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The Decision Zone: The New Stage of Interrogation Created by *Berghuis v. Thompkins*

Meghan Morris*

Abstract

This Article addresses a new stage of interrogation, approved of for the first time in the Supreme Court's 2010 decision, *Berghuis v. Thompkins.* This stage—the "decision zone"—is the period, however brief or prolonged, after officers have read a suspect his rights but before the suspect has decided whether to waive or to invoke those rights. In *Thompkins*, the Supreme Court allowed interrogation during this stage, which lasted almost three hours in that case. In *Thompkins,* the Supreme Court implicitly assented to prolonged interrogation before a suspect decides whether to invoke or to waive his rights, thus creating the decision zone.

This Article argues that existing precedents regarding trickery in interrogations address police behaviors only before a suspect is read his rights or after he has waived his rights and agreed to talk to police. These precedents do not directly address trickery in the decision zone. Such precedents are, in fact, overbroad when applied to interrogation in the decision zone because this interim period is the crucial time in which a suspect is deciding whether or not to waive his rights. Courts must look at the constitutionality of police trickery during this period as a new question not controlled by existing precedents.

Under *Maryland v. Seibert,* police officers may not intentionally undermine the effectiveness of Miranda warnings. This Article argues that

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trickery in the decision zone may be barred by *Seibert* and other precedents in certain instances. This Article proposes a two-factor test for deciding when trickery in the decision zone should be found unconstitutional. First, a court must ask whether a given police practice has the intent and effect of undermining Miranda warnings. Second, the court must ask whether the police practice has a tendency to produce false confessions. These factors, rather than existing precedents regarding trickery in interrogations, should control the new constitutional inquiry into police behavior within the decision zone.

I. Introduction

On June 1, 2010, the Supreme Court handed down an important decision that limited the rights of criminal suspects. In *Berghuis v. Thompkins*, the Court held that a suspect does not invoke his right to silence by remaining silent through two hours and forty-five minutes of interrogation.[1] Officers were allowed to question Thompkins for this prolonged period, despite his refusal to sign a card waiving his rights to silence and counsel.[2] They were allowed to continue questioning him despite his stubborn silence through almost three hours of interrogation.[3] The Supreme Court held that Thompkins did not invoke his right to silence

1. 130 S. Ct. 2250, 2258–60 (2010).
2. *Id.* at 2255–56.
3. *Id.*

through this long silence,[4] and that he then validly and voluntarily waived his right to silence in the following exchange:

> [Detective] Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered "Yes" and looked away.[5]

The Court held that these statements were constitutionally admitted into evidence at Thompkins's trial for first-degree murder.[6]

The *Thompkins* decision applied the standard from *Davis v. United States*, which involved the right to counsel and required suspects to clearly and unambiguously invoke their constitutional rights.[7] The Court reasoned that since interrogation must cease when a suspect invokes either the right to counsel or the right to silence, courts should apply the *Davis* standard in both cases.[8] Requiring clear invocation "'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity."[9]

The *Thompkins* decision has one particularly important implication. Supreme Court precedent allows implied waivers of the right to silence, which means that police may interrogate a suspect without an explicit written or verbal waiver.[10] But *Thompkins* is the first decision to explicitly allow police to interrogate a suspect before obtaining *any* waiver, whether implied or explicit, of a suspect's constitutional rights.[11] This is a new and important limitation on suspects' rights. It creates a new stage of interrogation—a legal limbo—during the window, however brief or prolonged, when a suspect has heard his *Miranda* warnings but has not yet waived his rights.[12]

Thompkins does not tell us what police actions or interrogation techniques are constitutional in this limbo. The legal landscape here is different from the period before a suspect has been read *Miranda* warnings as well as from the period after a suspect has validly waived his rights. The interval between *Miranda* warnings and a valid waiver, which I will call the

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4. *Id.* at 2259–60.

5. *Id.* at 2257 (alterations in original) (citations omitted).

6. *Id.* at 2264.

7. *See id.* at 2259–60; Davis v. United States, 512 U.S. 452, 458–59 (1994). In *Davis*, the Court held that the statement "[m]aybe I should talk to a lawyer" was not clear or unambiguous enough to invoke the accused's right to counsel. *Id.* at 462.

8. *Thompkins,* 130 S. Ct. at 2259–60.

9. *Id.* at 2260 (alteration in original) (quoting *Davis*, 512 U.S. at 458–59).

10. *See* North Carolina v. Butler, 441 U.S. 369, 374–75 (1979).

11. *Thompkins*, 130 S. Ct. at 2263.

12. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). In *Miranda*, the Court stated that unless other effective procedural safeguards were devised, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.*

"decision zone," is the period in which a suspect mulls over whether to waive or to invoke his rights to silence and counsel. The decision zone is thus a critical time for a suspect—it is when he considers whether to speak freely to the police or to preserve his rights to silence and counsel. This stage may last just seconds, or it may last hours, as it did in *Thompkins*.[13] In *Thompkins*, the Supreme Court approved of interrogation in the decision zone.[14] However, the Court's decision does not imply that all police interrogation tactics that are acceptable after a suspect validly waives his rights are necessarily allowable in the decision zone. Instead, the decision zone is a prime target for *Miranda*'s warning that a waiver may not be procured through cajoling or trickery.[15] I propose that the limit on *Thompkins*'s seemingly sweeping implications is *Miranda*'s language regarding "trickery."

Miranda bars police from tricking a suspect *into* a waiver of his rights.[16] This language particularly applies to police actions in the decision zone—during the minutes or hours of an interrogation before a suspect waives his rights. Under existing precedent, lying about evidence, pretending not to be an adversary, and minimizing the importance of *Miranda* warnings are generally constitutionally acceptable interrogation techniques.[17] Meanwhile, knowingly exploiting a suspect's mental illness, youth, or cognitive disability may be unconstitutional depending on the circumstances.[18] But what police can do before a suspect waives his or her rights is a completely different issue from what they can do during interrogation after a waiver.[19] *Miranda* only states that a suspect may not be "threatened, tricked, or cajoled *into* a waiver[.]"[20] Therefore, police have more latitude after a suspect voluntarily, knowingly, and intelligently waives his rights.[21] Under existing precedent, it is far worse for police to taint a suspect's decision to waive his rights than it is for them to influence his post-waiver decision to confess.[22] Put simply, precedents regarding post-waiver police actions are overbroad when applied to pre-waiver interrogation. Thus, this Article considers what otherwise acceptable interrogation tactics might

13. *Thompkins,* 130 S. Ct. at 2258–60.

14. *Id.* at 2264.

15. *Miranda*, 384 U.S. at 476 ("[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.").

16. *See id.*

17. *See infra* notes 88–89, 134–138 and accompanying text.

18. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432–35 (2000) (chronicling the development of "the law governing the admission of confessions"); Colorado v. Connelly, 479 U.S. 157, 163–67 (1986) (noting the development of the Supreme Court's "involuntary confession" jurisprudence, describing mental condition as a "significant factor in the 'voluntariness' calculus").

19. *See Miranda*, 384 U.S. at 444 (describing custodial interrogation and requiring procedural safeguards prior to interrogation to ensure protection of the privilege against self-incrimination).

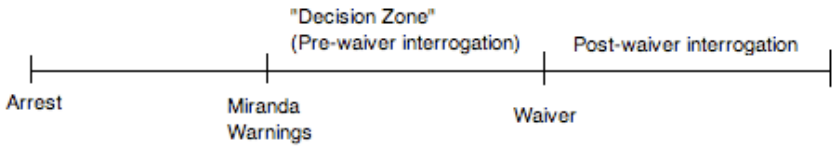
20. *Id.* at 476 (emphasis added).

21. *See id*. at 479.

22. *See Dickerson*, 530 U.S. at 432–36 (recognizing that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements" and describing the *Miranda* decision as providing "concrete constitutional guidelines" requiring law enforcement to provide specific warnings pre-interrogation).

be unconstitutional in the decision zone.

Figure 1: Timeline of an interview involving interrogation between warnings and waiver.



II. Background

The *Thompkins* decision is the latest in a line of cases that have retreated from or cabined the protective principles of *Miranda v. Arizona*.[23] In that seminal case, the Supreme Court promulgated warnings to ensure that police "use . . . procedural safeguards effective to secure the privilege against self-incrimination."[24] The Court went on to say that "if [an accused] is alone and indicates *in any manner* that he does not wish to be interrogated, the police may not question him."[25] In addition to the lack of "full warnings of constitutional rights," the Court was concerned with "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements . . . ."[26] Further, the Court specifically stated that most modern coercion was mental, and not physical.[27] Indeed, the psychological tactics employed by detectives seemed of particular concern because they were less obviously coercive.[28] Finally, the Court worried about the pressures inherent in custodial interrogation: "Even without employing brutality, the 'third degree' or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[29]

The Court even seemed to preemptively address the situation that arose in *Thompkins*:

> [T]he fact of lengthy interrogation or incommunicado

23. *See, e.g.*, *id.* at 433–35 (suggesting a distinction between involuntary confessions and *Miranda*-violating confessions); Colorado v. Connelly, 479 U.S. 157, 164 (1986) (holding that official coercion is necessary to vitiate the voluntariness of an accused's confession); Lego v. Twomey, 404 U.S. 477, 486 (1972) (holding that the prosecution must only prove voluntariness by a preponderance of the evidence).

