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THE INTERROGATED JUVENILE:
CAVEAT CONFESSION?

The plight of the arrested juvenile left to defend his own rights when confronted by imposing police interrogators is one of the critical issues in post-

1. *Gault* juvenile law. A young suspect may be taken off the street or may be arrested at home at an odd hour if the suspected offense is sufficiently serious. 2 He is then booked at the station house, given his *Miranda* warnings, and asked if he will waive his constitutional rights. During this process the youth ponders to the best of his ability the pros and cons of cooperating. If he is uncertain of what to do without outside help or is reluctant to talk immediately, he must find some manner of expressing himself which will make clear his desire to assert his fundamental rights. The continued interrogation of a suspect who has invoked his constitutional rights is coercive by law, 4 but the coerciveness of the interrogation may be obscured by the inability of a frightened juvenile to express his desire to assert his rights.

The recent California Supreme Court decision of *People v. Burton* 5 related to the problem of coerced juvenile confessions and at-

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1. *In re Gault*, 387 U.S. 1 (1967). *Gault* was a landmark decision by the United States Supreme Court which provided that despite the civil nature of juvenile court proceedings, minors were entitled to certain basic constitutional rights: notification of charges, notification of the right to counsel, right to confrontation and cross examination, and privilege against self-incrimination.


3. *Miranda v. Arizona*, 384 U.S. 436 (1966). A verbatim reproduction of the *Miranda* warnings as read to juveniles in one city is reproduced in Wren, *The Miranda Doctrine and Juvenile Court*, 18 Juv. Cr. Judges J. 114 (1968). That form reads in part: “At this time it is my duty to inform you of the rights that you possess while in custody. Under the law, you cannot be compelled to answer, and you have the right to refuse to answer any questions asked of you while you are in custody. If you do answer such questions, the answers given by you will be used against you in a trial in a court of law at some later date. . . . Do you understand this?”


5. 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971).
tempted to secure a meaningful application to minors of their full \textit{Miranda} rights. \textit{Burton} held that a minor's request to see his father prior to interrogation was an invocation of his Fifth Amendment right against self incrimination.\textsuperscript{6} To the extent that the \textit{Burton} decision attends to the spirit rather than to the technicalities of \textit{Miranda} rights, it represents a laudable step toward affording substantive protection to juveniles.

\textit{Burton}'s shortcoming lies in its failure to fashion a clear test of what elements of juvenile behavior should be considered an implicit invocation of \textit{Miranda} rights. Although the decision implies that the police and courts should strain to recognize any expression of hesitancy from a juvenile, it leaves open the question of how broad a range of behavior will be recognized as an invocation of the right to silence. Defense attorneys with youthful clients may be able to argue successfully that the \textit{Burton} decision should not be constrained by its facts. In \textit{Burton} the minor requested to see his father, but what if a juvenile asks to see an older sister who has always mothered him? Or a more experienced friend? What about expressions of fatigue or illness? It could be further argued, in the tradition of \textit{Gault}, that both consideration of a delinquent's rehabilitation and recognition of the inherent untrustworthiness of a subtly coerced juvenile confession make a broad interpretation of \textit{Burton} a social imperative. Both the legal and psychological literature reviewed below indicate that juveniles are in need of zealous protection of their fundamental right to be free from coercive interrogation.

\textbf{Miranda Implementation for Juveniles}

The California Supreme Court naturally has looked to the \textit{Miranda} decision for guidance on the issue of coercive interrogations. The \textit{Miranda} lesson is twofold; not only must the police warn a suspect of his constitutional rights and obtain a waiver of them prior to eliciting a confession,\textsuperscript{7} but they also must completely halt all questioning regardless of the formal waiver if the suspect asserts his right to silence or right to an attorney in any manner at any time.\textsuperscript{8} The best known aspect of the comprehensive \textit{Miranda} ruling is the requirement that the police must warn the suspect that he has a right to remain silent, that any statement he does make may be used against him, and that he may insist upon the presence of an attorney. Juveniles in California have a statutory right to receive these \textit{Miranda} warnings\textsuperscript{9} and are consid-

\begin{thebibliography}{9}
\bibitem{6} Id. at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6.
\bibitem{7} Miranda v. Arizona, 384 U.S. 436, 444 (1966).
\bibitem{8} Id. at 444-45.
\bibitem{9} \textsc{Cal. Welf. \\ & Inst'ns Code} § 625 (West 1972). For a discussion of the
ered competent to waive their constitutional rights unless there are cir-

cumstances which disprove that competence. California has not seen fit to declare that all juveniles are incompetent as a matter of law to waive their rights; the courts have instead adhered to the "totality of the circumstances" rule to determine competence for juveniles as for adults. The circumstance of being a juvenile is simply one important factor under consideration.

