the legal system underestimated the incidence of false confessions. Now that we know that deception entails a real risk of provoking false confessions, the reasoning runs, we should realize that the practice should be banned, even if it was common at an earlier time when we did not know what we know now.[186] The time may come when such arguments prevail: in 2021, New York lawmakers proposed legislation that would ban the presentation of knowingly false information to *any* suspect and the exclusion of all resulting confessions.[187] To date, however, legislation banning police deception during interrogations regardless of the age of the suspect has not passed.[188]

3. Contaminated Confessions. – According to one study of false confession cases, 95% of them involved contaminated confessions[189] in which the police "leak and feed the innocent suspect unique and/or nonpublic details that the innocent suspect, once broken, then repeats back and incorporates into his (false) confession statement, which makes it appear true and persuasive."[190] Although police are trained to avoid contaminating confessions,[191] it often happens unintentionally.[192] Some courts currently permit experts to testify about the problems with contaminated confessions,[193] but states should go further and prohibit police from sharing details

[186] *Id.* at 103-04; *see also* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006) (collecting studies showing a connection between deceptive interrogation practices and false confessions).

[187] S324-A, Senate, 2021-22 Reg. Sess. (N.Y. 2021)

[188] One could argue that Connecticut's ban on police deception extends to all individuals who are interrogated, but the law is not clear. It provides that any admission by *any* person during a custodial interrogation shall be presumed to be involuntary and inadmissible if law enforcement "engaged in deception or coercive tactics during such interrogation" and it lists representative examples of "deception or coercive tactics" for everyone and for children under eighteen separately. C.G.S.A. P.S. 23-27, § 1 (2023). False statements and misrepresentations of the law are listed as examples of "deception or coercive tactics" with respect to juveniles, but the statute expressly states that the lists it provides of what constitutes "deception or coercive tactics" for adults is not limited to the examples provided. *Id.* ("'deception and coercive tactics' includes, *but is not limited to*, any tactic that ….") (emphasis added). One could argue that, by prohibiting *deception* and coercive tactics, the legislature intended to stop police from lying to adult suspects as well – at least with respect to extreme lies (like fabricating evidence). But the fact that the legislature specifically listed the communication of false facts or misrepresentations of the law as problematic for juveniles (and did not list those as problematic for adults) might limit which kinds of deception courts interpret as falling within the purview of the statute with respect to adult interrogations.

[189] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18–19 (2011) (describing how 38 of the 40 cases he reviewed involved contaminated confessions); *see also* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 409 (2015) (finding that 24 of 26 false confessions were contaminated in a follow-up study).

[190] Richard A. Leo, *Interrogation and Confessions in* 2 REFORMING CRIMINAL JUSTICE: POLICING 250 (Erik Luna ed. 2017); *see also* Garrett, *supra* note 34, at 1053; Laura H. Nirider et al., *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837 (2012).

[191] Joseph P. Buckley, *The Reid Technique of Interviewing and Interrogation*, IN TOM WILLIAMSON, ED, INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH, REGULATION 190, 204-05 (Willan 2005) ("[I]t is imperative that interrogators do not reveal details of the crime.").

[192] Wright v. Commissioner of Correction, 68 A.3d 1184, 1193-84 (Conn. App. 2013) (describing the testimony of an expert that "unintentional contamination of suspects occurs frequently" during interrogations); *see also* KASSIN, *supra* note 12, at 155 ("Sometimes police can contaminate a confession without intent or awareness.").

[193] *E.g.*, People v. Krivak, 188 N.Y.S.3d 359, 367-68 (Cty. Ct. NY 2023); Sanford v. Russell, 387 F. Supp. 3d 774, 786-87 (E.D. Mich. 2019).

of a crime that only the perpetrator would know during the course of an interrogation.[194]

4. Stereotypes. – Some interrogation tactics should be banned because they are objectionable independent of concerns about false confessions. One good example is police reliance on overt sexist and racist stereotypes. Consider *State v. Baker*.[195] In an attempt to induce a confession in a sexual assault case, an interrogating officer sought to minimize the offense by telling a suspect that women are "more promiscuous . . . when they're on alcohol . . . cause they lose their inhibitions" and that "[g]uys are programmed to procreate."[196] The Hawaii Supreme Court noted the "fundamental duty of this court to call attention to those interrogation techniques that are 'so offensive to a civilized system of justice that they must be condemned under principles of due process'" and held "that interrogation techniques that rely on stereotyping protected classes of persons are inherently coercive, and strongly weigh against any subsequent statement being voluntary."[197]

In a slightly different vein, the Supreme Court of Indiana held that a confession was involuntary when a police investigator pressured a suspect to confess by saying that the suspect could not get a fair trial or an impartial jury because of his race.[198] According to the court, that tactic "undermine[s] public confidence in the fairness of our system of justice."[199]

5. Abusive Language. – In an overlapping but broader vein, a number of states have statutorily prohibited interrogators from using "abusive" or "offensive" language when questioning suspects — if those suspects are law enforcement officers.[200] Once again, it is worth

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[194] At the very least, courts should treat contaminated confessions the way they treat impermissibly suggestive police identification procedures and conduct a more rigorous reliability analysis to deter improper police behavior. Perry v. New Hampshire, 565 U.S. 228, 232 (2012); *see also* Garrett, *supra* note 189, at 421-22 (advocating for a requirement that that police conduct "blind" interrogations where the interrogator does not know the details of the crime and therefore cannot contaminate the confession).

[195] 465 P.3d 860, 874 (Haw. 2020).

[196] *Id.* at 864.

[197] *Id.* at 874–75 (quoting Crane v. Kentucky, 476 U.S. 683, 687 (1986)). The court specified that its holding "applies without regard to the source of the legal protection from discrimination," meaning that the protected classes contemplated were not limited to those recognized as a matter of constitutional (or other) law in particular. *Id.* at 875 n.19.

[198] Bond v. State, 9 N.E.3d 134, 141 (Ind. 2014).