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

25. *Id.* at 445 (emphasis added).

26. *Id.*

27. *Id.* at 448–49.

28. *See id.* at 445–49.

29. *Id.* at 455.

> incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.[30]

Clearly, this dictum has been superseded by the *Thompkins* decision. *Thompkins* stands at least for the proposition that if the police question an accused who has not yet waived his rights for over two hours before he makes a statement, the accused may still voluntarily, knowingly, and intelligently waive his rights simply by responding to questioning.[31] However, it is unclear how far the decision reaches.

In *Thompkins*, the accused knew he was being interrogated. Police officers questioned Thompkins about discrete, named crimes. Thompkins responded to questioning that was clearly meant to incriminate him.[32] When Thompkins made inculpatory statements, he presumably understood that he was being interrogated and that his statements incriminated him. This will not always be the case. The proliferation of deceptive techniques, including feigned sympathy for the suspect, may lead to situations in which a suspect who has received *Miranda* warnings does not understand that a detective is acting as his adversary.[33] One might think that it would be obvious to a suspect, arrested and interrogated by the police, that the officers are his opponents.[34] But many common interrogation techniques are designed to make an accused forget that fact and to believe that it is in his best interest to speak to—and to confess to—the police.[35]

Some of the limiting language in *Miranda* retains vitality. In particular, the Court has not repudiated its statement that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course,

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30. *Id.* at 476.

31. *Thompkins*, 130 S. Ct. at 2262–63.

32. *See id.* at 2256–57 (quoting a detective who asked "[d]o you pray to God to forgive you for shooting that boy down?" Thompkins responded "Yes.").

33. A leading interrogation manual recommends this technique, stating that an interrogator should ask to interview the suspect in a way that "appears beneficial to the suspect," like "Tom, I've been able to eliminate a number of people in this case by having them come in to talk to me. I'd like to arrange a time to meet with you as well." FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 89–90 (4th ed. 2004). The manual also recommends that an interrogator establish a rapport with a suspect and offer possible moral excuses for having committed the offense. *Id.* at 93, 213. These techniques are meant to help a suspect forget that the interrogator is his adversary.

34. *See* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 811 (1997) [hereinafter Slobogin, *Deceit*].

35. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808–09 (2006); *see also* INBAU ET AL., *supra* note 33, at 419 ("Ordinary people do not act against self-interest without at least a temporary perception of a positive gain in doing so."). The interrogation manual reassuringly states that "[i]t must be remembered that none of the [prescribed interrogation] steps is apt to make an innocent person confess and that all the steps are legally as well as morally justifiable." INBAU ET AL., *supra* note 33, at 212.

show that the defendant did not voluntarily waive his privilege."[36] The tactics the Court described and disapproved of in *Miranda*—isolating the suspect, projecting confidence in the suspect's guilt, lying about the existence of evidence against the suspect, and minimizing the seriousness of the offense—have been generally accepted tactics in obtaining a confession.[37] However, if suspects may be questioned without a waiver, and if they may then waive their rights solely by responding to questioning, then it is time to revisit *Miranda*'s language regarding trickery and consider how it applies in such interrogations. To ensure that suspects' rights are protected, it is essential that an implied waiver after a long interrogation not be obtained through deceit or trickery. Interrogations in which suspects are read their rights but refuse to waive them are a minority of all interrogations conducted,[38] but they are prime targets for *Miranda*'s admonition that suspects may not be tricked into a waiver of their constitutional rights.

III. Unconstitutional Trickery in the Decision Zone: A Two-Factor Test

The *Miranda* Court disapprovingly noted that "interrogators sometimes are instructed to induce a confession out of trickery."[39] The Court also surveyed a range of interrogation techniques, including displaying complete confidence in the suspect's guilt, offering excuses for why he might have committed the crime, and interrupting questioning to place the suspect in a line-up, possibly with fictitious witnesses to identify him.[40] But the Court did not say that these techniques were unconstitutional, nor did it say that they constituted "trickery" per se. So what exactly is trickery? It must be some subset of psychologically coercive interrogation practices, but the Court did not define it in *Miranda* and has illuminated its contours only vaguely through case-by-case determinations.[41] Commentators and scholars have catalogued police interrogation techniques,[42] critiqued or supported the use of deception in police interrogation,[43] and discussed the exploitation of

36. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

37. *See id*. at 450; *see also* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 391–95 (2007) [hereinafter Kassin, *Police Interviewing*]; *see generally* INBAU ET AL., *supra* note 33.

38. Kassin, *Police Interviewing*, *supra* note 37, at 394. In Kassin's study, police officers estimated that 81% of people waive their *Miranda* rights. *Id.* at 389. Kassin surveys other research to show that this estimate is fairly accurate: most studies estimate that about four-fifths of suspects waive their rights at the beginning of an interrogation. *Id.* at 383. Only one to four percent of people waive their rights but then invoke them during the interrogation. *Id.* at 394.

39. *Miranda*, 381 U.S. at 453.

40. *Id.* at 449–55.

41. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004); Colorado v. Connelly, 479 U.S. 157 (1986); Colorado v. Spring, 479 U.S. 564 (1987); Frazier v. Cupp, 394 U.S. 731 (1969). For a discussion of some of these determinations, see *infra* notes 45–52 and accompanying text.

42. *See, e.g.*, Kassin, *Police Interviewing*, *supra* note 37 (describing police interrogation techniques); Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 401–02, 403–04 (1999) (same).

43. *See, e.g.*, Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per*

suspects' weaknesses, particularly youth.[44] But few have explored the range of tactics that might be considered trickery, or how the use of *Miranda*'s language regarding trickery might limit precedents, like *Berghuis v. Thompkins*, that curtail suspects' rights and allow police interrogation before a suspect has waived his or her rights.

Several post-*Miranda* cases have considered what constitutes unconstitutional trickery, but all, apparently, only after the suspect has executed a waiver of his rights. The Burger and Rehnquist Courts handed down a few clear limitations on what might be considered trickery in the post-waiver context. In *Moran v. Burbine*, the Court confronted a situation in which police failed to inform an accused that a lawyer had been hired for him and that she had asked officers not to question him without her.[45] The Court found that this was not "the kind of 'trick[ery]' that can vitiate the validity of a waiver."[46] In *Colorado v. Connelly*, the Court required some sort of police coercion to render a confession invalid.[47] Thus, a spontaneous confession prompted by psychosis was admissible at the suspect's trial.[48] The Court has also found that a suspect's confession to murder in response to interrogation was voluntary even though he did not realize that the questioning would cover that offense.[49] The Court explicitly declined to hold that "mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of *Miranda* rights."[50] The Court noted, however, that in some cases, "affirmative misrepresentations by the police" might invalidate a suspect's waiver of his rights.[51]

Even with these limitations, a wide variety of investigative techniques could be considered unconstitutional trickery if the suspect has refused to waive his or her rights. Deceptive police department-wide practices meant to procure a suspect's waiver of *Miranda* rights are suspect

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Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment, 39 TEX. TECH L. REV. 1239, 1254–66 (2007) (describing potential tests for judging the significance of implied and explicit deception practiced before *Miranda* warnings and waiver); Gohara, *supra* note 35, at 831–40 (critiquing police interrogation techniques involving use of deception); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1185 (2001) (justifying lying during a police interrogation); Slobogin, *Deceit*, *supra* note 34, at 778–88 (discussing both the merits and moral dilemmas of police lying during interrogations).

44. *See, e.g.*, Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 233, 315 (2006) (describing the exploitation of youth witnesses); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (2005) (describing the difficulties that youth face during police interrogations).

45. 475 U.S. 412, 417 (1986).

46. *Id.* at 423 (citing Miranda v. Arizona, 384 U.S. 436, 476 (1966)).

47. Colorado v. Connelly, 479 U.S. 157, 164 (1986).

48. *Id.* at 161, 167.

49. Colorado v. Spring, 479 U.S. 564, 575 (1987).

50. *Id*. at 576.

51. *Id*. at 576, n.8.

under *Missouri v. Seibert*.[52] Lying about the existence of evidence incriminating the suspect, minimizing the importance of *Miranda* warnings, and pretending to be a friend rather than an adversary before the suspect has waived his rights might be examples.[53] Knowingly exploiting a suspect's youth, inexperience, low IQ, or mental illness could also be considered unconstitutional trickery.[54] Many of these techniques are quite common,[55] which might weigh in favor of considering them constitutional. But we also need to consider what the *Miranda* Court disapproved of or feared when it spoke of trickery,[56] and what the average person might think of as duplicitous or unfair when considering police tactics.

