PROGRAM MATERIALS
Program #3182
June 10, 2021

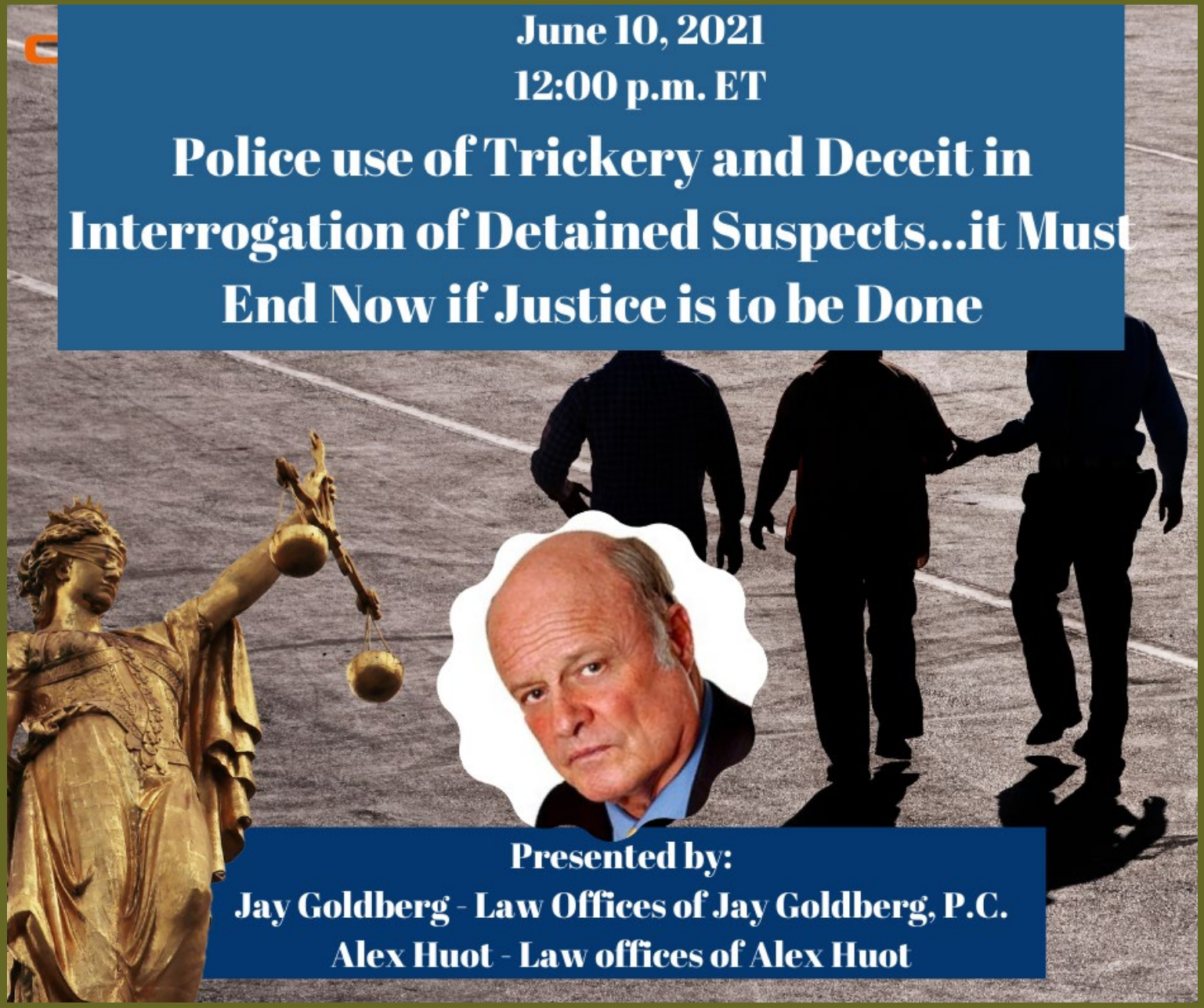
Police use of Trickery and Deceit in Interrogation of Detained Suspects...it Must End Now if Justice is to be Done

Copyright ©2021 by

- Jay Goldberg, Esq. – Law Offices of Jay Goldberg, P.C.
- Alex Huot, Esq. – Law Offices of Alex Huot

All Rights Reserved.
Licensed to Celesq®, Inc.

