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This special issue addresses several matters related to self-incrimination. Joshua Tepfer, Laura Nirider, and Steven Drizin begin the issue in an article examining custodial interrogations of and confessions by juveniles. The article reviews the law and social science evidence, and it offers guidance for judges in juvenile confession cases.

Bruce Frumkin addresses the same issue of confessing to a crime the defendant, whether juvenile or adult, possibly did not commit. His focus is expert testimony proffered to shed light on the voluntariness and validity of the confession.

Kirk Heilbrun, Sanjay Shah, Elizabeth Foster, Michael Keesler, and Stephanie Brooks look at a different intersection of experts and defendants, in the context of juvenile transfer cases. They examine the law and social science related to assessments of the juvenile’s empathy for the victim, acceptance of responsibility for the alleged offense, and the issue of compelled disclosure by the juvenile or a restricted assessment by the expert.

Thomas Grisso uses a developmental lens to frame his commentary on the three, primary articles and provides insights for law and policy.

All four articles are exemplary in their weaving together law and social science to inform legal policy and practice. These articles, taken together, point to some of the challenges facing judges as they try to make just decisions in complex circumstances, and they also provide guidance for judges.

I am grateful to these authors for their contributions, and I also want to acknowledge the extensive editorial assistance I received on this issue from Andrea Avila, University of Nebraska-Lincoln Law/Psychology Program, and Justine Greve, Kansas Court of Appeals.—Alan Tomkins
Being AJA president has put me in a sort of catbird seat attending a number of events that provide the opportunity to interact with thoughtful judges and court leaders and to gain perspective on the importance and value of AJA’s mission of Making Better Judges.

I was appointed to the Massachusetts District Court in 1986 at a time when then-Chief Justice Samuel E. Zoll and the court’s administrative director, Jerome S. Berg (an early graduate of what became the National Center for State Courts’ Institute of Court Management), were moving forward with an ambitious strategy to transform the district courts from perceived places of rough justice to a more credibly fair and impartial institution where there is the sort of due process everyone can believe in. Zoll and Berg were convinced of the transformative nature of professional development and established a judicial education committee, which I chaired from 1992 to 2007.

I was fortunate enough to be introduced to Patricia Murrell in time to learn some important lessons about the relationship of leadership and judicial education. Pat’s most enduring legacy is that she provided a generation of judicial education leaders with valuable tools we could use, and teach others to use, to make better judges and transform our courts.

Judicial educators and organizations like AJA become powerful transforming agents because we hold true and are firm in the belief that judges are knowledgeable, skillful, ethical, caring, and honorable professionals and that engagement in new learning is motivating, forward thinking, energizing, and brings value to the judiciary. That is why AJA is critical to the success of judges and how it happens that AJA directly benefits the peace, tranquility, and prosperity of our civil society. This is AJA’s story and we need to tell it in a way that is clear and convincing.

It was more than serendipity when I attended a judicial excellence dinner in Massachusetts where my colleague Judith Fabricant was honored and said:

“We tend to think of excellence as the quality of a single judge—something each of us tries to achieve as we sit alone in our courtrooms, or writing in our lobbies. All of that is true.

“But I think judicial excellence is also a communal endeavor—something we strive for together, and something we achieve, if we do, together. I would suggest that judicial excellence depends on our joint efforts—we cannot achieve it individually. If our court system as a whole provides quality justice to the public, then we all succeed in serving our mission, and we all can be justifiably proud. If not, if we have pockets of excellence but a pattern of inconsistency, then the public does not receive what it expects and is due, and that reflects on all of us.

“We achieve excellence together, I suggest, by sharing with each other: by sharing whatever expertise we have developed; by giving our time to offer educational programs; by mentoring new colleagues; by consulting with each other on difficult problems; by offering support when any of us is under attack, and by working together to improve the administration of our court.”

Now then, if leadership is the capacity to discern and develop resources, human or material, and if leadership involves organizing and ordering those resources to resolve a problem, realize a vision, or achieve a goal, leadership has to start with who we are and then move to what we do. And since education is the most powerful tool in the leader’s tool box, and since AJA offers a wide variety of education opportunities and publications, Prof. Murrell, Judge Fabricant, and AJA are excellent leaders. Right! Of course right.

1. Dr. Patricia Murrell recently retired from the faculty at the University of Memphis, where in 1988 she helped found the Leadership Institute in Judicial Education and the Institute for Faculty Excellence in Judicial Education. She has made a tremendous difference in the field of judicial-branch education and in the lives of countless judges, judicial educators, and colleagues. Many of us who were influenced greatly by attending Pat’s leadership programs were asked to write tributes on the occasion of Pat’s retirement. Some of the thoughts in this message come from that tribute.
Scrutinizing Confessions in a New Era of Juvenile Jurisprudence

Joshua A. Tepfer, Laura H. Nirider, & Steven A. Drizin

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

During this same time period, and utilizing a similar rationale, the high Court applied this “kids are different” approach to its Fifth Amendment jurisprudence in the constitutional consideration of custodial interrogations. In J.D.B. v. North Carolina, the U.S. Supreme Court held that law enforcement must consider a suspect’s age when weighing whether he is in custody and entitled to Miranda warnings. The decision marked a reversal of sorts, as only seven years earlier the Court had rejected the proposition that clearly established U.S. Supreme Court law required a consideration of age in the analysis was not “objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.” J.D.B., 131 S. Ct. at 2405. After J.D.B., of course, the failure of a court to make this consideration would be clear error.

POLICE INTERROGATIONS, FALSE CONFESSIONS, AND THE NEW JUVENILE JURISPRUDENCE

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

This article, tailored for a judicial audience, is taken from one published in the March 2014 issue of The Champion magazine, a publication of the National Association of Criminal Defense Lawyers.

Footnotes
5. Id. at 2399–40, 2408.
6. Yarborough v. Alvarado, 541 U.S. 652 (2004). The majority in J.D.B. explained that its decision was not constrained by the Alvarado decision, in that Alvarado simply held that failing to consider age in the analysis was not “objectively unreasonable under the deferential standard of review set forth by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214.” J.D.B., 131 S. Ct. at 2405. After J.D.B., of course, the failure of a court to make this consideration would be clear error.
7. J.D.B., 131 S. Ct. at 2398.
9. Id. at 2413 (Alito, J., dissenting).
15. Gault, 387 U.S. at 52.
Interrogation and Confessions. Now in its fifth edition, Criminal Interrogation and Confessions promotes the Reid Technique—which to this day markets itself as “the most widely used approach to question subjects in the world.”18

The Reid Technique teaches a nine-step interrogation method that is used to extract confessions—a process that it cautions should only be used when the police are confident the suspect is responsible for the crime being investigated.19 At the outset, interrogators are taught to isolate the suspect from family or support. The interview then begins with a rapport-building period, during which investigators will often allow the suspect to provide a narrative of his activities on the day of the crime. After a short break, the investigator is trained to re-enter the interrogation room and directly accuse the suspect of the crime. During this period, the officer is taught to assert unwavering confidence in the suspect’s guilt and discount any claims of innocence asserted.20 The goal of this portion of the interrogation is to make the suspect feel hopelessly trapped. When this is accomplished, confession is offered as a “carrot” to the suspect—in other words, as a way out of the suspect’s predicament. Through a process scholars call minimization, interrogators indicate that the benefits of confessing outweigh the costs of maintaining innocence.21 They may ask a murder suspect, for example, whether the murder was the unplanned result of a moment of anger or an “accident”—which are, they intimate, different from a premeditated murder (although it’s never said how the two differ). Ultimately, if an interrogator successfully obtains an admission of responsibility from the suspect, he is taught to elicit a narrative and detailed version of the criminal act.22

While no doubt effective in eliciting true confessions, the U.S. Supreme Court has recognized that these interrogation tactics can be so psychologically powerful as to elicit false confessions at a “frighteningly” high rate.23 The false confession stems from law enforcement’s mischaracterization of an innocent person as guilty and its decision to use these powerful tactics on that factually innocent person.24 The “inherently compelling pressures” described above can then convince even an innocent person to admit responsibility.25 Ultimately, the resulting false confession can often sound convincing and detailed, particularly if crime scene facts are made known to the suspect through media reports, local gossip, or, most often, the inadvertent, suggestive questioning of the interrogator.26 From national reports like CBS’s 60 Minutes to countless local newspaper articles, stories of false confessions—and resulting wrongful convictions—have become ubiquitous in the news cycle.

Interrogators employ these and [other] psychologically coercive tactics on even the youngest of suspects. While officers may generally recognize that juveniles are more vulnerable or suggestible,28 in practice, many officers simply do not alter their methods when interrogating a young suspect.29 Concrete examples abound. In the last few months alone, Tennessee law enforcement officers were caught on tape threatening several teenage suspects with the death penalty—or a lifetime of prison rape—during interrogations.30 The appropriateness of these tactics is highly debatable for any suspect, but it is particularly difficult to stomach their use when the person being questioned is only a teenager.

Due to juveniles’ “vulnerability” or susceptibility to . . . outside pressures,”31 their “difficulty in weighing long-term consequences,”32 and their “limited understandings of the criminal justice system and the roles of the institutional actors within it,”33 the J.D.B. court acknowledged what the research supports: children and teenagers are particularly vulnerable during custodial interrogations.34 And this country’s high

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

“[I]nterrogation tactics can be so psychologically powerful as to elicit false confessions at a ‘frighteningly’ high rate.”
Court is not alone in this conclusion: international treaties such as Article 37 of the Convention on the Rights of the Child—and a “significant number of [other] relevant international law materials”—demand that all minors receive legal assistance before interrogation while in police custody because of an increased risk of coerced or false confession. Given this backdrop, it is essential that judges carefully scrutinize all aspects of a juvenile’s confession. The sections below outline some of the particular issues for consideration.

**PRETRIAL SUPPRESSION ISSUES**

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

A confession must be suppressed where it is obtained in violation of Miranda v. Arizona or is otherwise involuntary. For a statement to be admitted into evidence in compliance with Miranda, a suspect must knowingly, intelligently, and voluntarily waive his rights to remain silent and to counsel when subjected to a custodial interrogation. The voluntariness of a confession is evaluated using a totality of the circumstances test that considers both the individual vulnerabilities of the suspect and law enforcement’s tactics in eliciting the confession. Each of these questions must be analyzed more rigorously when the confessor is a juvenile.

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

Sometimes, a law enforcement officer will elicit a confession from a juvenile without ever giving Miranda warnings at all, reasoning that the warnings were not required because the child was either not in custody or was not interrogated. The custody inquiry asks courts to consider whether an objective person would have felt free to leave under the circumstances. This custody question was at the forefront of J.D.B. In that case, a 13-year-old seventh grader suspected of burglary was in social studies class when an investigator arrived at the school and informed administrators—including the assistant principal and a uniformed school resource officer—that he needed to question the boy. The resource officer then went into the social studies classroom and removed the student, taking him into a closed-door room where he was met by the assistant principal and the investigator. After some small talk, the investigator, with aid from the assistant principal, questioned the boy, leading him to confess to the burglaries. No Miranda warnings were ever read.

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

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

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

The question of what constitutes an “interrogation” of a juvenile suspect also deserves new attention after J.D.B. An interrogation occurs when police should know that their words or actions are likely to elicit an incriminating response.76 Therefore, even if a suspect in custody, any Miranda-less confession he makes is admissible if it was not made in response to an interrogation. Where an officer knows he is dealing with a juvenile, the question becomes whether words or actions that would not constitute an interrogation of an adult suspect might when the person being questioned is a juvenile.

This very question is at issue in the Michigan case of People v. White.78 Seventeen-year-old armed-robbery suspect Kadeem White was taken into custody and given his Miranda warnings. He asserted his right to remain silent. Shortly thereafter, the officer said: “Okay. The only thing I can tell you is this, and I’m not asking you any questions, I’m just telling you. I hope that the gun is in a place where nobody can get a hold of it and nobody else can get hurt by it, okay. All right.” Kadeem responded with a brief admission that the State successfully sought to introduce into evidence.49

While a five-judge panel of the Michigan Supreme Court affirmed the admissibility of the statement, it did so over the vigorous dissent of two justices. Citing J.D.B. and other authority, Justice Kelly argued that the investigator “should have recognized that defendant’s age made him especially susceptible to subtle compulsive efforts and that such conduct would likely elicit an incriminating response.”79 Justice Cavanaugh explained that Kadeem’s youth and inexperience increased the likelihood that he would feel compelled to respect the officer and perceive the officer’s statements as requiring a response.51

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

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

The question of whether a suspect knowingly, intelligently, and voluntarily waives his Miranda rights is a separate inquiry that is governed by a “totality of the circumstances” test that has long included consideration of the suspect’s age.52 But after J.D.B.‘s express concern about the unique susceptibility of youth during custodial interrogation, judges would be well served to pay careful attention to the methods by which police obtain waivers from juvenile suspects.

Three decades ago, in a renowned study, psychologist Thomas Grisso concluded that the majority of juveniles under 15 simply did not understand at least one of their Miranda rights even when properly read to them.53 Even with the increased repetition of Miranda warnings on television shows and in pop culture, more recent studies have replicated these findings.54 And so-called “juvenile Miranda warnings,” which law enforcement often claims are simpler, more kid-friendly warnings that ensure a proper waiver, generally use language that still requires at least an eighth-grade level of comprehension, far above the intelligence level of many young confessors.55

Consider the case of an 11-year-old Florida murder suspect, who was administered Miranda warnings slowly and carefully before his questioning and admission. Three experts, including one retained by the State, all independently concluded that despite these precautions, this boy simply could not understand his rights.56 Or consider the case of a 12-year-old honor roll student in Arkansas, who initially signed a Miranda waiver and made a confession even though he later made clear that he had no idea what the word “waiver” meant. When the law enforcement officer misinformed the boy of the word’s meaning, his confession was suppressed and the murder charges eventually dropped.57 Even older juveniles, such as almost-17-year-old Nga Truong, have given confessions that were later suppressed despite properly read Miranda warnings when officers downplayed the rights’ significance.58

The lessons of these cases and the Grisso study is that for certain juveniles, judges should consider starting with a pre-
“[J]udges should take to heart a true ‘totality of the circumstances’ approach when it comes to juvenile waivers.”