An equally important but less famous aspect of the Miranda dicta
tate provides that even if the suspect has given a formal waiver, cus
todial interrogators must respect other less explicit invocations of con-
stitutional rights. The Supreme Court said that if the suspect indicates "in any manner and at any stage of the [interrogation] process" that he wants to consult with an attorney, there can be no further question-
ing. Thus, the Court has provided for the termination of interrogation when the suspect engages in either of at least two types of behavior: (1) refusing to grant a formal waiver, and (2) requesting to consult with an attorney. The Court then adds to this list a less specific third category of behavior by the accused which must terminate the interrogation. Miranda continues, "Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." There is no indication of what specific kinds of behavior this third category of other invocations might include, but this comprehensive third category is arguably broad enough to encompass a wide range of words and acts by the accused.

Subsequent rulings by the California Supreme Court have seized upon this third comprehensive Miranda category and have emphasized that no specific form of words or conduct is required for adults to in-
yoke the constitutional privilege of silence. Moreover, California has held that the invocation need not be made with unmistakable clarity.


10. "[A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." People v. Lara, 67 Cal. 2d 365, 383, 432 P.2d 202, 215, 62 Cal. Rptr. 586, 599 (1967).


12. 384 U.S. at 444-45.

13. Id. at 445.


For a suspect of any age, the desire to remain silent may be communicated by refusing to sign a waiver,\textsuperscript{16} by asking the police to telephone a relative who will contact an attorney,\textsuperscript{17} or simply by telephoning an attorney himself.\textsuperscript{18} In \textit{People v. Randall}\textsuperscript{19} the court enunciated a very broad test for the qualification of nonexplicit behavior as an invocation of constitutional rights. The test is whether the behavior of the accused "reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time."\textsuperscript{20} In \textit{Randall} this broad present willingness test was used to determine that the act of telephoning an attorney was an invocation of the suspect's Fifth Amendment right to silence, regardless of his formal waiver of that right.

\textbf{Burton and Beyond}

In \textit{Burton} the court reaffirmed the \textit{Randall} present willingness test and applied it in the case of a juvenile who requested to see his father. Weighing the factor of the youthfulness of the accused, the court concluded that the request amounted to an invocation of the Fifth Amendment right.\textsuperscript{21} \textit{Burton} thereby has made the circumstance of being a juvenile an important one with respect to the implementation of all the \textit{Miranda} requirements in California; youthfulness must now be considered not only in respect to assessing the minor's competence to give a formal waiver of his rights,\textsuperscript{22} but also with regard to any less explicit invocation of his constitutional privileges.

In \textit{Burton} a sixteen year old murder suspect was awakened and arrested at his home by several police officers early in the morning. He was taken to the station house where he was booked and, after some delay, interrogated. Sometime during the booking and delay period the boy asked if he could see his father and was told that he could not. In the meantime, his father had arrived at the station and similarly was denied access to his son. The younger Burton was then secluded in another room for interrogation, where he formally waived his constitutional rights following the \textit{Miranda} warnings.\textsuperscript{23} The ensuing confession, which originally was used against him in his criminal
trial, was held to be inadmissible by the California Supreme Court. The decision notes, "It appears to us most likely and most normal that a minor who wants help on how to conduct himself with the police and wishes to indicate that he does not want to proceed without such help would express such desire by requesting to see his parents." The court therefore held that in the absence of evidence to the contrary, a request by a minor to see his parents must be construed as an invocation of his Fifth Amendment right of silence.

The language in Burton leads to uncertainty as to whether the court was looking for any kind of behavior which indicated the juvenile's hesitancy to cooperate with the police, or whether it was significant that the court perceived the boy's request to see his father as analogous to an adult's request to see an attorney. The court observed, "[f]or adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents." Such language strongly suggests that the parallel between father and attorney is very important in this case. If so, then cases where a juvenile expresses a desire to see someone other than a parent, or expresses a desire for relief of a physical need such as sleep or food prior to questioning, are likely to be distinguished.

It is arguable, however, that the analogy between an adult's requesting to see an attorney and a minor's requesting to see his father was not critical in the disposition of Burton. Burton was expressly based on the Fifth Amendment right to silence rather than the Sixth Amendment right to counsel. Moreover, the court specifically used the Randall present willingness test. Application of that test to the Burton facts revealed that a juvenile's request to see his father amounted to conduct which "reasonably appears inconsistent with a present willingness . . . to discuss his case freely and completely . . . ." Under this interpretation, a variety of words and acts by an accused juvenile should qualify as invocations of the Fifth Amendment right to silence, regardless of whether the conduct is strictly analogous to requesting an attorney.

