

March 2021

Police Interrogation in Colorado: The Implementation of Miranda

Lawrence S. Leiken

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Lawrence S. Leiken, Police Interrogation in Colorado: The Implementation of Miranda, 47 Denv. L.J. 1 (1970).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

POLICE INTERROGATION IN COLORADO: THE IMPLEMENTATION OF *MIRANDA* *

BY LAWRENCE S. LEIKEN†

In this article, empirical research and analysis are presented which deal with the effect of the Miranda decision on the actual interrogation "contest" and the ultimate resolution of that contest in the courtroom. Interviews with suspects in the Denver County Jail indicate that the Miranda warnings do not impart a working knowledge of their constitutional rights to the suspects and raise questions as to the validity of the signed warning and waiver form which is used by the Denver police as evidence of a "knowing and intelligent waiver" of the rights of the suspects. The data also indicate that the right to counsel as a measure to protect the fifth amendment privilege can be frustrated by the police by noncompliance with requests for counsel, by obtaining "knowing and intelligent waivers" of the right (or evidence thereof), or by both. Psychological tactics and strategies, including promises and threats, still appear to be the major factors influencing the suspect's decision to talk in the interrogation room. The police and the judicial responses to Miranda are analyzed in terms of the findings referred to above, and the author concludes that the effect of Miranda on the game of interrogation is effectively neutralized in its implementation. Indeed, one of the latent functions of Miranda appears to be to aid the police in overcoming their evidentiary burden with respect to proving the suspect's knowledge and waiver of his constitutional rights. The author further concludes that making the right to counsel nonwaivable is a viable solution to the problems of effectively achieving the goals implicit in the Miranda decision.

CONTENTS

INTRODUCTION	2
I. DEFINING THE RULES OF THE GAME	4
A. <i>Resolving Ambiguous Areas: Judicial Interpretation of the Rules for Interrogation in Colorado</i>	4

*Research for this article was supported by the Criminal Justice Internship Program of the University of Texas Law School (directed by Professor Robert O. Dawson). The author served as a criminal justice intern in the office of the Denver Public Defender during the summer of 1969 and is grateful to the staff of this office for their encouragement and assistance.

†A.B. Dartmouth College, 1967; J.D. University of Texas Law School, 1970; Law Clerk, September, 1970, to Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit. The author is indebted to Professor Albert W. Alschuler of the University of Texas Law School for his guidance and assistance in the preparation of this article.

<i>B. The Colorado Procedure for Implementing Miranda</i>	8
1. The Judicial Role in Implementing <i>Miranda</i> and the Colorado Rules Relating to Confessions	8
2. The Police Role in Implementing <i>Miranda</i> : The Warning Procedure Used by the Denver Police Department	9
II. THE SUSPECT'S VIEW OF THE INTERROGATION PROCESS, HIS KNOWLEDGE, AND HIS DECISIONS	11
<i>A. Method and Interpretation of Results</i>	11
1. The Interviews	11
2. Nature of the Sample	12
<i>B. The Suspect's General Knowledge of His Constitutional Rights</i>	14
<i>C. The Decision to Talk</i>	16
1. Effect of Knowledge Imparted by Warnings	16
2. Effect of Factors of "Imputed Knowledge"	18
3. Effect of Promises and Threats: Inducements to Waive Constitutional Rights	21
<i>D. Suspects and the Rights to Counsel</i>	26
<i>E. Knowing and Intelligent Waiver of Constitutional Rights</i>	32
III. THE POLICE RESPONSE TO <i>Miranda</i> : THEIR ATTITUDES AND CONDUCT IN THE INTERROGATION ROOM	34
<i>A. Methodology</i>	35
<i>B. Police Attitudes Toward Interrogation</i>	36
<i>C. Observations in the Interrogation Room</i>	38
IV. THE <i>Miranda</i> HEARING AND THE PROBLEMS OF PROOF	41
<i>A. Some Observations of a <i>Miranda</i> Hearing</i>	41
<i>B. The <i>Miranda</i> Hearing and the Interrogation Process</i>	44
CONCLUSION: A NONWAIVABLE RIGHT TO COUNSEL	46

INTRODUCTION

WITHIN each game there is a well-established set of goals whose achievement indicates success or failure for the participants, a set of socialized roles making participant behavior highly predictable, a set of strategies and tactics handed down through experience and occasionally subject to improvement and change, an elite public whose approbation is appreciated, and, finally, a general public which has some appreciation for the standing of the players. Within the game the players can be rational in the varying degrees that the structure permits. At the very least, they know how to behave and they know the score.¹

¹N. LONG, *THE POLITY* 142 (1962).

Although the preceding passage was written as a means to analyze governmental policies in local communities, it also provides a point of orientation for a study of the police interrogation process. If the process is viewed as "a game," the players can be viewed as having strategies and tactics which are, of course, employed within the framework of a body of rules. There may be some predictability with respect to the nature of their roles. The players may be rational in varying degrees, and their attitudes toward the process itself may be an important determinant of the outcome. There may be various publics which are concerned with the rules by which the game is played and with which side prevails. The purpose of the following study is to describe a few of the elements of "the game" of interrogation after the rules were changed by the historic decision of *Miranda v. Arizona*.²

To provide some background information with respect to the issues in conflict and the rules of the game, the study begins with a brief sketch of some of the ambiguous areas surrounding *Miranda* and a few interpretations in those areas by state and federal courts in Colorado. Within the framework of the general law governing the interrogation process, a description of the procedures used to implement the *Miranda* rules will complete the description of the setting. Since almost all of the interrogations which will be explored here occurred in the Denver Police Station, an effort will be made to explain the procedures which are generally used by that agency to convey the *Miranda* warnings.

Secondly, information which was collected through interviews with suspects at the Denver County Jail during July and August of 1969 will be used to describe their roles within and attitudes toward "the game" of interrogation, the extent of their knowledge of the rules, and the reasons for their decisions with regard to the exercise of their rights. The attitudes and strategies of the police will be presented through both a description of interviews with them and observations of the manner in which they conduct interrogations. In order to realistically appraise these descriptions and observations, each of the sections will include a brief explanation of the methodology which was used to collect the information.

The ultimate contest is often resolved in the courtroom. The study returns to the courtroom where the focus is on the judiciary's view of *Miranda* and the difficulty of reconstructing the interrogation scene for the court. The study ends with some conclusions and recommendations with respect to the future of the interrogation process.

² 384 U.S. 436 (1966).

I. DEFINING THE RULES OF THE GAME

A. *Resolving Ambiguous Areas: Judicial Interpretation of the Rules for Interrogation in Colorado*

Miranda prescribes procedures to protect the fifth amendment privilege against self-incrimination and the sixth amendment right to counsel. The case essentially holds that to protect these rights during an in-custody interrogation (in the absence of other effective measures), the following warnings must be given to suspects: They must be warned that anything they say may be used against them; that they need not answer any questions; that they have the right to counsel during interrogation; and that, if they are indigent, counsel will be appointed to represent them.³

A reading of the *Miranda* opinion seems to make it apparent that the decision was made in response to what the Court considered to be unfair police tactics in the interrogation room. The Court quoted extensively from police manuals and texts "which document procedures employed with success in the past, and which recommend various other effective tactics."⁴ Although the Court stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented,"⁵ it nonetheless concluded that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."⁶ The warning procedure required for apprising the suspect of his rights was designed to combat and overcome the inherently compelling pressures and to permit a full opportunity for the exercise of a suspect's privilege against self-incrimination.⁷

It is interesting to note that the Court realized the *insufficiency of a warning* alone to protect the fifth amendment privilege against self-incrimination:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. . . . Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . . A mere warning given by the interrogators is not alone sufficient to accomplish that end.⁸

The Court therefore held that the right to have counsel present at

³ *Id.* at 467-73.

⁴ *Id.* at 448-49. The primary texts referred to were: F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956).

⁵ *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

⁶ *Id.* at 467.

⁷ *Id.*

⁸ *Id.* at 469-70.

the interrogation is indispensable to the protection of the suspect's rights and that he must accordingly be *further warned* that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation.⁹

When the suspect has been further warned of his rights, if the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant "knowingly and intelligently waived" his privilege against self-incrimination *and* his right to retained or appointed counsel.¹⁰

Although one of the avowed purposes of the *Miranda* decision was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow,"¹¹ it did not necessarily resolve all of the questions dealing with interrogation room practices.

For instance, some ambiguity remains, at least in Colorado, as to what constitutes "in-custody interrogation." In *Miranda*, the Court defined in-custody interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."¹² In *Mares v. United States*,¹³ the United States Court of Appeals for the Tenth Circuit held that the *Miranda* warnings need not be given if the defendant is not under arrest and is free to continue the interview or leave as he sees fit.¹⁴ The court, however, did not address itself to the question of whether or not the suspect himself realized that he could leave the interview at will or whether his subjective impression regarding his freedom to leave would have affected the court's finding. Similarly, in *United States v. Wainright*,¹⁵ the United States District Court for the District of Colorado chose not to follow the "custodial" test of *Miranda* and, without any explanation, apparently based its decision on the "focus" test of *Escobedo v. Illinois*¹⁶

⁹ *Id.*

¹⁰ *Id.* at 475.

¹¹ *Id.* at 442.

¹² *Id.* at 444.

¹³ 383 F.2d 811 (10th Cir. 1967).

¹⁴ *Id.* at 813. The defendant asserted that the trial court erred in receiving testimony of an FBI agent regarding a false alibi which the defendant had given. Although the testimony was apparently not given to establish the truth or falsity of what was contained in defendant's statement, a hearing was held out of presence of the jury on the admissibility of this evidence. The agents testified that they gave the defendant full and complete warnings of his rights. The defendant admitted full knowledge of his rights and showed familiarity with criminal investigations and procedures. The court nevertheless held *Miranda* to be inapplicable because the defendant was not under arrest and was free to continue the interviews or leave as he saw fit. *Id.*

¹⁵ 284 F. Supp. 129 (D. Colo. 1968).

¹⁶ 378 U.S. 478 (1964). The "focus" test as laid down by the *Escobedo* Court is that the *right to counsel* attaches when "the investigation is no longer a general inquiry into an unsolved crime but has begun to *focus* on a particular suspect . . ." *Id.* at 490 (emphasis added).

— it held that the defendant should have been warned of his rights because the adversary process of criminal justice had been directed against him as a potential criminal defendant as soon as he became a subject of criminal tax investigation by the Internal Revenue Service.¹⁷ While the court relied on both *Miranda* and *Escobedo* in its opinion,¹⁸ it failed to distinguish between them or to suggest why it chose to apply the standards of the earlier case rather than those of the later one.

Although there are numerous other ambiguities in the rules for interrogation in Colorado,¹⁹ perhaps the most troublesome vagary in the *Miranda* opinion (and the one most relevant to this study) is the question of what constitutes a "knowing and intelligent waiver" of constitutional rights. The problem here is ascertaining the factors to be considered in determining whether or not there has been a *Miranda* waiver and the weight to be given to each of these factors.

This is not a new problem since the same difficulty was encountered under *Escobedo*.²⁰ A case decided by the Supreme Court of Colorado under *Escobedo* points to some of the criteria which may be used to define a "knowing and intelligent waiver." In *Nez v. People*,²¹ the statements of a semiliterate Navajo Indian were held to be inadmissible. Among the determinative factors were his limited understanding of the English language and his ignorance of both the legal processes and his constitutional rights.²²

An additional variable which has been used in determining whether there has been a knowing and intelligent waiver is the age of the suspect. In the pre-*Miranda*, pre-*Escobedo* case of *Gallegos v. Colorado*,²³ the United States Supreme Court overturned a conviction which had been affirmed by the Supreme Court of Colorado because the age of the suspect had not been given sufficient weight by the courts below.²⁴ The prosecution argued that the boy had been advised of his right to counsel and chose not to exercise it; but the Court found that

[a] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know

¹⁷ *United States v. Wainwright*, 284 F. Supp. 129, 132 (D. Colo. 1968).

¹⁸ *Id.*

¹⁹ See generally, Note, *Legal Limitations on Miranda*, 45 DENVER L.J. 427 (1968).

²⁰ *Escobedo v. Illinois*, 378 U.S. 478, 490 n.14 (1964).

²¹ 445 P.2d 68 (Colo. 1968).

²² *Id.* at 78.

²³ 370 U.S. 49 (1962), *rev'g* 145 Colo. 53, 358 P.2d 1028 (1960).

²⁴ *Gallegos v. Colorado*, 370 U.S. 49, 55 (1962).

how to protect his own interests or how to get the benefits of his constitutional rights.²⁵

In the pre-*Miranda* cases, one sees the courts evaluating such factors as the previous experiences of the suspect with the criminal process, his intelligence, his education and mastery of the English language, his age, and other variables. In the *Miranda* opinion itself, however, the Court declared that

[a]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.²⁶

It is not clear from this language whether or not these various factors will continue to be given weight in determining the defendant's knowledge of his rights. Ostensibly, *Miranda* is an improvement upon *Escobedo* since it requires that the warnings or their equivalent be given before there can be "a knowing and intelligent waiver." On the other hand, a strong case can be made that as a result of the warning rules, these external considerations are subjected to less careful scrutiny than they were given under *Escobedo*.²⁷

As illustrated by the Colorado cases, *Miranda* standards continue to be ambiguous and difficult to administer in many instances. While the United States Supreme Court was initially responsible for these problems, it is apparent that the ambiguities can be dispelled more quickly if the lower courts and the members of the bar confront them directly. In any event, as the standards are applied to more factual situations, further clarification of the rules would appear to be almost inevitable.²⁸

²⁵ *Id.* at 54.

²⁶ *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).

²⁷ This proposition is discussed in §§ II(C)(2) & IV(B) *infra*.

²⁸ The argument for further clarification is not to be taken as a denigration of "creative ambiguity," which could give the states wider latitude for experimentation and judges broad discretionary powers in decisions based on the facts before them. Indeed, a cogent argument can be made that the central problem with *Miranda* is its egregious emphasis on specific warnings. From this point of view, *Miranda's* weakness is not too much ambiguity but too little "creative ambiguity." For a case which has been implemented more effectively than *Miranda* because of its "creative ambiguity," see *United States v. Wade*, 388 U.S. 218 (1967).