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

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

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

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

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

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

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

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

61. Hart v. A.G., 323 F.3d 884 (11th Cir. 2010).


63. Berghuis v. Thompkins, 560 U.S. 370 (2010) (applying North Carolina v. Butler, 441 U.S. 369 (1979), which is also a case where the suspect was an adult).

64. Doody v. Ryan, 649 F.3d 986 (9th Cir. 2011).


Critics Corner

Judges should thus inquire as to what special precautions officers took when questioning a youth. And it is not adequate if the only special precautions taken amount to securing the presence of a “youth officer” or obtaining parental consent. Courts have recognized that a police officer who is forced to alter roles and suddenly act in the best interest of a child as a “youth officer” may be no more help than a “potted plant.” At the same time, scholars have persuasively argued that the presence of even a well-meaning parent can actually add to the coercive nature of the interrogation for a child.

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

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

Reasonable Doubt Despite a Confession

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

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

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

68. Critics Corner, supra note 28.
69. Hardaway v. Young, 302 F.3d 757, 765 (7th Cir. 2002).
71. INT’L ASSN’N OF CHIEFS OF POLICE, supra note 59.
72. Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that telling a suspect that another suspect had already confessed and implicated him in the crime does not alone render a confession involuntary).
73. INBAU ET AL., supra note 19, at 255.
76. In a law review article, the authors provide a detailed explanation as to how practitioners can examine and apply the fit and contamination analysis described below. See Laura H. Nirider, Joshua A. Tepfer, & Steven A. Drizin, Combating Contamination in Confession Cases, 79 U. CHI. L. REV. 837, 849–61 (2012). The charts and other suggested tactics outlined in this article could also be utilized by judges and their clerks when tasked with evaluating a confession’s reliability.
analyzing the confession for contamination—or the disclosure of crime scene facts to the suspect before the confession. A confession can be contaminated by neighborhood gossip, or, in more high-profile cases, through media reports. A judge should consider (and allow into evidence) what information was in the public domain; if the confession only contains details already known to the general public, the confession may prove little. The same holds true for accurate details that could be explained through innocent knowledge: a young confessor who was also the first person to come upon a dead body and report it to police, for example, would be able to describe the deceased’s clothes or body position even if he did not commit the murder.

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

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

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

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

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

CONCLUSION

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

78. See Nirider et al., supra note 76 at 849–61.
80. INT’L ASSN’N OF CHIEFS OF POLICE, supra note 59.
81. See Milke v. Ryan, 711 F.3d 998 (9th Cir. 2013).
82. See, e.g., 725 ILL. COMP. STAT. ANN. 5/103-2.1(b), (d), (f) (West 2013) (explaining that there is a presumption of inadmissibility of a confession to certain offenses that was the result of an unrecorded interrogation that can only be overcome by a finding by the preponderance of the evidence that the statement was both voluntary and reliable).
83. INBAU ET AL., supra note 19, at 355.
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Expert Testimony in Juvenile and Adult Alleged False-Confession Cases

I. Bruce Frumkin

Judges of course know that in the 1966 case of Miranda v. Arizona, the United States Supreme Court ruled that a confession cannot be admitted into evidence unless a waiver of the Miranda rights (the rights to remain silent, to avoid self-incrimination, to obtain legal counsel before and during police questioning, and to obtain free legal counsel if indigent) is made “knowingly, intelligently, and voluntarily,” and that the 1967 ruling in the case In re Gault extended these protections to juveniles. It is well known, too, that there is a substantial body of case law and commentary addressing factors courts need to consider in evaluating whether a juvenile or adult’s waiver of Miranda rights was valid.

What is less well known by judges is to how assess the confession. Experts are often relied on to help understand the psychological factors relevant to a Miranda waiver. In particular, experts provide guidance into the voluntariness and the validity of a confession.

Expert testimony is generally of two types. The first involves an explanation of the psychologically coercive nature of either interrogations in general or the interrogation of the specific individual. Such testimony explains how interrogations can lead to false or unreliable statements. Oftentimes the testimony involves a discussion of relevant research on the “science” of false confessions. In this type of expert testimony, the defendant is not typically evaluated because that expert is not a forensic clinician, someone who can assess the particular defendant’s confession rather than only talk about confessions in general.

A second type of testimony is more defendant focused, addressing the specific interrogation and how it can produce a false confession. The expert—ordinarily a clinical psychologist or other type of mental health professional—not only reviews the interrogation itself but also conducts a psychological evaluation on the defendant to assess whether there are particular psychological characteristics that place him or her at greater risk than others of providing unreliable or false information in light of the interrogation tactics used. As is the case when determining the validity of other aspects of a Miranda waiver, whether a confession is deemed true or false is assessed by the trier of fact and decided on the “totality of circumstances” standard.

The increasing use of mental health testimony in alleged false-confession cases is likely due in part to more scientific research in the area, more extensive attorney training, anecdotal data from highly publicized cases (e.g., Central Park Jogger case), as well as data collected from the Innocence Project. The Innocence Project estimates that individuals had falsely confessed or provided incriminating information in approximately 25% of cases. Another study from Gross and Shaffer examined a larger sample of exonerations in a joint project from the University of Michigan Law School and the Center of Wrongful Convictions at Northwestern University School of Law. Out of 873 exonerees, 15% had confessed to their alleged crime (25% if only looking at homicide crimes).

Confessions and self-incriminating statements produced during police interrogations carry great weight with the trier of fact and become crucial components in the State proving beyond a reasonable doubt that the defendant committed the offense. Leo reports that 80% of suspects waive their rights, while Wrightsman and Kassin detail how confessions are produced in 50% of criminal cases and are challenged in court in 20% of cases. Although this research is now nearly 20 years old, it is this author’s personal experience that in cases in which a defendant goes to trial, the confessions are challenged at an even greater rate today.

Footnotes
5. Id. at http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php.
In 2004, Drizen and Leo\(^9\) analyzed 125 cases of proven false confessions in the United States between 1971 and 2002. A total of 63% of false confessors were under the age of 25, and 32% of this sample were juveniles. Tepfer, Nirider, and Tricario\(^10\) analyzed 103 exonerees throughout the country who were implicated in crimes before their 20th birthdays. All but four of the cases involved murder and/or a sex offense. Analysis showed 31% of these youth falsely confessed. This data also strongly suggested that younger children are more likely to falsely confess than older children in that 69% of 11–14-year-olds falsely confessed, compared to 38% of 15-year-olds, 19% of 16-year-olds, and 43% of 17-year-olds. Youths aged 18 and 19 falsely confessed at a rate of 15%. It is not known why there was a spike in the 17-year-old group. These data are consistent with the Gross and Shaffer study that showed of those exonerated juveniles 11-14 years of age, 74% falsely confessed, and of those 15-17 years of age, 34% falsely confessed.\(^11\)

Although there have been many documented false confessions in recent years, it is impossible to determine the rate of false confessions. This is because the police usually keep no tally of the number of suspects interrogated annually, and, of those departments that do, no data are kept concerning percentages that result in a true confession, no confession, or a false confession. A suspect, despite law enforcement claims to the contrary, may even deny having confessed in the first place. In addition, a true confession may also later be retracted by the defendant. As this author has written previously, a confession is often not true or false in a dichotomous fashion.\(^12\) There are varying degrees of truth regarding a particular confession. Even an essentially true confession can be challenged in court if an aspect of that confession erroneously places the defendant in a more incriminating light than what actually transpired.

It would seem that the percentage of juveniles who falsely confess, particularly in cases that are tried in juvenile court, is an underestimation of those percentages described in the exoneration studies. Youths who are tried in juvenile court likely confess at substantially higher rates than adults because these false confessions will remain undiscovered. Particularly if the charges are not serious and/or the penalties not severe, cases are less likely to be appealed. Furthermore, it is unlikely that a juvenile wrongly convicted in juvenile court will ever have his conviction reversed based on DNA testing, which is unlikely to have been performed. This is consistent with the relatively low 3% false-confession rate among both juvenile and adult exonerees who were charged with nonviolent crimes as reported in the Gross and Shaffer study.\(^13\)

Defense attorneys have used mental health professionals to suppress incriminating statements at the pretrial level when the voluntariness of a confession is questioned. In Crane v. Kentucky,\(^14\) the Supreme Court held that a confession’s reliability may also be challenged at trial, even if the confession had been initially deemed voluntary. Mental health experts have routinely been used in these cases as well.

The use of expert testimony in alleged false- or coerced-confession cases, both by defense attorneys and usually by prosecutors as rebuttal, are fraught with a number of pitfalls or difficulties in the evaluative techniques used and the testimony proffered. One difficulty is the expert being unaware of interrogative techniques that are usually used and the reasons why an individual may falsely confess.

**INTERROGATION PROCEDURES**

In a disputed confession case, an assessment needs to consider the specific methodology of the interrogation in question as well as the types of interrogation procedures used by law enforcement in general. The Reid Technique\(^15\) is the most widely used method in the United States to extract confessions from those individuals law enforcement believes are guilty of the offense. This technique is a nine-step process to obtain a confession. Simply described, it is one in which police confront the suspect with the knowledge that they know he or she was the person who committed the crime. Police then present two hypotheses to the suspect as to why the crime was committed. One of the hypotheses helps the suspect justify or excuse the crime, perhaps by affixing moral blame on an accomplice or the victim, or by emphasizing the suspect’s impaired mental state. The other hypothesis is that the suspect is some type of evil person or monster who intended to cause the harm. The suspect’s denials of guilt are handled, objections are overcome, and the police prevent the suspect from emotionally withdrawing from the situation at hand. The police give the suspect a chance to choose what he or she thinks would be the more acceptable or morally blameless explanation for the crime. Eventually a confession is obtained.

Drizen and Leo\(^16\) describe the pathways to a false confession. It begins with what they term as the Misclassification Error, in which law enforcement uses behavioral analysis to make what they believe to be a determination whether a sus-

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11. Gross & Shaffer, supra note 6, at 60, Table 17.
“A number of different models have been developed to explain why people falsely confess.”

Law enforcement is no more accurate (56%) than 67 (Saul M. PEACE was whereby a suspect confession are not trademarks of the Reid technique. This at times can be explained in light of the N


17. A number of different models have been developed to explain why people falsely confess. These models have been given different names and combined and/or separated into various permutations. The following is not meant to imply these are the only reasons why someone may falsely confess. Rather, it is to provide five descriptive examples to help explain why some people may confess to crimes they did not commit.

Kassin and Wrightsman identify three types of false confessions:22 (1) voluntary false confession, whereby a suspect confesses willingly because of a need for notoriety, need to protect a friend or relative, or a pathological need to be punished; (2) coerced-compliant false confession, in which the suspect confesses to avoid or avoid the stressful interrogation process or to achieve some immediate goal, such as less punishment (implied by the police) or a reward for cooperation (e.g., phone call to a wife, cigarette break, etc.); and (3) coerced-internalized false confession, in which a suspect, after being subjected to intense pressure and suggestion by police, begins to internalize or believe falsely that he or she committed the crime. Often individuals do not trust their own memories because they may have been high on drugs or were in a psychotic state around the time period of the offense. McCann identifies another category, the coerced-reactive false confession, in which the suspect confesses due to threats or pressure from an outside entity, such as a fellow gang member or an abusive spouse.23 A final category is the coerced-substituted false confession, in which a suspect has committed a finite number of similar offenses (e.g., stealing cars, burglaries) within a short, specific time period, yet confesses to a greater number of like offenses than actually committed because he or she does not remember the specifics of each and every offense.24 This at times can be explained in light of the police questioning the suspect about many unsolved cases, some of which were not committed by the suspect but some of which were.

RISK FACTORS FOR FALSE CONFESSIONS

Research has shown a number of risk factors associated with those who are susceptible to interrogative influence and, by extension, are at greater risk for giving a false confession (or a confession that, while essentially true, places the defendant in a more responsible or aggravating situation than warranted). Research summarized by Gudjonsson has shown that low intelligence, anxiety, memory impairment, sleep deprivation, and certain personality characteristics (including compliance,
acquiescence, poor assertiveness, and suggestibility) place an individual at risk of succumbing to police demands.\textsuperscript{25}

Juveniles are particularly vulnerable to interrogation tactics. They are more apt to make decisions based on immediate gain rather than looking at long-term consequences of a behavior. Law enforcement is allowed to use deception as part of the interrogation, such as lying about evidence and misrepresenting the nature or seriousness of the charges. Although police officers are not allowed to make direct promises regarding leniency, they are allowed to imply that if the individual cooperates, he or she will get a lesser sentence. As Drizen and Leo discuss, the expectation that giving a confession will result in release is a common explanation as to why juveniles end up confessing.

The prefrontal cortex is one of the last areas of the brain to mature. It is responsible for cognition, abstract reasoning, decision making, and the modulation of appropriate behavior in social situations. It integrates information from all the senses to direct thoughts and behaviors toward a specific goal.\textsuperscript{26} Juveniles are less able to reasonably evaluate consequences of their behaviors compared to adults. The prefrontal cortex needs to be fully developed to make the types of complex decisions necessary during an interrogation, such as whether to waive one’s Miranda rights and/or give a confession—true, partially true, or false.