Burton as a Tool for Equal Protection

Justice Fortas, writing for the majority in In re Gault, expressed

24. While Burton's confession was used for a criminal trial rather than a juvenile proceeding, the defendant was a sixteen year old at the time of the confession. Id. at 378, 491 P.2d at 794, 99 Cal. Rptr. at 2.
25. Id. at 382, 491 P.2d at 797, 99 Cal. Rptr. at 5.
26. Id. at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6.
27. Id. at 382, 491 P.2d at 797, 99 Cal. Rptr. at 5.
28. Id. at 383-84, 491 P.2d at 798, 99 Cal. Rptr. at 6.
29. Id. at 382, 491 P.2d at 797, 99 Cal. Rptr. at 5.
concern that juvenile cases are essentially treated as adult criminal cases in juvenile courts, yet without the procedural safeguards constitutionally guaranteed to adults. As a result, Gault required some procedural changes for juveniles in the adjudicatory stage, including the Fifth Amendment privilege against self incrimination. With Burton, the California Supreme Court is attempting to alleviate the plight of the juvenile in the pre-judicial stage by affording him meaningful protection of his newly gained rights.

The approach of the California Supreme Court in Burton reflects a Gault awareness of the procedural plight of juveniles. Burton was decided along the strict Miranda guidelines designed for adults, yet with a special recognition of a juvenile's difficulties of self-expression. If subsequent decisions do not limit Burton to cases where the juvenile's behavior is analogous to an adult's request to see an attorney, California will have taken a significant step toward affording juveniles more substantive protection of their right not to be compelled to incriminate themselves during interrogations.

A recent New Jersey decision also has tried to achieve meaningful protection for juveniles in the pre-judicial stage. The test enunciated in In re R. W. is whether the interrogation was "conducted with the utmost fairness, without force or other improper influence, mental or physical, and in accordance with the highest standards of due process and fundamental fairness." This notion of "fundamental fairness" has long been used as a shibboleth in juvenile law, but the test is an elusive one. Fundamental fairness is more a description of the court's conclusion than an operational test. California's present willingness test, which was formulated in Randall and approved in Burton, provides more guidance to police and lower courts on how to determine whether the suspect has made an invocation of his rights. The present willingness test focuses upon observable behavior by the accused rather than upon an abstract condition of fairness. Following Randall, the police and courts are given a focal point; whenever the accused indicates a need or desire for help, it must be decided whether this act or these words reflect a lack of present willingness to talk. If so, then further interrogation is coercive by law.

The Randall Test and Subtle Coercion

The importance of such an operational test for coercion is apparent in the psychological literature on persuasion. Experimental evidence, such as the data reviewed below, has shown that coercion is

32. *Id.* at 296, 279 A.2d at 714.
extremely difficult to detect in some situations. It therefore is desirable that a legal test for coercion be derived from identifiable behavior which can provide some concrete measure of the presence or absence of undue influences.

A psychologist studying irrational obedience to authority concludes that our culture may not provide adequate models for refusing to comply with the wishes of an authority figure when compliance is against one's own judgment. In his experiments, subjects knew that they would not lose their compensation for participating even if they refused to perform an anxiety provoking task, yet subjects overwhelmingly acquiesced. A typical subject's dilemma is described:

Despite his numerous, agitated objections, which were constant accompaniments to his actions, the subject unfailingly obeyed the experimenter. Although at the verbal level he had resolved not to go on, his actions were fully in accord with the experimenter's commands. He found it an extremely disagreeable task, but he was unable to invent a response that would free him from the experimenter's authority. Many subjects cannot find the specific verbal formula that would enable them to reject the role assigned to them by the experimenter.

This inability to find appropriate verbal expression for terminating a stressful encounter may similarly hinder a suspect in the exercise of his right to terminate an interrogation. If the police are insistent with him, even after the reading of his *Miranda* rights, he may comply unwillingly. His unsuccessful attempts to express his desire to terminate the encounter then become significant as an indicator of his real wishes, despite his obedience.

It is not even necessary for the police to be heavy-handed with an authoritative request to confess. Coercion can be extremely effective even when it is very subtly generated. For example, another psychological study involved persuading subjects to volunteer to cooperate with other individuals who were humiliating, anxiety provoking or otherwise unpleasant. It was important to the experimenters that the subjects believed that their choice was freely made, yet these psychologists realized that most people do not willingly enter into hostile interactions.

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33. Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN RELATIONS 57, 67 (1965) [hereinafter cited as Milgram, *Conditions*].

34. The Milgram experiments, designed to test the extent of obedience to authority, required subjects to shock a helpless victim with increasing voltage under the pretext that the psychologist was studying the effect of punishment on learning. For a detailed description of the procedure and results see Milgram, *Behavioral Study of Obedience*, 67 J. ABNORM. & SOC. PSYCHOL. 371-78 (1963).