The Supreme Court of Colorado did in fact clarify somewhat the ambiguous but important concept of what constitutes a "knowing and intelligent waiver" in the recent case of *Billings v. People*, 466 P.2d 474 (Colo. 1970). The court approved Judge Lewis' concurring and dissenting opinion in the recent case of *Sullins v. United States*, 389 F.2d 985 (10th Cir. 1968). In the *Sullins* case, Judge Lewis indicated that "an express declination of the *right to counsel* is not an absolute from which, and only from which, a valid waiver can flow," (despite the fact that *Miranda* stated that "an express statement that the individual is willing to make a statement and does not want an attorney could constitute a waiver.") *Billings v. People*, 466 P.2d 474, 476 (Colo. 1970) (emphasis added). In *Billings*, the Supreme Court of Colorado did not address itself to the question of waiver of the *right to counsel* or the question of waiver of *both* fifth

B. *The Colorado Procedure for Implementing Miranda*

1. The Judicial Role in Implementing *Miranda* and the Colorado Rules Relating to Confessions

The ultimate contest is often resolved in the courtroom. However, within the framework of the general law governing the interrogation process, the judiciary is able to assert only a limited role in enforcing the implementation of the *Miranda* rules within the interrogation room.

The Colorado procedure for determining the admissibility of a challenged statement or confession is to hold a hearing, out of the presence of the jury (when there is a jury trial) in which the court determines admissibility as a matter of fact and law. The jury or judge may then determine the weight to be given to the statement, but a jury may not hear the statement before the court has made a prior determination that the *Miranda* requirements were met.²⁹

The judiciary also has some self-imposed responsibilities which may overlap with the requirements of *Miranda* and affect its implementation. The Colorado Rules of Criminal Procedure require that any person who is arrested on a warrant shall be taken before the nearest available county judge without unnecessary delay.³⁰ The judge is to inform the arrested person, among other things, that he is not required to make a statement, and that any statement made by him may be used against him. The judge is also required to allow the defendant reasonable time and opportunity to consult counsel.³¹

Nevertheless, it can be asserted that the role of the judiciary in Colorado is in many cases limited to a determination of the admissibility of a statement or confession. For example, though the county judge in the Denver Police Station often sees the defendants the morning after they have been picked up and warns them of their rights pursuant to Rule 5,³² the suspects who are charged with serious crimes generally have been questioned the night before. Thus, the suspect is dependent on the police both to warn him of his constitu-

and sixth amendment rights. Rather, it appeared to conclude that an express statement, "I understand," followed closely by a confession could constitute a waiver of the *privilege against self-incrimination*, without considering the question of waiver of the *right to counsel* (which apparently had not been waived in this case). Having set forth these guidelines, the court remanded the case to the trial court to determine whether or not there had been a waiver of the privilege against self-incrimination. *Id.* at 476-77. *Quaere* whether or not it is reasoning such as this which prompts the Denver Police Department to include on its advisement form *only* a waiver provision for the privilege against self-incrimination. See text accompanying note 35 *infra*.

For other recent cases clarifying *Miranda*, see *Gilmore v. People*, No. 23460 (Sp. Ct. Court., April 8, 1970) (dealing with voluntary statements); *Neitz v. People*, 462 P.2d 498 (Colo. 1969) (illustrating the significance of the waiver form).

²⁹ *Compton v. People*, 444 P.2d 263, 266 (Colo. 1968).

³⁰ COLO. R. CRIM. P. 5(a).

³¹ COLO. R. CRIM. P. 5(b)(1).

³² COLO. R. CRIM. P. 5.

tional rights and to contact an attorney for him if he chooses to exercise his right to counsel during interrogation. In short, the only decisive impact of the judiciary generally on the process is the decision to admit or suppress the statement.

2. The Police Role in Implementing *Miranda*: The Warning Procedure used by the Denver Police Department

Some aspects of the police role in the interrogation process will be considered in greater detail later in the study.³³ The purpose here is to define generally the procedures used by the Denver Police Department to implement the *Miranda* rules.

The most important function of the Denver police and detectives in the implementation of *Miranda* is to read the standard advisement form to the suspect and to attempt to secure one signature indicating that he understands the rights that have been read to him and a second signature indicating that he wishes voluntarily to talk to the interrogator. Generally, the rights are read aloud to the suspect, and he is asked whether or not he wants to sign. If he signs the form, it is immediately taken from him and he is not given a copy.³⁴

DENVER POLICE DEPARTMENT ADVISEMENT FORM³⁵

Name _____ Birthdate _____

Date _____ Time _____ Location _____

You have a right to remain silent.

Anything you say can be used as evidence against you in court.

You have a right to talk to a lawyer before questioning and have him present during questioning.

If you cannot afford a lawyer, one will be appointed for you before questioning.

Do you understand each of these rights I have read to you?

Answer _____

Signature of Person Advised _____

Knowing my rights and knowing what I am doing, I now wish to voluntarily talk to you.

Signature of the Person Advised _____

Witnessed by _____

Signature of the Advising Officer _____

³³ See text, § III *infra*.

³⁴ It is interesting to speculate on the importance of not giving the suspect a copy of the signed waiver form and having the form taken from him immediately upon signing. By the quick removal of the form, the police would seem to be able to place minimal importance on the signing of the waiver provision and make it appear to the suspect that the signing is a mere legal formality which the police and all those interrogated must execute. This tactic appears to be consistent with the Denver police strategy of encouraging the suspect to forget the form and the rights advisement as soon as possible after the signing so that the interrogation can get underway and the police can elicit the information desired from the suspect. For a discussion of the significance of the waiver form to the suspect, see text, § II(E) *infra*. For a discussion of the tactic of distracting the suspect from the warnings, see text, at 38 *infra*.

³⁵ Denver Police Department, Form 369, June, 1967.

There is a great emphasis on the reading of the advisement form, and this procedure is almost never omitted during interrogations by members of the Denver Police Department. The findings in this study differ in this respect from those of the Yale study of the New Haven Police Department, conducted shortly after *Miranda* had taken effect.³⁶ At that time in New Haven, less than half the suspects had received a warning which included more than half of the specific warnings required by *Miranda*.³⁷

Of course, one reason for the better performance of the Denver police in giving the warnings is that much more knowledge about *Miranda* has been disseminated since the New Haven study and the police have been better trained to meet its requirements. A second reason for the greater percentage of warnings given by the Denver police may be that the New Haven police were given separate advisement of rights and waiver of rights forms,³⁸ whereas the Denver "advisement form" includes the provision for waiver of rights.³⁹ Arguably, the Denver police are induced to read the complete warning regularly because the waiver of rights provision which they wish signed appears on the same form.

In Denver, the suspect is often presented with an advisement upon arrest. In some cases suspects sign the advisement form before or as soon as they get into the squad car; in others, the warnings are given for the first time in the interrogation room of the police station. Police preoccupation with the advisement form and its waiver provision is demonstrated by repeated offerings of the form to suspects who refuse to sign the first time the form is offered.⁴⁰

There is another, collateral role, in addition to advisement, which some Denver police officers have undertaken in accordance with *Miranda*. This involves permitting a nonindigent suspect who requests counsel before or during interrogation to contact private counsel or the public defender's office. The extent of compliance with these requests will be considered later.⁴¹ It is sufficient to say here that at least some detectives consider compliance with such requests to be part of their legal obligation.⁴²

Like the judiciary, the Denver police have undertaken a limited role with respect to the implementation of *Miranda*. They have been

³⁶ Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

³⁷ *Id.* at 1550-51.

³⁸ *Id.* at 1551.

³⁹ See text accompanying note 35 *supra*.

⁴⁰ See text, at 30-31 & 39-40 *infra*.

⁴¹ See text, § II(D) *infra*.

⁴² Interview with Bryan Morgan, Assistant Public Defender, Office of the Public Defender, Denver, Colorado.

primarily concerned with the suspect's signing of the waiver form and his talking with them. In general, they read the entire advisement form to the suspect but give him no other explanation of his legal rights. Interrogators have also contacted lawyers for the suspects.

II. THE SUSPECT'S VIEW OF THE INTERROGATION PROCESS, HIS KNOWLEDGE, AND HIS DECISIONS

Despite the ambiguities which remain in the rules set forth by *Miranda*, and despite the inability of the courts and the apparent reluctance of the police to aggressively implement the full import of the decision, it is nevertheless quite clear that the historic decision has, at least nominally, quite drastically changed the rules of the "game" of interrogation. Not only is the suspect armed with his full fledged constitutional rights to remain silent and to have counsel present during interrogation, he must in addition be given the knowledge with which to exercise those rights. As the former Police Commissioner of New York, Michael J. Murphy, said of *Escobedo*: "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite."⁴³ The purpose of the investigations which are reported below was to determine the actual effectiveness of the suspect's newly defined rights in the face of what the United States Supreme Court referred to as the "inherently compelling pressures"⁴⁴ of the in-custody interrogation process.

A. Method and Interpretation of Results

1. The Interviews

Interviews were conducted in the Denver County Jail during July and August, 1969, concerning suspects' most recent interrogations by the police. Different suspects were interviewed at different stages of the criminal process. Some had been arraigned, but not yet tried, some were in the process of being tried, and a few had already been sentenced and were awaiting transfer to another penal institution. Fifty interviews were conducted in all: Forty-seven of the suspects had been interrogated by the Denver police, two by the FBI, and one by the Colorado Springs police. Almost all of the interrogations occurred in the Denver Police Station.

Before each interview, the suspects were told that the interviewer was a student doing research in the public defender's office and that the purpose of the interview was to compile a study of the police interrogation process. They were told that nothing that they said

⁴³ *Miranda v. Arizona*, 384 U.S. 436, 441 n.3 (1966). It is assumed that the commissioner assumed that it is the suspect who is allowed to butt, gouge, and bite.

⁴⁴ *Id.* at 466-67.

would either help or hurt them in the defense of their case but if they did have a specific message to be conveyed to the public defender who had been appointed to defend them, that message would be passed on. An effort was made to convince the suspects that the interviewer was making an independent study; that they could express their views on the competency of their counsel and of the public defender's office in general as freely as on any other subject; and that, unless they indicated to the contrary, the use of their statements would be limited to the study.

Two problems were inherent in the interviews and the manner in which they were conducted. The first was one of communications. This was particularly acute in the determination of whether a suspect had made a "statement" or "confession" during interrogation. For purposes of this study a "statement" is defined as a suspect's remarks which conveyed information relating to the alleged offense to his interrogator and which the suspect viewed as nonincriminating at the time he made it. A "confession" or "admission," as used here, is a statement made with the realization that it might be damaging. These concepts, however, could not always be applied systematically during the interviews because of difficulties in communications. Some suspects appeared able to apply the terms accurately to their conduct; others could not. Those in the latter group were asked to describe everything which they had said in the interrogation room and their reasons for talking. The observer then classified their conduct himself.

The second problem in evaluating the results of the interviews relates to the credibility of the suspects' responses. It is possible that some of the questions were leading and a few of the suspects might have tried to make themselves look like innocent dupes and the police like crafty ogres. The danger of suggestion was recognized and minimized as much as possible. For the most part, the suspects were very willing to describe their experiences and appeared to be candid, outspoken, and truthful.

2. Nature of Sample

In order to evaluate the general validity of the results, a brief description of the nature of the sample is in order.

At the outset, it should be pointed out that the *size* of the sample may create problems concerning the validity of the results. However, it is felt that the conclusions which are suggested by the data are consistent with each other, and, as will be pointed out, they are generally consistent with the results of other *Miranda* studies which have been conducted on a much larger scale than the present study.

All of the suspects had one thing in common: A member of the public defender's staff had been appointed to represent them during

or as a result of their initial court appearance. In a few cases, because of conflicts of interest in the public defender's office, the court had subsequently appointed private counsel to represent them. In three cases the suspects had ultimately secured sufficient funds to retain private counsel. One suspect insisted that the court appoint private counsel for him because he contended that a public defender had spoken with him at the police station and given incompetent legal advice.

Of the 50 suspects who were interviewed, 15 were white, 21 were Negroes, and 14 were Spanish-Americans. The median age was 25 for the whites, 23 for the Negroes, and 24½ for the Spanish-Americans. The median educational level for whites was 12 years — for Negroes and Spanish-Americans, 10 years.

The median number of previous arrests for the Spanish-Americans was by far the highest — 15; for the whites, 8; and for Negroes, 6. The mean number of previous felony convictions for the Spanish-Americans was 1.23, for the whites, 1.27, and for the Negroes, 0.9. A number of alternative hypotheses might be advanced to explain the high arrest rate and the relatively low felony conviction rate of the Spanish-Americans. It is possible that Spanish-Americans may be arrested for misdemeanor violations more often than whites, or that they are more often subjected to "investigative arrests" which terminate without prosecution or conviction. If the latter hypothesis were proved, then perhaps Spanish-Americans are being harrassed because of a racial or cultural bias in the system.

Another interesting observation was that the Spanish-Americans who were interviewed talked with the police with greater frequency than did the whites or Negroes. In 84.6 percent of the cases, they made oral or written statements, and in 46.1 percent of the cases they made confessions or damaging admissions. In contrast, the whites discussed the facts of the alleged crime with their interrogator only 51 percent of the time and confessed or made admissions in only 21.4 percent of the cases. Although the Negroes made some statement in 71.4 percent of the cases, they, like the whites, confessed or made a damaging admission in only 28.5 percent of the cases.

The high confession rate of the Spanish-Americans cannot be explained satisfactorily by the data available here. It cannot be explained by their median age because it was almost as high as the whites, nor by their number of previous felony convictions which was almost as high as the whites. Furthermore, their experience with the criminal process appears to have been greater than that of the other groups because their median number of previous arrests was almost twice as high as the whites and more than twice as high as the Negroes.

Although it can be argued that their low level of education explains the higher confession rate than that of the whites, this does not explain the divergence from the Negroes who had the same educational background. Although language or some other cultural factor may present a plausible explanation for this data, these factors were not explored in this study. The purpose here is merely to present a general picture of the characteristics of the suspects who were interviewed for this study.⁴⁵

A few additional characteristics of the sample should be pointed out. Forty-eight of the suspects interviewed were male and two were female. Their age ranged from 17 years to 65. The arrest range was from zero to an estimated 60 previous arrests, and the previous felony convictions went from zero to five. Most of the suspects had been charged with at least one serious felony. Fifteen were charged with robbery, 12 with murder, 12 with burglary, three with possession of narcotics, three with rape, three with theft, one with arson, and one with manslaughter. In some cases multiple charges had been filed, but in order to simplify the outline, only the most serious charge is described here.