I propose the following two-factor analysis for determining whether police actions in the decision zone constitute unconstitutional trickery: First, courts should consider whether an interrogation technique is meant to undermine the *Miranda* warnings previously given, and whether the technique has the effect of tricking or cajoling a suspect into a waiver of his constitutional rights; second, courts should consider whether a given interrogation practice may induce false confessions.[57] As Miriam Gohara has cogently argued, the tendency of coercive tactics to produce false confessions should be a key factor in determining whether those tactics constitute unconstitutional trickery.[58] I would add that such a tendency is particularly problematic in the decision zone—when the suspect is weighing whether to remain silent or to speak to the police. It is at this time when the suspect is determining the best course forward, and thus when he may be most susceptible to police trickery—such as the production of false evidence against him—that may make it appear rational to confess falsely. The remainder of this Article explores the precedential basis for the two-factor test and then applies the test to common interrogation practices.

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52. Missouri v. Seibert, 542 U.S. 600, 609–10 (2004).

53. *See* sources cited *supra* note 43.

54. *See* sources cited *supra* note 44.

55. *See* INBAU ET AL., *supra* note 33, at 89–90, 93, 213, 419–22; Kassin, *Police Interviewing*, *supra* note 37, at 388 Table 2.

56. The *Miranda* Court did not want existing coercive methods of interrogation to persist. "The requirement of warnings and waiver of rights is a fundamental [sic] with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Miranda v. Arizona, 384 U.S. 436, 476 (1966).

57. As even interrogators have begun to realize, innocent people may falsely confess when subjected to certain interrogation methods. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 195–236 (2008). In this chapter, Leo discusses two main types of false confessions: coerced and persuaded. Coerced confessions occur when the suspect does not actually believe that he is guilty, but nonetheless decides to confess to escape the interrogation or to gain a more lenient sentence. Persuaded confessions occur when police convince a suspect to temporarily doubt his innocence and believe it is more likely than not that he committed the crime of which he is accused. Although the suspect does not necessarily internalize false memories, he comes to doubt his sanity or his memory, and thus becomes willing to take responsibility for the crime. *Id.*

58. *See generally* Gohara, *supra* note 35.

A. Factor One: Intent to Undermine *Miranda*

When a person refuses to waive his rights directly after receiving *Miranda* warnings, this creates the decision zone scenario. Officers may begin the interrogation without a waiver. A person who fails to waive his rights immediately expresses some reluctance to speak with the police, and police may interpret this reluctance suspiciously—believing that the suspect has something to hide. They may actually attempt to press the suspect harder than if he had waived his rights. But, in the decision zone, police should not be able to use tactics that undermine the previously given *Miranda* warnings.

The first factor in my proposed test for unconstitutional police trickery in the decision zone is whether a given police tactic is intended to undermine *Miranda* warnings and prompt a suspect to speak. After *Berghuis v. Thompkins*, an incriminating statement can alone constitute a waiver of a suspect's right to be silent, even if that suspect has previously refused to waive his rights.[59] Thus, with suspects who refuse to waive their rights, police will be tempted to use tactics that cajole or trick a suspect into speaking. When interrogators do this, courts should evaluate police officers' actions by asking whether the interrogation practice was intended to undermine the suspect's *Miranda* warnings.

The Supreme Court has set a strong precedent of looking to police department practices and intentions in determining whether interrogation techniques are constitutional. In *Missouri v. Seibert*, the Court invalidated a confession obtained through a two-step procedure.[60] It was the police department's practice to first interrogate the suspect until he confessed; then, an officer would administer *Miranda* warnings and the interrogation would continue until the suspect confessed again.[61] This practice was not limited to a single police department, but was promoted by "a national police training organization" and organizations like the Police Law Institute.[62] Officers successfully used the two-step process against Seibert.[63] Missouri police interrogated her, procured a confession, and then gave her *Miranda* warnings, after which she confessed again.[64]

The plurality held that *Miranda* warnings delivered in the middle of an interrogation were sufficient if they were "effective enough to accomplish their object," which is to inform a suspect of his rights and his ability to

59. *See supra* notes 1–6 and accompanying text.

60. 542 U.S. 600, 616–17 (2004).

61. *Id.* at 604.

62. *Id.* at 609–10, 610 n.2. Though note that not all interrogation experts advocated this "question-first" practice. Interestingly, a later edition of the interrogation manual dissected in *Miranda* understood *Oregon v. Elstad*, 470 U.S. 298 (1985) only to salvage unwarned confessions where there was a good-faith failure to give *Miranda* warnings. *See* INBAU, ET AL., *supra* note 33, at 297. Thus, the manual disavowed the deliberate use of the two-step procedure to undermine the effect of *Miranda* warnings. *Id.*

63. *Seibert*, 542 U.S. 604–06.

64. *Id.*

invoke those rights.[65] In the case of the two-step procedure, the Court held that the meaning and purpose of *Miranda* warnings were so weakened by the prior interrogation that the mid-interrogation warnings were ineffective.[66] A suspect may have even reasonably believed that she did not have the rights to silence or counsel in the preceding interrogation, before she was given warnings.[67] Justice Kennedy concurred on narrower grounds, holding that *Miranda*-defective statements were inadmissible only if police deliberately limited the effectiveness of the *Miranda* warnings.[68] The existence of a department-wide strategy meant to undermine *Miranda* warnings in *Seibert* seemed to make the difference to Justice Kennedy.[69] Most lower courts have followed Justice Kennedy's reasoning.[70]

The logic of *Seibert* extends to procedures beyond the two-step interrogation used in that case. A driving concern of both the plurality and Kennedy's concurrence in *Seibert* apparently is that police ought not to purposefully undermine the effectiveness of *Miranda* warnings. If such behavior were allowed, then *Miranda* warnings would be rendered a meaningless exercise—"simply a preliminary ritual"—to otherwise coercive interrogation.[71] As the *Seibert* Court explained: "The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed . . . . it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance."[72]

Similarly, in his concurrence, Justice Kennedy stated that the case involved "a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given."[73]

Both the *Seibert* plurality and the concurrence focus on police intent to minimize the importance of *Miranda* warnings.[74] *Seibert*'s focus on intent limits the tactics that police may use in interrogating suspects going forward.[75] Under the reasoning of *Seibert*, officers may not purposefully

65. *Id.* at 615.

66. *Id.* at 615–16.

67. *Id.* at 620 (Kennedy, J., concurring).

68. *Id.* at 622 (Kennedy, J., concurring).

69. *See id.* at 621–22 (Kennedy, J., concurring).

70. *See, e.g.*, United States v. Williams, 435 F.3d 1148, 1157–58 (9th Cir. 2006) ("[W]e hold that a trial court must suppress postwarning confessions obtained during a deliberate two-step interrogation where the midstream *Miranda* warning—in light of the objective facts and circumstances—did not effectively apprise the suspect of his rights."); United States v. Kiam, 432 F.3d 524, 532 (3d Cir. 2006) (holding that the Court would apply the test from Justice Kennedy's opinion, requiring a deliberate flouting of *Miranda* and even then allowing certain measures to cure this unconstitutional action); United States v. Stewart, 388 F.3d 1079, 1090 (7th Cir. 2004).

71. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966).

72. Missouri v. Seibert, 542 U.S. 600, 611 (2004).

73. *Id.* at 620 (Kennedy, J., concurring).

74. *See id.* at 616–17; *id.* at 620–21 (Kennedy, J., concurring).

75. *See id.* at 617 ("Because the question-first tactic effectively threatens to thwart *Miranda*'s

work to limit the effectiveness of *Miranda* warnings.[76] Thus, police intent should be one factor in determining whether a particular tactic constitutes unconstitutional trickery meant to deceive a person into waiving his rights to counsel or silence.

A bare intent to deceive or trick, however, will rarely be sufficient to find police actions unconstitutional. The application of *Seibert* is limited by the clear pattern and practice of undermining *Miranda* warnings in that case.[77] Not long after *Miranda*, the Supreme Court decided *Frazier v. Cupp*, a case in which police officers falsely told a suspect that his cousin had confessed to a crime and had implicated him.[78] The suspect subsequently confessed to a murder, perpetrated along with his cousin.[79] One could argue that police also tricked Frazier by feigning sympathy for him, "suggest[ing] that the victim had started a fight by making homosexual advances."[80] However, the Court did not mention this directly in its voluntariness analysis. Also unmentioned in that part of the opinion is the fact that Frazier had indicated he wanted a lawyer, but was rebuffed by the interrogating officer.[81] The Court used a totality of the circumstances test in evaluating the voluntariness of Frazier's confession and found that an outright, knowing lie by police officers about evidence implicating the accused was insufficient to render his confession involuntary.[82] The Court stressed that Frazier had "received partial warnings of his constitutional rights; this is, of course, a circumstance quite relevant to a finding of voluntariness."[83] The fact that police had lied about his co-defendant's statements was "relevant" to the inquiry, but was insufficient to render his confession involuntary.[84] The Court did not specifically mention the officer's feigned sympathy in its voluntariness analysis, but one can imagine that this, too, weighed in the calculus, and was also found insufficient.