The technique for manipulation of "choice" was therefore very subtle. The experimenters simply were very insistent about how much they would appreciate the cooperation and said things such as, "I don't know whether you want to do it, but in any case, it's completely up to you." Despite the low keyed nature of this tactic, eighty percent of the subjects acquiesced. In this simple manner, an insistent authority figure can coerce many people to make an irrational "choice" to comply with the authority's wishes.

If a court were to examine the fundamental fairness of the circumstances surrounding the choice made in this psychological experiment, it is doubtful that the powerfully coercive, yet extremely subtle, tactics employed by the experimenters would be readily detected. A tactic, however, which succeeds in making eight out of ten people in the experimental situation choose an irrational alternative must be considered an "improper [mental] influence," in the words of the New Jersey court.

A California court using the Randall present willingness test might be more successful in detecting this subtle coercion. Since the coercive

37. Id. at 236.
38. Other experiments involving a manipulation of choice have similarly found that subjects can be induced to do disagreeable things, even to undergo physical pain, for very little justification. For example:
(1) In one experiment individuals who had previously indicated a disapproval of the "use of electric shock on humans for scientific purposes" were induced to administer such shock on humans. The inducement was minimal, and the subject's own responsibility for participating or leaving was emphasized. Despite the subjects' aversion to the task, and despite the explicit choice they were given, 97% of the subjects were successfully coerced into cooperation. Furthermore, a subsequent rating the subjects made of their perceived degree of choice showed that they felt they had almost complete choice in participation. In other words, not only could 97% of the subjects be persuaded to do something they disapproved of doing, but they felt they had done so voluntarily. Glass & Wood, The Control of Aggression by Self-Esteem and Dissonance, in THE COGNITIVE CONTROL OF MOTIVATION 207 (P. Zimbardo ed. 1969).
(2) Subjects who had already been deprived of breakfast and lunch one day, and who were therefore hungry, were persuaded to continue fasting until eight or nine o'clock in the evening. There was little incentive for enduring further hunger. The experimenter simply said, "[D]on't think you have to come this evening. But we would appreciate your help. If, however, you don't feel like doing it, that's okay because we can get someone else to do it." Nonetheless, 82% of these hungry people agreed to undergo the ordeal of further food deprivation. Brehm, Modification of Hunger by Cognitive Dissonance, in THE COGNITIVE CONTROL OF MOTIVATION 22 (P. Zimbardo ed. 1969).
(3) Thirsty people can be coerced into enduring further thirst without much incentive. One experiment found that 75% of the subjects asked to cooperate did so agree, despite the warning that they would be "very uncomfortable". Brehm, Commitment to Thirst: The Cognitive Camel Complex, in THE COGNITIVE CONTROL OF MOTIVATION 55 (P. Zimbardo ed. 1969).
39. See text accompanying note 32 supra.
tactic was based upon authoritative insistence, one important indicator of the presence of the coercion would be any hesitancy expressed by the individual subject. The Randall test would direct attention to any such expression of hesitancy. If the individual were a juvenile, Burton would have the court considering whether there were any characteristically juvenile expressions of unwillingness. In this manner, the extremely subtle coercion used in the psychological experiment, or a criminal interrogation, might be more readily detected by an observant court.

When it is seen how readily a subject in an experiment can be coerced into enduring a hostile interpersonal interaction from which he has nothing to gain, it is not surprising that only very few suspects refuse to talk with police interrogators even after the suspects are told they do not have to talk. A survey of actual station house interrogations, the Yale Interrogation Study, reported that the detectives used phrases such as “You don’t have to say a word, but you ought to get everything cleared up,” or “You don’t have to say anything, of course, but can you explain how . . . ?” The striking similarity to the low keyed tactic used in the psychological experiment is noteworthy. The mechanism of subtle persuasion by authoritative insistence could be operating in the station house as in the laboratory.

The particular vulnerability of juveniles to subtly coercive tactics has not been unnoticed by the courts. The United States Supreme Court said in Gallegos in 1962:

The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police . . . and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

The Court’s belief that the young are especially susceptible to coercion is supported by other evidence. It has been found that the characteristics of suspects most likely to be susceptible to police interrogation tactics are previous inexperience with the police, passivity, and low social status. A sociologist finds that “low status persons—those who have never enjoyed a secure or rewarding social position—are likely to be the most vulnerable of all to [police] indoctrination . . .”

41. Id. at 1552.
44. Id. at 48.
though a suspect of any age may possess these characteristics, the
typical inexperience, passivity, and low social status of the young en-
hances their susceptibility to coercion as a group.