B. *The Suspect's General Knowledge of His Constitutional Rights*

As previously stated, the purpose of these interviews was to determine the actual effectiveness of the suspect's newly defined *Miranda* rights in the face of the "inherently compelling pressures" of the in-custody interrogation process. According to *Miranda*, not only is the suspect to be armed with his full fledged constitutional rights to remain silent and to have counsel present during interrogation, he must in addition be given the knowledge with which to exercise those rights. In this section, the extent of the knowledge which is communicated to the suspect by the *Miranda* warnings will be considered.

All of the suspects interviewed read or were read the rights warnings. However, the transition from perception to understanding may not be automatically assumed. In order to determine whether or not the suspects "knew" at least the basic verbal substance of their rights at the time of the interrogation, each suspect was asked whether (at the time of the interview) he could recollect the content of the warnings.⁴⁶ If the suspects referred either directly or indirectly in

⁴⁵ The extent to which factors other than race may influence confession rates will be considered in § II(C) *infra*.

⁴⁶ As for faulty memory, public opinion experts have established that events occurring within the preceding 12-month period are reliably recalled. See, e.g., Robbins, *The Accuracy of Parental Recall of Aspects of Child Development and of Child Rearing Practices*, 66 J. ABSTRACT & SOCIAL PSYCH. 261 (1963). It is assumed here that those who could not recall the content of the rights warnings either did not initially understand what they were being told, even in the barest outline, or attached so little significance to it that it was quickly forgotten.

their answers to the right to counsel or the right against self-incrimination, even in a vague or incorrect manner, they were given credit for remembering the rights to which they had referred. The way the recollections were most commonly articulated by the suspects was that "what you say could be used against you" and "you have a right to a lawyer."

Forty percent of the suspects interviewed remembered both the fifth and sixth amendment rights. Twenty-one percent remembered the right against self-incrimination alone, and 8 percent remembered only the right to counsel. Thirty-one percent could recall neither of these rights.

It is possible, however, that the suspects' responses to this question may understate their actual knowledge of their rights at the time of interrogation. For example, while only about half of the suspects remembered the right to counsel when they were asked to state their recollections of the warnings, 73 percent indicated that they had some familiarity with the right to counsel when a subsequent question directed their attention specifically to that right. This discrepancy may be in part explained by the small amount of importance attached to the warnings by the suspects.⁴⁷

In order to determine with more specificity the suspects' practical understanding of their constitutional rights, several specific questions about these rights were asked. The findings are consistent with the proposition that many of them did not adequately understand their rights, even if they were able to articulate crudely the basic verbal substance.

For example, a number of the suspects knew that what they said might be used against them, but they didn't know *how* it could be used against them. Also, a number of those who remembered that the right to counsel was somehow involved in the warnings thought that the right attached only at the trial stage. (Twenty-seven percent of all the suspects interviewed shared this misconception.)

When asked whether an oral statement could ever be used against them in court, 45 percent of the suspects expressed the view that it could not be. A few of them stated that they had thought that the primary goal of the interrogators was to secure information which the police could use in their investigation. Some of them were anxious to give the police information because they felt that further investigation of the facts might help to exonerate them. Since they

⁴⁷ The significance to the suspect of signing the waiver provision, which appears on the same form as the rights warning, is discussed in § II(E) *infra*. For a discussion of the police tactic of distracting the suspect from the warnings and the waiver, see note 34 *supra* & text, at 47 *infra*. The conclusion which is suggested is that a number of suspects may have had some prior knowledge of their rights, but that the rights warnings had little effect in imparting such knowledge to the suspects.

felt that only "a statement" could be admitted into evidence and a statement had to be written out and signed by the suspects, they had no reservations about talking.

Most of the 45 percent of the suspects who expressed the view that an oral confession could not be used in evidence had been extremely cooperative during interrogation, at least until they were asked to sign a written statement. They apparently misunderstood their relationship with the interrogator and misconstrued the function of the interrogation process. Not surprisingly, most of them indicated that if they had known that the oral statements could be used against them in court, then they would not have revealed any information to the interrogator.

The suspects were also asked the amount of information which the law requires them to give the police. The question was asked in such a manner as to call upon the suspects to supply an answer even when they were not entirely certain of the validity of their answer. Fifty-three percent stated that a suspect must give the police a means to identify him so that they will be able to determine whether or not they have the right man. The information generally included name, address, age, and previous arrests, if any. Thirty-three percent indicated that the law does not require a suspect to tell the police anything. Seven percent believed that the suspect must give the police a means to identify him, that he has a duty to identify himself, and that he also has a duty to identify physical objects with which the police confront him. The remaining 7 percent indicated that the suspect must tell the police everything about the alleged offense and answer all of their questions.

There appears to be nothing very surprising about the suspects' responses to this question. Generally, it is to the suspect's advantage to identify himself. If he refuses, he may be deemed uncooperative, the court would be informed of this, and in most cases he would have little to gain from withholding this information. However, it is not evident why some of the suspects felt that they had a special duty to identify physical objects, and it is almost incredible that despite the warnings a few of the suspects felt that one has the duty to tell the police everything he knows about the alleged offense and answer all questions.

C. *The Decision to Talk*

1. Effect of Knowledge Imparted by Warnings

The data reported above lend credence to the proposition that, in actual practice, many suspects who are warned of their constitutional rights as required by *Miranda* do not gain an adequate understanding of their rights. Many cannot recall even the basic content of

the warnings, and a substantial number of those who could recall the warnings indicated a lack of any practical understanding of these rights. For those who could remember the basic content of the warnings, an attempt was made to test whether a relationship existed between the recollection of these rights and the making of statements and confessions by the suspects. One might expect that those who possessed even a rudimentary knowledge of their rights would have revealed less information to the interrogators than those who remembered none of the rights. However, the results were not entirely consistent with this expectation.

TABLE I
Recollection of Warnings and the Making of
a Statement and/or Confession

Recollection of Warnings	Made Statement			Made Confession		
	Yes	No	Total	Yes	No	Total
Recalled Right to Counsel	71.4% (15)	28.6% (6)	100.0% (21)	47.6% (10)	52.4% (11)	100.0% (21)
Did Not Recall Right to Counsel	85.0% (17)	15.0% (3)	100.0% (20)	35.0% (7)	65.0% (13)	100.0% (20)
TOTAL N°	(32)	(9)	(41)	(17)	(24)	(41)
Recalled Privilege Against Self-Incrimination	80.8% (21)	19.2% (5)	100.0% (26)	38.5% (10)	61.5% (16)	100.0% (26)
Did Not Recall Privilege Against Self-Incrimination	73.3% (11)	26.7% (4)	100.0% (15)	46.7% (7)	53.3% (8)	100.0% (15)
TOTAL N°	(32)	(9)	(41)	(17)	(24)	(41)
Recalled Both Rights	70.6% (12)	29.4% (5)	100.0% (17)	41.2% (7)	58.8% (10)	100.0% (17)
Recalled One Right	92.3% (12)	7.7% (1)	100.0% (13)	46.2% (6)	53.8% (7)	100.0% (13)
Recalled Neither Right	72.7% (8)	27.3% (3)	100.0% (11)	36.4% (4)	63.6% (7)	100.0% (11)
TOTAL N°	(32)	(9)	(41)	(17)	(24)	(41)

*Number of suspects interviewed.

Assuming that a recollection of the content of the warning is a reliable indicator of the suspect's knowledge of his rights at the time of interrogation, Table I does not lead to the conclusion that mere knowledge of *Miranda* rights causes the accused to talk less during interrogation. Indeed, in a surprisingly large number of cases suspects who could recall all or some of the content of the warnings revealed more damaging information than those who could remember none.

For instance, those in the sample who recalled the right to counsel were somewhat less likely to make a statement, but more likely to make a confession than those who did not recall that right. Those who recalled the privilege against self-incrimination were more likely to make a statement, but less likely to make a confession than

those who did not recall the privilege. Finally, those who recalled only *one* of the rights were more likely to make both a statement and a confession than those who recalled *both* rights. Those who recalled only one right were also more likely to talk than those who recalled neither. A partial explanation for these results may be that many of those who were aware of their rights had little practical understanding of these rights. Another possible interpretation is that the limited and often distorted information which was possessed by many suspects, was not a meaningful asset to the suspects during the interrogation process. At the very least the data suggest that whatever knowledge *is* imparted to the suspects by the warnings does not seem to have a significant impact on their decision to talk.⁴⁸

2. Effect of Factors of "Imputed Knowledge"

The *Miranda* warning serves as something more than just a device to communicate knowledge to the suspect. The fact that a warning is given also serves (and was apparently intended to serve) as evidence that the suspect did in fact have sufficient knowledge with which to exercise his constitutional rights. In the *Miranda* opinion itself, the Court declared that

[it would] not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.⁴⁹

The speculative factors referred to by the Court are those factors which were used prior to *Miranda* in determining the knowledge and ability of the suspect to exercise his constitutional rights at the time of interrogation.⁵⁰ Although it is not clear whether these factors were to continue to be given weight under *Miranda*, the Court seems to have implied that the fact that a warning was given would be better evidence of the knowledge of the suspect of his rights than would the speculative factors. The data reported above suggest that the warning is in fact rather poor evidence that the suspect had sufficient knowledge with which to exercise his constitutional rights because the knowledge which is communicated to the suspect is superficial and has little or no effect on his decision to talk. The data reported below will examine the effect of these speculative factors of "imputed knowledge" on the suspect's decision to talk.

One of these factors is the age of the suspect, the assumption

⁴⁸ Similar results are reported in Medalie, Zeitz & Alexander, *Custodial Police Interrogation in our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, table 11 at 1377 (1968); and Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, tables 11, 12 & 13 at 1565-67 (1967).

⁴⁹ *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).

⁵⁰ *Id.* at 469 n.38. See also text accompanying notes 20-27 *supra*.

being that older suspects are more likely to understand and assert their rights in the interrogation setting than extremely young suspects.⁵¹ As shown in Table 2, older suspects in the sample were in fact much less likely to confess and less likely to make statements than younger suspects.

TABLE 2
Age and the Making of a Statement or Confession

Age	Made Statement			Made Confession†		
	Yes	No	Total	Yes	No	Total
Younger Than 25 Years	75.0% (21)	25.0% (7)	100.0% (28)	42.9% (12)	57.1% (16)	100.0% (28)
25 Years or Older	68.2% (15)	31.8% (7)	100.0% (22)	18.2% (4)	81.8% (18)	100.0% (22)
TOTAL N*	(36)	(14)	(50)	(16)	(34)	(50)

*Number of suspects interviewed.

†Chi square significant at .10 level. Statistical significance will be reported only where $p < .10$.

The assumption with respect to age is clearly consistent with the results of the sample, although no inference can automatically be drawn that older suspects talked less primarily because of a superior knowledge of their rights. Perhaps they were better equipped psychologically to cope with the interrogation situation, or experience or temperament may have been a significant factor.

Another prevailing assumption has been that those with more education assert their constitutional rights more effectively, due to greater knowledge of the law or greater understanding of the warnings. In a recent study of the interrogations of 21 draft protestors—seven of whom were members of the Yale faculty or staff and 11 of whom were graduate and professional students⁵²—the authors concluded that the suspects knew little or nothing about their constitutional rights during interrogation: "In spite of their superior education, few of the suspects knew their rights in even the grossest outline."⁵³ The authors also found that the FBI warnings did not in any satisfactory way communicate their constitutional rights to them.⁵⁴

Arguably, this Yale study focused on an anomalous sample, and for this reason the results of the study could be misleading. The suspects, whose conduct was examined, were middle-class civil disobedients who openly defied the selective service law as a matter of

⁵¹ See text accompanying notes 23-25 *supra*.

⁵² Faculty Note, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 305 (1967).

⁵³ *Id.* at 305-06.

⁵⁴ *Id.* at 310-11.

conscience. They were proud of their activity and presumably could be expected to communicate their experience readily.⁵⁵

Nonetheless, the Denver County Jail sample comes closer to substantiating the views expressed in the *Yale Law Journal* than the prevailing assumptions about the effects of education. The finding presented in Table 3 was that those with more than 10 years of school were more likely to make statements than those with less than 10 years of school and were about equally likely to confess to the charges. If the sample is representative, there would appear to be little or no advantage to the suspect resulting from his superior education. It is interesting to note that the Denver police detectives feel that they generally get more information from educated middle-class suspects.⁵⁶

TABLE 3
Education and the Making of a Statement or Confession

Years of Education	Made Statement			Made Confession		
	Yes	No	Total	Yes	No	Total
2-10	63.6% (14)	36.4% (8)	100.0% (22)	31.8% (7)	68.2% (15)	100.0% (22)
11-14	75.0% (12)	25.0% (4)	100.0% (16)	31.3% (5)	68.7% (11)	100.0% (16)
TOTAL N*	(26)	(12)	(38)	(12)	(26)	(38)

*Number of suspects interviewed.

A third background factor which has been used by judges to impute knowledge to a suspect is his number of previous arrests and felony convictions. The assumption here was that if the suspect has had a substantial number of previous experiences with the criminal process, he will be more knowledgeable about his rights and more willing to assert them. As indicated in Table 4, however, those with fewer than eight arrests made about the same number of statements as those with more, but those with less than eight arrests had a slightly greater tendency to confess than those with more arrests. As indicated in Table 5, those with fewer previous felony convictions had a slightly greater tendency to make statements and confessions than those with more previous felony convictions.

⁵⁵ The authors also contend that the educated middle-class suspect feels a taboo against rudeness which allegedly makes him reluctant to tell the interrogator that he does not want to talk. These suspects treat interrogation as a social situation, and they treat the interrogator as if they are meeting a new acquaintance. For instance, one of the more knowledgeable and courageous suspects who took part in their study, asserted his fifth amendment rights and refused to talk with an FBI interrogator. Before doing so, however, he apologized for invoking the fifth amendment and implied that he would have preferred to speak with the interrogator! *Id.* at 315.

⁵⁶ Interview with Paul Montoya, Lieutenant, Denver Police Department, June 22, 1969.

TABLE 4
Previous Arrests and the Making of a Statement or Confession

Number of Previous Arrests	Made Statement			Made Confession		
	Yes	No	Total	Yes	No	Total
0-8	70.4% (19)	29.6% (8)	100.0% (27)	33.3% (9)	66.7% (18)	100.0% (27)
9 Plus	71.4% (15)	28.6% (6)	100.0% (21)	28.6% (6)	71.4% (15)	100.0% (21)
TOTAL N*	(34)	(14)	(48)	(15)	(33)	(48)

*Number of suspects interviewed.