[199] *Id.* at 138-39 (quoting Batson v. Kentucky, 476 U.S. 79, 87 (1986) (alteration in original)). For descriptions of officers using racist and homophobic statements in the interrogation room, see Gray v. Spillman, 925 F.2d 90, 91 (4th Cir. 1991); Stephen Rushkin, *Police Arbitration*, 74 VAND. L. REV. 1023, 1054-55 (2021); *Building Movement: Racial Injustice, Transformative Justice and Reimagined Policing*, 11 NW. J. L. & SOC. POL'Y 420, 431 (2017).

[200] *E.g.*, CAL. GOV'T CODE § 3303(E) (West 2018) ("The public safety officer under interrogation shall not be subjected to offensive language or threatened ...."); 50 ILL. COMP. STAT. ANN. 725/3.6 ("The officer being interrogated shall not be subjected to professional or personal abuse, including offensive language."); N.M. STAT. ANN. § 29-14-4(D)(6) ("[A]n officer shall not be subjected to offensive language ...."); W. VA. CODE ANN. § 8-14A-2(3) (prohibiting interrogating officers from using "offensive language" or threats of punitive action); CITY OF OVIEDO, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF OVIEDO AND THE COASTAL FLORIDA POLICE BENEVOLENT ASSOCIATION INC., CERTIFICATION NUMBER 1465 AND CERTIFICATION NUMBER 1653, Art. 7 § 2(F)-(H) (2018), https://perma.cc/2DWF-HN8M (preventing interrogators from using abusive, offensive, or threatening language, barring promises, rewards, or threats, requiring the recording of interrogations, and limiting the asking of questions that have been previously answered by the officer in a prior statement); CITY OF WICHITA, MEMORANDUM OF AGREEMENT BY AND BETWEEN THE CITY OF WICHITA, KANSAS AND FRATERNAL ORDER OF POLICE LODGE #5, WICHITA, KANSAS, INC. 38 (2017), https://perma.cc/3X7X-7S7H ("No offensive language, coercion or promise of

asking why a limit on interrogations that is worth imposing for law enforcement officers should not be imposed on interrogations generally.[201] Abusive language is not necessary for obtaining confessions. Indeed, on the assumption that the decision to refrain from using abusive language with police suspects does not represent a decision to let guilty police officers escape punishment, the willingness of several jurisdictions to forgo abusive language when interrogating police suspects demonstrates confidence that interrogators can do their jobs without such language. To be sure, the use of abusive language is unlikely to undermine the perceived legitimacy of the system in the same way, or to the same degree, as the resort to racist stereotyping. But it is still worth doing without. A system that disciplines itself to treat people with civility is more likely to be understood as legitimate than one that does not.

C. Rules of Adjudication

While some states directly regulate police interrogation practices through procedural or substantive restrictions, others rely on more indirect rules of adjudication under which state courts use their rules and procedures to provide police with feedback to incentivize their behavior.[202] These rules of adjudication may include stronger exclusionary remedies, pretrial reliability assessments, corpus delicti rules, consideration of race in confession analyses, eliminating causal requirements in such analyses, and presentation of experts and jury instructions.

1. Exclusionary Remedies. – Some states suppress physical evidence that police obtain as a result of *Miranda* violations[203] even though such evidence would not be suppressed under federal law.[204] In cases that rely predominantly on physical evidence – like drug and gun prosecutions – buttressing the in-court exclusionary rule can send powerful messages to officers that encourage them to honor suspects' *Miranda* rights.

2. Pretrial Reliability Assessments. – False confession experts have long argued that courts should rely on constitutional, statutory, or evidentiary principles to conduct pretrial reliability assessments and only permit confessions that are deemed reliable into evidence at trial.[205] Every

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reward as an inducement to answering questions shall be directed at the employee").

[201] Levine, *supra* note 122, at 1202.

[202] *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[203] *E.g.*, State v. Vondehn, 236 P.3d 691 (Or. 2010); State v. Peterson, 923 A.2d 585 (Vt. 2007); State v. Farris, 849 N.E.2d 985 (Ohio 2006); State v. Knapp, 700 N.W.2d 899 (Wis. 2005); Commonwealth v. Martin, 827 N.E.2d 198 (Mass. 2005).

[204] United States v. Patane, 542 U.S. 630 (2004).

[205] Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMPLE L. REV. 759, 802 (2013); Garrett, *supra* note 189, at 424 (citing *Napue v. Illinois,* 360 U.S. 264, 269 (1959, which holds that it violates due process for the state to present fabricated witness testimony, and arguing that pretrial reliability hearings designed to exclude false confessions should be constitutionally grounded in the Due Process Clause); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 990-97 (1997) (arguing that courts should analyze the fit (or lack thereof) between (a) a suspect's description of the crime in a postadmission narrative and (b) the known facts of the crime from the independent police investigation to determine if the confession is reliable and should be admitted); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438-40 (1998) (focusing on three factors to determine if a statement is trustworthy: (1) Did the statement lead to the discovery of evidence unknown to the police? (2) Did the statement include the identification of

state has an evidentiary rule patterned after Federal Rule of Evidence 403, which permits trial courts to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice or confusion.[206] Iowa relies on its state counterpart to Rule 403 to exclude confessions obtained through police use of force, threats, promises, or other inducements, noting that these confessions are inherently unreliable and therefore their probative value is low and is outweighed by the risk of misleading the jury and causing erroneous verdicts.[207]

3. Corpus Delicti Rules. – Some states will not allow a person to be convicted solely on the basis of an uncorroborated confession.[208] Corpus delicti rules, which recognize that confessions can be untrustworthy and require some independent evidence of guilt before permitting a criminal conviction, range in strength with some jurisdictions requiring only slight corroboration that a crime occurred and others requires substantial corroboration of the suspect's guilt.[209]

4. Race. – Scholars have argued that courts should consider suspects' race when determining whether they are in custody or have been coerced to confess.[210] After all, violence against Black men during interrogations is what catalyzed the Supreme Court to regulate confession practices,[211] and the vast majority of Black adults continue to believe that law enforcement will treat them unfairly and for good reason.[212] Justice Sotomayor has recognized the reality that racial profiling and police violence against Black and brown youth teach them to fear police.[213] That fear is only exacerbated by pressure-filled interrogation tactics like threats, promises, and lies. The law should recognize that Black men in America feel more pressure to confess – both to avoid physical harm and to escape a worse fate in the system.[214]

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highly unusual elements of the crime that are not publicly known? (3) Did the statement accurately describe mundane details of the crime that are not publicly known and could not be easily guessed?).