Frazier reveals the central role that warnings play in the modern-day voluntariness calculus. Frazier's arrest and interrogation occurred before the *Miranda* decision, so officers were not bound to give the specific warnings that the Court later found constitutionally required.[85] But officers did give

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purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's post-warning statements are inadmissible.").

76. *See id.*

77. *See id.* at 617; *id.* at 620 (Kennedy, J., concurring).

78. Frazier v. Cupp, 394 U.S. 731, 737–38 (1969); *see also* Gohara, *supra* note 35, at 796.

79. *Frazier*, 394 U.S. at 732, 738.

80. *See id.* at 738.

81. *Id*. Frazier stated "I think I had better get a lawyer before I talk any more. I am going to get into trouble more than I am in now." *Id.* The interrogating officer replied, "You can't be in any more trouble than you are in now," and continued the interrogation. *Id.*

82. *Id.* at 739.

83. *Id.*

84. *Id.*

85. *See id.* at 732 (Frazier was convicted in an Oregon state court in 1964, two years before the Supreme Court's ruling in *Miranda*).

Frazier "partial warnings" about his constitutional rights, and this weighed heavily in favor of finding his confession voluntary.[86] Even though the interrogating officers had knowingly lied to Frazier, far overstating their evidence against him by saying his cousin had implicated him, and even though the officers supplied Frazier with what they suggested was an understandable motive for committing a murder, the Court still concluded that Frazier's confession was voluntary because he had been informed of his constitutional rights.[87]

Thus, it cannot be that an officer's intent to deceive a suspect will independently be a decisive factor in determining where unconstitutional trickery exists. Clearly, there are some cases in which officers may constitutionally knowingly deceive a suspect.[88] But an interrogating officer's deceptive intent is—and should be—a factor in the analysis. Under *Seibert*, the relevant intent is not the intent to deceive, but the intent to undermine *Miranda* warnings.[89] If officers intend to undermine the effectiveness of *Miranda* warnings through their actions, this factor should and does make any technique they use constitutionally suspect.

B. Factor Two: Tendency to Produce False Confessions

There is less precedent for using the likelihood of false confessions as a factor in evaluating police tactics, but it is a current judicial consideration for particular categories of suspects. The possibility of false confessions by vulnerable populations such as juveniles and the mentally retarded has been a factor in judicial analyses of punishments for these groups.[90] Any particular deceptive interrogation tactic should be more likely to be considered unconstitutional trickery if knowingly employed against these vulnerable groups. However, courts should also extend their analysis to particular police practices that are more likely to induce false confessions, regardless of the

86. *Id.* at 739.

87. *Id.*

88. *See, e.g.*, United States v. Fleming, 225 F.3d 78, 91 (1st Cir. 2000) (holding that a confession was voluntary when given in response to a promise of immunity from an FBI agent without authority to grant immunity); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990) ("[I]t is well settled that police may use small deceptions while interrogating witnesses . . . . [and] police are free to solicit confessions by offering to reduce the charges against the defendant."); United States v. Matthews, 942 F.2d 779, 782 (10th Cir. 1991) (finding the suspect's statements voluntary where he was led to believe that if he cooperated, no charges would be brought against him).

89. Missouri v. Seibert, 542 U.S. 600, 622 (2004).

90. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2401 (2011) (noting the problem of false confessions with particular concern to those of juveniles); Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) (noting the problem of false confessions and exonerations of people with mental disabilities); In re Jimmy D., 938 N.E.2d 970, 979 (N.Y. 2010) (Lippman, J., dissenting) ("So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room."); State v. Lawrence, 920 A.2d 236, 264 (Conn. 2007) (Palmer, J., concurring) (stating that "children and mentally disabled persons are especially vulnerable to police overreaching . . . [and] it appears that they also are more likely than others to confess falsely even in the absence of improper government coercion").

suspect's characteristics.

Courts might think of this analysis as similar to an entrapment inquiry. In entrapment cases, a court asks whether given police actions were likely to make a person who was not predisposed to commit a crime act criminally.[91] Part of this inquiry is whether "the government's conduct created a substantial risk that the offense would be committed by a person other than one ready to commit it."[92] The inquiry into police interrogation tactics would be similar: did the government's conduct create a substantial risk that a confession would be made by a person who did not commit the crime?

Certain police tactics may change an innocent suspect's analysis of his options and make it seem rational for him to confess to a crime he did not commit. Obviously, physical coercion can affect the innocent suspect's choices in this way, which is in part why the Supreme Court and the public have disavowed using force in interrogations.[93] But non-physical police coercion can also lead a suspect to confess falsely. In some instances, confessing falsely may seem to be the most rational option.[94] If a particular police tactic is likely to induce false confessions, this should be a factor in a court's trickery analysis.

IV. Application of the Two-Factor Test

A. Lying About Evidence

A common (and commonly critiqued) method of police interrogation involves lying to a suspect about the evidence against him by exaggerating the strength of the State's case.[95] Only a few years after *Miranda*, the Supreme Court considered and upheld the admissibility of a confession when

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91. United States v. Hall, 608 F.3d 340, 343 (7th Cir. 2010); United States v. Orisnord, 483 F.3d 1169, 1178 (11th Cir. 2007).

92. United States v. Ryan, 289 F.3d 1339, 1343–44 (11th Cir. 2002) (quoting United States v. Brown, 43 F.3d 618, 623 (11th Cir. 1995)).

93. *See* Chambers v. Florida, 309 U.S. 227, 231–36 (1940); *see also* Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991) ("It has long been held that beating and threatening a person in the course of custodial interrogation violates the fifth and fourteenth amendments of the Constitution.") (citing Adamson v. California, 332 U.S. 46, 54 (1947); Brown v. Mississippi, 297 U.S. 278, 286 (1936)).

94. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 998 (1997).

95. *See* Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1285 (2007) (noting that police lie during interrogations about the strength of the case against the suspect); Gohara, *supra* note 35, at 835 (recommending that laws should prohibit police from misrepresenting the presence or strength of forensic evidence against a suspect); Magid, *supra* note 43, at 1198 (noting that confessions usually occur only after some form of deception by the officer, including exaggerating the strength of the evidence); Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1242 (2001) (noting that misrepresenting the strength of the evidence against a suspect is an interrogation tactic); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429 (1996) (noting that police lie about sources of testimonial evidence to convince suspects that they have a solid case).

police falsely told the suspect that his accomplice had confessed.[96] In a study by Saul Kassin, in which police self-reported various actions that they took in interrogations on a one (never) to five (always) scale, the average score for "[i]mplying or pretending to have independent evidence of guilt" was a 3.11.[97] This put lying to the suspect regarding the evidence against him below some more widely-accepted techniques like "[c]onducting the interrogation in a small, private room" or "[i]dentifying contradictions in the suspect's story."[98] But, perhaps surprisingly, this tactic was more common than "[a]ppealing to the suspect's religion or conscience" or "[s]howing the suspect photographs of the crime scene or victim."[99] The authors of the study note that because this result is based on self-reporting, it may actually under represent the frequency of this and other possibly coercive tactics.[100] In fact, overstating the evidence police have against the accused is a recommended tactic in at least two widely used interrogation training manuals.[101]

Police officers can and do lie about evidence in a variety of ways. For example, they can give an accused a polygraph and then tell him that he failed. Three percent of officers in Kassin's study reported that this is a tactic they "always" use.[102] Police could state that another person has implicated the suspect in a crime, as the officers did in *Frazier v. Cupp*.[103] They may place a suspect in a line-up where several false witnesses identify him as the perpetrator of crimes other than the one of which he has been accused.[104] They might even go so far as to tell an accused that his fingerprints or DNA was found at the scene. In the well-known Central Park Jogger case, a detective falsely told one of the suspects that his fingerprints had been found on the jogger's shorts.[105] In that case, interrogations including false evidence and insinuations that admitting the crime would be in the best interest of the suspects led to five false confessions.[106] All five defendants were exonerated over a decade later through DNA evidence and a confession from the actual perpetrator.[107]

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96. *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969).

97. Kassin, *Police Interviewing*, *supra* note 37, at 388.

98. *Id.*

99. *Id.*

100. *Id.* at 397.

101. INBAU, ET AL., *supra* note 33, at 290–92; CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 142–44 (6th ed. 1994). These are both later editions of training manuals that the Court critiqued in *Miranda v. Arizona*. *See* 384 U.S. 436, 449 n.9 (1966).

102. Kassin, *Police Interviewing*, *supra* note 37, at 388.

103. 394 U.S. 731, 737–38 (1969).

104. *Miranda*, 384 U.S. at 453. The *Miranda* Court quotes another popular interrogation manual from the time, which states that "[i]t is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." O'Hara, FUNDAMENTALS OF CRIMINAL INVESTIGATION 106 (1956).

105. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 897 (2004).

106. *Id.* at 896.

107. *Id.* at 898–99.