TABLE 5
Previous Felony Convictions and the Making of a Statement or Confession

Number of Previous Felony Convictions	Made Statement			Made Confession		
	Yes	No	Total	Yes	No	Total
0-1	69.7% (23)	30.3% (10)	100.0% (33)	33.3% (11)	66.7% (22)	100.0% (33)
2-5	64.3% (9)	35.7% (5)	100.0% (14)	28.6% (4)	71.4% (10)	100.0% (14)
TOTAL N*	(32)	(15)	(47)	(15)	(32)	(47)

*Number of suspects interviewed.

These relationships, except with respect to education, go in the direction which is consistent with the prevailing assumptions, but the relationships do not appear to be very strong. A few suspects may be in a slightly better position to assert their constitutional rights because of age or previous experience with the criminal justice system; but there is no basis here to assert that they generally have a significant advantage. Also, it is not clear whether the slightly better performance of the suspects with more arrests and felony convictions can be attributed to greater knowledge of their rights, psychological advantages, more experience, a generally defiant attitude, or a combination of these factors.

3. Effect of Promises and Threats: Inducements to Waive Constitutional Rights

It can be argued that knowledge is not ordinarily the most crucial variable in human decisionmaking. Most of our conduct and a large part of our decisionmaking may be controlled more by such factors as conditioning, instinct, and what we believe is expected of us. If most human decisions are influenced more heavily by these factors than by the thought processes, then it may be chimerical and deluding to expect the suspect to capitalize on his knowledge of rights. If anything, less rationality should be expected of him because he is in a high-pressure, crisis-laden situation which is hardly con-

ducive to rational decisionmaking.⁵⁷ Perhaps what is required during interrogation under these conditions is close knowledge of the institutions and personalities of the criminal justice system, and few of the suspects had or could be expected to have had the benefit of this kind of knowledge.⁵⁸

If the knowledge communicated to the suspect by the *Miranda* warning is inadequate to protect his rights and not a useful asset to him during the interrogation, and if the knowledge, attitudes, or temperament which come with age and experience have only a slightly more significant impact on the suspect's decision to talk, then perhaps the psychological pressures of the interrogation room of which the *Miranda* Court spoke are still operative as the major factors effecting the suspect's decision to talk. These psychological tactics and strategies were clearly deemed by the Court to constitute compulsion within the meaning of the fifth amendment.⁵⁹ Insofar as they involve direct promises and threats, they also violate the common law doctrine prohibiting promises and threats and later rules having the same effect.⁶⁰ The psychological tactics and strategies of the police will be discussed in a later section of this article.⁶¹ This section will discuss briefly, from the suspect's point of view, the promises and threats which served as inducements to them to waive their constitutional rights and talk.

To the extent that the suspects' answers were credible in this regard, the results of the interviews with the suspects at the Denver County Jail indicate that promises and threats are frequently used by the interrogators at the Denver Police Department as a means to secure statements and confessions from the suspects and are occasionally used to induce them to sign the waiver provision of the warning form.⁶² Half of the suspects who had been questioned at the Denver Police Department (23 out of 46) described specific statements made by their interrogators which can be classified as promises and threats. For example, many of the suspects at the Denver County Jail claimed that they had been told that if they did not talk or sign the waiver form they would be charged with more serious crimes. Specific illustrations of promises and threats

⁵⁷ *Miranda*-type warnings cannot "eliminate whatever 'inherently coercive atmosphere' the police station may have." *Interrogations*, *supra* note 36 at 1613.

⁵⁸ Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 655-56 (1967). See also Faculty Note, *supra* note 52.

⁵⁹ See note 6 *supra* and accompanying text.

⁶⁰ Courts have often held that the use of promises and threats as inducements to confess violates the voluntariness standard. 3 WIGMORE, EVIDENCE §§ 825-26 (3d ed. 1940); *Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 954-84 (1966).

⁶¹ See text, § III *infra*.

⁶² Specific examples of promises and threats reported by the suspects are presented in Appendix A *infra*.

reported are presented in Appendix A *infra*. Thirty-one percent of the suspects (six out of 19) explicitly mentioned the promises and threats when they were asked to describe their primary reasons for talking to the police. Specific illustrations of these and other reasons for talking to the police are presented in Appendix B *infra*. At least in these cases the influence of the inducements on the suspects' decisions to talk appears to have been substantial.

The significance of the existence of promises and threats in the interrogation process cannot be overstated. First, the use of promises and threats in interrogation clearly constitutes compulsion within the meaning of the fifth amendment and can effectively preclude the effective exercise of both the privilege against self-incrimination and the right to counsel in interrogation.⁶³

Second, the use of such tactics violates the doctrine of voluntariness which has traditionally been applied in determining the admissibility of a confession. As early as 1783 in *King v. Warickshall*,⁶⁴ an English court held that confessions which are obtained in consequence of promises or threats may not be admitted into evidence.⁶⁵ In 1897 in *Bram v. United States*,⁶⁶ the United States Supreme Court stated that,

a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.⁶⁷

Although the Court's later conclusion that the fifth amendment privilege against self-incrimination "was but a crystallization of the doctrine as to confessions,"⁶⁸ has been called simply erroneous,⁶⁹ nevertheless, promises and threats violate both the common law doctrine of voluntariness and the more recent interpretations of the fifth amendment.⁷⁰

One can gain additional insight into the effects of promises and threats in the interrogation room if he compares their use to the

⁶³ See *Malloy v. Hogan*, 378 U.S. 1, 6-7 (1964) and cases cited therein; F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 191-94 (1967); W. SCHAEFER, *THE SUSPECT AND SOCIETY* 11 (1967). See also text, § 11(D) *infra*.

⁶⁴ 168 Eng. Rep. 234 (1783).

⁶⁵ *Id.* at 235.

⁶⁶ 168 U.S. 532 (1897).

⁶⁷ *Id.* at 542-43 (quoting from 3 RUSSELL ON CRIMES 478 (6th ed.)).

⁶⁸ *Id.* at 543.

⁶⁹ *Developments in the Law — Confessions*, *supra* note 60, at 960.

⁷⁰ See note 63 *supra* and accompanying text.

widespread practice of plea bargaining.⁷¹ In plea bargaining a promise of leniency is traded for the suspect's act of self-conviction,⁷² and there is a general consensus that this sort of bargaining must be upheld.⁷³ The prosecutor makes an offer to the defense attorney that if the suspect is willing to waive his right to trial and plead guilty, the severity of the criminal process will be reduced. In both "the interrogation room bargain" and the normal plea bargain a legal right is forborne for an apparent benefit to the suspect. The cost to the suspect in some instances may be the same—if he makes a very damaging statement to the interrogator in response to a promise, in effect, he may be convicting himself.

Nevertheless, there are important differences between plea bargaining as commonly practiced and the sort of bargaining that occurs in the interrogation room. The surface similarities between the processes are quickly dispelled when they are evaluated in terms of the protections which they offer the suspect. In the case of plea bargaining the suspect is ordinarily represented by counsel, who in most instances

⁷¹ The practice of plea bargaining is generally acknowledged as being one of the most significant processes in our administration of criminal justice. For a detailed discussion of the process, see D. NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966). See generally materials cited in NEWMAN, *Id.* at 78 n. 1: M. SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, 24-29, 85-87 (1961); Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951); Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956); Polstein, *How to "Settle" a Criminal Case*, 8 PRAC. LAW. 35 (1962); Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L.C. & P.S. 506 (1942); Vetri, *Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 181 (1964).

⁷² The types of leniency take various forms. In Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956), the author categorized the types into four main groups: (1) charge reduction; (2) sentence reduction; (3) concurrent charges; (4) dropped charges. *Id.* at 787. Besides the four major groups there are innumerable variations, some of which are listed in Vetri, *Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964). The author stated:

Many other types of agreements are made with defendants to induce a plea. These include promises not to prosecute co-defendants, promises to arrange for the defendant or co-defendant to be incarcerated in a particular prison, promises to have the defendant or co-defendant tried in a juvenile court, recommendations for pre-sentence investigations, . . . and agreements not to oppose probation. Promise of immunity by the prosecutor can also be used to induce guilty pleas. Immunity can be promised with respect to some crimes in order to obtain a plea on another crime. Technically, immunity promises come within the scope of a promise to dismiss charges in an indictment, but often the immunity relates to crimes not yet charged.

Id. at 866 n.7.

⁷³ Sheer pragmatic considerations such as costs, personnel, facilities, and time dictate that the process must continue. See, e.g., *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957). The procedure is not without its problems, however, as noted by Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* 64 MICH. L. REV. 1469 (1966): "[I]t is common knowledge that plea bargaining frequently results in improper guilty pleas by innocent people. For example, a defendant falsely accused of robbery may plead guilty to simple assault, rather than risk a robbery conviction and a substantial prison term." *Id.* (emphasis added). See Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 181 (1964).

is able to distinguish between good and bad bargains.⁷⁴ Generally, the defense attorney will evaluate the prosecution's authority and can more realistically appraise the credibility of the promised benefit. Another protection for the suspect in this process is that the prosecution and the defense counsels often have a working relationship which may act to deter the prosecution from fully exploiting the mistakes of his adversary. Finally, after an agreement has been reached and approved by the court, it becomes enforceable.⁷⁵

In contrast, the suspect who bargains in the interrogation room has none of these protections. He may not even be cognizant that he is in a bargaining situation and that the cost of the promised benefit is the relinquishment of a constitutional right. In many cases he cannot effectively distinguish between good and bad bargains and cannot evaluate the credibility of the threat or promise. He probably has no working relationship with the interrogator,⁷⁶ and his adversary may exploit his ignorance with impunity. Most importantly, the agreement which is reached in the interrogation room has not been sanctioned by the court and is unenforceable. Proving that it ever took place may be impossible for the suspect.

If the suspect is to have the kind of effective right to counsel which was envisioned by the *Miranda* court, he should not be asked to "make a deal" with his interrogator nor be frightened or threatened into doing so. He should not be treated as if he were his own counsel, nor should he be distracted from his right to have counsel present during the questioning. The interrogation room is a singularly inappropriate place for bargaining and only the most exceptional suspect is qualified to engage in the bargaining process. Furthermore, when the suspect is induced (either consciously or subconsciously) to bargain away his right to counsel, his fifth amendment privilege becomes impaired and ineffectual.⁷⁷

The results of this study appear to indicate that despite the stringent common law rule prohibiting promises and threats and later rules having the same effect,⁷⁸ police interrogators still resort to these tactics regularly. The continued presence of promises and threats

⁷⁴ A survey conducted by Newman reported in 46 J. CRIM. L.C. & P.S. 780 (1956), *supra* note 72, revealed that approximately 50 percent of his sample were represented by counsel. Of the other half, almost 50 percent of them were recidivists and had at least some experience with the plea bargaining process. That, to some extent, would vitiate the necessity for them to have counsel to interpret and distinguish the "good and bad bargains."

⁷⁵ See, e.g., *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308 (2d Cir. 1963); *United States ex rel. Elksnis v. Gilligan*, 258 F. Supp. 244 (S.D.N.Y. 1966); *People v. Cassidy*, 90 Ill. App. 2d 132, 232 N.E.2d 795 (1967).

⁷⁶ "Local" recidivists, however, may be an exception to this condition. See Newman, *supra* note 72, at 784.

⁷⁷ See text accompanying notes 8 & 9 *supra*.

⁷⁸ See note 60 & text accompanying notes 63-70 *supra*.

in the interrogation rooms of the Denver Police Station can probably best be attributed to the difficulties in proving that they were ever made. The problems of proof and reconstructing the events of the interrogation room will be examined later in the study.⁷⁹

D. Suspects and the Right to Counsel

The need for counsel in the interrogation room to protect the suspect's fifth amendment privilege against self-incrimination is apparent from the findings reported above. The knowledge imparted to the suspect by the required warning appears to be insufficient to protect the suspect from the psychological tactics and strategies of the police — the "inherently compelling pressures" of the interrogation room. Further, if promises and threats *are* to be employed, they should be employed under the watchful eye of an attorney, or mediated by an attorney who is familiar with the rules of the game and more able to negotiate a conscionable bargain.

Because in *Miranda* the Court itself realized the insufficiency of a warning alone to protect the fifth amendment privilege against self-incrimination, it held that the right to have counsel present at the interrogation is indispensable to the protection of the suspect's rights.⁸⁰

The most apparent possible problem with the Court's holding in this regard is that the means adopted to protect the right to counsel in the interrogation room is the same device which was to be employed to protect the privilege against self-incrimination — a warning to the suspect advising him of his rights.⁸¹ If a rights warning is insufficient to protect one right (as the Court admits and this study confirms), it is possible that a similar warning would be insufficient to protect the other right.

In order to ascertain whether or not the warnings adequately apprised the suspects of their right to counsel, they were asked whether or not they were cognizant at the time of questioning that they had the right to see counsel before questioning and have him present during questioning. A surprisingly large 73 percent indicated that they were cognizant of the right to counsel, although only approximately one-half of the suspects remembered the right to counsel when they were asked to state their recollections of the warnings. Furthermore, 10 percent of the suspects who stated that at the time of interrogation they did not realize that they had the right to have counsel sit in during interrogation claimed that they asked to see an attorney before

⁷⁹ See text, § IV *infra*.

⁸⁰ See text accompanying notes 8 & 9 *supra*.

⁸¹ See text accompanying notes 8 & 9 *supra*.

questioning anyway. They appeared to have picked up enough from the warnings to attempt to exercise a right which they did not fully understand.

Thus it appears that most of the suspects were aware of their sixth amendment right as it applied to interrogation. (The data suggest, however, that this was due not necessarily to the warnings in many cases, but to the suspects' prior knowledge of their rights.) It might be inferred that they were capable of exercising the right to counsel.

Yet, 67 percent of the suspects asserted that they had requested the presence of counsel during questioning while only 6 percent indicated that they were given the benefit of counsel.⁸² Although it might be wise to view this latter statistic with some skepticism (since a few of the suspects who were interviewed prior to trial may have perceived this information as directly related to the defense of their case), the statistic suggests that the police are able to somehow effectively frustrate the right to counsel, despite the suspects' knowledge of their rights and their attempts to assert them.

One obvious tactic which is readily available to the police to counter the suspects' knowledge or attempts to assert their right to counsel is to induce the suspect to waive his right to counsel while at the same time obtaining sufficient evidence to prove that the waiver was "knowing and intelligent."⁸³ In order to elucidate to some extent the nature of the suspects' waivers of their right to counsel, consideration will be given to the interesting and enigmatic decisions made by the 16 percent of the suspects who stated that they knew that the law gave them the right to counsel during interrogation, but they decided not to exercise that right. Ostensibly, these suspects made "knowing and intelligent waivers" of the right to counsel; but before reaching that conclusion, one should look at the factors which influenced their decisions.