[206] FED. R. EVID. 403.

[207] State v. Quintero, 480 N.W.2d 50, 52 (Iowa 1992); State v. Mullin, 85 N.W.2d 598, 600 (Iowa 1957). Oregon, which relies on the a similar evidentiary rule to exclude unreliable eyewitness identifications, State v. Lawson, 291 P.3d 673 (Or. 2102), could easily extend its rule to address false confessions.

[208] *E.g.*, GA ST. § 24-8-823 (2013) (noting that "confessions of guilt shall be received with great caution" and that "[a] confession alone, uncorroborated by any other evidence, shall not justify a conviction").

[209] Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 474-75 (2018) (cataloguing different approaches); David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMPLE L. REV. 759, 790 (2013).

[210] *E.g.*, Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 141-42 (2017).

[211] Brown v. Mississippi, 297 U.S. 278, 285 (1936).

[212] Korpo Momolu, Gallup, *Black Adults More Likely To Know People Mistreated by Police* (August 3, 2020), https://news.gallup.com/poll/316526/black-adults-likely-know-people-mistreated-police.aspx (noting that 71% of Black adults surveyed know 'some' or 'a lot of' people mistreated by police" as compared to 34% of White adults; similarly, 50% of Black adults "report knowing people who were sent to jail unfairly" as compared to 13% of white adults).

[213] Utah v. Strieff, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

[214] Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 468 (1996) ("Those people who protest their innocence in the face of police lies about overwhelming evidence ... may genuinely fear that

Courts acknowledge race in a number of related criminal procedure contexts. Some states discount the degree to which police can rely on a Black or Latino person's flight to establish reasonable suspicion of criminal activity, noting that there are innocent reasons why Black and Latino men might fear police and run from them – particularly when they live in communities with a history of racial profiling and police brutality against their community members.[215] One court has relied on implicit bias studies and racial profiling statistics to conclude that it will not consider during a sentencing hearing prior arrests of Black and Latino community members that did not result in criminal convictions, because those prior arrests could be attributable to racial profiling.[216] And in *Jamison v. McClendon*, Judge Carlton Reeves argued that a suspect's race should be relevant when addressing whether they voluntarily consented to a search.[217] If racial constraint and racial profiling inform the fear and coercion present in an exchange between a suspect and the police for purposes of flight, consent, and sentencing, they also inform the fear and coercion present when police question suspects and ask them to make statements. But courts that are willing to recognize the role of race in these related contexts have not yet recognized race as a factor in custody and voluntariness analyses.

5. Causal Requirements. – Some jurists reject causal inquiries that require courts to find an impermissible police interrogation tactic *caused* the resulting confession before such confession is suppressible.[218] Courts performing causal inquiries examine how a suspect reacted to the impermissible tactic, how much time elapsed between the use of the impermissible tactic and the resulting confession, and whether there were any intervening circumstances during that time period.[219] But the idea that courts can measure the causal effects of an impermissible interrogation tactic on the psyche of a suspect is belied by social science showing that a person's external appearance does not accurately reflect how they feel inside.[220]

Many individuals – and particularly poor people of color who often grow up in violent surroundings – put on a calm face of unemotional fearlessness as a coping mechanism to mask

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they are being framed with fabricated evidence. While a more sophisticated, educated, and financially secure individual may be confident that he or his lawyer ultimately will be heard and the accusations withdrawn, those not so well situated may fear punishment for wrongs they did not commit. In particular, members of social groups with disproportionately high conviction rates, such as young black men, may despair of release and conclude they must confess to something to escape a worse fate.").

[215] *E.g.*, Washington v. State, 287 A.3d 301, 325 (Md. 2022); United States v. Brown, 925 F.3d 1150, 1156 (9th Cir. 2019); Commonwealth v. Warren, 58 N.E.3d 333, 342 (Mass. 2016); People v. Horton, 142 N.E.3d 854, 868 (Ill. App. 2019).

[216] United States v. Mateo-Medina, 845 F.3d 546, 553 (3d Cir. 2017).

[217] 476 F. Supp. 3d 386, 414–15 (S.D. Miss. 2020) ("In America where Black people 'are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles,' who can say that Jamison felt free that night . . . to say no to an armed Officer McClendon?").

[218] *E.g.*, Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) (Gibbons, J., dissenting); State v. Griffin, 262 A.3d 44 (Conn. 2021) (Ecker, J., concurring in part and dissenting in part).

[219] *E.g.*, State v. Griffin, 262 A.3d 44, 74 (Conn. 2021) (noting that the defendants "responded dispassionately" and two hours passed after the comment was made); People v. Linton, 302 P.3d 927, 954 (Ca. 2013) (noting that time passed).

[220] ALDERT VRIJ, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE 38 (Chichester: John Wiley & Sons 2000) (summarizing research showing it is not possible to rely on observable behaviors to determine if someone is being truthful).

their internal fear.[221] Even when they are terrified, they may instinctively put on airs and engage in a little bravado to appear tough and protect themselves.[222] As one state court judge recognized: "I do not profess to know what psychological, emotional, and cultural factors actually lay behind this defendant's calm demeanor. My point is that I have no way to know or even guess, *and neither does the trial court or the majority*."[223] For these reason, he and some other judges would not require a direct, causal link between an impermissible interrogation tactic and a confession.