A few courts have invalidated confessions obtained through the presentation of false evidence.[108] These courts seem to be particularly concerned with fabricated documentary evidence that appears to come from reputable sources, rather than simple verbal misrepresentations. For example, in *State v. Cayward*, a Florida appeals court considered false lab reports shown to a nineteen year old suspected of sexual assault.[109] Both reports purported to show that the suspect's semen had been found on the victim's underwear.[110] The police showed the false reports to the defendant during his interrogation intending to procure a confession, and the defendant confessed to the assault.[111] The trial court found that this tactic violated the Due Process Clause, and the court suppressed the ensuing confession.[112] The court stated that police deception did not automatically render a suspect's confession involuntary—particularly when the suspect had been given *Miranda* warnings.[113] The court also noted that several other Florida courts had upheld confessions even when officers made "incorrect, misleading statements to suspects."[114] However, the court found that police acted unconstitutionally when they manufactured documents that appeared to come from respected, independent sources.[115] The court found that the appearance of impartial reliability in these documents, as opposed to the statements of police who the suspect knows are his adversaries, crossed the line of deception allowed under the Due Process clauses of the Fifth and Fourteenth Amendments.[116]

However, most courts have been unwilling to proscribe the use of false evidence to procure confessions.[117] Lying to a suspect and even presenting him with false documentary evidence have been consistently

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108. *See, e.g.*, Commonwealth v. Baity, 237 A.2d 172, 177 (Pa. 1968) ("[A] trick which has no tendency to produce a false confession is a permissible weapon in the interrogator's arsenal."); State v. Cayward, 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989); State v. Patton, 826 A.2d 783, 784 (N.J. Super. Ct. App. Div. 2003); State v. Chirokovskcic, 860 A.2d 986, 987 (N.J. Super. Ct. App. Div. 2004).

109. *Cayward*, 552 So. 2d at 972.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 973.

114. *Id.* at 973.

115. *Id.* at 974. The court noted:

> It may well be that a suspect is more impressed and thereby more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him. If one perceives such a difference, it probably originates in the notion that a document which purports to be authoritative impresses one as being inherently more permanent and facially reliable than a simple verbal statement.

Id.

116. *Id.* at 974.

117. *See, e.g.*, State v. Jackson, 304 S.E.2d 134 (N.C. 1983), *rev'd on other grounds*, 479 U.S. 1077 (1987); Moore v. Hopper, 389 F.Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975); Roe v. People, 363 F.Supp. 788 (W.D.N.Y. 1973).

allowed by the courts. According to the First Circuit, "trickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect."[118]

Courts have found confessions voluntary when police have falsely told the suspect that his fingerprints were found at the scene of the crime, or even showed him a photograph of a fingerprint, pretended it was found at the crime scene, and presented him with false documentation that an expert had determined the fingerprint was his.[119] Similarly, courts have found that falsely suggesting that DNA evidence implicates the suspect does not vitiate the voluntariness of his confession.[120] Courts have allowed a confession to be admitted when police arranged for the suspect to be falsely identified in a line-up or falsely told that he has been identified in some other way.[121] A mock polygraph falsely indicating that the defendant failed the test also does not render a suspect's subsequent confession involuntary.[122] Following the lead of *Frazier v. Cupp*, many courts have upheld confessions when a suspect was falsely told that an alleged accomplice confessed.[123]

It turns out that the most directly deceitful tactic police can use—the one most likely to be considered trickery as that term is commonly used—is not considered by the courts to be unconstitutional trickery per se under a voluntariness analysis.[124] It is only a factor in the totality of the

118. United State v. Byram, 145 F.3d 405, 408 (1st Cir. 1998).

119. Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998); Ledbetter v. Edwards, 35 F.3d 1062, 1066 (6th Cir. 1994); Green v. Scully, 850 F.2d 894, 903–04 (2d Cir. 1988); Sovalik v. State, 612 P.2d 1003, 1007 (Alaska 1980); *see also* Oregon v. Mathiason, 429 U.S. 492, 493–94 (1977) (where an officer falsely told a suspect that his fingerprints were found at the scene before giving *Miranda* warnings).

120. United States v. Bell, 367 F.3d 452, 462 (5th Cir. 2004); Conde v. State, 860 So. 2d 930, 952 (Fla. 2003); Nelson v. State, 850 So. 2d 514, 521–22 (Fla. 2003). As a side note, the Fifth Circuit's analysis in *Bell* seems to require the defendant to prove his innocence before a court can find that confronting him with false evidence in interrogation made his confession involuntary. *See Bell*, 367 F.3d at 460–61.

121. *Ledbetter*, 35 F.3d at 1066; Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992). Like in *Bell*, the *Holland* court seems to require that a suspect show evidence of his innocence to show that presenting false evidence violated Due Process. The court stated that the false evidence "did not lead [Holland] to consider anything beyond his own beliefs regarding his actual guilt or innocence," and thus was not unduly coercive. *Id.*; *see also* Beasley v. United States, 512 A.2d 1007, 1008 (D.C. 1986); People v. Bush, 278 A.D.2d 334, 334 (N.Y. App. Div. 2000), *aff'd sub nom.* Bush v. Portuondo, No. 02-CV-2883(JBW), 2003 WL 23185751 (E.D.N.Y. Oct. 29, 2003); People v. Walker, 278 A.D.2d 852, 853 (N.Y. App. Div. 2000). *But see* Miranda v. Arizona, 384 U.S. 436, 453 (1966) (describing, with seeming disapproval, an interrogation tactic from *O'Hara*, *supra* note 104, where "[t]he accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses").

122. People v. Mays, 95 Cal. Rptr. 3d 219, 229 (Dist. Ct. App. 2009); People v. Serrano, 14 A.D.3d 874, 874–75 (N.Y. App. Div. 2005); Contee v. United States, 667 A.2d 103, 104 (D.C. 1995); State v. Farley, 452 S.E.2d 50, 54 (W.Va. 1994).

123. *See, e.g.*, United States v. Montgomery, 555 F.3d 623, 632 (7th Cir. 2009); United States v. Velasquez, 885 F.2d 1076, 1088–89 (3d Cir. 1989); United States v. Petary, 857 F.2d 458, 461 (8th Cir. 1988); United States v. Hill, 701 F. Supp. 1522, 1525 (D. Kan. 1988); United States ex rel. Brandon v. LaVallee, 391 F. Supp. 1150, 1151–52 (S.D.N.Y. 1974); Burch v. State, 343 So. 2d 831, 833 (Fla. 1977).

124. *See, e.g.,* State v. Jackson, 304 S.E.2d 134 (N.C. 1983), *rev'd on other grounds*, 479 U.S. 1077 (1987); Moore v. Hopper, 389 F.Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F.2d 1053 (5th Cir. 1975); Roe v.

circumstances analysis after a suspect waives his or her *Miranda* rights. However, the same tactics might be regarded differently if employed to undermine *Miranda* warnings and to procure a suspect's waiver of his rights to counsel and silence. Again, precedents regarding voluntariness and police actions after a suspect voluntarily waives his *Miranda* rights are overbroad when applied to situations where the same actions are used to trick or cajole a suspect into waiving those rights.

Some argue that it does not matter whether police lie to a suspect at any point in a custodial interrogation, because this sort of deceit alone does not undermine the suspect's perception of his relationship with the detectives as an adversarial one.[125] If the suspect knows that his interrogators are his "enemies," and they do not challenge this perception, then he will remain on his guard and be skeptical of what they say.[126] He will probably expect his interrogators to lie to him. As long as the evidence does not change the suspect's perception of his own guilt or innocence, the resulting statements will be voluntary.[127] If this is the relevant distinction, then police may deceive a suspect with impunity as long as their relationship is clearly adversarial.

But the relevant distinction is a different one. In the above cases, the suspects had already waived their rights before police lied to them about evidence or used other deceptive tactics. *Miranda*'s language requires being tricked *into* a waiver.[128] Thus, if police use false evidence to *obtain* a waiver of a suspect's rights rather than using this tactic after a waiver, this would render a suspect's subsequent statements involuntary.[129] Consider the facts in *Berghuis v. Thompkins*, in which the suspect had refused to sign a waiver of his *Miranda* rights.[130] The Court found that Thompkins did not waive his rights until he spoke in response to a detective's question about whether he prayed to God to forgive him for shooting and killing a boy.[131] Thompkins's response to this question constituted an implied waiver of his rights. Thompkins's interrogator appealed to his religious beliefs in a successful effort to obtain inculpatory statements.[132] But Thompkins spoke in response to questioning that was clearly intended to implicate him in a murder.[133] There is no indication that police employed false evidence or lied to

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People, 363 F.Supp. 788 (W.D.N.Y. 1973).

125. *See* Christopher Slobogin, *Deceit, supra* note 34, at 811. Slobogin writes, "the arrest threshold both limits police deception to openly identified 'enemies' and alerts the potential dupe to the adversarial relationship, [so] such trickery is not inherently immoral . . . ." *Id.*

126. *Id.*

127. *See* Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992).

128. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

129. *See id.*

130. 130 S. Ct. 2250, 2262–63 (2010).

131. *Id.* at 2263.

132. *Id*.

133. *Id.* at 2257. The detective asked "Do you pray to God to forgive you for shooting that boy down?" *Id.*

Thompkins in his interrogation. They did not use trickery to goad him into speaking and thus waiving his rights.

In the alternative case, if a suspect refuses to waive his rights and police introduce false evidence into the interrogation, I believe that this deception would be directly barred by *Miranda*'s prohibition against using trickery to obtain a waiver.[134] Under the two-factor test outlined above—intent to undermine *Miranda* warnings and a probability of false confessions—presenting false evidence in the decision zone would be found unconstitutional. First, if police present false evidence in the decision zone, this would seem a clear attempt to undermine the previously read warnings about the rights to silence and counsel. The purpose of confronting a suspect with false evidence at this point would be to goad him into speaking, either to defend himself or to confess. Further, given the frequency of this practice and its recommendation in widely-used interrogation manuals, the use of false evidence seems to have the same official approval that accompanied the two-step procedure in *Seibert*. Second, the use of false evidence as an interrogation tactic has been a key factor in several false-confession cases.[135] Confronting a suspect with false evidence implicating him in a crime may change the innocent suspect's cost-benefit analysis. Given the large number of well-publicized exonerations in the last decade, he will know that conviction is a realistic possibility even if he is innocent. The suspect may believe his best option is to confess falsely and remain in the interrogator's good graces, rather than to insist on his innocence and receive a longer sentence due to his refusal to cooperate. A false confession when presented with seemingly valid evidence of guilt can be a rational choice.[136] Thus, presenting false evidence in the decision zone should be considered unconstitutional trickery that taints any subsequent waiver of the suspect's rights to counsel and silence.

B. Pretending Not to Be an Adversary

Virtually all court decisions regarding the voluntariness of confessions in the face of detectives' ploys and stratagems are premised on a suspect's recognition that his interrogator is his adversary.[137] The idea is that since a suspect knows that the interrogator's interests are contrary to his own, he will distrust the interrogator and will not be susceptible to her pressures,

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134. *See Miranda*, 384 U.S. at 476. This is a different situation from what Robert P. Mosteller considers in his article. *See* Mosteller, *supra* note 43. Mosteller considers deception after arrest but before police read a suspect *Miranda* warnings. *Id.* at 1257. In contrast, the situation presented here is analogous to the one in *Thompkins*: the suspect has been read *Miranda* warnings, but has refused to waive his rights.

135. Drizin & Leo, *supra* note 105, at 897; Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 AM. J. CRIM. L. 191, 197 (2005); *see also* Saul M. Kassin & Katherine L. Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125–26 (1996).

136. Ofshe & Leo, *supra* note 94, at 1007–08.

137. *See* Slobogin, *Deceit, supra* note 34, at 811.

tricks, or lies. But, in practice, interrogators work to develop a rapport and to get suspects to believe that the interrogators are working to help them.[138] The Inbau Manual recommends attempting to connect with suspects in a natural way, to express sympathy for their situation, and to offer seemingly understandable reasons for committing the crime at issue.[139] The manual instructs interrogators to induce confessions out of "self-interest" and help suspects forget that the interrogator is their adversary.[140]

Courts seem to approve almost uniformly of feigning sympathy for suspects to encourage confessions.[141] In *Miller v. Fenton*, a case on remand from the Supreme Court, the Third Circuit found that a "friendly approach" did not render a confession involuntary.[142] The Court did recognize that:

> Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily make only to a friend, not to the police.[143]

But the Court found that playing the "good guy" was an acceptable

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138. *See* Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 261–62 (1996); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 614–617 (1979). An extreme example of this is documented in an article by Peter Carlson, where he writes about a particular interrogator who questioned a man suspected of murdering a woman. *See* Peter Carlson, *You Have the Right to Remain Silent . . . But in the Post-Miranda Age, the Police Have Found New and Creative Ways to Make You Talk*, WASH. POST, Sept. 13, 1998, at W6. The interrogator spoke to the suspect about home repairs, something they both did, and then, after a while,

> the killer mentioned that he'd dated a woman whose house he'd repaired and she dumped him. [The detective] loved that. That was his opening. He started talking about his ex-wife, how rotten she was, how much he hated her. He started getting all worked up. Pretty soon, he sounded like a psycho killer himself, saying he'd love to blow her head off if only he could get away with it.

Id. The detective then "eased into the subject of the woman that the killer had shot twice in the head during a carjacking." *Id.* He asked what happened with her, and when the suspect said that the woman was screaming and wouldn't shut up, the detective said, "I don't blame you. I hate it when [bleep] women start running their [bleep] mouths." *Id.* The suspect then confessed to shooting the woman to shut her up. *Id.* The man was convicted and still sometimes calls the interrogator because he doesn't have anyone to talk to in prison. *Id.* When he calls, the interrogator doesn't say "what no interrogator would ever tell a suspect because it would give away one of the secrets of the trade: 'Hey, I'm not your friend. It was a [bleep] put-on.'" *Id.*

139. INBAU ET AL., *supra* note 33, at 89–90, 93, 213.

140. INBAU ET AL., *supra* note 33, at 93, 419.

141. *See* Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1554–64 (2008); Mosteller, *supra* note 43, at 1254–66; *see also* Roberts v. State, 102 S.W.3d 482, 488 (Ark. 2003) (where police officers told a suspect: "Get it off your chest, we'll help."); Anders v. State, 445 S.W.2d 167, 171 (Tex. Crim. App. 1969) (where the officer testified that he tried to "make [the suspect] think he had a friend there, and get him to admit something").

142. 796 F.2d 598, 607 (3d Cir. 1986).

143. *Id.*

interrogation tactic, and that other circumstances would have to add to the interrogation's non-adversarial feel to render it coercive.[144] Similarly, in *Anders v. State*, a sheriff pretended to befriend the suspect in an effort to get him to confess.[145] The court found that this pretension was acceptable, and did not render the suspect's confession invalid, because the suspect testified that he knew that the officer was not actually his friend.[146] Though the atmosphere was not adversarial, the suspect still knew, in retrospect, that the officer was his adversary, and that recognition was enough to preserve the voluntariness of the suspect's statements.[147]

The main case in which an officer's friendly attitude was found to be constitutionally problematic was *Spano v. New York*.[148] The interrogator and the suspect actually were friends.[149] The Court found that the interrogator exerted improper influence over his friend, the suspect, by suggesting that if the suspect failed to confess, the interrogator would lose his job.[150] But—barring an actual, pre-existing relationship between the suspect and his interrogator that the interrogator attempts to exploit (surely a rare situation, especially in non-rural areas)—false concern for the suspect's well-being or other attempts at creating a non-adversarial atmosphere have not been considered unconstitutional trickery.

One could consider Detective Helgert's interrogation in *Thompkins* to be a form of non-adversarial questioning designed to get Thompkins to confide in him. The detective asked about Thompkins's belief in God to soften him up for the punchline: "Do you pray to God to forgive you for shooting that boy down?"[151] The implicit approval of this sort of questioning in *Thompkins* makes it less likely that a non-adversarial tone would be considered unconstitutional trickery even in the decision zone.

This tactic is meant to undermine prior *Miranda* warnings, and therefore fulfills the first prong of the two-factor test. Playing the "good cop" is an extremely common technique that is taught and trained, just like the two-step interrogation strategy was common practice and procedure in *Seibert*.[152] Its purpose is generally to procure a confession. But particularly when a person has been read his rights but has refused to waive them, the purpose of the "good cop" is to undermine the significance of *Miranda* warnings. In this situation, the false friendliness is meant to obtain a waiver that has thus far been refused and to avoid an invocation of the suspect's rights, which the interrogator surely fears because it would end the

144. *Id.*
145. *Anders*, 445 S.W.2d at 171.
146. *Id.*
147. *Id.*
148. 360 U.S. 315 (1959).
149. *Id.* at 323.
150. *Id.* at 319.
151. Berghuis v. Thompkins, 130 S. Ct. 2250, 2257 (2010).
152. *See supra* notes 60–70 and accompanying text.

interrogation. It is a widespread practice meant to undermine the importance of the *Miranda* warnings already given.

However, being friendly to a suspect without more seems unlikely to produce a false confession, and thus it fails the second prong of the two-factor test.[153] This tactic is not mentioned in the false confession literature, nor does it involve confronting the suspect or suggesting details of the crime that could be woven into a false confession.[154] Instead, an officer using the non-adversarial approach generally offers excuses for committing the crime or appeals to the suspect's moral or religious beliefs. Because this tactic is unlikely to lead to false confessions and because the Supreme Court tacitly approved of it in *Thompkins*, courts probably will find that creating a non-adversarial atmosphere is constitutional, even in the decision zone.