Kassin and Kiechel\textsuperscript{27} demonstrated in the laboratory the false-confession phenomenon by convincing college undergraduates they accidently caused a computer to crash by hitting the Alt key on a keyboard during a computer-based task. These false-confession studies were replicated by a number of researchers, including Redlich and Goodman.\textsuperscript{28} They demonstrated that age was correlated with signing a false statement with concomitant negative consequences (i.e., spending an additional ten hours retyping the material). There are problems with extrapolating this research to real-life interrogations. First, in the criminal and juvenile contexts, punishment is more serious than ten hours of data entry. Second, research participants were convinced they accidently, rather than purposely, committed the infraction. As Redlich and Goodman point out, the results of these studies replicate those involving the suggestibility of child witnesses in that: (a) juveniles are more suggestible than adults, (b) young children, particularly those under the age of 14, understand legal concepts less well than adults,\textsuperscript{29} and (c) leading and suggestive repetitive interviews lead to inaccurate and false reports. Juveniles are substantially more vulnerable than adults to police influence and in giving false confessions.

The Reid interrogation method and its various offshoots are highly effective and serve the purpose of getting truly guilty individuals to confess. Unfortunately, a major problem with these techniques is that there are certain vulnerable individuals who may confess not because they committed the offense, but because they are overly susceptible to giving in to these interrogation methods. It is a proper role for a mental health professional to describe the specific psychological characteristics of a defendant, how those characteristics interact and are influenced during the interrogation, and how they may influence the validity or reliability of statements given to law enforcement compared to the average person.

In alleged false- or coerced-confession cases, a mental health professional needs to conduct a comprehensive clinical and psychosocial interview with a special focus on obtaining the defendant’s version of what transpired during the interrogation. In addition, psychological tests are administered to more objectively assess those psychological vulnerabilities which have been known to be associated with a higher risk of succumbing to police demands and/or providing false statements. Such evaluations usually include intelligence, personality, and malingering tests.

One important test is the Gudjonsson Suggestibility Scale\textsuperscript{30} (GSS) to specifically measure interrogative suggestibility. Interrogative suggestibility has been defined as the extent to which an individual comes to accept messages or information communicated during formal questioning as true.\textsuperscript{31} Although not administered as a test of memory, the GSS is presented to the defendant as such. The test involves the reading of a complex narrative story containing 40 bits of factual information. After the story is read, the subject is asked to recall everything he or she remembers about the story. Generally, after a 50-minute delay, the defendant is again asked to recall the story’s details. Then 20 standardized questions are asked about the story, 15 of which are designed to be leading or misleading. A Yield 1 score is subsequently obtained. This is the number of times the subject yields to the leading questions. Regardless of performance, the individual is firmly told he or she has made a number of errors and that it is necessary to go over each question again and to be “more accurate.” Then the 20 questions are repeated. A second yield score, Yield 2, is obtained. A third measure, Shift, is obtained, which is the number of times an

\textsuperscript{29} For a more thorough overview, see Thomas Grisso, Forensic Evaluations of Juveniles (2nd ed. 2013).
\textsuperscript{31} Id. See also Frumkin, supra note 12.
individual shifts from one response (right or wrong) to a different response. A Total Suggestibility Score is also calculated, which is the sum of Yield 1 and Shift. The results of this test are directly relevant to how suggestible an individual is to police interrogations—that is, how frequently the defendant gives in to leading questions and shifts to different responses under pressure. The GSS provides one piece of data which may be relevant to addressing issues pertaining to the validity or voluntariness of a confession. Results from the GSS become relevant only if law enforcement provides misleading information to the suspect or pressures that suspect into changing his or her response. Research has shown that Yield 1 is influenced by cognitive variables, while Yield 2 and Shift are more impacted by personality variables.

Gudjonsson summarizes the research regarding suggestibility and juveniles. Children who are 12 years of age and older, although no more likely to give in to leading questions than adults, are more affected by negative feedback or interrogative pressure to change their responses. Younger children are more suggestible than older children and tend to be not only more susceptible to negative feedback and pressure but also more likely to yield to leading questions, in comparison with both older juveniles and adults. This has implications as to how juveniles are interrogated.

Gudjonsson also developed the Gudjonsson Compliance Scale (GCS) as a 20-item self-report measure to complement the GSS. Compliance differs from suggestibility because the individual does not have to privately accept the premise presented by police officers as true. On the test, the subject responds True or False to each of 20 items (e.g., I give in easily when I am pressured). There is a companion version of the test to administer to those who know the subject well. The problem with the GCS is that there is no way to assess if the respondent is presenting him or herself accurately or is purposefully or unconsciously minimizing or exaggerating compliance. This is not a problem for the GSS because it is relatively immune from malingering. For example, in a study by Baxter and Bain, an experimental group was told before administering the test that their suggestibility was to be measured. This group was told to feign suggestibility. Only the Yield 1 score on the test was affected.

Psychological testimony should serve the purpose of educating the jury about risk factors within the individual and the interrogation process itself that could increase the likelihood of a false or involuntary confession. It is not proper for the expert to opine whether the confession was coerced, involuntary, false, likely false, or even true. Testimony related to psychological characteristics of a defendant in interaction with interrogative tactics assists in determining the weight to be given to the voluntariness or validity of a confession. This type of testimony has been accepted in many jurisdictions throughout the country. When testimony has not been allowed, it is generally because the mental health expert had planned on addressing the ultimate legal issue as to whether the defendant gave a false or involuntary confession or because relevance for the particular case was not established.

A defendant might be highly suggestible, the police might have been overly coercive in their interrogation methods (it is for the court to draw the line as to whether the police crossed a legal threshold in their methods of extracting a Miranda waiver or confession), or an interactive combination of the two. Yet, a suggestible defendant may have committed an offense and nonetheless retracted a true confession. Expert testimony is designed to provide specialized knowledge to the trier of fact so a determination can be made as to how much weight to give to the confession or the effects of the interrogation on the defendant, not to provide an opinion on the validity of the confession itself. Testimony can also be provided as to the effects of particular interrogation techniques on people in general and on the defendant in particular and how those procedures can produce false confessions.

It is problematic when the mental health professional places undue and inappropriate weight on the GSS and other test scores (such as IQ) to opine that the defendant was likely to have given a false confession. Rather, it is preferable to discuss how such psychological factors increase the likelihood of a false confession compared to the average person. Testimony when worded in relative terms (e.g., the person's psychological functioning compared to others, which heightens the risk of a false confession) or in explanatory terms (e.g., if this person did not do the crime, why he or she may have said they did so), provides useful information to the trier of fact in deciding how much weight to give to self-incriminating statements. There is a greater chance this testimony would be admitted because it is specialized knowledge that assists the trier of fact and does not invade the province of the jury. Many clinicians blur the boundaries between their roles and that of the trier of fact. When this happens, such testimony is oftentimes not allowed at trial.

Some argue that the GSS should only be used in cases in which a suspect erroneously believed he or she committed the crime: a coerced-internalized false-confession scenario. Further, some suggest GSS is not relevant for the type of confession in which a suspect confesses due to pressure from police or from others because these suspects know whether or not they committed the crime, and their “autobiographical memory” was not impaired. This is a fallacy because the Shift reported by Gudjonsson in a United States sample.

33. Id.
34. See also Frumkin et al., supra note 32 (replicating the findings

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score is much less influenced by memory processes than the Yield score. There is also a correlation between compliance and suggestibility. Finally, as with all test data, the results must be interpreted by the totality of the circumstances for a particular defendant in the context of a specific case and its facts.

RECENT RULINGS ON ADMISSIBILITY OF FALSE-CONFESSION, EXPERT TESTIMONY

Case law has been mixed regarding the admissibility of expert testimony on false confessions in general or the use of the GSS in particular. Several courts support the position that such expert evidence both in juvenile and adult cases adds critical evidence to the jury's determination of whether a confession might be false. In a seminal case, nearly two decades ago, the Seventh Circuit in United States v. Hall found that although a trial court may exclude “expert testimony that may in some way overlap with matters within the jury’s experience,” the court's determination that the sociological expert’s “testimony would add nothing to what the jury would know from common experience” was an insufficient basis to prevent the jury from considering valid social science evidence. Two other federal circuits have issued decisions similar to Hall, as have the Federal District Court of New Mexico and nine states: California, Colorado, Florida, Indiana, Kentucky, Nebraska, New York, North Carolina, and Utah. However, courts have not unequivocally allowed expert testimony, with the majority of exclusions based on the helpfulness of the expert testimony to the trier of fact. In People v. Bennet, for example, a trial court refused to allow expert testimony (by this author) concerning a defendant’s suggestibility because the trial court decided (and the Illinois Appellate Court upheld) that interrogative suggestibility “was not beyond the common knowledge of lay persons and would not aid the trier of fact in reaching its conclusions.” Furthermore, the defendant's suggestibility was not tied to a diagnosed mental illness. Similarly, 12 other states—Alaska, Arkansas, Georgia, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, and New Jersey—three of the federal circuits, the Federal District Court in Massachusetts, and the U.S. Court of Appeals for the Armed Forces have rejected expert testimony as unreliable or usurping the function of the jury. Nevertheless, as suggested elsewhere in this issue, the vast majority of commentators who have examined the issue believe trial courts “should be open to hearing from an expert on police interrogations of juveniles as they consider the police tactics used and the ultimate voluntariness of the confession, and the same is true for adults.”

As might be anticipated in light of the overall mixed receptivity by courts to expert evidence in general regarding confes-

38. United States v. Hall, 93 F.3d 1337 (7th Cir. 1996).
39. Id. at 1344.
40. Id. at 1341.
41. Id. at 1344–45.
45. People v. Filippo, 159 P.3d 100 (Colo. 2007).
48. Terry v. Commonwealth, 332 S.W.3d 56 (Ky. 2010).
54. 376 Ill. App. at 371, 876 N.E.2d at 272.
55. 376 Ill. App. at 573, 876 N.E.2d at 273 (contrasting this case from another suggestibility case where “expert testimony...was relevant because ‘juries are unlikely to know that social scientists and psychologists have identified a personality disorder that will cause individuals to make false confessions,” quoting United States v. Hall, 93 F.3d 1337, 1345 (7th Cir. 1996)).
68. United States v. Dixon, 261 Fed. Appx. 800 (5th Cir. 2008); United States v. Antone, 412 Fed. Appx. 10 (9th Cir. 2011); United States v. Benally, 541 F.3d 990, 995 (10th Cir. 2008). See also Belyea, 159 Fed. Appx. at 529–30 (trial court should have made a specific determination regarding whether the proffered expert evidence was within common knowledge of jurors).
"[A] reoccurring issue courts have focused on is the fit of the expert testimony to the case facts."

sions, courts’ allowances/exclusions of testimony based on the GSS have been similarly mixed. In Misskelley v. State,72 for example, the Supreme Court of Arkansas upheld the trial court’s ruling to disallow a clinical psychologist to testify based on the GSS.73 The psychologist was allowed to testify that the juvenile defendant was “quite suggestible,” however.74 Thus, the trial court did allow the psychologist and another expert, a sociologist, to offer their expert opinions about the voluntariness of the defendant’s confession.75 Similarly, in Commonwealth v. Soares,76 the Appeals Court of Massachusetts upheld a motion judge’s decision not to accord any weight to a psychologist’s testimony regarding the defendant’s confession as part of the defendant’s motion to suppress his statements to police.77 The psychologist appeared unaware of the purpose of the GSS, stating that the GSS results would not apply to a custodial situation if “the interrogation was devoid of physical force” or shouting.78

The GSS was judged to meet Daubert79 and Frye80 standards of admissibility in United States v. Raposo81 and People v. Nelson.82 In Raposo, the Federal District Court rejected the government’s request to exclude expert testimony on false confessions and the GSS83 because it was deemed relevant to the factual question of both the falsity and the voluntariness of the confession.84 In Nelson, the Illinois Supreme Court noted the trial court found the GSS was generally accepted in the scientific community, thus meeting the Frye test for admissibility.85

Finally, a reoccurring issue courts have focused on is the fit of the expert testimony to the case facts. In United States v. Deuman,86 a false-confession expert’s testimony was ruled inadmissible. The problem was not that the expert’s theories were problematic as a general matter; rather, they were deemed “unreliable and irrelevant” to the specific facts at issue in the case.87 Coupled with the risk that the expert’s testimony of the possibility of a coerced confession would be especially persuasive to the jury,88 the proffered testimony was excluded. In its analysis, the court distinguished the proffered testimony in this case from cases where the expert testimony is intended to assist the fact finder in understanding how the defendant’s psychology makes him or her especially susceptible to making a false confession.89 Similar to Deuman, an Oregon trial court disallowed GSS testimony not because the judge felt that the GSS was a poor test but because the court believed “it’s a comment on the evidence, it’s a comment on the voluntariness.”90 However, the Oregon Court of Appeals disagreed with the trial court and allowed the testimony, stating, “It would have been probative, relevant, and helpful to the trier of fact.”91

RECOMMENDATIONS

Law enforcement officers in the United States use the Reid technique or similar interrogation practices to get people whom they believe are guilty of a crime to confess. It is an effective method to get guilty people to confess to crimes, in that half of criminal cases involve a confession.92 Whether it is fair to use deceit and psychologically coercive procedures to extract confessions is both a societal and moral issue. Public safety concerns as well as punishment for those who do not uphold the law generally trump, in many peoples’ minds, concerns for how confessions are obtained, as long as the interrogation does not involve physical coercion or extreme deprivation.