6. Experts and Jury Instructions. – Some courts will permit expert testimony on the dangers of false confessions and will give jurors instructions about false confessions.[224] These practices help to ensure more accurate verdicts while educating police about problematic practices. But experts and instructions remain relatively rare in the false confession context when compared to the prevalence of experts and instructions about mistaken eyewitness identifications.[225] Courts could do more to import the lessons learned in the misidentification context to false confessions and increase reliance on experts and specialized jury instructions.

D. Police Training

In addition to limiting interrogation tactics through procedural restrictions, substantive limits on what police can do, and rules of adjudication that give officers incentives to behave better, some reformers have sought to change the way that police interrogators are trained. As noted above, most interrogators in the United States have long been taught the Reid Method, which seeks to overwhelm suspects and manipulate them into confessing. If interrogators were instead trained to use other approaches—like the nonconfrontational approaches used in Australia, Canada, Denmark, Germany, New Zealand, Norway, Sweden, and the United Kingdom—they would produce fewer false confessions.[226]

The possibility that American interrogators need to be trained in a different way burst into

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[221] *E.g.*, Mary Maxwell Thomas, *The African American Male: Communication Gaps Converts Justice into "Just Us" System*, 13 HARV. BLACKLETTER L.J. 1, 9 (1997) ("'Cool pose is a distinctive coping mechanism that serves to counter, at least in part, the dangers that black males encounter on a daily basis.'" (quoting RICHARD MAJORS & JANET MANCINI BILLSON, COOL POSE: THE DILEMMA OF BLACK MANHOOD IN AMERICA 5 (1992)); ROBERTO ARON, JULIUS FAST, & RICHARD B. KLEIN, TRIAL PRACTICE SERIES: TRIAL COMMUNICATION SKILLS § 4:4 (2d Ed. 2020) ("With men, an open display of emotion is usually considered a sign of weakness. To be in control, to show no feelings, to act 'cool' in the face of any threat is considered manly."); Monika Dargis & Michael Koenigs, *Witnessing Domestic Violence During Childhood is Associated with Psychopathic Traits in Adult Male Criminal Offenders*, 41 LAW & HUM. BEHAV. 173, 174 (2017) ("[E]xposure to community violence is directly correlated with callous-unemotional traits in detained juveniles.").

[222] Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 93 (2016).

[223] State v. Griffin, 262 A.3d 44, 97 n.21 (Conn. 2021) (Ecker, J., concurring in part and dissenting in part) (emphasis in original).

[224] *E.g.*, Garrett, *supra* note 189, at 425-26, 429-31 (collecting cases); Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 227-55 (2005).

[225] *Compare* Gary L. Wells, *Eyewitness Identification in* 2 REFORMING CRIMINAL JUSTICE: POLICING 273 (Erik Luna ed. 2017); 3 Wharton's Criminal Procedure § 21:8, *Jury Instructions* (14th ed. 2023). The National Academy of Sciences recommends that judges allow social science experts to testify at trials involving eyewitness identifications to explain the frailty and fallibility of eyewitness testimony, but says nothing about false confession experts. IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATIONS (Oct. 2, 2014), https://nap.nationalacademies.org/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification.

[226] Sources collected *supra* notes 4 & 16-18.

public consciousness early in the twenty-first century, when the world learned that American personnel had tortured and humiliated Iraqi terrorism suspects at the Abu Ghraib prison.[227] President Obama formed a High-Value Detainee Interrogation Group (HIG) composed of FBI agents, CIA agents, and Pentagon officials, which began funding public research on interrogations.[228] An HIG-funded metastudy revealed that nonconfrontational interrogation practices were more effective at producing true confessions and less likely to generate false confessions than an accusatory approach like Reid.[229] In accordance with that finding, the Los Angeles Police Department (LAPD) in 2013 began sending police officers for HIG training on nonconfrontational interrogation methods.[230] The LAPD is slowly converting from reliance on Reid to more nonconfrontational approaches and finding that, in 75-80% of the cases, they are able to obtain confessions or other new information that helps them solve the crimes at issue.[231] Convinced by the data, Wicklander-Zulawksi & Associates – one of America's largest police consulting and training firms – announced in 2017 that it would no longer train detectives on the Reid Method due to its risk of generating false confessions and the availability of effective alternatives.[232] And California's recent custodial interrogation law, which goes into effect this year, will prevent interrogators from relying on the tactics that are at the heart of the Reid Method when questioning juveniles.[233]

Most jurisdictions have yet to move away from the Reid Method, and the transition may need to be gradual. When England replaced the Reid Method with the PEACE Method, it adopted a tiered approach, providing different levels of training for officers depending on their different roles.[234] A similar approach could be an effective way to integrate nonconfrontational interrogation

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[227] *E.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (April 30, 2004), https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib.

[228] Office of Public Affairs, Dept. of Justice, Press Release 09-835, *Special Task Force on Interrogations and Transfer Policies Issues its Recommendations to the President* (Aug. 24, 2009), https://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president.

[229] Christian A. Meissner, et. al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 481 (2014); *see also* Brent Snook, et al., *Reforming Investigative Interviewing in Canada*, 52 CANADIAN J. OF CRIMINOLOGY AND CRIM. JUST. 203, 215-29 (2010) (noting that the PEACE technique in Canada has been as successful as Reid in obtaining confessions from the guilty without the same risks of false confessions); KASSIN, *supra* note 12, at 159 (describing how the confession rate remained the same in England after PEACE was adopted but there were fewer false confessions).

[230] Robert Kolker, *Nothing but the Truth: A Radical New Interrogation Technique Is Transforming the Art of Detective Work: Shut Up and Let the Suspect Do the Talking,* THE MARSHALL PROJECT (May 24, 2016), https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth#.gR9TabJrx (discussing how the LAPD became "guinea pigs" and how successful the program has been).