It has been suggested that the reason suspects who know of the right to counsel do not request the presence of counsel before interrogation is that they have had previous experiences with incompetent lawyers.⁸⁴ While many of the suspects were critical of the quality of legal representation which they had experienced in previous cases, none of them suggested that they preferred not to have counsel. Every suspect interviewed appeared to feel that in most situations any lawyer is better than none at all.

⁸² Of these three suspects (6%), one was questioned by the FBI and one by the Colorado Springs police.

⁸³ Other tactics available to the police are discussed in § III *infra*.

⁸⁴ The suggestion was made by Professor Robert O. Dawson, University of Texas School of Law, as a possible hypothesis for this study.

The reason cited by four of the suspects for not exercising their sixth amendment right was that although they knew that they theoretically had a legal right to counsel, they felt that the police would not call a lawyer even if they requested one. Their own previous experiences and those of their friends had taught them that it would be an exercise in futility. One of the suspects indicated that he could not afford his own lawyer and felt that the police would not call the public defender's office for him. Although he was not certain that the police never call lawyers for nonindigent suspects, he stated that there was no chance that a lawyer would be called to assist an indigent.

An explanation given by three suspects was that calling a lawyer would slow things up. Two of the suspects referred specifically to the cramped and uncomfortable conditions (no showers) at the city jail and felt that if they did not call a lawyer, they would get to the more habitable county jail sooner. The other indicated that he thought he would be released soon because the evidence against him was not strong enough to prosecute, and waiting for a lawyer would delay the process.

Two of the suspects contended that the reason they did not exercise the right to counsel was the fear that the interrogators would think that they were "wise guys" and police discretionary powers would be used against them. In one case the suspect asserted that the interrogator tried to dissuade him from calling a lawyer by telling him that although he had the right to a lawyer, he'd be smarter if he didn't call one. According to this suspect, the interrogator said that "a lawyer would be expensive; he'd tell you that you could beat this charge, but you can't." Both of the suspects explicitly stated that they did not want to do anything which would make the interrogators angry.

The other three suspects had three distinct explanations for their conduct. One felt that his conscience demanded that he talk immediately without waiting for a lawyer; so he didn't bother to ask for one. One stated that he didn't expect to say anything under any circumstances. As a result, he believed, a lawyer could not give him any additional protection at that stage. And finally, one suspect who was told that he was being charged with assault didn't want to bother with a request for a lawyer because the charges were not serious. (The victim died the next day and the charges were changed to voluntary manslaughter.)

All of these suspects except one had signed the waiver provision and all of them knew about the right to counsel and when it attaches. None had asked for a lawyer. Judges would probably find "knowing and intelligent waivers" in each of these cases, but it is submitted that most of them are inappropriate for such a finding.

The waiver should not apply to the first situation where the suspects knew their "theoretical" rights but felt they would be of no practical value. The second situation is not appropriate for the waiver because an entirely collateral matter (the condition of city jail) determined the outcome rather than any intelligent consideration of the options which were available. Where the suspects were obviously intimidated by their interrogators, their decision could not be "knowing and intelligent"; and the suspect who was told that he was charged with assault rather than voluntary manslaughter was in no position to exercise his rights because he had no realistic conception of the consequences of his decision.

The theory of the waiver may be consistent with only a few of the actual decisions. The suspect who thought he was not going to say anything anyway and the suspect who thought that the police did not have enough to prosecute, irrespective of the ultimate validity of these assertions, may have given their decisions the kind of attention that the *Miranda* court envisioned. Waivers arguably could be found here.

Whether a "knowing and intelligent waiver" took place in the case of the suspect whose conscience demanded that he talk immediately is a debatable question. On the one hand, his mental processes were never activated and there was no consideration of alternatives. On the other hand, he indicated that under all circumstances conscience would be his only guide and the presence of a lawyer would probably not have affected his conduct during interrogation. He deliberately chose to follow his conscience and stated that he would do so again even if the consequences were a long jail sentence.

In most of these situations the suspects' knowledge of their rights did not enable or encourage them to protect those rights in any meaningful way. To label their conduct "knowing and intelligent waivers" merely because they knew their rights and did not attempt to exercise them is to rely on a fiction that is questionable in light of the actual decisionmaking process. Judicial standards must be applicable to specific factual settings and should not gloss over and obscure the events which transpire in the interrogation rooms.

If the courts are incapable of determining the *subjective* factors which actually influence the suspects' choices, then they should explicitly recognize their inability to do so. The problem may be that "the knowing and intelligent waiver" test purports to be subjective as well as objective, but it may be applied only objectively. One cannot tell what went on in a suspect's mind by looking at his signature on a form or even by asking him whether or not he knew his rights. The decisionmaking process is much too complex to be treated with such vacuous formalism.

The treatment of the right to counsel should include the police response to the exercise of the right as well as the decision to exercise it. The suspect's description of the police conduct should be examined critically. Its value is that it gives some insight into his attitudes toward the police and an account of what happened in the interrogation room. That the account may be highly partisan does not suggest that it should be dismissed summarily.

Eighteen of the suspects who indicated that they had requested counsel before or during interrogation were asked to describe the response of the police to their requests. One had been questioned by the FBI, one by the Colorado Springs police in Colorado Springs, and the remaining 16 had all been questioned by the Denver police at the Denver Police Station. Both the suspect who was interrogated by the FBI and the one questioned by the Colorado Springs police indicated that interrogation ended immediately after their requests for counsel were made. Attorneys were contacted, and, after they had arrived, the interrogations were continued.

In contrast, most of the suspects who were questioned at the Denver Police Department were much more critical of the treatment which they received. Fourteen of them stated that interrogation continued after their requests for counsel; no counsel ever appeared, and to their knowledge no effort was made to contact an attorney on their behalf. Some claimed that they were coaxed to talk even after they had unequivocally stated that they would not do so until they had spoken with an attorney. Many of these suspects asserted that the interrogators ignored their requests for counsel, and a few claimed that the interrogators actively tried to discourage them from exercising the right by insisting that an attorney would be of no assistance to them or it would "just slow things up."

The 15th case is deserving of a brief separate explanation. The suspect alleged that he indicated at the inception of his first interrogation that he would not talk or sign the waiver provision without first consulting an attorney. He stated that he didn't have funds to retain his own attorney and asked the interrogator to contact one for him. The questioning ceased immediately and he claimed that he was assured that a lawyer would be called to speak with him. Four days passed. No attorney came.

On the fifth day he was taken into the interrogation room again.⁸⁵ When the suspect stated that no attorney had contacted him,

⁸⁵ In *Miranda* the Court stated: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966). *Quaere* whether or not a re-interrogation in this situation in and of itself constitutes a violation of *Miranda*.

the interrogator acted surprised.⁸⁶ However, without making any effort to contact one, he asked the suspect if he had changed his mind and had decided to sign the waiver provision and talk. The suspect was tired of sitting around the jail. So he wrote out and signed a confession for burglary. This was his first arrest and first interrogation experience.

In only one case did a suspect who was questioned at the Denver Police Department state that the police complied with his request for an attorney. The questioning stopped immediately after the request. It was not continued until after the suspect had had the opportunity to consult with counsel.

While the suspects' descriptions may not be taken at face value, there is some support for them. Two of the attorneys at the Denver Public Defender's office stated that although calls regularly come into the Public Defender's office in response to requests for the presence of counsel at lineups, the office is seldom called to furnish counsel to be present during interrogations.⁸⁷

There are two possible explanations for the willingness of the Denver police to call the Public Defender's office to furnish counsel for lineups and their reluctance to do so for interrogation. The first is that the role of counsel during identification proceedings is passive, whereas counsel at interrogation can act immediately to determine the outcome. The suspect must appear in the lineup, and a lawyer cannot advise him not to do so. If counsel feels that the lineup is unfair, he has no means to correct that situation at the police station. Furthermore, at the Denver Police Station, counsel at a lineup identification was not until recently even permitted to hear the remarks of the witness when he makes the identification, although knowledge of these remarks would often benefit him in cross-examination.⁸⁸ While counsel's role at a lineup is exclusively observational, a lawyer can exercise an immediate and decisive influence over the outcome of interrogation by advising his client not to make a statement.

A second explanation for police willingness to contact counsel for lineups and their reluctance to contact *Miranda* counsel is that the

⁸⁶ Joe Quinn of the Public Defender's Office suggests three possible explanations of this situation: (1) The suspect was not taken before a county judge pursuant to Rule 5 of the *Colorado Rules of Criminal Procedure*, with the intent or effect of gaining psychological advantage over the suspect. (2) The suspect was taken before a county judge for a judicial advisement, but no attorney was contacted for him. (3) A call was placed to the Public Defender's Office by a matron at the city jail, but because of heavy workloads, the attorney on jail duty for that day did not respond to the call. Interview with Joe Quinn, Assistant Public Defender, May 22, 1970, Office of the Colorado Public Defender, Denver, Colorado.

⁸⁷ Conversation with Bryan Morgan, Assistant Public Defender and Interview with Joe Quinn, Assistant Public Defender, August 14, 1969, Office of the Public Defender, Denver, Colorado.

⁸⁸ *Braxton v. Phillips*, No. 7514 (Dist. Ct. Denver, Oct. 2, 1968) (Public Defender's office obtained an injunction prohibiting police from conducting lineups unless and until defense attorneys were allowed to hear the remarks of witnesses).

judiciary has used much more stringent standards in overseeing the implementation of *United States v. Wade*⁸⁹ than *Miranda*. If counsel is not present at a lineup, the Colorado district court judges have shown a strong inclination to exclude the identification from evidence. In contrast, the absence of counsel during interrogation is ordinarily given little weight per se in determining the admissibility of a statement.

The public defenders argue that efforts at interrogations by the Denver police do not end merely because the suspect has expressed his desire to see counsel before answering any questions.⁹⁰

At first blush it appeared that most of the suspects knew about their right to counsel—it seems to follow that they can effectively exercise it. On closer examination it becomes apparent that knowledge of the existence of the right is not enough. The first difficulty is that some of the suspects who knew about the existence of the right did not try to exercise it. A consideration of the factors which influenced their decisions leads to the conclusion that many of the decisions were affected by the kinds of psychological pressures that the Supreme Court hoped to exclude (or at least mitigate) from the interrogation room through the implementation of *Miranda*.

A second problem is that, to the extent that the suspects' descriptions are credible, the Denver Police Department often frustrates the exercise of the right to counsel even after the suspect has tried to assert it. From the suspects' point of view, they were dependent upon the police to protect their sixth amendment right, and the police exploited this dependency. Most of the suspects could protect their right to counsel, if anywhere, only in the courtroom since the court could suppress a statement by resorting to the exclusionary rule. Few of the suspects believed that the right to counsel was of much value to them in the interrogation rooms of the Denver Police Station.⁹¹

E. Knowing and Intelligent Waiver of Constitutional Rights

After holding that the right to counsel is indispensable to the protection of the privilege against self-incrimination (and that the suspect must accordingly be further warned of the right to counsel), the Court in *Miranda* held that if the interrogation continues in the absence of counsel, a heavy burden rests upon the prosecution to establish a "knowing and intelligent waiver" of *both* the privilege against

⁸⁹ 388 U.S. 218 (1967).

⁹⁰ See note 87 *supra*.

⁹¹ However, one sophisticated suspect, who was interviewed in connection with the Washington, D. C. study of *Miranda*, would rather protect his right to counsel only in the courtroom. He observed, "I wouldn't want [a lawyer in the interrogation room]. That's the *worst* place to have a lawyer because the police play it straight then. I wanted them to make a mistake." Medalie, Zeitz & Alexander, *supra* note 49, at 1378.

self-incrimination and the right to counsel.⁹² The results of this study suggest that knowing and intelligent waivers of the privilege against self-incrimination do not occur very often among suspects because the knowledge of rights imparted by the warning is not extensive and not sufficient to allow the suspect to effectively exercise the privilege. The data further suggest that knowing and intelligent waivers of the right to counsel are not extremely prevalent among suspects because a large number of them claim to have had this right frustrated by the police, and many of those who admit to having waived the right did so apparently because of psychological pressures. Yet the great majority of suspects interviewed had signed the waiver of rights provision which is included on the rights warning form. Some of the information collected in the interviews sheds light on the question of why so many suspects were willing to sign the waiver of rights provision. The suspects were asked whether or not the signing of the waiver form (in either place on the form) could have any legal effect. The purpose here was to determine the general impressions of the suspect with respect to the nature of the form and the degree of significance which they probably attached to it during the interrogation. The question was intentionally open ended and may have been somewhat ambiguous.⁹³

To the extent that their responses to the question reflected their actual impressions of the significance of the form, the suspects' perceptions of the form were for the most part astonishingly naive. Approximately 60 percent of the suspects thought that under no circumstances could their signatures on it have any legal effect.⁹⁴

The majority of the suspects appeared to have substantially underrated the significance of signing the warning form. Fifty-four percent of all of them stated that they signed both parts of the form including the waiver of rights provision, and 21 percent did not even remember whether they had signed the form or not. It was inferred from their comments about the form and their conduct that they saw it as a merely mechanical device — a formality. Relatively few of the suspects distinguished between the first provision which indicated only that they had been warned and the second which indicated that they

⁹² See note 28 & text accompanying note 10 *supra*.

⁹³ While its ambiguity may have been problematic for the suspects, it was felt that a more specific and precise question with respect to the legal effect of the form might lead the suspects to consider issues which they had not considered during interrogation. The latter evil seemed to be greater than the former. As a protective measure, if the suspects appeared to be bothered by the ambiguity of the question and seemed to associate any possible legal significance with the form, their responses were recorded in such a manner as to indicate that they believed that a signature on it could have a legal effect.

⁹⁴ The presence or absence of signatures on the form is very frequently given determinative weight by the judges in *Miranda* hearings in deciding whether or not to admit the defendant's statement. See text, at 44 *infra* & *Neitz v. People*, 462 P.2d 498 (Colo. 1969) (illustrating the significance of the waiver form).

were voluntarily choosing to waive the privilege against self-incrimination. When this distinction was brought to their attention, most appeared to be confronting it for the first time.

Twenty-five percent of the suspects stated that they refused to sign either any place on the form or one of its provisions. A few indicated that the reason they refused to do so was because of possible legal significance. However, it also appeared that these suspects tended to be much less cooperative in general than the others. Their entire response to the interrogation process was different. As indicated in Table 6, those who refused to sign both provisions or only one provision were much less likely to make any statement or confession than those who did not.