The problem is that there are certain vulnerable people who may confess to a crime they did not commit because of these very interrogation tactics designed to get guilty people to con-
such vulnerabilities include low intelligence, anxiety, memory problems, acquiescence, suggestibility, compliance, and sleep deprivation. Juveniles and young adults are particularly susceptible to false confessions. Although the PEACE model for investigative interviews seems to rarely produce false confessions, it is not yet known whether the guilty confess when the PEACE model is used at the same rate as when the Reid technique is used.

Mental health testimony about an individual’s vulnerability to interrogation tactics that might produce a false or partially false confession can provide the trier of fact with important information to assist in deciding how much weight should be given to the confession. The testimony must consist of specialized knowledge and be relevant to how the confession was ultimately obtained.

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There are a number of legal decisions in which the court must decide whether juveniles can be rehabilitated. Such decisions include juvenile adjudication/placement, waiver, and reverse waiver. The criterion used by courts to consider rehabilitation amenability is typically phrased in a way similar to that described under Pennsylvania state law. In deciding whether a child may be decertified (reverse waived from criminal to juvenile court), the court can consider whether the child is amenable to treatment, supervision, or rehabilitation as a juvenile. The court may consider the following in determining treatment, supervision, or rehabilitation amenability: (a) age, (b) mental capacity, (c) maturity, (d) degree of criminal sophistication, (e) previous records, (f) nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate, (g) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction, (h) probation or institutional reports, (i) any other relevant factors, and (j) whether there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

Empathy for the victims of the defendant's offenses, and acceptance of responsibility for such offenses, may be considered by mental health and justice professionals working with post-adjudicated youth. But rendering an expert opinion that describes the youth's capacity for empathy or acceptance of responsibility, when that opinion is based in part on questions concerning the alleged offense, places the evaluating expert in an awkward position. To what extent can denial of culpability be used to infer limited empathy and acceptance of responsibility? How does the Fifth Amendment right against self-incrimination factor into this consideration?

Some courts have addressed these questions, at least in part. In a recent Pennsylvania decertification case, the defendant, facing potential adjudication in criminal court, was 11 years old when charged with shooting and killing his stepmother and her unborn child. The trial court denied a defense motion to decertify the case to the juvenile division, and defense counsel appealed.

In the appeal, defense contended that the trial court committed an error of law in applying a provision of the decertification statute in a manner that infringed upon the defendant's Fifth Amendment right against self-incrimination. In particular, the psychiatrist retained by the Commonwealth testified that the youth avoided talking about the evidence presented at the preliminary hearing and the factual allegations. The psychiatrist added that such avoidance of taking responsibility complicated rehabilitation, as taking responsibility is a necessary precursor to effective rehabilitation. Thus, he concluded, Jordan Brown could not be rehabilitated.

The trial court decided that the defendant could not be rehabilitated by the age of 21, citing the expert's reasoning that the defendant would not take responsibility for his actions—and thus concluding that rehabilitation was unlikely to be successful. On appeal, however, the appellate court held that the Fifth Amendment applies in decertification proceedings. The appellate court vacated the trial court's order, remanding the case for a new decertification hearing. In the subsequent trial court hearing, without the evidence offered initially by the Commonwealth's expert, the court concluded that Jordan Brown should be decertified.

This Pennsylvania case offers some precedent for legal proceedings in which a juvenile defendant's rehabilitation amenability is at issue. This article will address two questions: (1) To what extent does the Fifth Amendment provide protection from compelled testimony at transfer hearings? and (2) What does the relevant behavioral science evidence suggest concerning the appraisal of a defendant's capacity for empathy and acceptance of responsibility—and to what extent is such an appraisal limited when a mental health expert cannot question the defendant about his/her role in the alleged offense?

Footnotes
3. Id.
5. § 6355(a)(4)(iii).
FIFTH AMENDMENT PROTECTION OF JUVENILES FROM COMPELLED TESTIMONY AT TRANSFER HEARINGS

In 1967, the United States Supreme Court established that the Fifth Amendment is broadly applicable to juvenile transfer hearings. Since that time, some states have more specifically addressed the application of the Fifth Amendment in juvenile transfer hearings with respect to compelled testimony in such hearings. This section will describe jurisdictions in which (a) compelled, self-incriminating testimony is disallowed; (b) such testimony is permitted; and (c) relevant law does not clearly support either (a) or (b). Whenever possible, we focus particularly on the use of such testimony to the question of amenability to rehabilitation rather than other questions (e.g., risk of future offending) that often arise in transfer proceedings.

JURISDICTIONS DISALLOWING COMPELLED SELF-INCriminating TESTIMONY

Alaska. In R.H. v. State, the court compelled the juvenile to submit to a psychiatric evaluation and substance abuse screening. Therein, the court sought to avoid the risk of self-incrimination by allowing the defendant's attorney to be present, to screen the report first, and to limit the use of the report beyond the waiver hearing. During the stage of the transfer hearing devoted to determining the juvenile's treatment amenability, the State presented testimony from three experts who had examined the defendant “(t)o establish the probable cause of R.H.'s delinquent behavior and the adequacy of existing facilities to provide treatment to R.H. . . .” However, the juvenile did not introduce psychiatric evidence on his own behalf.

On appeal, the defendant claimed infringement on his right to be free from self-incrimination. The State argued that R.H. was protected because “the court restricted the use of the evaluations to the determination of R.H.'s amenability to treatment and precluded their use in subsequent phases of his case . . .” In its ruling, the court noted that “the stakes involved in such proceedings are high” and that the transfer hearing is an adversarial process. The court concluded that this compelled evaluation helped the state to incriminate the defendant, citing Estelle v. Smith as authority that “the fifth amendment privilege is not confined to directly inculpatory statements or to any particular type of proceeding.” The court explained that the prosecution's report helped the court decide to prosecute R.H. as an adult—and, as a result, he faced much more serious punishment. However, the court also noted that had the juvenile presented psychiatric evidence on his own behalf, this may constitute a waiver of the Fifth Amendment privilege. Ultimately, the court held that “the erroneously admitted evidence did not have an appreciable effect on the court's ultimate decision to waive jurisdiction,” vacating the original order and remanding the case for reconsideration.

Arizona. In one Arizona case in which a juvenile was charged with first-degree murder, the state requested a mental health evaluation. The defense opposed this request because any incriminating statements could be used in both the transfer hearing and in any subsequent proceedings (including on the issue of guilt). The court ordered the examination but stated that “the decision whether to submit to [the evaluation] was up to the appellant. No limitation as ordered on the use of the results of the examination.” Additionally, the court made clear that it intended to use the juvenile's decision regarding participation in the evaluation when determining his treatment amenability. The appellate court found the juvenile's refusal formed a foundation for the lower court's determination of non-amenability, adding that this issue could be avoided by “placing appropriate limitations on the use of appellant's statements in the court's order granting the request for a mental examination.” However, by not limiting the use of the evaluation and then “penalizing the appellant for refusing to cooperate,” the process violated the defendant's Fifth Amendment rights.

California. In Ramona R. v. Superior Court, the California Supreme Court reviewed a case in which a juvenile defendant, charged with murder, had been held by the trial court as “unfit to be tried in juvenile court” due to the “gravity of her offense” and low treatment amenability. After granting appeal, the Supreme Court of California considered whether section 707(c) of the California Welfare and Institutions Code was unconstitutional. The issue was that it appeared to compel a minor to submit to a psychiatric evaluation and substance abuse screen the report first, and to limit the use of the report beyond the waiver hearing. During the stage of the transfer hearing devoted to determining the juvenile's treatment amenability, the State presented testimony from three experts who had examined the defendant “(t)o establish the probable cause of R.H.'s delinquent behavior and the adequacy of existing facilities to provide treatment to R.H. . . .” However, the juvenile did not introduce psychiatric evidence on his own behalf.

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8. Id. at 207.
9. Id.at 208.
10. Id. at 210.
11. Id.at 209 (citing Estelle v. Smith, 451 U.S. 454 (1981)).
12. Id. at 210.
13. Id. at 211–12.
14. Id. at 213.
15. In re Juvenile Action No.J-77027-1, 679 P.2d 92 (Ariz. Ct. App. 1984) (wherein the juvenile was charged with first-degree murder of his father's girlfriend and the state petitioned to transfer him to

criminal court).
16. Id. at 94.
17. Id.
18. Id. at 96 (citing Estelle v. Smith, 451 U.S. 454, 468 (1981)).
19. Id.
20. Id. at 93–96.
22. Id. at 790–91.
23. Id. at 790.
24. Id.
25. Id. at 795.
In this case, the magistrate ordered the trial court to rule whether the juvenile's declining to participate in the court-ordered evaluation of the juvenile when it requested the case be transferred to criminal court. The court found that the immunity required by California law was violated, the question of whether it is unconstitutional to place the burden of proving fitness for juvenile court treatment on the minor was not addressed.

**Colorado.** In *People in Interest of A.D.G.*, the Colorado Court of Appeals reviewed a case in which a juvenile had been charged with manslaughter and use of a weapon. In most of the cases reviewed in this article, transfer appeals are filed by the defense after a juvenile has been transferred to criminal court. In this case, however, the lower court denied the prosecution's motion to transfer the case to criminal court, retaining the defendant in juvenile court. Thus, it was the prosecution's appeal that was addressed in *People in Interest of A.D.G.*

In the original case, the prosecution sought a psychological evaluation of the juvenile when it requested the case be transferred to criminal court. The juvenile court “concluded that it could not order a psychological examination over the juvenile's objection” and that a juvenile could not be “compelled to submit to an evaluation because of his Fifth Amendment right against self-incrimination.” On review, the Colorado Court of Appeals agreed, holding that a juvenile cannot be compelled to participate in an evaluation under these circumstances.

Concluding that the trial court was correct in its decision not to compel the evaluation, the appellate court reasoned that the Fifth Amendment clearly applies to transfer hearings because (1) they are “plainly adverse” to the juvenile, and (2) the juvenile risks loss of rehabilitation and is instead subject to adult penalties. Finally, the court held that the juvenile's refusal to be examined by a psychologist could not be considered as part of a transfer decision because a “defendant may not be penalized for the exercise of his Fifth Amendment right to remain silent.”

*People in Interest of A.D.G.*, however, was later distinguished by *People in Interest of C.Y.* In this case, the magistrate ordered a psychosexual evaluation as part of a risk management plan after C.Y. was found incompetent to stand trial and could not be restored. The court held that the magistrate's order did not violate C.Y.'s right to be free from compelled self-incrimination, reasoning that the case did not involve a transfer hearing but instead concerned “the 'neutral' issue of competency.” Further, the court concluded that any statements made during the evaluation would be obtained during treatment related to incompetency, and the juvenile would receive statutory immunity.

**Kansas.** In *State v. Davis*, the Supreme Court of Kansas considered whether consent to a psychological evaluation pursuant to a transfer hearing was objectionable when *Miranda* rights had not been read beforehand. In the original trial, the juvenile defendant had been convicted of first-degree felony murder and related offenses. Therein, the prosecution had not tried to admit self-incriminating statements at trial—rather, such statements were used only as part of the evaluation. The trial court insisted that it would not consider any statements about the alleged offense that may establish guilt but would rather use other information in the report. Upon conviction, the juvenile defendant appealed on a number of grounds, including the circumstances surrounding the court-ordered psychological evaluation.

On appeal, the Supreme Court of Kansas held that a juvenile's declining to participate in the court-ordered evaluation may not be admitted as evidence against the juvenile. Under these circumstances, in Kansas, there appears to be two levels of protection against compelled self-incriminating statements: they are not admissible on the issue of guilt, and the defendant may decline participation in a court-ordered evaluation on Fifth Amendment grounds without risking adverse consequences.

**Massachusetts.** In *Commonwealth v. Wayne W.*, the Supreme Judicial Court of Massachusetts reviewed a case wherein two juvenile defendants were transferred to criminal court. The
defendants appealed on the basis of the Juvenile Court's exclusion of their expert psychiatric witnesses, who would have testified regarding their “amenability to rehabilitation within the juvenile justice system.”51 The judge excluded the experts, however, because the juveniles had refused to participate in an evaluation with the prosecution's psychiatric expert.52 They asserted that being evaluated by the prosecution's expert would violate their right against self-incrimination.53

Although the Supreme Judicial Court of Massachusetts held that Fifth Amendment protection applies in transfer hearings and related proceedings, it was careful to limit the scope of that protection.54 The court stated that when defendants “voluntarily choose to offer expert psychiatric evidence, [they] can be ordered to participate in an examination by a Commonwealth expert.”55 The court also noted that “a defendant who speaks on his own behalf thereby gives up his privilege of silence and may be compelled to respond to questions posed by the State on matters reasonably related to the subject matter of his own testimony.”56 Thus, the court upheld the lower court's transfer decision but explained that its ruling could have been different had the juveniles not sought to introduce their own expert psychiatric testimony.57

Minnesota. The Minnesota appellate court has held that, for purposes of certification, a “juvenile is presumed guilty of the alleged offenses.”58 For presumptive-certification proceedings, the State must demonstrate that the juvenile “was 16 or 17 years old at the time of the offense” and that “the alleged offense carries a presumptive prison sentence.”59 At that point, the juvenile may rebut the certification by demonstrating that the juvenile system would better serve public safety if the case were not transferred. In the case In re Welfare of S.J.T., defense contend that (1) "Minnesota certification procedure violates the Fifth Amendment by requiring the juvenile to rebut a presumption of certification," and (2) “the Fifth Amendment precludes the district court from compelling the juvenile to submit certain information to the state.”60 The appellant had retained his own expert but refused to meet with the state's expert.61 Although he met with a probation officer conducting the certification study and agreed to provide access to medical records, the juvenile then revoked this release of information.62

On review, the appellate court found that although certification proceedings are “not a dispositional procedure,” the Fifth Amendment “applies to all proceedings.”63 The court also held that although the presumptive certification proceedings offer

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51. Id. at 1324, 1329.
52. Id. at 1329.
53. Id.
54. Id. at 1332.
55. Id. at 1329.
57. Id.
59. Id.
60. Id. at 345.
61. Id. at 346.
62. Id.
63. Id. at 347.
64. Id. at 348.
65. Id.
66. Id. at 351.
67. Id. at 349 (citing Minn. R. Juv. Delinq. P 18.04(5)).
69. Id. at 458.
70. Id. at 459.
71. Id.
72. Id.
73. Id.
74. Id. at 460.
court found that because he could not establish “a nexus between his substance abuse or his emotional and behavioral issues and the park robbery, as he denies any involvement in the robbery,” the court certified him to criminal court.