C. Exploiting a Suspect's Known Weaknesses

Up until this point, I have focused on particular police actions, but I turn now to suspect attributes that may be relevant to trickery. In particular, mental illness, mental retardation, and youth are factors that may lead a suspect to be more vulnerable to psychologically coercive interrogation. If interrogators knowingly exploit one or more of these attributes, then the tactics used should be more likely to be considered trickery. These attributes are also relevant to the "totality of the circumstances" voluntariness analysis, but the inquiry here is different.[155] Instead of looking at whether these vulnerabilities contributed to a lack of voluntariness, the question here is whether police knowingly exploited a suspect's mental illness, cognitive disability, or youth.[156] Using these factors as part of the trickery analysis

153. I distinguish the friendly approach from what Richard Leo calls "[t]he most potent psychological inducement," which is the suggestion of leniency. LEO, *supra* note 57, at 202. It is possible to appear friendly or non-adversarial without appearing to offer leniency. In fact, I would argue that this is exactly what Detective Helgert did when he asked Thompkins whether he prayed to God to forgive him for shooting someone.

154. *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1054–55 (2010). Garrett discusses how most false confessions of exonerated people contain a great deal of detail, including facts that only the perpetrator could have known. *Id.* at 1054. Garrett concludes that these details could only have been introduced by interrogators, whether purposefully or not. *Id.* at 1052–54. He argues that to avoid convincing false confessions, police should implement safeguards such as recording entire interrogations and "double blind" questioning in order to prevent the disclosure of key facts. *Id.* at 1115–16.

155. For examples of the post-*Miranda* "totality of the circumstances" inquiry, see Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that police misrepresentations, while relevant, were not sufficient to render the confession inadmissible under the "totality of the circumstances"); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (noting that prior decisions "reflected a careful scrutiny of all the surrounding circumstances").

156. Suspects who are mentally ill, have cognitive deficiencies, or are young are the most vulnerable to police trickery, and I believe the voluntariness analysis does not do enough to protect them. Indeed, their situation sounds much like Stephen Schulhofer's assessment of the state of the world before *Miranda*:

> The voluntariness test ostensibly took account of special weaknesses of the person interrogated, but because it did permit the use of substantial pressures, suspects who

should reach situations in which the suspect's statements would not be considered involuntary, but where police obtain either a waiver or a statement by purposefully exploiting a suspect's vulnerability.

Under *Colorado v. Connelly*, a suspect's confession is considered voluntary and admissible if his mental illness prompted him to spontaneously confess.[157] Because of the state action requirement of the Fifth and Fourteenth Amendments, a confession is involuntary only if some police coercion drives the suspect to confess.[158] However, *Colorado v. Connelly* does not address the situation in which police know of a suspect's mental illness (or other weakness) and still choose to interrogate the suspect or knowingly exploit this weakness in their interrogation. In fact, the *Connelly* court took care to note that there was no indication of Connelly's mental illness when he arrived at a Denver police station and spontaneously confessed to a murder.[159] So what happens if, knowing that a suspect is mentally ill, the police question him? What if they purposefully use his instability or delusions in order to obtain a waiver or a confession?

At this point I want to return to the argument, suggested by Miriam Gohara and others, that whether a tactic induces false confessions should be a key element of whether that tactic is unconstitutional.[160] This factor is particularly salient for certain vulnerable populations, such as people with mental illness or cognitive disabilities and young people. These groups are particularly likely to confess falsely.[161] This is in part because they are more susceptible to suggestions than fully-functioning adults, and may be more likely to bend to authority figures.[162] They may also be more susceptible to the tactic of feigned sympathy and understanding.[163] Thus, a full analysis of

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> were ignorant of their rights, unsophisticated about police practices and court procedures, easily dominated, or otherwise psychologically vulnerable were more likely to be on the losing end of a successful police interrogation.

Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871–72 (1981).

157. 479 U.S. 157, 164 (1986).

158. *Id.* at 163–64.

159. *Id.* at 160–61. Connelly approached a uniformed police officer in downtown Denver and stated that he wanted to talk to someone about a murder he had committed. *Id.* at 160. He was given *Miranda* warnings and asked questions about whether he had been drinking or taking drugs. *Id.*

160. *See* Gohara, *supra* note 35, at 817–20; *see also* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3–4 (2010) [hereinafter Kassin, *Police- Induced Confessions*] (noting "serious questions concerning a chain of events by which innocent citizens are judged deceptive in interviews and misidentified for interrogation . . . and are induced into making false narrative confessions that form a sufficient basis for subsequent conviction"); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 492 (1998) (arguing that training manuals and practices "teach police to use tactics that have been shown to be coercive and to produce false confessions"); Ofshe & Leo, *supra* note 94, at 997 (explaining improper use of interrogation procedures that can result in four types of false confession: stress-compliant, coerced-compliant, non-coerced persuaded, and coerced-persuaded).

161. Kassin, *Police-Induced Confessions*, *supra* note 160, at 19–22.

162. *Id.*; LEO, *supra* note 57, at 195–96.

163. Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False*

police trickery must account for situations in which police know of the vulnerabilities of those they interrogate and exploit them to obtain a confession.

1. Mental Illness

Most scholarship on the general topic of interrogations of the mentally ill concerns the possibility of people with mental illnesses making false confessions.[164] I suspect that this focus is in part due to the range of possible mental illnesses. A person might be competent to waive his or her rights and be able to withstand coercive interrogation with minor depression, whereas someone with severe delusions may not. Thus, there can be no per se rule regarding the trickery of mentally ill people. It may also often be the case that there is no documentation of a suspect's mental illness until after he or she is arrested and interrogated.[165] This post-hoc evidence may not be enough to show that police saw indications of a suspect's mental illness and exploited it during an interrogation. However, there may be cases when police knowingly exploit the mental illness of a suspect to extract a confession, and this should be considered unconstitutional trickery, even if courts do not describe it in this language.

Allison Redlich relates an instance of clear police coercion in interrogating a person known to be mentally ill.[166] A paranoid schizophrenic who was committed to an institution developed an interest in an ongoing rape case.[167] Because of his interest, police came to the mental hospital to interrogate him three separate times.[168] They fed him the facts of the crime and told him that by confessing he would help to "smoke out" the real perpetrator.[169] The suspect was tried on the basis of his confession and his "knowledge" of the facts of the crime and was convicted and imprisoned for seventeen years before being exonerated by DNA evidence.[170] This incident, in which officers clearly knew that their interrogation subject was mentally

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Confession, 55 PSYCHOL. SERVS. 19, 20–21 (2004) (noting the susceptibility of the mentally ill); Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH. & LEE L. REV. 385, 417 (2008) (noting the vulnerability of youth to police interrogation techniques).

164. *See* Kassin, *Police-Induced Confessions*, *supra* note 160, at 5, 21–22 (finding that 10% of false confessors have a diagnosed mental illness, and that depressed mood and traumatic life experiences were linked to giving a false confession); Drizin & Leo, *supra* note 105, at 971 (finding that people who are mentally ill are more likely to confess falsely, because they are more vulnerable to suggestions, pressure, and false evidence); Redlich, *supra* note 163, at 19–21 (writing that suspects with mental illness may perceive implicit threats or promises as explicit statements; that they may be less likely to understand their rights; that they may be more susceptible to the ruse of interrogator-as-friend; and that they may be more likely to give the cues interrogators perceive as indicating guilt or deception, leading the interrogator to press harder).

165. *See, e.g.*, Hendricks v. State, 660 S.E.2d 365, 366 (Ga. 2008).

166. *See* Redlich, *supra* note 163, at 19.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

ill and exploited his condition to procure a confession, should be considered unconstitutional trickery.

A Washington court has stated that "when police are aware of a condition that impacts a suspect's ability to either understand or validly waive *Miranda* rights, exploitation of that condition would constitute police misconduct which would make the resulting confession inadmissible."[171] However, in that case the court found the interrogation in question constitutional, in part because "the precautions taken by the detectives in conducting the interview were clearly intended to take [the suspect's] mental impairments into account."[172] These precautions included reading the suspect his rights at least four times, going over the waiver "with care," and asking the suspect "primarily . . . open-ended questions."[173]

Similarly, the Georgia Supreme Court has written that "[a] person who is mentally ill can be competent to make a voluntary confession."[174] However, the court previously had found involuntary the confession of a man who suffered a severe stroke which left him psychotic, depressed, and incapable of living on his own.[175] Because this case arose before *Colorado v. Connelly*, the court used the prior "free will" analysis, but the case would almost certainly come out the same way using *Connelly*'s analysis.[176] Police interrogated the defendant while he was confined to a Veterans Affairs psychiatric ward, and therefore they had clear notice of his mental illness.[177] In fact, the police had been notified of the defendant's original, spontaneous confession by a social worker at the psychiatric ward.[178] Yet the police chose to interrogate the defendant, knowing of his serious mental illness.[179] No mention is made in the court's opinion of any special precautions to ensure the truthfulness or voluntariness of his statements in response to that interrogation.[180] This seems to be a case of police knowingly exploiting a suspect's mental illness to obtain a confession.