TABLE 6
Signing of Waiver Form and Making of a Statement or Confession

Signed Waiver Form	Made Statement*			Made Confession†		
	Yes	No	Total	Yes	No	Total
Yes	81.0% (17)	19.0% (4)	100.0% (21)	52.4% (11)	47.6% (10)	100.0% (21)
No	20.0% (2)	80.0% (8)	100.0% (10)	10.0% (1)	90.0% (9)	100.0% (10)
TOTAL N‡	(19)	(12)	(31)	(12)	(19)	(31)

‡Number of suspects interviewed.

*Chi Square significant at .002 level.

†Chi Square significant at .025 level.

In sum, those who sign the waiver form generally do not understand the nature of their act, and those who refuse to sign are less cooperative generally in their interrogations. The effect of a signed waiver form on the judicial determination of "knowing and intelligent waiver" will be considered later in this report.⁹⁵

III. THE POLICE RESPONSE TO *Miranda*: THEIR ATTITUDES AND CONDUCT IN THE INTERROGATION ROOM

Although *Miranda* may have been intended ultimately to effect the nature of the suspect's role in the interrogation room, the decision addressed itself directly to the conduct of the police with respect to the suspect. Basically, the police are required to warn the suspect of his fifth and sixth amendment rights as they apply to the interrogation process, and if the interrogation continues in the absence of counsel, the prosecution must assume the heavy burden of establishing that the suspect knowingly and intelligently waived both his right to remain silent and his right to counsel.⁹⁶ The purpose of these

⁹⁵ *Id.* See also text, § IV(B) *infra*.

⁹⁶ See text accompanying notes 3-10 *supra*.

requirements was purportedly to allow the suspect to overcome or effectively counter the police strategies and tactics which are designed to elicit a statement or confession from the suspect — the inherently compelling pressures of the interrogation room. The purpose of this section will be to examine the police response to the *Miranda* requirements in terms of their attitudes, goals, strategies and tactics in the interrogation game.

A. Methodology

In order to gain insight into the police conduct of interrogations, two brief, informal interviews were conducted with interrogators of the Denver Police Department. More specifically, these interviews were designed to elicit information with respect to the goals of the interrogators and their attitudes toward the use of psychological tactics and strategies to accomplish these goals. The purpose of the interrogation room observations which followed was to confirm the existence of the goals, strategies, and tactics which were implied by the attitudes of the police, and to examine the nature and effect of the strategies and tactics in action.⁹⁷

Since it was possible for the observer to sit in on only eight interrogations, the experience inside the interrogation room was quite limited and serves only as a means to suggest some of the problems which arise there.⁹⁸ Furthermore, the eight interrogations which were witnessed may not have been entirely representative. None of them involved extremely serious felonies, such as murder and rape. Among the charges which had been filed on these suspects were assault on a police officer, attempted burglary, robbery, and assault with a deadly weapon. Also, two of the cases involved family disturbances. As a result, it is possible that the interrogators did not press for confessions as hard as in some other instances in which the charges were more severe.

Before each of the eight interrogations the observer was introduced to the interrogator by his division chief as a student who had a Ford Foundation grant to study the criminal justice process. In five instances the interrogators were friendly and receptive and appeared not be inhibited by the observer's presence. In three cases, however, the interrogators appeared to be annoyed with the prospect of having their work observed. Although none of them voiced an immediate protest to their superiors, apparently two of them later expressed mis-

⁹⁷ These investigations were conducted during July and August, 1969.

⁹⁸ In Denver, unlike New Haven, the police and district attorney's office do not have an open door policy with respect to observation by outsiders. They permitted the observations for only a short time and even then, with some reluctance. The position taken by the district attorney's office was that the presence of an outsider in the interrogation room interferes with the rights of the suspect.

givings to their division chief about the wisdom of allowing the observations. Furthermore, unlike the New Haven study,⁹⁹ the observations at the Denver Police Station did not last long enough for the interrogators to become familiar with the observer and accustomed to his presence. Thus, it is quite possible that their conduct during the questioning was inhibited by the presence of an outsider.

In each instance the observer and interrogator (in a few cases two interrogators) entered the room together. They sat with the suspect at a table and were similarly attired. The observer was introduced to the suspect only by name, and the suspect was not informed that an outsider was present. Nor was the suspect asked whether or not he would permit the observation. From all indications, the suspect probably viewed the observer as another policeman. While the conduct of the interrogator may have been influenced by the presence of a third party, it appears highly unlikely that there was any such influence on the suspect.

B. *Police Attitudes Toward Interrogation*

Some of the literature which has been written about the police discusses their dissatisfaction with the judiciary — particularly the United States Supreme Court.¹⁰⁰ According to Albert Reiss and David Bordua, the police view court decisions to dismiss charges against a defendant as a rejection of their own decisions.¹⁰¹ The individual policeman, being production-oriented, views an acquittal as his own failure within the police system, or he may feel that the refusal of the courts to convict rests on the most artificial of formalities.¹⁰² Finally, Reiss and Bordua contend that the displacement of the policeman's position of authority when he testifies in court, "plus the generalized lower prestige of police when taken together with the institutionalized distrust of police built into the trial process creates a situation where the police not only feel themselves balked by the courts but perhaps, even more fundamentally, feel themselves dishonored."¹⁰³

The discussions at the Denver Police Station appear to confirm the existence of the policeman's dissatisfaction with the judiciary. For instance, one assistant division chief contends that in cases since

⁹⁹ For a description of the Yale study, in which the observers in the New Haven Police Station gradually developed a close rapport with the New Haven police, see *Interrogations*, *supra* note 36, at 1531-32.

¹⁰⁰ See, e.g., Reiss & Bordua, *Environment and Organization: A Perspective on the Police*, in *THE POLICE: SIX SOCIOLOGICAL ESSAYS* 25, 32-40 (D. Bordua ed. 1967); J. WILSON, *VARIETIES OF POLICE BEHAVIOR* 52 (1968).

¹⁰¹ Reiss & Bordua, *supra* note 100, at 33.

¹⁰² *Id.* at 37.

¹⁰³ *Id.* at 39.

Gideon,¹⁰⁴ the United States Supreme Court has gone much too far in extending the procedural rights of the suspects. He is particularly critical of the court's extension of the right to counsel at the pretrial stages because he feels that when it is exercised, it interferes with "proper" law enforcement. He believes that the effect of having counsel present is to suppress the truth, since lawyers generally advise their clients not to say anything, and that the extension of the right to counsel in the interrogation room is just one instance in which the Supreme Court has displayed excessive concern with individual rights and a great insensitivity to the needs of society.

A number of the interrogators were questioned informally with regard to their goals and strategies during the interrogation period. The interrogators uniformly appeared to be concerned with accomplishing two goals. The first was to get the suspect to sign the waiver provision after warning him of his rights, and the second was to get him to talk whenever possible. A few of them indicated that if a suspect is reluctant to sign the form or to talk, then it would be permissible to give him some mild encouragement to do so. They felt that various incentives might be legitimately used to accomplish their objectives but did not specify exactly the kinds of encouragement which are permissible. The interrogators unanimously believed that the warnings must be given in order to have the statement admitted into evidence at trial. However, once that duty has been fulfilled, some of them felt that they have wide latitude in inducing the suspect to waive his rights.

For the most part, they appeared to have adopted the same attitudes as the authors of the police interrogation manuals, but their strategies were not as highly developed.¹⁰⁵ The manuals suggest a systematic analysis of the suspect's emotional state and a concerted intellectual effort to develop specialized strategies for manipulating his emotions. According to the manuals, the interrogator's objective should be to elicit incriminating statements after crumbling the defenses of the suspect.¹⁰⁶ Among the tactics prescribed to accomplish this goal are the following: calling attention to the subject's physiological and psychological symptoms of guilt, Mutt and Jeff routines, building the subject up and tearing him down, bluffing, compounding falsehoods, confusing the suspect with kindness, and other tactics based on "indirect emotional subterfuge."¹⁰⁷

¹⁰⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁰⁵ See generally F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1967); A. AUBRY & R. CAPUTO, *CRIMINAL INTERROGATION* (1965).

¹⁰⁶ AUBRY & CAPUTO, *supra* note 105, at 31.

¹⁰⁷ For a comprehensive description of prescribed police strategies and tactics in the interrogation room, see generally INBAU, *supra* note 105, and AUBRY & CAPUTO, note 105, at 75-99.

While the Denver police interrogators often appeal to the suspects' emotions through sympathy, kindness or anger, they seem to rely more on "common sense" psychology than on the kind of systematic analysis and subtle psychological strategy which is suggested by the manuals. Although their tactics are neither as specialized nor as sophisticated as those presented in the manuals, they know how to get what they want from the suspect during interrogation.

The strategy of one interrogator differed at least in one respect from the police manuals. While the manuals indicate the crucial importance of a confession or admission,¹⁰⁸ he was generally satisfied when he could get any statement from the suspect which could be used for impeachment in court. He further indicated that he is willing to exert some pressure when he believes that he needs the evidence for conviction but will "go easier" when there is sufficient evidence to convict without it. When a confession is definitely needed for a conviction, he is especially careful to encourage the suspect to sign the waiver provision. Once he gets the waiver signature, he attempts to induce the suspect to forget about the warnings by asking simple questions which few suspects find objectionable such as age, address, and phone number. Only after the suspect has been distracted from his rights, does he ask about the facts of the alleged crime.

The interrogators all appeared to recognize the value of using "common sense" psychology in the interrogation room. Although they never spoke in terms of the complex psychological theories articulated in the police manuals, they felt it was very important to be sensitive to the particular forces which were working on the suspect.¹⁰⁹ They stated that they thought sympathy tactics in many situations are especially successful in getting the suspects to talk. One indicated that he likes to impugn the character of the victim in some crimes against the person cases because this "helps the suspect justify his actions to himself and makes him more willing to discuss them." Another indicated that he tries to present himself as the suspect's "friend" because he often is able to get better results, particularly with inexperienced suspects.

C. *Observations in the Interrogation Room*

The purpose of the observations in the interrogation room was to confirm the existence of the goals, strategies and tactics which were implied by the attitudes of the police and to examine the nature and effect of the strategies and tactics in action. In order to illustrate the

¹⁰⁸ Cf. AUBRY & CAPUTO, *supra* note 104, at 21.

¹⁰⁹ For more subtle psychological strategies in the interrogation room, see generally AUBRY & CAPUTO, *supra* note 105, at 75.

findings, a few of the eight interrogations which were observed will be described in some detail.

On June 26, 1969, a Spanish-American suspect was questioned regarding an attempted burglary. The suspect was in his early twenties and had a long list of previous arrests. According to the interrogator, the police had insufficient evidence to give them "probable cause" on this charge, but the suspect was also being held on another charge — failure to appear.

Without encouragement, the suspect signed the waiver form, but after what appeared to be momentary indecision, he stated that he did not want to talk. The interrogator appeared to be interested in assisting the suspect and spoke in a friendly tone. He made the following statement: "You're in jail now; if you want to talk, the entire matter might be cleared up before your case gets to court." The suspect repeated his statement that he did not want to talk. At that point the questioning ceased, and he was returned to his cell.

On June 27, 1969, an interrogator questioned an Eskimo charged with assault with a deadly weapon. The suspect was alleged to have stabbed his wife with a knife. He had no previous experience with the criminal justice system, no previous arrests, and signed the waiver form without any encouragement.

Immediately after the suspect signed the waiver form, the interrogator stated, "I would appreciate it very much if you would tell me exactly what happened last night." Again, the interrogator's tone was friendly and familiar. He suggested to the suspect that he often has problems with his own wife. The suspect admitted that he had come home drunk but denied that he had a knife and denied knowledge of the stabbing. Despite this denial, the detective asked, "Where did you have the knife?" The suspect repeated his previous answer.

After the interrogation the detective stated privately that he often repeats questions which have been answered negatively, because it sometimes "trips the suspect up" and gives the interrogator "a psychological advantage." He also indicated that he seldom has difficulty in getting suspects in family disturbance cases to talk, because they are almost invariably vulnerable to sympathy tactics and want to get their problems off their chest. In this interrogation the suspect appeared to view the interrogator as a friend, and despite repeated questions and denials concerning the knife, he did not appear to recognize the adversary nature of the relationship.

On June 30, 1969, a Spanish-American youth was questioned with respect to an aggravated assault charge which had not been filed at the time of questioning. The youth had been arrested a number of times before and had a conviction of assault with a deadly weapon. Before

the interrogation on the morning of the 30th, the suspect had twice been warned of his rights. In each instance he had refused to sign the waiver provision and had refused to talk. The interrogator asked him for the third time whether he finally had decided "to cooperate" by signing the form and talking. The suspect said that he had changed his mind and was now willing to do so. He signed both provisions of the advisement form.

In response to the interrogator's questions the suspect admitted that he had had a gun on his person but denied that he had taken it out of his pocket. The interrogator then asked the suspect the hypothetical question: "Would you ever shoot anyone?" The response was that in some situations he would "possibly do so." The suspect also volunteered the statement that the arresting detective had told another detective who was present at the time of the arrest that he wanted "to pin an aggravated assault rap on him and get him sent to jail for a few years." When asked later why he did not record this statement along with the others, the interrogator gave two reasons. First, "it was a lie." Second, "it has no relevance to the facts."

In another interrogation which took place on June 30th, a suspect charged with robbery refused to sign the waiver provision and asked for a lawyer. The interrogator's response was that a lawyer wouldn't help him and that he ought to be more cooperative. The suspect appeared to be intransigent, and the interrogator concluded that further attempts to question him would be futile. The questioning ceased, and the suspect was permitted to return to his cell.

The observations in the interrogation room of the Denver Police Department were singularly unastounding — and certainly less dramatic than the practices described by the suspects at the County Jail. Any possible legal defects involved (promises, threats, or even mild encouragements) were so ambiguous or subtle that they possibly could not be shown to have violated "due process" as that standard has been traditionally interpreted.

However, certain observations can be made about the interrogators' techniques. First, the interrogators seemed to be aware of and willing to utilize various tactics to influence the suspect — to "encourage" him to talk. One interrogator emphasized his own desire for the suspect to speak with him. One suggested that it would help the suspect to talk. Further, hypothetical questions were asked which were designed to elicit incriminating answers.

A second observation is that the tactics used by the interrogators were used not only to elicit statements, but were used also to accomplish the stated goal of obtaining waivers of rights from the suspects. One suspect was presented with two additional warning forms after

he had explicitly refused to sign the first, and he was asked three times whether or not he wanted to talk. Another was advised that it would be better not exercise the sixth amendment right to counsel.