In the consolidated appeal, the defense argued that requiring juveniles to admit guilt “to rebut the presumption of adult certification” while “failing to prohibit the admission of their incriminating statement in subsequent guilt-determination proceedings” violated their Fifth Amendment rights. The appellate court agreed, holding that the Fifth Amendment privilege against self-incrimination “applies to inculpatory statements made in juvenile proceedings.”

The court reasoned that requiring juveniles to “establish a direct nexus” between their problems and the criminal conduct forces them to provide inculpatory evidence to rebut the certification presumption. Because there was no prohibition against using these statements in subsequent proceedings, the appellate court held that “Nevada's presumption certification provisions . . . violate the Fifth Amendment and therefore are unconstitutional.”

New Mexico. In a recent New Mexico case, a juvenile (Christopher P.) was charged with two counts of first-degree murder and conspiracy to commit first-degree murder. At a second (amenability) stage of the transfer hearing, the children's court judge ordered the defendant to submit to a mental health evaluation to help determine his rehabilitation amenability. Although the juvenile's counsel objected, the court “ordered the child to discuss the alleged delinquent acts with the psychologist conducting the evaluation” and also ordered that the information about the alleged offenses could be used only for the amenability portion of the transfer hearing. The youth was transferred to criminal court and appealed on numerous grounds, including Fifth Amendment infringement “when the children's court ordered him to discuss the alleged crimes during the psychological evaluation.”

On review, the Supreme Court of New Mexico reversed the transfer, overriding the trial and appellate courts. The court found that Fifth Amendment rights of the child were violated when he was made to discuss the charges, though the court also held that ordering a mental health evaluation was not beyond the authority of the trial court.

Oklahoma. In J.T.P. v. State, a juvenile was arrested on murder charges and a petition was filed for transfer to criminal court. After his arrest, the juvenile was questioned, with his father present for some of the questioning. However, it could not be determined whether the father knew his son was in custody or whether the juvenile ever attempted to assert or waive his constitutional rights. The juvenile was subsequently transferred to Arkansas for a polygraph test; the father provided permission, and the juvenile was informed of his Miranda rights. The polygraph was administered by a police captain, who was alone in the room with the juvenile, and the juvenile confessed to his part in the murder after the polygraph was administered.

On appeal, the defense contended that this confession was in violation of his Fifth Amendment rights. The appellate court agreed and further held that the juvenile court must exclude certification evidence involving “statements of a child, obtained in violation of constitutional or statutory rights” that are inadmissible in delinquency or criminal proceedings. In the case at hand, the court determined that the statement resulting from the interrogation should not be admitted. Thereafter, the court saw insufficient evidence that the juvenile could not be rehabilitated (although those two were not necessarily linked).

JURISDICTIONS ALLOWING COMPELLED SELF-INCRIMINATING TESTIMONY

Alabama. The 14-year-old juvenile in Lippold v. State was charged with murder, but because of his age, the circuit court heard a motion for transfer to juvenile court. This motion was unsuccessful, and the defendant was tried and convicted in adult criminal court. In the transfer hearing, the prosecution presented a psychologist's testimony regarding a court-ordered evaluation. Although the psychologist provided notification to the juvenile, he was not sure whether the defendant fully understood the potential implications. There was no counselor or parent present, and the defendant described facts relating to the offense. Based largely on the evaluation, the defendant was tried in the circuit court as an adult.

On review of this decision, the Court of Criminal Appeals of Alabama observed that “[h]ad the State of Alabama endeavored to use the statement made to Dr. Bitgood as substantive evi-
The court also noted, in the hearing, the testimony was provided from multiple sources, including his paternal grandmother, a DHS supervisor, a social worker, a teacher from juvenile detention, a Youth Services Center facility director, a child and adolescent psychiatrist (who testified about the defendant’s prior hospitalizations), a Division of Youth Services case manager, and an Arkansas Public Defender Commission investigator (who had met with the juvenile). The prosecution also proffered testimony from a state police special agent and a mental health professional who had evaluated the defendant for competence to stand trial.

Appealing the decision to try the juvenile defendant in criminal court, defense argued that the defendant’s Fifth Amendment right against self-incrimination was violated because he “was forced to incriminate himself at a transfer hearing.” The prosecution contended—and the Supreme Court of Arkansas agreed—that the statute did not compel the juvenile to testify and that he did not actually “testify” at the hearing. By this line of reasoning, therefore, the Fifth Amendment does not seem to prevent Arkansas prosecution from presenting inculpatory evaluation evidence at a transfer hearing.

**Louisiana.** In *State in the Interest of Bruno*, the juvenile defendant was charged with second-degree murder, and the State sought transfer to criminal court. Pursuant to that motion, the prosecution sought to have the juvenile submit to a “psychiatric and psychological examination . . . for the purpose of evaluating the child’s ‘amenability’ to the juvenile system.” Although defense objected, the trial court held that the applicable state statute did “not prevent a judge from ordering a child in a juvenile transfer proceeding to undergo a psychological evaluation.” As the court explained, a juvenile transfer requires “a full-blown hearing at which the child has a right to an attorney, and which involves the presentation of evidence by both the child and the state.”

On appeal, the Supreme Court of Louisiana found that a juvenile undergoing such an evaluation is entitled to Fifth Amendment protections. In this case, though, the court explained that the evaluation was not used to determine guilt but rather to simply address the question of amenability to treatment. As a result, “it does not violate the child’s right not to be compelled to give evidence against himself.” The court also noted, however, that “no statements, either inculpatory or exculpatory, made to the psychologist or psychiatrist during the examination, would be admissible at the trial on the merits of the child’s guilt or innocence.”

**Michigan.** In 1993, the Supreme Court of Michigan granted an appeal after a juvenile, charged with possession and delivery of a substance containing cocaine and related charges, was waived for trial in adult criminal court. In the hearing, the defendant offered character testimony and his own psychologist. However, the juvenile was waived following testimony from the probate court psychologist and the arresting police officers. The juvenile appealed this transfer and the appellate court reversed, holding that “the constitutional rights applicable in criminal proceedings extended to . . . the dispositional phase of a waiver hearing.” The Michigan Supreme Court reversed the appellate court, however, holding that the constitutional rights did not extend to the dispositional phase of a waiver hearing because the best interests of the juveniles and the public are taken under consideration.

**Texas.** In *K.W.M. v. State*, the 14th District Court of Civil Appeals of Texas reviewed a case wherein a juvenile, charged with aggravated robbery at age 16, appealed his discretionary transfer to criminal court. In the state’s petition for transfer, the prosecution submitted a written confession and diagnostic report/evaluation as evidence. Although the defense objected to these documents’ admission, the court overruled the objection, and the case was ultimately transferred to the adult system.

The juvenile appealed, arguing, *inter alia*, that the psychological report and evaluation—neither requested nor consented to by him or his attorney—should not have been admitted.
The court stated that the Texas Code requires that “prior to the hearing, the juvenile court shall order and obtain a complete diagnostic study, social evaluation, and full investigation of the child, his circumstances, and the circumstances of the alleged offense.” Defense countered that this violates the Fifth Amendment right against self-incrimination. The Court of Civil Appeals, however, described the transfer hearing as “not an adjudication of the child's guilt or innocence” and concluded, therefore, that Fifth Amendment rights did not apply. Interestingly, the court also noted that the code “does not require the court to order the child to discuss his or her involvement in the alleged crime with the examiner but merely the circumstances of the alleged offense.” Therefore, a juvenile is not coerced to make self-incriminating statements, and his “Fifth Amendment rights are in no way jeopardized” (even if they did apply).

Washington. The juvenile in In re Hegney was charged with felony murder, tried as an adult, and convicted. He appealed the decision, but the Court of Appeals of Washington, Division 2, affirmed the decision. The defense filed a personal restraint petition, arguing that Washington's juvenile declination procedure (i.e., a court declining to transfer a juvenile presumptively tried as an adult to juvenile court) violated his Fifth Amendment rights. The defense contended that the procedure created a circumstance in which “evidence was admitted at the decline hearing, and used against Mr. Hegney, that later the same court determined to be inadmissible.” The appellate court held, however, that a “decline hearing is not prosecutorial in nature,” and guilt is not in question. They further stated that “(t)he procedure itself cannot lead to a juvenile's loss of liberty” and that “even improperly obtained statements by the police are admissible at a decline hearing, even though they would not be admissible at a substantive trial.”

JURISDICTIONS NEITHER ALLOWING NOR DISALLOWING COMPELLED SELF-INCriminating TESTimony

West Virginia. In State v George Anthony W, two juveniles were taken into custody as suspects in a murder, were questioned separately, and confessed. At the transfer hearing, the juveniles moved to suppress the confessions and evidence, but the court denied this motion and granted the state's petition to transfer the case to criminal court. The juveniles appealed, arguing that the confession had been obtained in violation of West Virginia law because of the “failure of the authorities to present them to a judge or other appropriate party for a detention hearing prior to obtaining the statements.” The relevant statute indicates that “[a] child in custody must immediately be taken before a referee or judge of the circuit court and in no event shall a delay exceed the next succeeding judicial day. . . .” In an earlier case, the court established that delaying that appearance to obtain a confession violates this code.

The appellate court, applying this “Ellsworth J.R. test,” found that the appellants were held in custody “without being presented before a judicial officer.” The court further concluded that the delay's purpose was to obtain a confession and accordingly held the confessions to be invalid. Because the transfer decision was based on the invalid confessions, the transfer decision was reversed and remanded by the appellate court. This decision neither clearly affirmed nor rejected the role of the Fifth Amendment in juvenile transfer hearings; although the trial court's decision was reversed because of its use of an “invalid confession,” the confession was invalid under the Ellsworth J.R. timeliness test, not on Fifth Amendment grounds.

EMPATHY, ACCEPTANCE OF RESPONSIBILITY, REHABILITATION AMENABILITY, AND REOFFENSE RISK

Based on the above review, it appears that courts are divided on whether the Fifth Amendment protects juveniles from compelled confession during pre-adjudicative transfer hearings. Some courts apply those confessions, or lack thereof, to inform the question of whether the youth displays empathy for others (including potential victims) and accepts responsibility for what he or she has (allegedly) done. Courts favoring such compelled confession suggest that the confession indicates empathy and acceptance of responsibility. Those courts further assume that juveniles who, by admission or confession, display empathy and accept responsibility for the alleged offense will be more amenable to rehabilitation efforts in the juvenile system.

But how accurate is this suggestion? What does the relevant behavioral science research indicate about the relationship between empathy for victims, acceptance of responsibility, and juvenile offending? More specifically, how do relevant evidence and contemporary best practices suggest that risk and needs be assessed in juveniles? Finally, and most specifically, what are the roles of empathy and acceptance of responsibility in assessing reoffense risk and risk-relevant needs—and does such assessment require a discussion of the alleged offense? We focus on these questions in this section.

To facilitate this discussion, we will consider empathy and acceptance of responsibility (AR) in the broader context of the leading contemporary model describing risk and needs: the

128. Id. (citing Tex. Fam. Code Ann. § 54.02(d) (West 2013)).
129. Id. at 661–62.
130. Id. at 662.
131. Id.
132. Id.
134. Id. at 1210.
135. Id. at 1203.
136. Id.
137. Id. (citing State v. Piche, 442 P.2d 632, 635–36 (Wash. 1968)).
138. Id. (citing In re Harbert, 538 P.2d 1212 (Wash. 1975)).
140. Id.
141. Id. at 367.
142. See W. VA. CODE § 49-5-8(d).
144. George Anthony W. at 368.
145. Id. at 376.
Risk-Need-Responsivity (RNR) model. While empathy/AR can influence the decision about the presence of some risk factors related to juvenile offending, there are other factors that describe needs and affect risk as well.

**EMPIRICAL RESEARCH ON EMPATHY, ACCEPTANCE OF RESPONSIBILITY, AND JUVENILE OFFENDING**

Normative development of empathy into adulthood has been shown to relate to prosocial behavior. Conversely, research has established a negative relationship between (1) empathy and (2) aggression and antisocial behavior. One meta-analysis found the empathetic/sympathetic index as measured by self-report questionnaires to be negatively related to aggression and antisocial behavior. It should be noted, however, that only one study analyzed in this meta-analysis specifically involved criminal offending. Cohen and Strayer found empathy was significantly lower in conduct-disordered youth relative to a comparison group when participants viewed videotaped vignettes. In addition, lower levels of empathy have been related to an increased risk for engaging in interpersonal violence and aggression. Exhibiting deficits in empathy may fit in the broader context of developmentally delayed moral judgment. A meta-analysis of 50 studies showed a lower stage of moral judgment for juvenile delinquents. In addition, lower levels of empathy in juveniles have been associated with a lack of “moral judgment maturity” and self-serving cognitive distortions.