[231] *Id.*

[232] Eli Hager, *A Major Player in Law Enforcement Says It Will Stop Using a Method That's Been Linked to False Confessions*, THE MARSHALL PROJECT (March 9, 2017), https://www.businessinsider.com/reid-technique-false-confessions-law-enforcement-2017-3. Even John Reid & Associates has announced an intention to offer PEACE method trainings, although it continues to rely on its confrontation-based Reid Approach as well. *See* KASSIN, *supra* note 12, at 360.

[233] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024).

[234] Tracey Green, *The Future of Investigative Interviewing: Lessons for Australia*, 44 AUSTRALIAN J. FORENSIC SCI. 31, 35-36 (2012) (describing England's tiered approach); Georgina Heydon, *Helping the Police with Their Enquiries: Enhancing the Investigative Interview with Linguistic Research*, 85 POLICE J. 101, 104 (2012) (noting that the tiered

approaches in America. Reformers should target Police Officer Standards and Training Councils (POSTs), which serve as central, statewide authorities for establishing minimum training standards in many states. Through evidence-based advocacy, perhaps they can be swayed — as the LAPD and Wicklander-Zulawski have been — to incorporate nonconfrontational interrogation approaches into their standards for new recruits. And if police officers are trained to use approaches other than the Reid Method, there will be fewer false confessions, and the interrogation process will be more respectful and fair, restoring some faith and legitimacy to the system.

III. PATHS AND PRIORITIES

The reforms canvassed in the previous part comprise a menu of options for advocates and policymakers interested in improving interrogation practices. This Part provides a guide for choosing among those options. In some respects, reformers in different jurisdictions will need to make different choices: it is a feature of pursuing reform locally, after all, that different states are different, so reformers in different places must navigate different landscapes. For example, whether to seek reform through legislation, judicial decisions, evidentiary rule reform, training reform, or some other mechanism is a question that must be answered based on the characteristics of particular jurisdictions. That said, it is also possible to make some generally applicable recommendations about what reforms to pursue.

Other things being equal, direct substantive regulation of interrogations is better than procedural devices that require suspects to invoke their rights or rules of adjudication that are designed to incentivize officers to behave better. Rules are better than standards. And it is crucially important for reformers to pay attention not just to making rules restricting interrogation practices but to specify the remedies for violations of those rules—a point that is too often overlooked. Finally, partial reforms aimed at protecting especially sympathetic and vulnerable populations, like children, are worth pursuing both for their own sake and as beachheads for broader reform.

A. Prioritizing Substantive Restrictions

Part II subdivides the different ways to approach interrogation reform into four categories: procedural devices, substantive restrictions, rules of adjudication, and changes to police training. Reformers might wish to promote change of all four kinds. But the four kinds of reforms are not equally effective.

The most effective kind of reform is the substantive restriction on interrogation methods, which changes those methods directly rather than indirectly. To be sure, the other methods are important. If changing the training of police officers could move interrogations away from the Reid Method toward nonconfrontational alternatives like the PEACE method, false confessions would decline, and the legitimacy of the system would benefit. That said, changing police culture is difficult, and cultural change happens only gradually. A set of substantive restrictions on the problematic aspects of the Reid Method — that is, bans on the threats, promises, deception, abusive language used to intimidate suspects, police contamination, and so on — could force changes more expeditiously while also catalyzing cultural change for the longer run.

Reforms seeking to impose substantive restrictions like these can proceed by partial measures where more comprehensive reform is not political feasible. A state that is unwilling to

approach focused on providing "support to recruits and more junior officers in using the new approach to investigative interviewing").

adopt a general ban on threats, promises, lies, and abusive language in the interrogation room might be willing to ban one or two of those things or to ban a subset of practices within a given category. For example, the New Hampshire Supreme Court has not held that all promises made by police interrogators are prohibited, but it has laid down that rule with respect to a subset of promises — specifically, promises of confidentiality and promises of immunity.[235] Similarly, several state courts have held that one form of police deception – presenting suspects with fake evidence of guilt – will result in the exclusion of all resulting confessions.[236] Indiana's Supreme Court has not banned all uses of offensive and abusive language by police during interrogations, but it was willing to prohibit interrogators from relying on racist stereotypes.[237] These reforms are valuable on their own terms, even if more comprehensive reforms would be better. And once a partial reform is in place in a given jurisdiction, the logic of that partial reform can create a basis for the more general reform. The argument that interrogators need to be able to do something that interrogators have previously done becomes weaker once it is clear that precluding interrogators from doing some of that thing has not debilitated the work of interrogation generally.

Where substantive restrictions are not politically feasible, reformers can turn to procedural protections and rules of adjudication. But some procedural protections and rules of adjudication more effective than others at curbing abusive interrogation practices.

For example, states' attempts to buttress *Miranda*'s waiver and invocation procedures are helpful, but they are modest interventions. Rather than embodying a robust approach toward regulating interrogation, they are rearguard attempts to stem the erosion of Warren Court holdings. And their effectiveness is likely to be limited. Research shows that people interacting with the police often waive their rights because of the power imbalance they experience rather than because they need additional information about what rights they have.[238] Practical steps like providing suspects with fast, easy access to counsel in police stationhouses and limiting the length of interrogations can accordingly do more than prescribing what *Miranda*-style warnings police are obligated to provide.

Given how few cases go to trial,[239] rules of adjudication are less likely to shape officer behavior when compared to direct regulation. But if decision rules are the only politically palatable approaches to reform in a jurisdiction, strong exclusionary remedies and pre-trial reliability hearings send a more powerful feedback signal to police than expert witness testimony or jury instructions do. To be sure, expert witnesses and jury instructions about the dangers of false confessions are necessary for cases that go to trial. But reformers deciding where to spend limited political capital and scarce resources should think about aiming as high as is politically feasible,

[235] State v. Parker, 999 A.2d 314, 320-21 (NH 2010); State v. McDermott, 554 A.2d 1302, 1305 (NH 1989).