Another contributor to the vulnerability of some minors under-
going interrogation is the effect of drugs they may have taken prior to
their arrest.45 A self-report study of juveniles institutionalized for de-
linquency reveals that forty percent claimed they had been under the
influence of drugs or alcohol at the time they were interrogated by the
police.46 The effect of such intoxication at the time of questioning is
uncertain, but at least one experiment indicated that some drugs tend
to make some individuals confess to real or imagined crimes.47

The Illusory Power of Nonwaiver

There are other pressures on a juvenile suspect which make it
likely that he will formally waive his constitutional rights even if he
does not want to do so. Ferster and Courtless' article on the disposi-
tion of arrested juveniles shows that one of the most critical factors de-
termining how a child's case will be handled is the impression he
makes on the police when he is detained.48 Nearly half of the minors
arrested never reach either juvenile or criminal court, but are either re-
leased or referred to welfare or police agencies.49 The police's deci-
sion usually is not based solely on the severity of the offense, but on an
assessment of the personal characteristics of the child and his general
demeanor. A showing of respect and repentance is particularly impor-
tant.50 A refusal to waive his constitutional rights after the reading of
the Miranda warnings obviously would be incompatible with a coop-
erative attitude. Since cooperation and a contrite demeanor are impor-
tant for an early favorable disposition of the minor's case, nonwaiver
would not appear to be in the juvenile's immediate interest.

45. It was contended by the defendant in Burton, for example, that the boy was
under the influence of drugs at the time of his arrest and consequently could not under-
stand what was being said to him. Brief for Appellant at 2, People v. Burton, 6 Cal. 3d
46. Ferguson & Douglas, A Study of Juvenile Waiver, 7 SAN DIEGO L. REV. 39, 52
(1970) [hereinafter cited as Ferguson & Douglas]. It should be noted that this statistic
is based upon a self-report study only and is not otherwise proven. On the other hand,
the problem of the possible unreliability of confessions given while the suspect is under
the influence of drugs may be far more serious than this unsystematic sample indicates.
47. Dession, Freedman, Donnelly & Redlich, Drug-Induced Revelation and Crim-
nal Investigation, 62 YALE L.J. 315, 318-19 (1953). The drugs used in this experi-
ment, however, were sodium pentothal and sodium amytal, commonly known as "truth
serums." The phenomenon may not generalize to other drugs.
48. Ferster & Courtless, The Beginning of Juvenile Justice, Police Practices, and
49. Id. at 572.
50. Id. at 579.
Moreover, children appreciate the fact that cooperation will benefit them during interrogations, as shown by the Ferguson and Douglas study. The researchers interviewed both nondelinquent children who had never been arrested and delinquent children who had been institutionalized by juvenile courts. When asked if they felt it would be "better" to talk to the police in interrogations, seventy-four percent of the delinquents and ninety-three percent of the nondelinquents answered yes.\textsuperscript{51}

The suggestion of these two studies taken together is that since nonwaiver is contrary to the short term goal of getting released, there is an internal pressure not to exercise that power. A child desperately may want the interrogation to cease, but he also may want to appear cooperative because he feels, not without cause, that it will be better to talk. This internal pressure which the juvenile suspect feels, combined with the degree of external pressure which can be so subtly generated by the police, makes nonwaiver an unlikely phenomenon. The Ferguson and Douglas experiment confirms this conclusion. In their experiment, ninety delinquent and nondelinquent children who were unaware that they were participating in an interrogation experiment were summoned for questioning. They were given the \textit{Miranda} warnings in various forms and were asked to waive their rights. More than ninety-five percent of these juveniles then voluntarily waived their constitutional rights.\textsuperscript{52}

\textbf{Dangers Inherent in Coercive Interrogations}

\textit{In re Gault} held that juveniles have the right to the protection of the Fifth Amendment in juvenile court proceedings because (1) confessions which are the "mere fruits of fear or coercion" may be untrustworthy\textsuperscript{53} and (2) the equality of the individual and the state must be maintained.\textsuperscript{54} In response to the contention that the state should proceed with juveniles only in the manner of a concerned guardian, Justice Fortas wrote for the majority, "[t]he Latin phrase [\textit{parens patriae}] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."\textsuperscript{55} Further, "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."\textsuperscript{56} \textit{Gault}, then, can be said to stand for the proposition that the informal

\textsuperscript{51} Ferguson & Douglas, \textit{supra} note 46, at 51.

\textsuperscript{52} Id. at 53.

\textsuperscript{53} 387 U.S. 1, 47.

\textsuperscript{54} Id.

\textsuperscript{55} Id. at 16.

\textsuperscript{56} Id. at 47.
procedure appropriate for disciplining a child in everyday conduct is not appropriate when handling a child within the machinery of law enforcement.