Empathy has commonly been divided into affective and cognitive components. The affective component is the concordant emotional response (i.e., sharing of emotional state) when observing another's emotional response. For example, affective empathy would include the capacity to feel sad when observing someone else who is obviously sad. The cognitive component involves understanding another's emotional state. Cognitive empathy, therefore, involves the capacity to understand that another person who is obviously sad is feeling that way—and to accurately label this emotion as sadness. In a meta-analysis of studies regarding cognitive and affective empathy of offending, low cognitive empathy was strongly related to offending, while low affective empathy was more weakly related. In the same study, the negative relationship between empathy and offending was stronger with violent offenders compared with sexual offenders, meaning that violent offenders showed more empathy deficits than did sexual offenders. Also, the relationship between empathy and offending was stronger in adolescents than in adults in this meta-analysis. Notably, however, there was no relationship between empathy and offending after taking into account socio-economic status and intelligence. In other words, lower levels of empathy were more likely to be seen in individuals of lower SES and more limited intellectual functioning—and it might be that it was lower SES and lower intelligence rather than empathy that were causally related to offending.

Additionally, in a group of juvenile sexual offenders, emotional empathy was found to have a negative relationship with non-sexual offenses. Within this same group of juveniles, researchers concluded emotional empathy plays a role and influences the relationship between offending and other factors. For example, emotional empathy was found to moderate the relationship between hostile masculinity and offending. It seems clear empathy and offending cannot be viewed in isolation but rather considered within the broader context of potentially related factors.

Acceptance of responsibility has not been empirically studied in the same depth as empathy regarding its relationship to aggression and offending. There is some research, however, on how apologizing may relate to a reduction in future offending.

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147. See, e.g., C. Daniel Batson et al., *Distress and Empathy: Two Qualitatively Distinct Vicarious Emotions with Different Motivational Consequences*, 55 J. PERSONALITY 19, 30 (1987) (table showing a higher proportion of high-empathy versus low-empathy subjects who offered help when escape was easy or difficult).


149. Miller & Eisenberg, supra note 148, at 338–41.

150. Id. at 332 (referencing Christiane M. Hoppe & Robert D. Singer, *Overcontrolled Hostility, Empathy, and Egocentric Balance in Violent and Nonviolent Psychiatric Offenders*, 39 PSYCHOL. REP. 1303, 1305–08 (1976)).


152. E.g., Ari Kaukianinen et al., *The Relationship Between Social Intelligence, Empathy, and Three Types of Aggression*, 25 AGGRESSIVE BEHAV. 81, 87 (1999); Deborah R. Richardson et al., *Empathy as a Cognitive Inhibitor of Interpersonal Aggression*, 20 AGGRESSIVE BEHAV. 275, 278 (1994); Miller & Eisenberg, supra note 148, at 328–34.


156. Id.


Empathy was not directly a component of responsibility and apologies is discussed in the following section. In one study conducted in New Zealand, offending youths who did not apologize were found to be three times more likely to recidivate than those who did. An apology may contain a genuine element of remorse or regret, but it is certainly a formal expression of such. Another study examined the relationship between acceptance of responsibility and engagement with the treatment process. The investigators found that youths who accepted responsibility for their behavior and thought there was a good reason for their placement scored high on such scales as readiness to change and engagement in treatment. In contrast, those who shifted responsibility to others and felt there was not a good reason for the placement scored lowest on the measures.

Lack of remorse (e.g., feeling bad or guilty) can be viewed as a component of “callous/unemotional (CU) traits,” which helps to explain the lack of both empathy and acceptance of responsibility. CU traits help distinguish adolescents with a more consistent pattern of antisocial and delinquent behavior. The presence of CU traits in juveniles has been related to past violent offenses in a group of juvenile offenders. Those who exhibit CU traits have been shown to have a greater focus on the positive aspects of aggression while having less focus on negative aspects of such aggression. Empathy was not directly related to the propensity for violent behavior in adolescents.

SUPPORT FOR INFLUENCE OF EMPATHY AND ACCEPTANCE OF RESPONSIBILITY IN PRACTICE LITERATURE

There is some research support, discussed previously, for the relationship between empathy and aggression. The presence of empathy has been viewed as a protective factor, while the lack of empathy has been regarded as a risk factor. Some have suggested that empathy inhibits aggression, as more empathic individuals have the ability to view situations from different perspectives. Aggressors may vicariously experience another's distressed reaction, which could make it less likely that they would continue to engage in aggressive behavior. Thus, one perspective is that increasing victim empathy decreases self-serving cognitive distortions (e.g., putting one's own needs over that of others and the community), which also may have the effect of inhibiting aggression and other antisocial behavior.

While normative development is associated with an increase in empathy during adolescence, aggressive delinquents have been found to have delayed or arrested development of empathy. One study found a moderate positive relationship between being able to recognize fearful expressions in others and the ability to empathize with emotional experiences. On the other hand, it has recently been suggested that empathy may be understood best in relation to one's experiences and circumstances. That is, whereas empathy deficits may be part of the personality structure in a subgroup of chronic, violent adolescent offenders, other juvenile offenders “may be prone, as any one of us is, to situation-specific empathy failures. . . .” Peer groups and other environmental factors influence whether and to what extent empathy may be displayed.

Although acceptance of responsibility for offending has not


160. Carrie J. Petrucci, Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System, 20 BEHAV. SCI. & L. 337, 359 (2002) (stating that “[t]he key components of an apology” are “an expression or remorse or regret, acceptance of responsibility, compensation, and a promise to avoid the behavior in the future . . . ”).


162. Id. at 477.

163. Id.


165. E.g., Paul J. Frick & Mesha Ellis, Callous-Unemotional Traits and Subtypes of Conduct Disorder, 2 CLINICAL CHILD & FAM. PSYCHOL. REV. 149, 159–60 (1999) (discussion on CU traits designating a severe subtype of childhood-onset conduct disorder).

166. Ivan P. Kruhl et al., Historical and Personality Correlates to the Violence Patterns of Juveniles Tried as Adults, 32 CRIM. JUST. & BEHAV. 69, 81 (2005) (finding that the Callous/Unemotional Scale, Impulsivity/Conduct Problems Scale, and Antisocial Process Screening Device Total Score were significantly correlated with past violence).


169. See, e.g., Fara McCrady et al., It’s All About Me: A Brief Report of Incarcerated Adolescent Sex Offenders’ Generic and Sex-Specific Cognitive Distortions, 20 SEXUAL ABUSE: A J. OF RES. & TREATMENT 261, 266 (2008) (finding that “self-serving cognitive distortions were correlated with overall lower empathy” in adolescents incarcerated in a state correctional facility for adolescent sexual offenders).


172. Matt Zaitchik, Questions About the Construct of Empathy in the Treatment of Adolescents in the Juvenile Justice System, 31 AM. PSYCHOL. L. NEWS 5, 6 (2011) (stating that “m[aybe] it’s long past time we searched for empathy not within the individual, as part of some enduring aspect of their moral sensibility, but as a part of the social landscape where they perform, where empathy is temporarily suspended by group norms, cognitive frameworks and social forces in which the juvenile offender finds himself embedded. . . ”).
been widely studied, related concepts have been discussed. For instance, in one classification system, several versions of acceptance-concessions, excuses, justifications, and refusals—are seen as types of “accounts.”

Concessions include the notion of apology. Apologies can be viewed as a form of accepting responsibility by acknowledging the violation of a social norm. The mechanism of how this may decrease aggression or reduce the probability of recidivism is unknown. It is possible that an apology can express “moral inferiority,” so if the victim accepts the apology, there is an equalizing of the status between offender and victim. An obvious limitation is that an offender may use an apology solely for self-serving reasons (e.g., to mitigate a sentence), in which case no genuine acceptance of responsibility or remorse is present.

**ASSESSMENT OF REOFFENSE RISK AND RISK-RELEVANT NEED IN JUVENILES**

An important goal of juvenile assessment is to gauge a youth's risk, needs, and responsivity (RNR) by identifying both risk and protective factors. Risk factors can be defined as “external or internal influences or conditions that are associated with or predictive of a negative outcome.”

One commonly used distinction involving risk factors is static versus dynamic. Static risk factors are largely historical and not amenable to change through planned intervention; they include factors such as gender, history of abuse, history of antisocial behavior, and history of offending. Static risk factors contribute important information for accurately gauging reoffense risk, which in turn is relevant to the needed intensity of rehabilitation services (with higher risk individuals needing services of greater intensity).

Dynamic risk factors (also called criminogenic needs) can change over time and through planned intervention. Examples include substance abuse, mental health, educational level, peer relations, family dysfunction, and use of leisure time. For instance, if a juvenile has a poor educational history, one appropriate focus of rehabilitation would include improving basic academic skills necessary for responsible living and employment (e.g., reading, basic math).

A risk/needs assessment also may address what factors may decrease the risk of reoffending. In contrast to risk factors, such “protective factors” are generally those “external or internal influences or conditions that decrease the likelihood of a negative outcome or enhance the likelihood of a positive outcome.” Examples of protective factors include existing positive involvement, strong social supports, and favorable motivation/attitude toward treatment. Having such protective factors present may increase a youth's “responsivity” to treatment. The “responsivity principle” in juvenile and correctional rehabilitation concerns characteristics that affect a youth's potential response to rehabilitation rather than characteristics directly related to antisocial behavior.

Risk and protective factors have been extensively studied; some have been shown to be particularly related to reoffense risk or prevention of antisocial behavior. For instance, research has shown that the strongest predictors may include a young age at first contact with the law and young age at commitment. However, it is important to note that there is no single factor that, by itself, is highly predictive of reoffending. As a result, investigators have identified multiple domains that, taken together, show a reasonably strong relationship to reoffense risk. These domains will be summarized in the next paragraph.

Major domains in which risk and protective factors are assessed include the individual, family, academic/vocational, peer relations, and community domains. At the individual level, assessment of intellectual ability, personality, and substance-use history offer potentially useful information for appraising risk. For instance, impulsivity/risk-taking behavior, low IQ, and high levels of negative emotionality (e.g., anger, fear) may be seen in association with higher levels of delinquent behavior. An intolerant attitude toward deviant behavior has been shown to have a significant risk-reducing effect in higher risk individuals. The family domain includes familial/parental stability—in particular, whether there is a history of neglect or abuse (physical, sexual, or emotional)—and also the nature and level of parental involvement. This domain may also reveal several protective factors, such as positive adult influences and whether there is a close relationship with at least one supportive adult. In the educational domain, an assessment of achievement and commitment to school should be made. Beyond academic achievement, schooling may help youth adapt to the environment, establish self-esteem, and verbalize conflicts offering alternative methods to deal with disputes or angry feelings. Peer relations may serve as a risk factor not only when there are negative peer relations (e.g., friends with arrest histories, drug abuse histories, risk-taking behaviors) but also if the youth is socially withdrawn. Social withdrawal and isolation...
It is advantageous to have multiple, collateral interviews and a youth’s self-report.

may result in increased violent behavior. Finally, the environment provides another domain in which risk and protective factors may be found, namely socioeconomic status (SES). Low-income and high-crime neighborhoods are risk factors because of the potential exposure to crime and violence. An evaluation of the community may also reveal formal or informal support systems beyond the family.187

The evaluation of these domains and their respective risk and protective factors is accomplished through examining records (e.g., school records, juvenile records), the youth’s self-report, the report of collaterals, and the results of formal testing. Collaterals typically include parents but could also include school administrators, coaches, ministers, case managers, or other individuals that are highly familiar with the youth’s history. The major advantage of having multiple collateral interviews, in conjunction with the youth’s self-report, is to broaden the picture of the youth and assess consistency of reports across sources. Other areas can be assessed through formal testing of intellectual abilities, academic achievement, and personality. Once data are collected, the assessment report summarizes relevant risk and protective factors and offers areas that are amenable to treatment.

ROLES OF EMPATHY AND ACCEPTANCE OF RESPONSIBILITY IN ASSESSING REOFFENSE RISK AND RISK-RELEVANT NEEDS IN JUVENILES

Specialized risk/needs tools are commonly used to organize risk factors and protective factors and to promote empirically supported risk classification. These tools facilitate structured, informed decision making that is less subject to idiosyncratic judgment and individual biases.188 Two such instruments include the Youth Level of Service/Case Management Inventory189 and the Structured Assessment of Risk Violence in Youth.190 The YLS/CMI is a standardized instrument that generally assists in assessing risk, needs, and responsibility in youths to help formulate a case plan. The SAVRY is a structured risk assessment tool for use with adolescents that helps in gauging an adolescent’s risk for future violent behavior. Both tools specify a series of factors, based on the best available research, to be assessed. The evaluator rates the severity of each factor, and the overall risk and needs are determined in light of all the information about these relevant factors.

Risk/needs tools are effective because they identify patterns of behavior and traits that have been present over an extended period in an individual’s life. Regarding empathy and acceptance of responsibility, an evaluator should consider whether an apparent lack of empathy relates to a single instance (e.g., the current offense) or whether the deficit is apparent more broadly. While both are important considerations, the latter has greater implications regarding one’s future risk for aggressive behavior or recidivism (see discussion of empirical literature that follows). In addition, many domains on specialized measures such as the SAVRY are independent of the circumstances of the instant offense. This means that much risk-relevant information can be gathered—and rehabilitative interventions implemented—even when acknowledgment or acceptance of responsibility in the instant offense is not made. In a related vein, the presence of a single risk factor (e.g., lack of empathy on the SAVRY) in the absence of others would most often lead to the conclusion that the individual was at low risk for future offending.