However, there must be circumstances in which police can constitutionally interrogate mentally ill people, even those who are committed to institutions. We cannot expect all confessions from mentally ill people who have committed crimes to come with little or no prompting as

171. State v. Cushing, 842 P.2d 1035, 1037 n.3 (Wash. Ct. App. 1993).

172. *Id.* at 1038.

173. *Id.*

174. Hendricks v. State, 660 S.E.2d 365, 366 (Ga. 2008) (quoting Johnson v. State, 347 S.E.2d 584, 585 (Ga. 1986)).

175. State v. Gardner, 328 S.E.2d 546, 546–47 (Ga. 1985).

176. *See* Colorado v. Connelly, 479 U.S. 157, 166–67 (1986) ("Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who has confessed . . . . We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws . . . .").

177. *Gardner*, 328 S.E.2d at 546.

178. *Id.*

179. *Id.*

180. *See, e.g.*, Kassin, *Police-Induced Confessions*, *supra* note 160, at 22 (discussing protections for vulnerable suspects in England, including the presence of adults and a judicial determination of "fitness for interview").

in *Connelly*.[181] The distinction is that police must not knowingly exploit the suspect's mental illness to obtain a confession. To avoid such exploitation, police officers interrogating mentally ill suspects ought to take precautions such as adopting an "investigative," instead of a "confrontational" interviewing method, not feeding facts to the suspects (especially false evidence), and mandating the presence of an attorney during interrogation.[182]

2. Youth

In contrast to mental illness, there has been much judicial and academic scrutiny of the interrogation of young people. The Supreme Court recognized, well before *Miranda*, that the interrogation of juveniles presented particular constitutional challenges.[183] The Court recently reaffirmed this principle in holding that a person's youth is relevant in determining when *Miranda* warnings are required.[184] Many scholars have addressed the permissibility of trickery in interrogating juveniles,[185] so I will address it only briefly here.

Youth, unlike mental illness, will almost always be readily apparent to interrogators. Therefore, as a vulnerability, it is more likely to be exploited. Further, courts have recognized that juveniles have a less developed sense of consequences and are more vulnerable to outside pressure.[186] Because of these developmental differences, the Supreme Court has categorically exempted juveniles from the death penalty.[187] Because of these same developmental differences, "adolescents are particularly vulnerable to the classic interrogative techniques of confronting the suspect with false evidence and utilizing other forms of 'trickery.'"[188] They are more likely than adults to confess falsely.[189] All I want to add to this already well-

181. *See Connelly*, 479 U.S. at 160; *see also* United States v. Raymer, 876 F.2d 383, 386–87 (5th Cir. 1989) (holding a confession voluntary despite known mental illness because there was little questioning of the suspect, and he testified that he was aware of his rights).

182. *See* Kassin, *Police-Induced Confessions*, *supra* note 160, at 27–32.

183. *See* Haley v. Ohio, 332 U.S. 596, 599–601 (1948) (finding a Fourteenth Amendment Due Process Clause violation when police elicited a confession of a fifteen year-old boy in the middle of the night without an attorney or parent present); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (finding a fourteen year-old to be unable to appreciate the consequences of a confession or his constitutional rights without the presence of an attorney or parent).

184. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011) (stating that youth is a permissible factor in the analysis as long as "the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer").

185. *See, e.g.*, Birckhead, *supra* note 163; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 312 (2006); Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 992 (2005).

186. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005).

187. *Id.*

188. Birckhead, *supra* note 163, at 418–19.

189. Kassin, *Police-Induced Confessions*, *supra* note 160, at 5; *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 66 (2008) (noting a study that found the demographics of the innocence group are not representative of the prison population, much less the general population).

developed discussion regarding the interrogation of juveniles is that because they are readily identifiable and because of their still-developing personalities and minds, juveniles are perhaps the most easily exploited group in interrogations. Because they are more likely to succumb to authority figures and to act impulsively, it is particularly important that courts not allow interrogators to obtain waivers from juveniles through trickery or deceit.

3. Low IQ and Mental Retardation

The legal situation of people with cognitive disabilities is in many ways similar to that of juveniles. The Supreme Court has exempted people with mental retardation from the death penalty under the Eighth Amendment, citing the high risk of false confessions.[190] Like juveniles, people with cognitive disabilities are often susceptible to suggestion, deferential to authority figures, and they fail to understand the long-term consequences of their actions.[191] Mental disabilities are consistently a factor in courts' voluntariness analyses.[192]

However, it is less likely that police will knowingly extract a confession from a person with a cognitive disability because this characteristic is less apparent than a person's youth. Again, it is the *knowing* exploitation that is relevant to the trickery analysis. It may appear to police that a suspect is slow, or that he is having trouble answering questions in a rational manner. But unless the suspect's cognitive disability is very severe, it is likely that police would never recognize such a disability during an interrogation.

If police do learn of a suspect's mental retardation, then, as with mental illness, interrogation alone probably will not qualify as trickery. But to avoid knowingly taking advantage of a suspect's mental deficiency, interrogators should take steps to ensure that the suspect's statements are both voluntary and reliable. For instance, empirical studies show that people with mental retardation are unable to understand *Miranda* warnings as they are commonly given and so they are not effectively apprised of their rights to silence and to an attorney.[193] Thus, an important step would be taking time to more fully explain the suspect's constitutional rights in cases where suspects have mental disabilities. Other ways to avoid exploiting a suspect's

190. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002); *see also* Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21 (nothing that the U.S. Supreme Court has explicitly cited the possibility of false confession as a rationale underlying their decision to exclude low IQ and mental retardation categorically from capital punishment); Drizin & Leo, *supra* note 105, at 970–73 (same).

191. Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21; Drizin & Leo, *supra* note 105, at 971.

192. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 742 (1966) (considering defendant's third or fourth grade education and low IQ); Reck v. Pate, 367 U.S. 433, 441 (1961) (noting the defendant's "subnormal intelligence").

193. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 495–96, 572 (2002).

mental disability might include having an independent observer present in the interrogation room, avoiding leading questions, and not lying to the suspect or presenting false evidence.[194] In failing to take such precautions during interrogations of suspects with known mental disabilities, police run the risk, under this analysis, of tricking a suspect by knowingly exploiting his disability.

4. Under the Two-Factor Test

Unlike the prior specific tactics, exploiting a suspect's mental illness, mental retardation, or youth to procure a confession is already unconstitutional in some contexts. But these practices are particularly problematic in the decision zone. To allow police to exploit suspects' vulnerabilities in order to procure a waiver of their constitutional rights would render *Miranda* warnings a meaningless ritual and would result in a return to the pre-*Miranda* practice for these particularly vulnerable suspects.[195] This would severely taint the waiver decision. Further, there is a particular risk of false confessions among young people, the mentally ill, and people with cognitive disabilities, since these groups are more suggestible and tend to rely more heavily on authority figures.[196] Under the two-factor test, the knowing exploitation of a suspect's mental weaknesses to procure a waiver of the suspect's right to silence would be considered unconstitutional. Again, the two factors in this analysis are (1) whether police knowingly undermine *Miranda* warnings; and (2) whether the practice at issue has a tendency to produce false confessions. Though it would be a fact-based analysis, knowingly exploiting a suspect's youth or mental defect to procure a waiver of his *Miranda* rights would fulfill both factors in many situations.

V. Conclusion

Berghuis v. Thompkins implicitly held that police could interrogate suspects after giving *Miranda* warnings but before obtaining a waiver of the suspect's constitutional rights. In that case, when the suspect responded with an incriminating answer over two hours later, the Court found that he had waived his rights by implication. This is a new and important limitation on suspects' rights. However, *Thompkins* is itself limited by *Miranda*'s

194. *See* Drizin & Leo, *supra* note 105, at 971–73. In their article, the authors relate an incident where the suspect's mother told police of the suspect's low IQ before his interrogation. *Id.* When detectives interrogated the suspect, he gave nearly incomprehensible statements, but subsequent statements typed by detectives provided increasing amounts of detail. *Id.* The suspect signed the statements, but DNA evidence eventually exonerated him. *Id.*; *see also* Kassin, *Police-Induced Confessions, supra* note 160, at 21 (discussing suggestibility and reliance on authority figures).

195. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966); Schulhofer, *supra* note 156, at 871–72.

196. Kassin, *Police-Induced Confessions*, *supra* note 160, at 20–21; Drizin & Leo, *supra* note 105, at 970–73.

language regarding trickery. Since *Thompkins* allows police to interrogate a suspect before he waives his rights, *Miranda*'s exhortation that a suspect may not be tricked *into* a waiver has particular force. This language strongly limits what actions and statements interrogators may make during the legal limbo after they have given *Miranda* warnings but before the suspect waives his rights. Interrogation tactics that have previously been held constitutional when used after a suspect waives his rights are not necessarily constitutional in this interim period. Thus, courts must carefully consider, as a new question not controlled by existing precedent, what constitutes unconstitutional trickery in the decision zone.