Empirical evidence indicates that Gault considerably understated the argument in favor of protecting children from self-incrimination at any stage of their cases. Sociologist Edwin Driver believes that the subtle forces operating even in post-Miranda interrogations are "at least equal to physical duress in influencing behavior." Driver observes: Evidence from the field of group dynamics suggests that the isolation of interrogation may influence ideas and behaviors. In a lengthy interrogation, the continued isolation of the suspect from his friends and relatives may begin to tell, for maintenance of attitudes, beliefs, and opinions requires support from one's fellows. . . . As the interrogation continues the suspect may become uncertain about his feelings toward the police, toward the law he is charged with violating, perhaps even toward his innocence.7

The suggestion that coerced confessions not only may fail to separate the innocent from the guilty but may also be psychologically harmful is particularly relevant in juvenile law. Can the ideal of rehabilitation be reconciled with a station house procedure which inspires confusion in a child with respect to the police, the law and his own innocence?

It has been found, for instance, that the experiences of arrest, interrogation and the juvenile court hearing leave many juveniles with hostile feelings toward the police. One researcher's interviews with boys on probation aged ten to sixteen years reflect this reaction.58 When the boys were asked about their feelings toward all those involved in the process (judge, police, parents, and other youth authorities), the most hostility was displayed toward the police.59 Many of the boys had perceived the police as too hurried and as poor listeners. This study of post-hearing interviews did not intend to prove any cause and effect relationship between arrest and hostility, but it does suggest that the experience of arrest and interrogation by the police may have a detrimental effect on many children's attitude toward the law's right arm.

Gault was also concerned with the possible untrustworthiness of confessions unprotected by the Fifth Amendment. Psychologist Philip Zimbardo believes, "Not only are police methods likely to make a guilty man incriminate himself against his will, but I am convinced that they also can lead to false confessions by the innocent . . . ."60

58. Id. at 46.
60. Id.
The danger of inaccurate confessions may be exacerbated by the process which determines which suspects are subjected to the most coercive interrogation tactics. The Yale Interrogation Study revealed that the questioning of suspects was usually a haphazard process whenever the police already had adequate evidence against the accused and when the crime was not serious. When the detectives felt they needed information from the interrogation, however, especially for a serious crime, the grilling was typically in the coercive manner feared by the *Miranda* court. Another legal writer considering such confessions has observed:

> Extracting confessions in our police and prosecutorial practice has become something like a universal folk ritual. In a large number of the instances of crimes . . . reported to authorities . . . the peace officers have no evidence against any individual acceptable in court, or only weak evidence, or evidence of a crime of a lower degree than they suspect has in fact occurred. But the officers know of persons in some way connected with the event: family or associates, persons seen in the vicinity, men with records suggesting that they are likely to have been involved in offenses of the sort in question.62

Through the detention and interrogation of such suspects in the station house, the police often succeed in obtaining the confession needed to compensate for the weakness of their other evidence.63 Since the most coercive tactics are employed in cases where corroborating evidence is weakest,64 there is a significant likelihood that the leading questions characteristic of high pressure interrogations may produce considerably less accurate confessions. Such a result cannot be said to be proven by the evidence presented here, but an experiment which could test this hypothesis is suggested in the margin.65

62. Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21, 23 (1965) (footnotes omitted) [hereinafter cited as Sutherland]. Similarly, Snyder reported from his interviews with delinquent children that those who had more than one encounter with police often felt “that once they had been 'picked up' for something they were suspected of having committed every subsequent offense in the neighborhood.” Snyder, *supra* note 59, at 184.

63. Sutherland, *supra* note 62, at 23.

64. Yale Interrogation Study, *supra* note 40, at 1539.

65. To demonstrate the existence of unreliable confessions one must observe confessions under several conditions. It is not practical to devise a direct measure of reliability, so reliability must be inferred. One possible way of obtaining such a measure is by the following experiment:

**Procedure:** The experimenters would have to observe actual interrogations by the police, as done in the Yale Interrogation Study, *supra* note 40. Before each interrogation, the observers would have to question the detectives, in the absence of the accused, concerning their broad theory of the suspect's involvement in the crime and how much evidence has already been gathered relative to the case. During the interrogation itself the observer should then note both the degree of pressure exerted on the suspect, as measured in the Yale Interrogation Study, and the extent to which the actual
Regardless of the minor's guilt or innocence, an inaccurate report of the events in question may seriously hamper a juvenile court judge in proper disposition of the case. For instance, a judge employing the ideal of the juvenile court philosophy would hesitate to accord identical treatment to a youngster who had simply "gone along" with friends and one who had masterminded a plot. Yet, if an inaccurate confession has been gained through coercion, the court may be misled and unable to make such discriminations.

Confession corresponds to the police's preconfession theory of the crime.