[236] State v. Patton, 826 A.2d 783 (NJ Super. 2003); State v. Farley, 452 So.2d 50, 60 n.13 (W. Va. 1994); State v. Cayward, 552 So.2d 971, 974 (Fla. Dist. Ct. App. 1989).

[237] Bond v. State, 9 N.E.3d 134, 141 (Ind. 2014).

[238] *See, e.g.*, Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962 (2019) ("The reason people comply with police … is *social*, not informational. The social demands of police-citizen interactions persist even when people are informed of their rights. It is time to abandon the myth that notifying people of their rights makes them feel empowered to exercise those rights.").

[239] Research shows that over 95% of cases end in pleas rather than trials. *See, e.g.*, AMERICAN BAR ASS'N CRIMINAL JUSTICE SECTION, 2023 PLEA BARGAIN TASK FORCE REPORT at 34 n. 2 (2023), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf.

lest they procure less powerful reforms at the expense of more effective ones.

B. Rules over Standards

One of the primary reasons why the United States Supreme Court gravitated away from relying on a totality-of-the-circumstances voluntariness test in the 1960s and shifted toward the more rule-like holdings in *Miranda* and *Massiah* was that the voluntariness standard was amorphous and therefore unworkable.[240] It "virtually invited [trial judges] to give weight to their subjective preferences" and "discouraged review even by the most conscientious appellate judges."[241] In practice, this meant that almost all confessions were admitted into evidence, regardless of how much pressure a suspect felt.[242] By laying down rules, the Court in *Miranda* and *Massiah* hoped to change that situation. And not surprisingly, the more recent collapse of *Miranda* and *Massiah* has meant that trial courts once again admit most confessions into evidence with little scrutiny.[243]

One lesson of this history is that states stepping into this regulatory void with the intention of providing real constraints on police interrogation will need to do so with clear rules rather than pliable standards. After all, interrogators will resist changing their practices, and trial courts have become accustomed to giving interrogation practices only the barest of scrutiny. Standards requiring only (for example) that interrogation practices be "reasonable" will therefore predictably have little effect. But even a court willing to uphold overly aggressive interrogation tactics as reasonable can enforce a rule requiring that the interrogation be video recorded or limited to two hours in length. And indeed, most of the states that have begun to regulate confession law are relying on explicit rules or at least putting rule-like contours on state voluntariness doctrines – from explicit recording requirements to bans on the use of certain interrogation tactics.[244] There will, of course, be some standard-like inquiries that are unavoidable in these bans: a state can ban the use of threats, but it is hard to eliminate judgment from the decision of what constitutes a "threat." That said, states can make those inquiries more rule-like by codifying non-exhaustive lists of impermissible threats, using statutory interpretation canons like *ejusdem generis*[245] to fill in the gaps, and then letting case law thicken the categories of prohibited threats.

As a concrete example, consider the new Connecticut law that admirably seeks to address the physical and mental health needs of suspects by attempting to ensure that they have access to food, sleep, bathrooms, and medications but does so by prohibiting the "unreasonabl[e]" deprivation of these necessities. What, exactly, would make some such deprivations reasonable

[240] See sources collected *supra* note 34.

[241] Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869-70 (1981).

[242] Godsey, *supra* note 98, at 470 ("[A] finding that a confession was made involuntarily [is] very rare in practice."); Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1966) ("A victim of objectionable interrogation practices could only satisfy [the voluntariness test] … in a utopian judicial world.").

[243] *Supra* Part I; Primus, *supra* note 25, at 10-23 (describing the collapse).

[244] *Supra* Part II.

[245] Ali v. Federal Bureau of Prisons, 552 U.S. 214, 223 (2008) (describing the ejusdem generis canon of statutory interpretation as follows: "when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration" (quoting Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991)).

and others unreasonable? Do police need to give such breaks only when requested? At regular intervals? It is too soon to know how the law will be applied, but it would not be shocking if trial courts examining specific cases acted inconsistently — or consistently, in a strikingly pro-interrogator way. The goals of the statute would be more reliably served if legislators had chosen a rule — say, that suspects must be offered breaks to attend to their physical needs every sixty minutes.[246] To be sure, any such choice of rule would be in part arbitrary. But it would also be more likely to produce actual change in the conduct of interrogations.

C. Vulnerable Populations

If a state is initially unwilling to adopt a blanket ban on threats, promises, deception, contamination, or abusive language, it might be willing to prohibit police from relying on these tactics when interrogating particularly vulnerable groups – like children. A number of states have recently enacted statutes designed to stop police from lying when interrogating juvenile suspects.[247] Relying on social science suggesting that children are particularly suggestible, want to please authority figures, are especially vulnerable to the pressures of an interrogation setting, and are unlikely to fully understand their *Miranda* rights,[248] reformers have successfully fought for legislation that prevents police from tricking kids into confessing by lying about the evidence against them.

Once that rule is in place with respect to juvenile suspects, reforms can push to expand the protection to other vulnerable people. For example, social science research shows that intellectually-disabled and mentally-ill suspects often resemble juveniles in that they do not understand the *Miranda* warnings, try to please authority figures, and are particularly vulnerable to manipulation.[249] Relying on that research as well as research indicating that intellectually-disabled suspects are more likely to confess falsely, a group of state representatives in Pennsylvania proposed a bill that would prohibit police from using deceptive interrogation tactics

[246] States know how to draft these kinds of rules in LEOBORs when police are being questioned. *Supra* Part II.

[247] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024); C.G.S.A. P.S. 23-27, § 1 (2023); N.R.S. AB 193 § 1 (effective July 1, 2024); C.R.S.A. § 19-2.5-203 (2023); U.C.A 1953 § 80–6–206 (2023); 705 ILL. COMP. STAT. 405/5-401.6 (2022); O.R.S. § 133.403 (2022); IND. ST. 31-30.5-1-6 (2023).