Third, it appears that most interrogations are conducted "in private," without a witness present, and one of the interrogators recorded only those parts of the suspect's statement which incriminated him and omitted the exculpatory portion because "it was not relevant" or "it was a lie."

That the use of these or any tactics at all was mild during the observations, of course, leaves a significant question unanswered. However, there are two indications that an accurate picture of the use of tactics and psychological pressures lies somewhere between what was observed and what was reported by the suspects in the County Jail. First, the cases were not very important, and a number of the interrogators explicitly stated afterwards that they did not care whether or not the suspects talked. Second, there were some indications that a few of the interrogators were inhibited by the presence of an outsider and would have exerted more pressure in his absence. If this is the case, then the practices described here may understate the severity of the pressures exerted generally during interrogations at the Denver Police Station.

IV. THE *Miranda* HEARING AND THE PROBLEMS OF PROOF

Thus far the focus has been on the interrogation room—an attempt to describe and analyze the impact of *Miranda* on the roles of the suspect and the interrogator in the interrogation process. However, the interrogation contest is often ultimately resolved in the courtroom. In Colorado the judge, during a private hearing in chambers, makes a finding of fact and law with regard to the admissibility of a statement or confession. If the court finds that the statement is admissible, then it may be introduced into evidence, and the jury determines the weight which will be given to it.¹¹⁰ The *Miranda* hearing thus serves as the only formal link between the events which transpire in the interrogation room and the body of law designed to control those events.

In order to examine to a limited extent the judicial response to *Miranda* in Colorado and the relationship of that response to the interrogation process, some *Miranda* hearings were observed.

A. *Some Observations of a Miranda Hearing*

In an article in the *Columbia Law Review*, Sheldon Elsen and Arthur Rosett describe the events of typical *Miranda* hearings.¹¹¹ They

¹¹⁰ *Compton v. People*, 444 P.2d 263, 266 (Colo. 1968).

¹¹¹ Elsen & Rosett, *supra* note 58.

assert that in most cases the prosecution will contend that the suspect waived his rights, that he did so without any inducements, and that his waiver was "knowing and intelligent."¹¹² According to Elsen and Rosett, when the defendant takes issue with these allegations of the prosecution and the testimony is conflicting, the defendant ordinarily has little chance. One of the defendant's disadvantages will be his criminal record in most cases,¹¹³ and the court will take judicial notice of it. A second disadvantage is that the judges recognize that confessions are generally accurate, and a third is that judges face political pressure to convict. The result is that when the allegations at the hearings are "contradictory, ambiguous, or ambivalent" (as they frequently are), the judges are likely to decide in favor of the law enforcement officials.¹¹⁴

Too few suppression hearings were observed in this study to confirm or disconfirm the interpretations of Elsen and Rosett as they apply to Colorado. However, the hearings which were observed suggest some of the possible problems inherent in the judicial response to *Miranda*, and one hearing will be described for purposes of illustrating some of these problems.

Donald Everett Carroll was charged with murder and was tried in the courtroom of Judge Robert Kingsley in August of 1969.¹¹⁵ Carroll was questioned at the Denver Police Station one morning at 2:30 a.m. shortly after he was picked up at a bar. During the subsequent *Miranda* hearing, he claimed that he had been intoxicated at the time of questioning because he had consumed "approximately fifteen drinks and some pills" during the evening. His interrogators admitted that the defendant looked "as if he had done a lot of drinking," when questioned, but they denied that he was intoxicated.

The prosecution and the defense agreed that Carroll had refused to sign the first *Miranda* form presented to him and that he had stated that he did not want to talk. Carroll claimed that he requested an attorney at that point, but his interrogators denied that any such request had been made. Moreover, both sides agreed that after he refused to sign the first warning form, Carroll was kept in the interrogation room for approximately 15 minutes. The prosecution claimed that after this period of time had expired, Carroll on his own initiative decided that he wanted to talk and would sign the warning form. When asked by the defense why the defendant was still sitting in the

¹¹² *Id.* at 658-59.

¹¹³ The criminal record is relevant to show that the defendant has prior experience with the criminal justice system and therefore, probable knowledge of his rights.

¹¹⁴ Elsen & Rosett, *supra* note 58, at 659.

¹¹⁵ *People v. Carroll*, No. 60679 (Dist. Ct. Denver, August 2, 1969), *appeal docketed*, No. 24461 (Sup. Ct. Colo., Nov. 4, 1969).

interrogation room 15 minutes after he had refused to talk, the police answered that they were filling out some papers.

The arguments for the defense were as follows: Carroll was intoxicated when questioned. He had consumed 15 drinks before questioning and testified that he was drunk. Under rule 5(A)(2) of the Colorado Rules of Criminal Procedure he should have been brought before a county judge before questioning to determine whether or not he was intoxicated.¹¹⁶ The suspect requested counsel before questioning. His statement on the first waiver form indicated that he didn't want to talk. Once he stated that he refused to talk, he should have been removed from the interrogation room. Finally, he was not informed that he was charged with murder when questioned.

Against the objection of the defense the prosecution was permitted to introduce Carroll's criminal record into evidence. The defense pointed out that all of Carroll's previous arrests had occurred before *Miranda* had taken effect.¹¹⁷ Judge Kingsley admitted the record into evidence.

The court's finding was that there was "a knowing and intelligent waiver" and that the statement of the defendant was admissible into evidence. The court found that the suspect was not intoxicated when he made the statement, and that the police had no duty to take him before a county judge to decide this question. Judge Kingsley did not believe that the suspect asked for counsel and felt that a 15-minute detention in the interrogation room after the defendant had indicated that he didn't want to make a statement was justified. Finally, he found that there was no duty on the part of the police to inform the suspect of the nature of the charges before questioning.

From a defense perspective, the conclusions of the court may have been disconcerting, but even more problematic was the mechanical and cursory nature of the *Miranda* hearing itself. As soon as the police witness had testified, it became a practical certainty that Carroll's statement would be admitted into evidence. (Both the public defender and the district attorney indicated privately that at that point the result became a foregone conclusion.) As often happens in the Denver district courts, Judge Kingsley scolded the police interrogator momentarily, but in his decisionmaking, he appeared to ignore the issue of proper police conduct and *Miranda's* bearing on that issue. His consideration did not appear to go beyond the defendant's signatures on the advisement form, the police testimony, and the defendant's criminal record.

¹¹⁶ This provision was changed in the new Colorado Rules of Criminal Procedure which became effective April 1, 1970.

¹¹⁷ Thus, it is argued, no inference should arise that his previous experience with the criminal justice system had given him a prior knowledge of his constitutional rights

As with most *Miranda* hearings, Carroll's hearing did not clearly violate any strictly legal standards. However, within the context of the research findings concerning the actual interrogation process, it will be asserted that the *Miranda* hearing is generally, for the suspect, a kind of ritualistic formalism with a vacuous result.

B. *The Miranda Hearing and the Interrogation Process*

It has been said about *Miranda* that central to the decision was a dissatisfaction with regard to the way the lower courts find the facts which occurred in the interrogation room. The concern was that they gave dubious police testimony excessive weight, and the hope was that by defining standards more clearly, *Miranda* would mitigate this problem.¹¹⁸ Even after the implementation of *Miranda* one sees the lower courts still relying excessively on sources of information which, to a large extent, are unreliable.

A strong case can be made that in Denver the prosecution has a special advantage — the warning form used by the Denver Police Department. If the judge, when given the form, sees that the suspect has signed both the warning and waiver provisions (although the only waiver provision that appears is for fifth amendment rights), the defendant will ordinarily be hard pressed to convince the judge that he did not understand his rights or that he was induced to sign through promises or threats. The warning form often serves as tangible evidence for the prosecution to support its allegations, and some judges in Denver appear to treat the signatures on the form as the creation of an almost conclusive presumption of waiver — or at least *prima facie* evidence that is difficult to rebut.¹¹⁹ While the suspect may be given the opportunity to contradict the allegation of waiver, normally his uncorroborated assertions would seem to be given little credence and are summarily dismissed.

It is submitted that giving the signatures decisive weight is entirely inconsistent with the spirit of *Miranda*. Any realistic analysis of the events of the interrogation room leads to the conclusion that the suspect's conduct itself is often inconsistent with an inference of waiver. He may sign the waiver provision, and at the same time request counsel; or he may state that he does not want to talk before succumbing to the pressure of a persistent interrogator. Moreover, the findings of this study indicate that often the suspect does not fully understand the rights which he is alleged to have knowingly and intelligently waived,¹²⁰ and he often does not understand the sig-

¹¹⁸ Elsen & Rosett, *supra* note 58, at 649.

¹¹⁹ For an appellate case illustrating the significance of the waiver form, see *Neitz v. People*, 462 P.2d 498 (Colo. 1969).

¹²⁰ See text, §§ II(B) & (C) *supra*.

nificance of the waiver form which he signs.¹²¹ Finally, the data suggest that police interrogation tactics are often directed not only to eliciting a statement or confession from the suspect, but also to securing either a "knowing and intelligent" waiver, or legally sufficient evidence of such a waiver as that standard is defined by the courts.¹²² It thus appears that the major evidentiary link between the interrogation room and the courtroom is inherently unreliable. Developing accurately the events which occurred in the interrogation room and the suspect's unique situation there may be difficult. Yet, if the purpose of *Miranda* is to be fulfilled, the courts must take the more difficult path.

In the *Miranda* hearings in Denver, as they are presently conducted, the defendant is frequently dependent upon the police to support his assertions. The problem of the defense counsel then is the objectivity and reliability of the police witness. As *Miranda* implies, in many instances police cannot be relied upon to establish objectively the events which transpired in the interrogation room. Their unreliability may be attributed to multiple factors. Few consciously lie, but many may distort the truth because of what they perceive to be their own interest in the case. Another reason for police distortions during the *Miranda* hearings is that *Miranda* itself is heinous to them, and they may feel that in *Miranda* the Supreme Court has called their credibility into question.¹²³ It may thus be chimerical to expect them to describe their own conduct and that of the suspect during questioning objectively.

A strong case can be made that the state should be compelled to provide a more accurate and reliable record of events in the interrogation room than is presently provided through the testimony of police officers. For instance, tape recording the entire interrogation session might resolve the problems of selective recordation or inaccurate reconstruction of the events occurring in the interrogation room. The defendant would then not be forced to depend on his interrogator to testify that he requested counsel or that he was induced to talk through promises and threats. Moreover, the recordings would give the court a better basis to determine whether there has been "a knowing and intelligent waiver." And perhaps most importantly, they would give the court an opportunity to evaluate and control police conduct in the interrogation room.

¹²¹ See text, § II(E) *supra*.

¹²² See text, § III *supra*. It appears that Colorado courts only require an express waiver of the privilege against self-incrimination, although the *Miranda* Court seemed to contemplate an express waiver of *both* the privilege and the right to counsel. See note 28 *supra* & text accompanying note 10 *supra*.

¹²³ See text accompanying notes 100-103 *supra*.

In addition, the police should be compelled to use scientific testing equipment, which is normally at their disposal, for interrogation purposes. For example, if a suspect appears to be drunk (or "looks like he has been drinking") they should give him a breathalyzer or blood alcohol test before asking him to sign a warning form or questioning him. If the state ordinarily uses special procedures to build its case against a suspect, those procedures should also be used to enable the suspect to protect his rights.

If implemented, these reforms could go a long way toward improving the *Miranda* hearing as a fact finding proceeding. Counter-vailing considerations, of course, should also be taken into account. It may be arguable that the presence of the tape recorder would interfere with the discretionary powers of the police and would further damage their morale. Their conduct in the interrogation room might be inhibited and possibly fewer statements would be elicited. However, the conclusion is inescapable that if the *Miranda* hearing is to serve any meaningful function, it must provide a better means of establishing the events which transpired in the interrogation room.

CONCLUSION: A NONWAIVABLE RIGHT TO COUNSEL

When the United States Supreme Court in the *Miranda* decision changed the rules of interrogation to give the suspect a battery of protections against the "inherently compelling pressures" of the interrogation room, the game of interrogation became inordinately subtle and complex.

First, the suspect was given the right to knowledge of his privilege against self-incrimination — this knowledge to be given in the form of a warning that he has a right to remain silent.¹²⁴ It appears, however, that the knowledge actually communicated to the suspect is often too abstract and incomplete to be of much practical value to him in decisionmaking.¹²⁵ Even the knowledge or the attitudes and temperament which come with age and experience appear to have only a minimal impact on the suspect's decision to talk.¹²⁶ In addition, *Miranda* notwithstanding, their interrogation room decisions are often significantly influenced by promises, threats, and the other psychological tactics and strategies which the Court was attempting to neutralize.¹²⁷

Second, realizing the insufficiency of the warning to protect the privilege against self-incrimination, the Court extended the sixth

¹²⁴ The rationale of the *Miranda* decision is discussed in § I(A) *supra*.

¹²⁵ See text, §§ II(B) & (C)(1) *supra*.

¹²⁶ See text, § II(C)(2) *supra*.

¹²⁷ See text, § II(C)(3) *supra* & Appendices A & B *infra*.

amendment right to counsel to the suspect in the interrogation room to insure protection of the fifth amendment privilege.¹²⁸ The most apparent possible problem with the Court's holding in this regard is that the means adopted to protect the right to counsel in the interrogation room was the same device which was to be employed to protect the privilege against self-incrimination — a warning to the suspect advising him of his rights.¹²⁹ Although the data in this study revealed that suspects generally possessed an awareness of the right to counsel (probably a prior knowledge), the findings also suggested that the police are able to frustrate the exercise of this right — either by failure to comply with requests for counsel, by inducing waiver of the right, or by both.¹³⁰

Third, the Court held that if the interrogation continues without the presence of counsel, then a heavy burden rests upon the prosecution to establish that the suspect "knowingly and intelligently waived" his constitutional rights.¹³¹ A description of the ease with which a legally enforceable "knowing and intelligent waiver" of constitutional rights could be obtained from an unknowing suspect completed the analysis of the impact of *Miranda* on the suspect's position in the game of interrogation.¹³²

The response of the Denver police to *Miranda* was found to be strict compliance with its formal requirements.¹³³ However, this was not found to be inconsistent with the strategy of directing interrogation room tactics against the suspect's weakest positions: (1) a poor understanding of the warnings and his constitutional rights, from which he is easily distracted; and (2) a propensity to sign the waiver of rights form with little or no inducement.¹³⁴ Psychological pressures, including promises and threats, were found to be used to induce the suspect to talk and to waive his right to counsel in interrogation.¹³⁵

The police strategies appeared to be structured around the evidentiary problems posed by the legal framework of the interrogation game. One of their goals is to obtain tangible evidence of the suspect's knowledge of his rights and tangible evidence of the suspect's knowing and intelligent waiver of his rights.¹³⁶ The warning

¹²⁸ See text accompanying notes 8-9 *supra*.