Possible results: The predicted results of the experiment would be that unreliable confessions tend to occur more frequently when the police have only weak corroborating evidence and the suspect is interrogated under high pressure. One way the experiment could fail to show the predicted results would be if it were found that in cases where there is weak corroborating evidence, the degree of pressure exerted on the suspect had no effect on the number of confessions confirming the police's preconfession theory of the crime. If the confession story is very similar to the police theory just as often under low pressure as under high pressure present for weak evidence, or, similarly, when there is strong evidence, then the experiment would not have shown that high pressure produces less reliable confessions. If only pressure, or only the amount of evidence turned out to have an effect on the number of confirming confessions, then the experiment would fail to show the predicted result; it is the interaction of these two variables which is of critical importance.

If the experiment does produce the predicted result, then it will be seen that when there is weak evidence and high pressure, then more confessions will result in substantiation of the detectives' preconfession theory than when there is weak evidence and low pressure. The strong evidence condition would show little or no difference in the varying levels of pressure. This interaction might occur if it is true that when there is only weak evidence, and high pressure is exerted on the suspect, he tends to acquiesce in the police's version of the event.

The predicted result can be shown graphically:

![Graph showing interaction of pressure and evidence on confessions]

66. For a discussion of the original philosophy of juvenile law, see In re Gault, 387 U.S. 1, 14-19 (1967).
Another potential result of subtly coercive interrogations is that
the confessor may become unable to remember the complete truth later. An experiment conducted by psychologist Daryl Bem\(^6\) demonstrated that subjects who have lied under circumstances in which they are ac-
customed to telling the truth show a tendency to misremember the truth later. The act of lying at times generally associated with telling the truth caused the subjects actually to believe the lie. Significantly, this result occurs only when the coercion has been subtle; if the tactics used to elicit the lie have been heavy-handed, the person does not believe his lie because he has not been placed in a circumstance in which he is accustomed to telling the truth.\(^6\) Relating his finding to criminal con-
fessions, Bem asserts:

It appears that the less a society uses [overtly] coercive tactics in
interrogation, the more susceptible the individual being interro-
gated becomes to thought control through self-persuasion. Indeed, it could be argued from the conclusions of our research that there
is need for greater legal safeguards for the individual during the
crime interrogation.\(^6\)

Some false confessions may be mere fantasies generated by a men-
tally disturbed individual. It is probably more frequent, however, that
crimes may be constructed out of behavior which, unknown to the
accused, the law does not consider culpable because of some extenu-
ating circumstance. An “assault” is not always an assault; perhaps
that moment had come when it became self-defense. A “rape” is not al-
ways a rape; there is often a thin line between consent and nonconsent.
Burglary requires not just breaking and entering, but such action with
an intent to commit a felony. Legal definitions of crimes often are not
as general in scope as public definitions. In response to an interroga-
tor’s leading question, a suspect may confess that he committed an
assault without realizing that his act was not necessarily criminal. Yet,
Bem’s data\(^7\) suggest that confessing the act’s criminality distorts the
memory of the actual event, so that individual may not be able to re-
member the complete truth later. The suggestible suspect who re-
sponds affirmatively to leading interrogation questions may subse-
sequently believe that his behavior was criminal, even if the law might
not have found it culpable.

The implications for the juvenile confessor are particularly dis-
turbing. The Yale Interrogation Study found a disproportionate num-
ber of young suspects among those who were subjected to the most co-
ercive tactics, possibly because juveniles often were questioned about

\(^{68}\) Id.
\(^{69}\) Bern, When Saying is Believing, PSYCHOLOGY TODAY, July 1967, at 25 [hereinafter cited as Bem].
\(^{70}\) See text accompanying notes 67-69 supra.
more serious crimes.\textsuperscript{71} In light of the fact that juveniles possess personal qualities which make them among the most susceptible to subtle coercion,\textsuperscript{72} Bem's prediction of self-persuasion becomes especially relevant. It has been argued, however, that a child's "guilt" or "innocence" is not an important consideration in the disposition of juvenile cases.\textsuperscript{73} The original philosophy of juvenile law held that actual guilt was of secondary importance when compared to the "downward career" of the child.\textsuperscript{74} It is this reasoning which justified use of the preponderance of the evidence rule in juvenile courts rather than the adult criminal standard of proof beyond a reasonable doubt.\textsuperscript{75} The logical extension of this argument seems to imply that an inaccurate confession by the child would not hinder the court in disposing of the case in the best interest of the juvenile's future development. If, however, as a result of making an inaccurate confession of criminality, the child now believes himself to be a criminal, his self-concept may have been permanently affected.