The presence of empathy or acceptance of responsibility would affect a number of items on the YLS/CMI in the Personality/Behavior and Attitudes/Orientation domains. In particular, “Inadequate Guilt Feelings” in the Personality/Behavior domain is defined as feeling no remorse when behavior has caused harm to another, not accepting responsibility for actions, and offering excuses.191 In the Attitudes/Orientation Domain, the “Callous, Little Concern for Others” item is closest to “empathy”; the assessor would consider evidence of little concern for the feelings or welfare of others. Other items in this domain may also be affected by empathy and acceptance of responsibility. These include “Antisocial/Procriminal Attitudes,” in which the values, beliefs, and rationalizations concerning the crime and victim are taken into account. The items “Not Seeking Help” and “Actively Rejecting Help” would be influenced by the youth’s failure to recognize the need for help and resistance to interventions.

In the SAVRY, empathy plays a direct role in the “Low Empathy/Remorse” risk factor in the broader Individual/Clinical domain. This is one of a total of 24 risk factors on this measure. The manual defines empathy as “the identification, understanding, and sharing of another person’s thoughts, feelings, and intentions.”192 Remorse is defined as “distress arising from repentance for behavior that has hurt another.”193 Both empathy and acceptance of responsibility would be rated by considering the broad patterns in the individual’s life. The individual’s description of the alleged offense could serve as one element within this broader pattern but would not offer an adequate basis for rating either empathy or acceptance of responsibility in the absence of broader (non-offense-related) behavior and capacities. Although empathy and acceptance of responsibility (as reflected by remorse) are limited to one of 24 items on the SAVRY, these constructs may be related to other items. For

186. Id. (discussion “Risk Factors in Childhood” and “Risk Factors in Adolescence” contained in chapter 4).
187. Melton et al., supra note 1, at 486–87.
189. Robert D. Hoge & D.A. Andrews, The Youth Level of Ser-
190. RANDY BORUM ET AL., STRUCTURED ASSESSMENT OF VIOLENCE RISK IN YOUTH (2002).
192. Borum, supra note 190, at 46.
193. Id.
instance one item is “Negative Attitudes.” Here, an examiner may look for indications of attitudes and values that condone violence, or misperceiving the actions of others as being hostile or aggressive. Another item in which empathy/acceptance of responsibility may be reflected is “Poor Compliance.” A high rating on this item may indicate that the youth does not believe he or she is at risk and cannot appreciate the need for intervention. Having a positive attitude toward intervention is also a protective factor on the SAVRY and may indicate an acceptance of responsibility.

Several important conclusions may be drawn regarding these specialized (empirically supported) measures and their incorporation of empathy and acceptance of responsibility. First, the measures consider multiple domains in yielding final conclusions about risk and needs. These two items are included within the overall number of items and domains but are sufficiently small in number so that, by themselves, they would not usually yield a conclusion that an individual was at high risk even if they reflected significant deficits. Second, both empathy and acceptance of responsibility are assessed using information from the person’s life broadly. Their description of the offense is one aspect from which judgments regarding these items can be drawn. However, a more stable and accurate estimate would draw upon information regarding the person’s functioning over time, across situations, and with different people. Third, deficits in empathy and acceptance of responsibility are often related to other risk-relevant deficits in an individual. When this occurs, the broader pattern of deficits becomes apparent, the rated risk of re offending is higher, and the risk-relevant needs are more extensive.

CONCLUSION

The law is unsettled and inconsistent on the issue of compelled self-incrimination for the purpose of assessing risk and needs in the context of juvenile transfer. Empirical behavioral-science evidence suggests that empathy and acceptance of responsibility are modestly related to both risk and needs and should be assessed as part of forensic mental health evaluations of juveniles being considered for transfer. Taken together, however, empathy and acceptance of responsibility constitute only part of the evidence relevant to assessing need and amenability to intervention. Moreover, information about empathy and acceptance of responsibility related directly to the circumstances and behavior involved in the alleged offense are an even smaller piece of the puzzle, as both can be assessed as broader capacities independent of the alleged offense. Accordingly, the harm to the assessment’s relevance and reliability from not discussing the alleged offense appears minimal—while the prejudicial harm to the defendant stemming from compelled self-incrimination in this context may be considerable.

194. When there is a legal justification for an individual’s declining to talk about the offense, such as that individual’s being so advised by counsel on a pretrial or continuing appeal basis, then their declining to discuss the offense or denying culpability should not form the basis for a mental health professional’s conclusion that such an individual lacks empathy or does not accept responsibility. The two influences are inextricably intertwined and simply cannot be separated until there is no longer a legal strategic justification for the individual’s declining to discuss the offense.

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Protections for Juveniles in Self-Incriminating Legal Contexts,
Developmentally Considered

Thomas Grisso

My comments use a developmental perspective on adolescents’ capacities as a way to supplement the conclusions of three previous articles in this volume (Tepfer, Nirider and Drizin; Frumkin; and Heilbrun et al.) that discuss policies to protect juveniles in legal contexts in which they are asked to make self-incriminating statements.

The Tepfer and Frumkin articles provide ample reason for concern about adolescents’ responses to police interrogation. They argue adolescents are at greater risk of making false confessions (as they are more susceptible to police interrogation strategies) and are more likely to waive their rights due to poor understanding or acquiescence. Tepfer and his coauthors point out that we have entered an era of juvenile justice reform that recognizes that “adolescents are different,” a perspective that has received special emphasis by the U.S. Supreme Court in several recent cases. Age, the Court says, must be taken into consideration when weighing the validity of a confession. Frumkin describes some of the things that mental health examiners can do to assist courts in weighing youths’ capacities and vulnerability—especially their suggestibility—in individual cases that challenge confessions. Both articles refer broadly to differences between adolescents and adults. My comments add some complexities that arise when we go beyond these differences to address diversity among young people across the adolescent age span. This leads me to suggest some refinements in our thinking about the types of protections needed for juveniles in police interrogations.

In a very different legal context, Heilbrun and his coauthors focus on practice in many states that allows pretrial transfer evaluations to include examiners’ discussions with juveniles about their involvement in their alleged offenses. The presumed value of talking about the alleged offense is to determine whether the youth has empathy or remorse, which is relevant for judging whether the young person can be rehabilitated or, if not, should be tried and potentially sentenced as an adult. This may seem like an entirely different context than police interrogation. Yet when viewed from a developmental perspective, as I will do later, we encounter some of the same concerns about youths’ capacities that arise in discussions of their behaviors in police interrogations. And here too a developmental perspective leads us to some considerations that seem not to have been recognized by courts when shaping law and policy for juvenile transfer proceedings.

ADOLESCENTS’ FUNCTIONAL DEVELOPMENT

Adolescents are different from adults because they are still undergoing development in several areas that influence comprehension and decision making. The evidence comes from neuroscience regarding adolescent brain development as well as from behavioral studies of adolescents’ functioning on tasks that demonstrate comprehension and decision making. The evidence can be summarized as follows.

In general, several abilities continue to develop and improve throughout adolescence that might make a difference in teens’ capacities in legal contexts. These include: (a) basic knowledge of the world, including the risks associated with various decisions; (b) the ability to handle abstract concepts (like the meaning of a “right”); (c) the ability to delay impulses by stopping to think about consequences before deciding (for example, about whether to admit or deny involvement in an alleged offense); (d) using judgment that weighs long-term positive or negative consequences, not just short-term gains; and (e) a developing sense of independent autonomy and identity associated with making decisions that are not merely acquiescent or oppositional responses to peers or authority figures. Readers of the Tepfer and Frumkin articles will see the relation between these developing abilities and our concerns about adolescents’ capacities to make voluntary, knowing, and intelligent decisions about their rights and their responses to police questioning.

Recognizing that “adolescents are different from adults” in these ways is essential when fashioning special protections for juveniles in police interrogations. But that distinction only takes us partway to our objective, because it focuses on adolescent–adult differences and does not consider differences among adolescents.

Variability among adolescents in their capacities can be framed in two ways. First, younger adolescents are far less...
capable than older ones. Improvements in ability are continuous across the six years between the 12th birthday and the 18th birthday. The risks of vulnerability due to lesser capacities are greater in the younger teen years than for the “average” adolescent and far greater than for older adolescents.\(^7\) (We recognize this when we allow older but not younger adolescents to obtain a driver’s license.) It is true that various fMRI studies of adolescent brain development find that changes in areas of the brain relevant for decision making continue well into the 20s.\(^8\) In this sense, even older adolescents have not achieved the neurodevelopmental status of adults. Yet on tasks involving *Miranda* comprehension and abilities related to competence to stand trial, research typically finds little average difference in performance between 16–17 year olds and young adults.\(^9\) The same studies find much difference between early teens and these age groups. Thus, there is great variability in capacities across the adolescent years because of substantial differences on average between younger and older adolescents.

Second, variability in the capacities of adolescents that make them generally less mature than adults is seen not only between younger and older adolescents, but also within any specific age. Most forensic mental health professionals who evaluate juveniles can provide examples of some 14-year-olds whose understanding of *Miranda* warnings or ability to make reasonable decisions under stress surpassed those of some adults, as well as examples of 18-year-olds who were more vulnerable than the average 14-year-old. Courts are right to require attention to age when weighing young people’s capacities, because on average these change with each advancing year until they stabilize in adulthood. Yet a youth’s age itself is an imperfect factor for making assumptions about an individual, because any specific age group includes young people with capacities ranging from far below to far above the average.

In summary, “adolescence” as a period of development from about ages 12 through 17 is a meaningful class for many purposes when thinking about needed protections in police interrogation. Yet the needs and capacities of most 12-year-olds are quite different from those of most 17-year-olds, thus making “juvenile” or “adolescent” a less-than-meaningful class for some purposes. These simple developmental observations are at the heart of challenges to our efforts to fashion protective policies for juvenile interrogations. I will return to those challenges in a moment.

**DEVELOPMENTAL PSYCHOPATHOLOGY**

The Tepfer and Frumkin analyses explore complexities in identifying youths’ capacities. Those complexities are even greater, however, if one considers the mental disorders among young people who are arrested and questioned by law enforcement officers. A significant body of research\(^10\) supports the conclusion that at least 60% of youth who are arrested and enter juvenile detention centers meet standard psychiatric diagnostic criteria for one or more mental disorders. About 40% have more than one disorder, and about 20% have serious, persistent, and chronic mental disorders. Symptoms of disorders found among delinquent youths often include clinically significant anxiety (sometimes related to trauma), depression (related to affective disorders), and impulsiveness (especially related to ADHD). As a consequence, many young people who are questioned by law enforcement officers are burdened not only by immature capacities related to their level of development, but also by symptoms of mental disorders.

Symptoms of mental disorder have two general effects that are relevant to consider in the context of young persons’ vulnerability during police questioning. First, most of these symptoms increase a youth’s susceptibility to interrogation strategies and decrease the ability to use the already-immature capacities that the youth might have. Second, persistent mental disorder can cause delays in an adolescent’s general development, such that the youth lags behind his or her peers both cognitively and socially. This is another reason that age norms for adolescent functioning are only a starting point for considering the capacities of individual young people.

**IMPLICATIONS OF DEVELOPMENTAL DIVERSITY FOR LAW AND POLICY IN POLICE INTERROGATIONS**

The diversity of abilities among younger and older adolescents—and within any specific age group—is important to consider when we analyze our laws and policies for protecting juveniles’ rights in police interrogations. Our mechanisms for protection are at two levels: (a) guiding and restricting police interrogations at the time that confessions are obtained, and (b) judicial adjudication of cases in which claims are made that waivers and confessions obtained in police interrogation were invalid. The diversity of abilities among adolescents across or within various ages is addressed by the modes of protection provided in the latter context, but not the former.

Regarding the latter, courts’ scrutiny of the validity of confessions or waiver of rights is guided by a “totality of circumstances” test.\(^11\) This presumes that no specific characteristic of the child and no specific interrogation behavior of law enforcement officers are determinative of the validity of waiver or the


9. See GRISSO, JUVENILES’ WAIVER, supra note 7.

10. For a review, see THOMAS GRISSO, DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS 6–13 (2004).

While juveniles as a class need special protections during interrogation, the youngest adolescents need even more.

voluntariness of a youth’s confession. For example, the younger the juvenile, the more carefully the matter of susceptibility to coercion may be scrutinized. But the mere fact that the youth is 13 or 14 is neither dispositive nor even presumptive regarding an answer to the legal question. Every case must be weighed according to the balance of factors in the specific case. This approach provides for individual consideration of the wide range of developmental and psychiatric statuses of adolescents. As Frumkin describes, many of these characteristics can be assessed by mental health professionals who can provide such information to the court when waivers and confessions are questioned.

But regarding the first type of protective intervention, policies to guide police questioning, a “totality of circumstances” approach is of questionable value. There are three reasons.

First, police are provided operating procedures to apply to adolescents in general. There are exceptions in some jurisdictions; for example, some require parents’ presence when suspects are 14 or younger. But by and large police are not provided separate procedures for younger and older adolescents.

Second, judicial “totality of circumstances” opinions do not provide meaningful guidance for police officers regarding how to manage interrogations with adolescents of different ages. We sometimes presume that juvenile court decisions about the validity of youths’ confessions or waiver of rights will somehow “set precedent” that will be translated into better police practices. Yet there is relatively little for police to learn from judicial decisions in this arena. When each case is decided on the “totality of circumstances,” no single factor is likely to be highlighted in a manner that “sends a message” to police about how to adjust their practices. For example, a 13-year-old’s vulnerability may weigh heavily in the court’s decision in one case and be offset by other factors in another case. The multiplicity of factors weighed in those cases creates no clear guidance about how police officers are to translate any of the factors into judgments about their handling of juvenile cases.

Third, even if it were clear that certain developmental or pathological characteristics of adolescents create greater risk of invalid waivers, this offers law enforcement officers little assistance. The circumstances of police investigations do not allow for individual assessments, and law enforcement officers should not be expected to “assess” youths’ developmental capacities and mental disorders before questioning them. Such a requirement would hold law enforcement officers accountable for employing discretion that they cannot be expected to exercise meaningfully.