[248] Fair and Just Prosecution, *Youth Interrogation: Key Principles and Policy Recommendations* (2022); Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & POL'Y 395, 429-30 (2013); *see also* Leo, *supra* note 190, at 248-49 (describing research showing that juveniles "tend to be developmentally immature, impulsive, naively trusting of authority, submissive, eager to please adult figures, and thus more easily pressured, manipulated, and persuaded to make or agree to false statements without fully understanding the nature or gravity of an interrogation or the long-term consequences of their responses to police accusations").

[249] *E.g.*, Sheri Lynn Johnson et al., *Convictions of Innocent People with Intellectual Disability*, 82 ALB. L. REV. 1031, 1042-43 (2018-19); Samson J. Schatz, Note, *Interrogated with Intellectual Disabilities: The Risks of False Confessions*, 70 STAN. L. REV. 643, 670-71 (2018); Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002); *see also* Leo, *supra* note 190, at 248-49 (noting that intellectually-disabled individuals falsely confess "for a variety of reasons related to their low intelligence, short attention span, poor memory, and poor conceptual and communication skills, which cause them to become easily confused, highly suggestible and compliant, and easy to manipulate" and that people with mental illnesses "possess any number of psychiatric symptoms that make them more likely to agree with, suggest, or confabulate false and misleading information to detectives during interrogation, including faulty reality monitoring, distorted perceptions and beliefs, an inability to distinguish fact from fantasy, proneness to feelings of guilty, heightened anxiety, mood disturbances, and a lack of self-control") .

on people with autism or other intellectual disabilities.[250] Although the bill did not pass in this first attempt, it shows how advocates can push to expand protections from one vulnerable group to another.

Once deception is prohibited with respect to vulnerable groups for a period of time and the government is still able to solve crimes and successfully prosecute cases, arguments against restricting the relevant interrogation practices will be harder to make. Opponents of interrogation reform often claim that restrictions on the police will inhibit them from obtaining confessions, which, in turn, will stop them from being able to solve crime.[251] But if experience shows that police are able to solve crimes even when deceptive interrogation practices are prohibited, it should become clear that such prohibitions do not undermine public safety. The case for making something like a prohibition on deception general is then easy to make. After all, police deception creates a risk of false confessions in cases involving all suspects, not just when the suspects are juveniles or are intellectually disabled.[252]

Much as a reform protecting a specific vulnerable population can be a beachhead for extending that reform to the population as a whole, it can be a beachhead for mandating other protections for that specific vulnerable population. Thus, the same logic that directs that children might confess falsely when police resort to deception also indicates that children might confess falsely when police use certain kinds of psychological manipulation that do not constitute deception as such. Sensibly enough, California recently banned not just deception in the interrogation of juveniles but also the kinds of psychologically manipulative practices that are characteristic of the Reid Method when interrogating kids.[253] More broadly, a group of elected district attorneys from across the country has published a report that not only supports banning police deception in juvenile interrogations but also endorses other protections for juvenile suspects, including time limits for questioning and prohibitions on nighttime interrogations.[254]

D. Remedies

Reformers who want to change police interrogation practices need to pay attention to the remedies they prescribe for violations of interrogation rules. Without an effective remedy, a substantive rule might do little to change how interrogators behave. The point may seem obvious, but it needs to be emphasized, because too many state-level reforms have undermined themselves by not giving remedies the attention they need.

The recent wave of statutes prohibiting deception when police interrogate juveniles

[250] PENNSYLVANIA HOUSE BILL NO. 1999 (2021).

[251] *E.g.*, Miranda v. Arizona, 384 U.S. 436, 516 (1966) (Harlan, J., dissenting) (arguing that *Miranda* protections will "impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it").

[252] Gohara, *supra* note 186, at 791 (collecting studies).

[253] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024); *see also* Caitlyn Wigler, *Juvenile Due Process: Applying Contract Principles to Ensure Voluntary Criminal Confessions*, 168 U. PA. L. REV. 1425, 1453-54 (2020) (arguing for PEACE instead of Reid for juveniles).

[254] Fair and Just Prosecution, *Youth Interrogation: Key Principles and Policy Recommendations* App. A., pp. 11-12 (2022) (recommending a requirement that all interrogations of juveniles happen at times when the young person would normally be awake and alert and a requirement that juvenile interrogations be presumptively limited in time to no more than two hours in duration with a break of at least thirty minutes after the first hour).

furnishes good examples. In California and Utah, the state legislatures have prohibited the police from engaging in deceptive conduct while interrogating juveniles but not specified any remedy at all for violations of the rule.[255] Maybe the courts will interpret the statutes to mean that any confession procured in violation of the rules is inadmissible. But maybe not: as a general matter, courts have developed all sorts of remedial schemes for violations of criminal procedure rules. Maybe the courts will decide that such confessions are admissible if they have other indicia of reliability, or if there were exigent circumstances, or if they are used only to impeach a witness — as courts have done in other contexts. If so, the courts might also take permissive attitudes toward what counts as indicia of reliability or exigent circumstances. Maybe they will decide that such confessions are always admissible and that the juvenile suspect (or the suspect's parents) can sue for civil damages in a regime where such damages are rarely awarded. It is entirely unclear.

Of the state statutes that do specify remedies, too many specify remedies that are likely too weak to change police behavior. For example, Illinois provides that confessions made by juveniles during custodial interrogations at police stations are presumptively inadmissible if the police knowingly engage in deception.[256] But the statute goes on to say that the state can overcome the presumption of inadmissibility by proving that it is more likely than not that the confession was voluntarily given based on the totality of the circumstances despite use of the impermissible police tactics.[257] Under federal constitutional law, the state already has the burden of demonstrating by a preponderance of the evidence that any confession it wants to use is voluntary under the totality of the circumstances.[258] So it is unclear what additional protection the Illinois statute provides. It is good for the legislature to say that police should not deceive children, but not much is likely to change if deceptively procured confessions continue to be admitted in court.[259] Some other states have done better. In Oregon, for example, admitting a juvenile confession procured through a deceptive interrogation requires the state to prove by clear and convincing evidence that the statement was voluntary and not made in response to the false information used by the police to elicit the statement.[260] In Connecticut, the state has to show by clear and convincing evidence not only that the statement was voluntary and not induced by the improper police conduct but also that any deception or coercive tactics did not undermine the reliability of the statement and did not create a substantial risk of a false confession.[261]

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[255] WEST'S ANN. CAL. WELF. & INST. CODE § 625.7 (effective date July 1, 2024); U.C.A 1953 § 80–6–206 (2023).