### Inaccurate Confessions: How Likely?

Data on the number of false or inaccurate confessions traditionally have been difficult to obtain. If the self-persuasion process has in fact been frequently operative, verification of an inaccurate confession would be difficult since a confession's accuracy usually would not be subject to later challenge. The only definitive proof of the existence of false confessions must come from cases where other evidence unequivocally disproves the confessor's guilt. Such cases are understandably rare, but those which do get reported give cause to consider the impact of the phenomenon. For example, in \textit{In re Carlo}, two boys, thirteen and fifteen years old, were arrested and interrogated concerning the murder of a young girl. The boys confessed, including such details as beating and sexually assaulting her. The autopsy and other uncontroverted evidence at the trial showed that no such beating or sexual assault had ever taken place.\textsuperscript{76} Another example is \textit{In re Gregory}. In that case, two twelve year old boys confessed to the murder of an aged housekeeper in a New York mansion and actually reenacted the crime for the police. It was later shown that one of the boys had been locked in a mental ward of a hospital at the time the crime was committed.\textsuperscript{77}

\textsuperscript{71} Yale Interrogation Study, supra note 40, at 1561.
\textsuperscript{72} See text accompanying notes 43-44 supra.
\textsuperscript{73} See the discussion of this philosophy in \textit{In re Gault}, 387 U.S. 1, 15-16 (1967).
\textsuperscript{74} \textit{Id}.
\textsuperscript{75} See \textit{In re Dennis M.}, 70 Cal. 2d 444, 454, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969).
Finally, in *In re Garland*, a fifteen year old boy was apprehended because he was on the street at a late hour. Although he was not at that time linked with any crime, the police interrogated him extensively. He confessed to several crimes, including a burglary, for which there was no other significant evidence. The court observed that it was physically impossible for the boy to have removed the property involved in the burglary.\(^\text{78}\)

Such cases, incredible at first blush, are more plausible in light of the empirical studies which have been reviewed here. We are reminded that "the mind of man is malleable, the gentle art of persuasion can be the gloved hand of thought control, and beliefs are sometimes fragile things."\(^\text{79}\) It is apparent that minors, at the very least, should be protected from a process which may leave a youth confused "about his feelings toward the police, toward the law he is charged with violating, perhaps even toward his innocence."\(^\text{80}\)

### Conclusion

The landmark decisions of *Miranda* and *Gault* promulgated policies whose implementation is still largely unresolved. The right of the juvenile suspect in California to receive the *Miranda* warnings and the accompanying right of refusing to waive these constitutional rights are not effective as safeguards against coercion. Since there are strong internal and external pressures compelling the individual to waive his right, the power of refusal is an illusory one.

The dilemma of a minor faced with police interrogators is that if the youth is assertive enough to refuse to waive his constitutional rights, the refusal itself will virtually eliminate all possibility of release or other leniency. On the other hand, if the juvenile is submissive, he may emerge from the interrogation experience with increased hostility toward the police and confusion about the nature of his own guilt or innocence. A juvenile suspect’s “power” of nonwaiver is a “heads they win, tails he loses” phenomenon.

Moreover, the legal and psychological literature reviewed here strongly indicates that the suggestible juveniles, who are least likely to assert their *Miranda* rights through nonwaiver or another unmistakable act, are those in greatest need of protection from the leading questions of interrogators. *People v. Burton* attempts to deal with this problem by emphasizing the second *Miranda* requirement, which prohibits the continued interrogation of suspects after they have expressed reluctance to talk. The *Burton* decision recognizes that a juvenile’s expression of

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\(^\text{79}\). Bern, *supra* note 69, at 22.

his unwillingness to forego his right to silence may be buried in a request to see his father. This decision must not be constrained by its facts and the analogy which the court saw between a boy asking to see his father and an adult requesting to see an attorney. Burton also relies upon Randall's broad present willingness test, under which a wide range of words and acts expressing hesitation would arguably be included.81

The interdisciplinary approach affords an opportunity to appreciate both the breadth of the problem of coercion and the necessity that it be resolved. Much of the psychological literature has suggested that extensive damage may result from coerced confessions—damage which may never be undone even if the confession is later ruled inadmissible as evidence. For this reason, it is hoped that the court will continue to develop the Randall test with its emphasis on observable behavior rather than upon an abstract condition, such as fundamental fairness. A test which focuses upon behavior gives more specific guidance to police and to lower courts. Finally, it is hoped that the court will expand the Burton principle that a juvenile may be less sophisticated than an adult in an expression of his desire to assert his Fifth Amendment right against self incrimination.

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81 Burton is distinguished in Griffin v. Superior Court, 26 Cal. App. 3d 672, 699, 103 Cal. Rptr. 379, 396 (1972), where the court found that the defendant's statements during interrogation were not an indication of a desire to invoke the Fifth Amendment privilege, but were a ploy to find out how much the police already knew. The defendant was not a juvenile, however.

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