Tepfer and Frumkin offer one approach to this problem. They refer to the value of judicial use of the best-practices guidelines for juvenile interrogations developed by the International Association of Chiefs of Police. If used consistently by judges, the guidelines might clarify some factors for police. But will guidelines such as those offered by the IACP be adequate to deal with the diversity of capacities across the adolescent age spectrum? For example, will “limiting juvenile questioning sessions to an hour” have the same ameliorative effect for the average 12-year-old as for a 16-year-old? Will non-leading and dispassionate interviewing do anything at all to address younger adolescents’ vulnerability to making statements based primarily on their desire to escape the immediate situation rather than considering longer-range consequences of their choices? Will the simplified Miranda warning, “You have the right to get help from a lawyer right now,” and the youth’s reply, “It means I can get a lawyer right now if I want,” have any protective value for the majority of 13-year-olds, if they do not know the types of help a lawyer might provide?

For purposes of fashioning protective police practices in the interrogation of adolescents, developmental considerations do not support the notion that “one size fits all.” There is sufficient research on the behavioral, cognitive, and functional differences between youth 14 and under and older juveniles to require protections for younger adolescents that go beyond those that law and policy for police interrogations might fashion for juveniles as a class. When I performed the first studies of juveniles’ capacities to understand and waive Miranda rights, I concluded that juveniles 14 and younger were especially poorly equipped to understand Miranda rights and to make decisions to waive them. Since that time (30 years ago), much more research has examined youths’ capacities related to Miranda waivers and confessions and to abilities relevant for competence to stand trial. Most of those studies have found results consistent with my suggestion that while juveniles as a class need special protections during interrogation, the youngest adolescents need even more. The same project provided evidence that merely requiring the presence of parents offered little meaningful protection. My suggestion at the time—I was young and exuberant—was a legal requirement that interrogation of adolescents 14 and younger should not occur without the presence of legal counsel.

My point is not to argue for this specific protection, but to supplement the two preceding articles by arguing the need for a tiered perspective when fashioning policies for police practices in juvenile interrogations. Protections based on an “average” for adolescents may be insufficient for the youngest adolescents, most of whom are developmentally immature even in relation to the average for young people seen in juvenile courts.

12. INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, REDUCING RISKS: AN EXECUTIVE’S GUIDE TO EFFECTIVE JUVENILE INTERVIEW AND INTERROGATION (2012).


15. Id.

16. For a recent review, see ALAN GOLDSTEIN and NAOMI GOLDSTEIN, EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS 54–66 (2010).

17. For a recent review, see IVAN KRUH and THOMAS GRISCO, EVALUATION OF JUVENILES’ COMPETENCE TO STAND TRIAL 60–74 (2009).
Heilbrun and his coauthors reviewed laws and policies allowing or prohibiting inquiry about the alleged offense when mental health professionals examine a juvenile for a transfer hearing. The authors explain that courts believe discussion of the offense is important to learn whether the juvenile in question experiences remorse and acceptance of responsibility, suggesting better prospects for treatment in the juvenile system. They review research on the relation of empathy and future offending, finding some limited evidence for it. This analysis is certainly helpful, but a developmental perspective offers additional questions.

First, as the authors of the Heilbrun article explain, affective and cognitive empathy appear to have some relation to offending among juveniles, and the relation is a bit stronger in juveniles than in adults. They also explain that empathy involves the ability to understand (cognitive) or feel (affective) the condition of the other person. Many of the studies they cite use methods that assess whether the person can recognize others’ emotions. Yet if we are interested in whether empathy serves to reduce offending, we must know whether a person can recognize others’ emotions before those emotions are displayed—indeed, often at times before an offense when the potential victim is not yet present. “How would a hypothetical person feel if, hypothetically, I were to do something to them?” This “empathy in advance” requires more than recognizing and feeling another person’s emotions. It requires some level of ability to think abstractly about people and feelings that do not yet exist. Developmental psychology tells us that reasoning about abstractions is one of the capacities that is developing early in adolescence. Typically it has formed by ages 12 or 13, but for many youth with developmental delays (due to intellectual disability, mental disorders, or economic disadvantage), it may still be developing well into mid-adolescence.

If the capacity for this type of “empathy in advance” is changing (increasing) across some part of adolescence, then what we learn about an adolescent’s empathy at a given point in time may simply be the youth’s current level of development regarding empathic responsiveness, not an indication of the youth’s capacity for it in the future. We have some evidence of the implications of this. The Heilbrun article points out that lack of empathy has been related to measures of “callous-unemotional trait,” which is one component of psychopathy. Yet a well-constructed longitudinal research study recently found that if we use a high score on a measure of such characteristics at age 14 to predict that the youth’s score will be high ten years later, we will be right only 16% of the time. Callous-unemotional trait and capacities for empathy may be more developmentally stable when measured in older adolescents. But in states that allow 13- and 14-year-olds to face transfer hearings, assessing their empathy at that age tells us their current empathic functioning at best, but may tell us little about their future capacity for empathy.

Second, judging from Heilbrun’s description of court decisions on this issue, few if any courts have been thinking about transfer evaluations as events to which adolescents respond according to their developmental characteristics. They are focusing on protecting defendants from self-incrimination in future legal proceedings. But in the language of validity of waivers in police interrogations, they are not thinking about the “totality of circumstances.” Given youths’ relative immaturity—and given the procedures employed by forensic examiners—what are the possible threats to the reliability of the information that will be obtained for the transfer hearing? Even with adequate protections against the use of self-incriminating statements in future adjudication of the offense, what are the implications for the quality of information for purposes of the transfer hearing itself?

To examine these implications, we must talk about the context. There are some similarities between the transfer evaluation and the police interrogation. In both contexts, an authority figure meets with a subject in a setting in which the subject is not free to leave (or is likely to perceive the situation in that way). The authority figure and the subject are alone; there is no legal counsel present. The authority figure gives the subject a warning that the information can be used for some future legal purpose. Both contexts typically involve some type of “conversation” about the subject’s life circumstances (school, home, etc.) before discussing the offense, often designed in part to create a condition in which the subject will talk freely. Eventually the topic of the alleged offense is raised, and the authority figure asks the subject to talk about it. With some variability, the authority figures in both contexts may display a manner that suggests to the subject that the reason for talking about the alleged offense is in part to advance the subject’s own welfare. There are also some differences between the two contexts. Unlike the interrogation context, the juvenile is likely to have been advised by legal counsel before the transfer evaluation. The content of the warning in the transfer evaluation will differ from the Miranda warnings of police interrogations: for example, that the evaluation will be used by the court to determine whether the youth will remain in juvenile court or be

19. My description is based primarily on experience, not on research. Transfer evaluations by mental health professionals are one of the least-researched types of forensic mental health assessment. The little that has been published in this area has been reviewed in Thomas Grisso, Clinicians’ Transfer Evaluations: How Well Can They Assist Judicial Discretion? 71 LA. L. REV. 157–89 (2010).
20. In many states, juveniles have the right to have their attorneys present during forensic evaluations. In my experience, attorneys rarely choose to be present.
transferred to be tried as an adult; that if transferred, and if found guilty, the youth will be subject to penalties like an adult; that what the youth says now will not be used in that future trial, only in the transfer hearing. In contrast to the police interrogator, the forensic examiner will ask many more questions about the juvenile’s general life and background to meet the clinical purposes of the evaluation, as well as probing much more about the juvenile’s motivations for the offense and subsequent feelings about it.

At some point, the forensic examiner will pose the question: “I’d like to talk to you about what happened that night in the alley. Are you willing to do that?” And later, “How did you feel afterwards?” Now the youth has to make some choices, many of which are similar to those made in police interrogations: whether to admit or deny or partially admit or deny and, in any case, how to manage the questioning that will follow. And now we encounter the same questions about the potential influence of developmental immaturity on the youth’s decisions. Believing that authority figures like forensic examiners will help them only if they confess, will they confess to things they did not do? Fearing punishment, will they minimize their involvement in the offense in ways that are clearly contradictory to known facts, thus causing them to appear to be avoiding responsibility? Seeking peer approval, will they put on a remorseless face to impress their cohorts who are similarly charged? Being traumatized by the offense itself, will they react as many younger adolescents do by burying their emotions so as not to be overwhelmed by them, leading to a flat appearance that we can easily misinterpret as a sign of lack of remorse?

There is no research to tell us whether or how frequently young people engage in such behaviors in transfer evaluations. But as a forensic examiner who used to do many transfer evaluations, I have seen all of these reactions and had to contend with their meaning. Over time I learned to distrust the transfer evaluation interview as a place to learn about young people’s degree of remorse—just as we distrust juveniles’ confessions in police interrogations. Observing a young person’s sadness and apologies, or lack of them, in the complex social context of a transfer evaluation usually told me little that I could rely on. Much better were data obtained from situations outside the interview: for example, in the case of one youth, the documented fact that while he was fleeing from the alley where he had just stabbed another boy in a fight, he stopped at someone’s house to alert 911 to the injured boy’s whereabouts before going into hiding. Any competent forensic examiner will look outside the interview for data to arrive at meaningful inferences about remorse and empathy.

Heilbrun and his coauthors concluded that empathy related to the offense was only a “smaller piece of the puzzle” for determining amenability to rehabilitation, so that allowing inquiry about the offense during transfer evaluations is not of great value. Similarly, my analysis suggests that courts may be overestimating the importance of allowing inquiry about the offense in transfer evaluations. My reasoning, however, adds to the problem the risk of the unreliability of information gained in that context, given the influence of developmental immaturity on juveniles’ responses to the transfer evaluation inquiry.

CONCLUSION
This brief commentary on the three preceding articles reinforces the value of “thinking developmentally” about adolescents’ responses to police interrogations and legally relevant clinical interviews. For police interrogations, it suggests that our future thoughts about policy and law regarding special protections for juveniles may need to go beyond “adolescent–adult differences” to consider special protections related to differences among adolescents themselves—younger and older, average and disabled. For transfer evaluations, our thinking about policy regarding inquiries into the offense to determine remorse and empathy may need to go beyond the question of protections against self-incrimination. We should consider the ways in which juveniles’ developmental immaturity may seriously limit the reliability of what we can learn in the context of our inquiry.
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Institute for the Advancement of the American Legal System and American College of Trial Lawyers, Working Smarter, Not Harder: How Excellent Judges Manage Cases (2014) (39 pp.)
http://goo.gl/MgS573

How often do you have the chance to get tips from judges throughout the country who have been recognized for their ability to fairly and efficiently handle civil cases? Even at the AJAs annual educational conference, which had a program on this topic in 2013, you would hear only from a few judges. But the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System have teamed up on a project that brings you the tips of nearly 30 such judges.

American College of Trial Lawyers members identified judges in seven states, representing population and geographic diversity, who were outstanding civil-case managers. They then interviewed those judges on a series of structured topics about case management, including how to handle discovery generally, discovery disputes, dispositive motions, settlement possibilities, sanctions, trial settings, and other matters. This highly readable, 39-page report summarizes the suggestions.

As the report explains, five general themes emerged:

- Assess a case and its challenges at the outset. Use active and continuing judicial involvement when warranted to keep the parties and the case on track.
- Convene an initial case management conference early in the life of the case. Discuss with the parties anticipated problems and issues, as well as deadlines for major case events.
- Reduce and streamline motions practice to the extent appropriate and possible. Rule quickly on motions.
- Create a culture of collegiality and professionalism by being explicit and up front with the lawyers about the court’s expectations, and then holding the participants to them.
- Explore settlement with the parties at an early stage and periodically throughout the pretrial process, where such conversations might benefit the parties and move the case toward resolution.

The full report provides suggestions related to each of these themes and includes sample provisions from discovery and scheduling orders.

A Community Court Grows in Brooklyn: A Comprehensive Evaluation of the Red Hook Community Justice Center
http://goo.gl/ODNyDB (Full Report)
http://goo.gl/QdKYee (Exec. Summary)

The first community court in the United States was established in 1993 in a midtown Manhattan neighborhood of New York City. A few years later, in 2000, the Red Hook Community Justice Center in nearby Brooklyn began operation. Today, there are at least 70 in operation around the world.

A new report provides the first comprehensive, independent evaluation of the Red Hook Community Justice Center. The study was conducted by the National Center for State Courts in partnership with the Center for Court Innovation and the John Jay College of Criminal Justice.

The report is comprehensive, evaluating differences between the community-court model and traditional court in areas including sanctions, recidivism, arrest rates, and costs. The report concluded that community courts can reduce crime and strengthen neighborhoods. Of particular interest are findings suggesting that the procedural-fairness principles applied in the Red Hook Community Justice Center have led to a greater perception by the community of the court’s legitimacy, and that this greater legitimacy has led to better outcomes. Study data also suggested that the public’s perception that the court shared community values had helped its effectiveness.

Links provided above will take you either to the full report or an executive summary. In addition for specific comments about the report’s findings on procedural fairness, see a blog posting by one of the study’s authors, David Rottman, at http://goo.gl/uHfyqz.

WEBSITES OF INTEREST

Northwestern Law School, Bluhm Legal Clinic, Center on Wrongful Convictions of Youth
http://goo.gl/29MVaP

The authors of our lead article, which analyzes the emerging caselaw on juvenile confessions, are part of Northwestern Law School’s Center on Wrongful Convictions of Youth. That center maintains a website with resources related to this subject.

The website has a number of useful resources, including a list of recent articles related to wrongful convictions and court orders suppressing apparently unreliable confessions. Also included is an interactive map showing key developments by state in several areas, including juvenile Miranda warnings and the presence of attorneys or parents during interrogations.