[256] 705 ILL. COMP. STAT. 405/5-401.6 (2022).

[257] *Id.*; *see also* N.R.S. AB 193 § 1 (effective July 1, 2024) (requiring the state to show that the statement was ", reliable, and not induced by an act in violation of this section" by a preponderance of the evidence).

[258] Lego v. Twomey, 404 U.S. 477 (1972).

[259] Colorado's law is even weaker. C.R.S.A. § 19-2.5-203 (2023) (noting that the state can overcome the presumption of inadmissibility by showing by a preponderance of the evidence that (a) the confession was voluntary or (b) the police acted in good faith and reasonably believed the deceptive information was true at the time); *see also* IND. ST. 31-30.5-1-6 (2023) (noting that statements obtained from juveniles based on materially false statements about the evidence against them will be admissible if police had "a reasonable good faith belief that the information was true at the time it was communicated to the juvenile").

[260] O.R.S. § 133.403 (2022).

[261] C.G.S.A. P.S. 23-27, § 1 (2023); *see also* 11 DEL. C. § 2022 (2022) (providing for automatic exclusion of any statement obtained after police use deceptive tactics during the interrogation of a juvenile, but providing that the statement may be admitted if the state proves by a preponderance of the evidence that the statement "is reliable and was not induced by the use of deceptive tactics").

In any given case, it is possible that the weakness of the remedy that a statutory reform provides is not an oversight but a deliberate choice—one resulting from a lack of political will to enact a more consequential reform.[262] But inattention has likely played a role as well, because advocates and lawmakers too often pay attention to substantive prohibitions and neglect the practical remedy question.[263] If reformers want to change actual interrogation practices, they must pay as much attention to remedies as to substantive rules.[264]

E. Evidence Rules, Statutes, or Judicial Decisions

Finally, consider the choice of what form restrictions on interrogation practices should take. Such reforms can be embodied in statutes, rules of evidence, state constitutional provisions, or judicial decisions. In many cases, the choice will depend on the politics — legislative, judicial, and otherwise — of the relevant jurisdiction. In many states, legislatures have been willing to act (especially on behalf of juveniles) even when courts were not. But if a state has an unfriendly legislature and a friendly high court, a common law rule-like gloss on voluntariness doctrine (like Maryland's[265]) or an interpretation of the state constitution (like New Hampshire's[266]) might be the best path forward. Moreover, in many states it is easier to repeal a statute than it is to overturn a judicial decision. That makes judicial reform more attractive, if it seems possible to get a favorable ruling in the first place. And in jurisdictions where neither the legislature nor the judiciary is amenable to reform, a city council, local police department, or civilian oversight board might be willing to craft local regulations, or at least to experiment with a new approach. Ideally, reformers would adopt multi-pronged approaches to interrogation reform, pursuing different reforms simultaneously in different forums depending on what is most likely to be effective in each. But if local politics make reform possible in more than one forum, there can be reasons for choosing one rather than another. Notably, statutes and evidentiary rules often provide clearer rules to guide and change police behavior,[267] whereas the judiciary may gravitate toward totality-of-the-

[262] K'reisa Cox, *Curtailing Coercion of Children: Reforming Custodial Interrogation of Juveniles*, 49 J. Legis. 393, 406-14 (2023) (discussing how many juvenile interrogation bills' remedies were watered down during the political process).

[263] *Id.* (noting that California and Utah removed rebuttable presumptions of inadmissibility in favor of "total ban[s]" on deception). The failure to put a strong exclusionary remedy or civil penalty in the bills to support a total ban seems to have been an oversight.

[264] The remedy problem exists with respect to judicial decisions as well as statutory enactments. In many cases, litigants have persuaded courts to deem interrogation tactics problematic only to have the court then say that use of the problematic tactic is just one factor to be considered in an overall totality-of-the-circumstances voluntariness inquiry. Marcus, *supra* note 99, at 611-27 (collecting cases where judges have chastised police or noted the impropriety of their interrogation techniques while still admitting the resulting confessions as voluntary). In practice, this means that judges typically admonish police for bad behavior but provide no exclusionary remedy. Not surprisingly, this has not resulted in much change in police practices in the interrogation room.

[265] *Supra* notes 154-156 and accompanying text.

[266] *Supra* note 159 and accompanying text.

[267] For example, Iowa's use of the rules of evidence to exclude confessions obtained by force, threats, promises, or other improper inducements avoids the totality-of-the-circumstances approach and causal requirements. State v. Madsen, 813 N.W.2d 714, 725-26 (Iowa 2012); *see also* State v. Mullin, 85 N.W.2d 598, 600 (Iowa 1957) ("[A] confession can never be received in evidence where the prisoner has been influenced by any threat or promise, for the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner, and therefore

circumstances inquiries and other flabby standards.

CONCLUSION

Too often, police interrogations produce false confessions and cause other harms as well, all of which compromise the legitimacy of the legal system. The U.S. Supreme Court's decision to abandon the project of regulating interrogations is therefore deeply unfortunate. But there are ways forward. Good alternatives to the Reid Method are available, and states can choose to improve their practices even when not compelled to do so by federal courts. If reformers think carefully about which reforms will be most consequential and strategically about how best to pursue those reforms given their local political cultures, police interrogation practices can be significantly improved despite U.S. Supreme Court neglect.

excludes the declaration if any degree of influence by force or other inducement has admittedly been exerted upon him.").