¹²⁹ *Id.*

¹³⁰ See text, § II(D) *supra*.

¹³¹ See text accompanying note 10 *supra*.

¹³² See text, § II(E) *supra*.

¹³³ See text, § I(B)(2) *supra*.

¹³⁴ See text, § III *supra*.

¹³⁵ See text, §§ II(C)(3) & III *supra*.

¹³⁶ See text, § III(B) *supra*.

and waiver form is effective in attaining this goal.¹³⁷ A second implicit goal appeared to be to avoid compilation of tangible evidence of inducements to waive constitutional rights.¹³⁸ Privacy in the interrogation room and selective recordation of the interrogation is apparently effective in accomplishing this goal.¹³⁹

The response of some of the state trial courts in Colorado appeared to be conducive to the success of the police strategy. The limited information collected suggested that judicial consideration in a *Miranda* hearing often does not go beyond a consideration of the signatures on the warning form, the police testimony, and the defendant's criminal record¹⁴⁰ — evidence which, in light of the findings of this study, was shown to be questionable at best.¹⁴¹ Thus the impact of *Miranda* on the ultimate interrogation contest seems to have been effectively neutralized. Indeed, one of the latent functions of *Miranda*, as implemented in Colorado, appears to be to aid the police in overcoming their evidentiary burden with respect to proving the suspect's knowledge and waiver of his constitutional rights.¹⁴²

A suggestion for improving the evidentiary link between the interrogation room and the courtroom was presented in the previous section¹⁴³ — mandatory full disclosure of the events of the interrogation process. The implementation of this suggestion, however, does not resolve the basic conflict between the ideals implicit in *Miranda* and the apparent realities of the interrogation game. This would not give the suspect the working knowledge or practical understanding of his constitutional rights which the Court assumed was necessary to the protection of those rights. Furthermore, there is no conclusive evidence which suggests that if the suspect *did* have such knowledge, it would be useful to him in combating successfully the inherently compelling pressures of the interrogation room.¹⁴⁴

Without adequate knowledge or some other means to successfully combat interrogation room pressures, no waiver can be knowing and intelligent (warnings and signatures as evidence to the contrary notwithstanding). It was perhaps in deference to this proposition that the Court held the right to counsel indispensable to the protection of the fifth amendment privilege.¹⁴⁵ However, the Court appears to

¹³⁷ See text, § IV(B) *supra*.

¹³⁸ See text, §§ III(A) & IV(B) *supra*.

¹³⁹ *Id.*

¹⁴⁰ See text, § IV *supra*; *Neitz v. People*, 462 P.2d 498 (Colo. 1969).

¹⁴¹ See discussion of these findings in this regard in text, § IV(B) *supra*.

¹⁴² See text, § IV(B) *supra* & text accompanying notes 49 & 50 *supra*.

¹⁴³ See text, § IV(B) *supra*.

¹⁴⁴ See text, § II(C) *supra*.

¹⁴⁵ See text accompanying notes 8 & 9 *supra*.

have diluted this secondary protection beyond effectiveness by making this right waivable as well — and as easily.¹⁴⁶ As such, the right to counsel in the interrogation room appears to be only another Pawn with which to protect the King's Rook.¹⁴⁷

A case can be made that a means to give the present fifth amendment waiver standard more integrity is to make the right to counsel nonwaivable. Arguably, with the opportunity to consult with counsel before interrogation and with his assistance in the interrogation room, the suspect will be able to make the kind of "knowing and intelligent waiver" of his fifth amendment right which was contemplated by the *Miranda* Court. The reform should be evaluated in terms of its effects on the rights of the accused as well as its impact on traditional law enforcement functions.

The presence of counsel at every interrogation would immediately satisfy the suspect's sixth amendment right and would give him a better opportunity to exercise his privilege against self-incrimination. The reform would solve most of the problems with respect to *Miranda's* implementation which have been described in this study.

The suspect would have the benefit of greater knowledge of his rights and of the consequences of his interrogation room decisions. He would be less vulnerable to psychological manipulation. With the assistance of counsel, he would have the opportunity to bargain intelligently with his interrogator. Furthermore, the presence of counsel per se would probably inhibit the exercise of abusive pressures within the interrogation room.

The presence of a lawyer at every custodial interrogation would probably make the *Miranda* hearing a much more significant proceeding. Counsel could act as a witness and testify during the hearing. His testimony would be given the same weight as that of the police. When counsel testifies, the court will have more information and, as a result, a better basis for determining the events which actually transpired. Also, if the court has the benefit of such testimony regularly, it will be in a better position to control police conduct in the interrogation room.

The principal argument against a nonwaivable right to counsel is that it might interfere with certain law enforcement objectives. Besides convicting perpetrators of crimes, these objectives are, among others, identifying and implicating accomplices, clearing other crimes, and recovery of stolen goods.¹⁴⁸ In considering the probable effects of the reform on these law enforcement objectives, one can safely assume that the interrogators would not be able to elicit as many

¹⁴⁶ See text, § II(D) *supra*.

¹⁴⁷ But see text accompanying note 43 *supra*.

¹⁴⁸ *Interrogations*, *supra* note 36, at 1593-97.

statements and confessions if a lawyer were always present, because in most instances lawyers would advise their clients not to talk.

The first article on *Miranda* in the *Yale Law Journal* sheds some light on the relationship between incriminating statements and convictions. The authors concluded that the presence of a lawyer during interrogation can affect the suspect's probability of conviction in less than 10 percent of the cases. The reason is that in about 90 percent of the cases the police have enough evidence to convict even before beginning interrogation.¹⁴⁹

Even though the presence of a lawyer at every interrogation would not affect conviction rates very substantially, it may be that the reform would in some instances prevent the police from obtaining information which is now often available to them. For example, a suspect, who might in the absence of counsel have revealed the name of an accomplice whose existence was previously unknown to them, may not release this information if counsel is present.

Similarly, a suspect who has committed multiple crimes (with which the police had not associated him) may be less likely to clear the books by confessing to all of them if counsel is present. However, a persuasive argument can be made that efforts to clear the books are too often "fishing expeditions" which should not be encouraged anyway.¹⁵⁰

An additional argument against a nonwaivable right to counsel is that the public would have to bear the increased cost of providing lawyers for the interrogations of all indigent suspects rather than for the few who presently exercise the sixth amendment right. The cost problem, however, has not been insurmountable in the case of lineups. While the cost of the reform may pose a problem, further experiments with "station house counsel" may indicate that legal assistance can be provided at the police station more economically than is presently anticipated.

In conclusion, although some law enforcement objectives might be adversely affected by a nonwaivable right to counsel, it is submitted that the social cost of preserving the present rules for interrogation is greater than the cost of implementing the reform. As presently applied, *Miranda* is an expression of judicial mythology. It is a case which impressively defines fundamental rights but does not go far enough in providing practical remedies. A nonwaivable right to counsel would enable virtually all suspects to exercise the rights in the interrogation contest which they are already supposed to have. The reform would be a step in the direction of making the *Miranda*

¹⁴⁹ *Id.* at 1600.

¹⁵⁰ *Id.* at 1595-96.

decision "a working instrument of the law" rather than "a mere declaration of intent."¹⁵¹

APPENDIX A

PROMISES AND THREATS

Suspects' descriptions of promises or threats allegedly made to them at Denver Police Station (unless otherwise noted) as an incentive to talk; whether they made statements; whether they made admission or confession.

- (1) Threat: "If you won't talk to us, I'll file probation violation on you." Statement — Yes; Admission or Confession — Yes.
- (2) Promise: "If you tell us who else sells dope in Kansas City, then we will let you go." Statement — Yes; Admission — Yes. Not at Denver Police Station.
- (3) Threat: "If you refuse to talk about this charge, then we'll file other charges on you." Statement — Yes; Admission — No.
- (4) Threat-promise: "If you won't tell us anything, then we'll definitely file on you. If you talk, we may not. Other guy made statement that put all of the blame on you. You'll be better off if you talk." Statement — No; Admission — No.
- (5) Promise: "If you talk, I'll see that your bond is low so that you'll be able to get out." Statement — Yes; Confession — Yes.
- (6) Threat-promise: "If neither of you admits that you own the heroin, then we'll prosecute both of you for conspiracy. If you admit that you bought the heroin and that it was strictly for your own use, then your friend will be released." Statement — Yes; Confession — Yes.
- (7) Promise (to wife): "If you admit possession, then we won't file on your husband." Statement — No; Confession — No.
- (8) Promise: "If you will cooperate, we will file only one of the charges against you. Only one count will be filed. The others will be dropped." Statement — Yes; Confession — Yes.
- (9) Threat-promise: "If you don't answer questions, DA will bring first degree murder. If you talk to us, then you'll probably get self-defense or involuntary manslaughter. It will help you to make a statement." Statement — Yes; Confession — No.
- (10) Threat-promise: "If you do not sign form and answer questions, we will charge you with being a habitual criminal . . . life in pen. If you admit these ten burglaries, then we'll drop all but one and drop possession too." Statement — Yes; Confession — Yes. (Claims he made confession which was not true.)
- (11) Promise: "If you cooperate and talk, then we'll try to have the charges dropped. The most time you'd get is a few months." Statement — No; Confession — No.
- (12) Promise. "If you admit to these burglaries, then we won't file additional burglaries and habitual criminal against you. We'd also get you a law bond so that you could get out of jail. Your bond will be lower if you talk." Statement — No; Confession — No.
- (13) Promise: "I won't file the robbery charge against you if you talk to us about the rape." Statement — Yes; Confession — Yes.

¹⁵¹ Elsen & Rosett, *supra* note 58, at 645.

- (14) Promise: "If you can tell me who's doing these robberies (someone else?) then I won't file the second case on you. Help me and I'll only file one charge." Statement — Yes; Admission — Yes.
- (15) Threat: "If you don't talk to us, we won't give your wife protection." Claims he was physically coerced to talk (pushed around). Claims interrogator deliberately opened drawer in which guns were present.
- (16) Promise-threat: "If you admit to one aggravated robbery, then we'll drop the other one. If you don't talk to us, we'll tell the DA that you were uncooperative and that won't help you." Statement — No; Confession — No.
- (17) Promise: "If you tell us where some labs are and help us to bust one, we will help you get a law bond." Statement — Yes; Confession — Yes.
- (18) Threat-promise (murder charge): "If you don't talk to us, we're going to put your wife in jail and your baby son in an adoption home. If you tell us what happened, we can go much easier on you." Statement — No; Confession — No.
- (19) Threat (by South Carolina Police): "If you won't talk to us, then we'll put you in isolation." Statement — No; Confession — No. No promises or threats when questioned by Denver Police. Statement — No; Confession — No.
- (20) Promise-threat: "To make it easier on yourself, you should cop out to burglary and we will drop the other charges. Don't be bone-headed. If you won't talk to us, we'll file six or seven other charges against you. If you admit to burglary, then we'll drop the rest." Statement — No; Confession — No.
- (21) "If you cooperate by making a statement, things will go much easier for you in court. You'll be on the basketball court much sooner if you make a statement." Statement — Yes; Confession — No.
- (22) Promise-threat (murder): "If you tell us what happened, then we'll probably be able to get you into a hospital or the worst we'll do is get you voluntary." Suspect claims that he was physically harrassed in that police would wake him up from his sleep a few times a night in order to question him. Felt that if he refused to talk to them and sign statement that he would be "slapped around." Suspect says: Statement — No; Confession — No. Police contend that they have a statement which he made.
- (23) Promise-threat: "I should think you'd be man enough to give us a statement and save Geraldine. You could help her. DA has agreed that Geraldine had no foreknowledge of what would happen. The judge isn't going to like it if you refuse to talk and cooperate. If you will give us written statement, then we will release Geraldine." Statement — Yes; Confession — Yes.
- (24) Ambiguous promise: "You are only being charged with assault with a deadly weapon. You'll be much better off if you tell us exactly what happened. You don't have to worry about prison. Most you can get is a fine." Victim died the next day and the charges were changed to manslaughter. Statement — Yes; Confession — Yes (assault with a deadly weapon charge).
- (25) Threat: "If you are not the one who stole those bottles, then your wife and mother-in-law are going to jail. Either you stole them or they did." Statement — Yes; Confession — No.

APPENDIX B

REASONS FOR TALKING

Reasons suspects made statements, admissions, or confessions, as enumerated by them.

- (1) Caught red-handed in building.
- (2) Fear of physical harm; worn down by persistent questioning; promise to reduce severity of charges if he confessed.
- (3) Felt that truth would get him out of jail.
- (4) Was tired and wanted to cooperate with police.
- (5) Thought statements would help him because he thought they were exculpatory.
- (6) Intoxicated when questioned; not informed that he would be charged with murder at the time he made statement.
- (7) Wanted to cooperate; felt that asking for a lawyer would slow things up, police had so much other evidence.
- (8) Admitted that he stole the goods because police had the stuff anyway.
- (9) To show that he was cooperative; misrepresentation by police, they told him he would be charged with misdemeanor — charged with felony.
- (10) Promise would free the other party if he confessed; confessed to get friend out of jail.
- (11) Can't stand the city jail (can't take a shower there, crowded); felt that if he refused to talk or ask for lawyer, it would slow things up and he would have to spend more time there; claims that he was pressured into waiving rights because of intolerable conditions at city jail.
- (12) Promise: If he talked, police would drop some of charges; if he talked he would get out of jail sooner.
- (13) Talked to speed things up and get cops off his back.
- (14) Thought he was not making a statement when he was answering questions; thought police would use what he said to help *him* in their investigation.
- (15) Made statement because she was upset, felt terrible and had to talk to someone.
- (16) Thought statements were not incriminating, thought truth would help, didn't realize cops might use his statement for impeachment in court; promises and threats, use of sympathy tactics by police, police broke him down by persistent questioning even after he asked for lawyer.
- (17) Threatened with being charged with habitual criminal, promise not to do so if he talked.
- (18) Sick and tired of sitting around jail; friendly detective promised that he wouldn't file aggravated robbery if suspect made statement; thought if he talked to cops, he would be allowed to talk with parole officer sooner.
- (19) Made statement that "he might have done it" because he thought he was having friendly conversation with cop who was friend, didn't realize that he was making a statement which could be used against him in court; thought that there could be no statement except in writing and with signature.