Celesq® AttorneysEd Center
www.celesq.com
5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919


June 10, 2021
12:00 p.m. ET
Police use of Trickery and Deceit in Interrogation of Detained Suspects...it Must End Now if Justice is to be Done
Presented by:
Jay Goldberg - Law Offices of Jay Goldberg, P.C.
Alex Huot - Law offices of Alex Huot

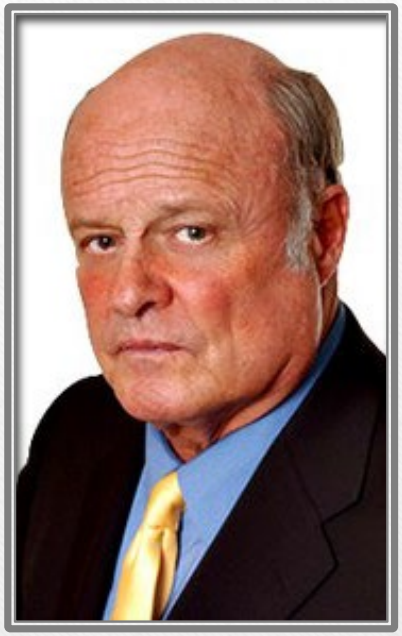
Goldberg began his career as an assistant district attorney in New York County right out of Harvard Law School working for district attorney Frank S. Hogan.

Jay Goldberg is a graduate of the Harvard Law School and was elected to Phi Beta Kappa, receiving his degree magna cum laude.

He was acting United States Attorney for the Northern District of Indiana, Special Attorney and Counselor to the United States Department of Justice, Washington D.C., an Assistant District Attorney, New York County and Special Assistant to James B. Donovan, an American hero, who effected the transfer of Russian spy Rudolph Abel for Francis Gary Powers (Bridge of Spies, with Tom Hanks).

He has been a past lecturer on trial advocacy at the Harvard Law School.

He is the author of four books: **Preparation and Trial of Criminal Cases within the Second Circuit** , (2009) (Amazon.com, 5 stars); Preparation and Trial of A Federal Criminal Case , (2010); Techniques in the Defense of a Federal Criminal Case , (2012); and, **The Courtroom is My Theater , (2018).**



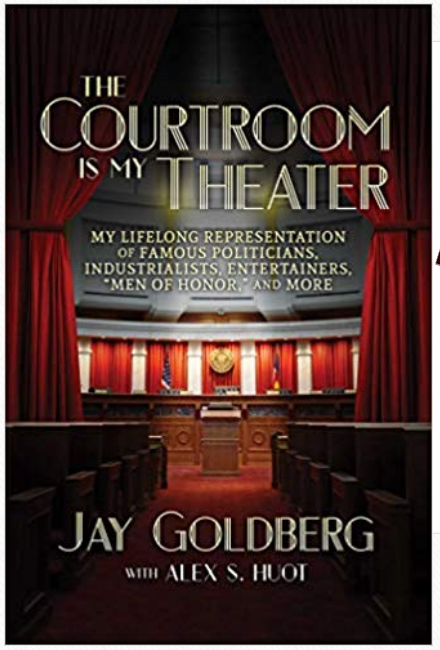
Jay Goldberg

www.jaygoldberg.com
remagoldberg10@gmail.com
T: 917.838.8984

Rema M. Goldberg, MA (psychology)
Provided major assistance

Books by Jay Goldberg

In The Courtroom Is My Theater, Jay Goldberg shows why he is one of the preeminent trial attorneys in America, as he shares stories of his high-profile courtroom drama as well as his adventures outside of the courtroom with some of the country's most prominent politicians, businessmen, entertainers, and "men of honor."



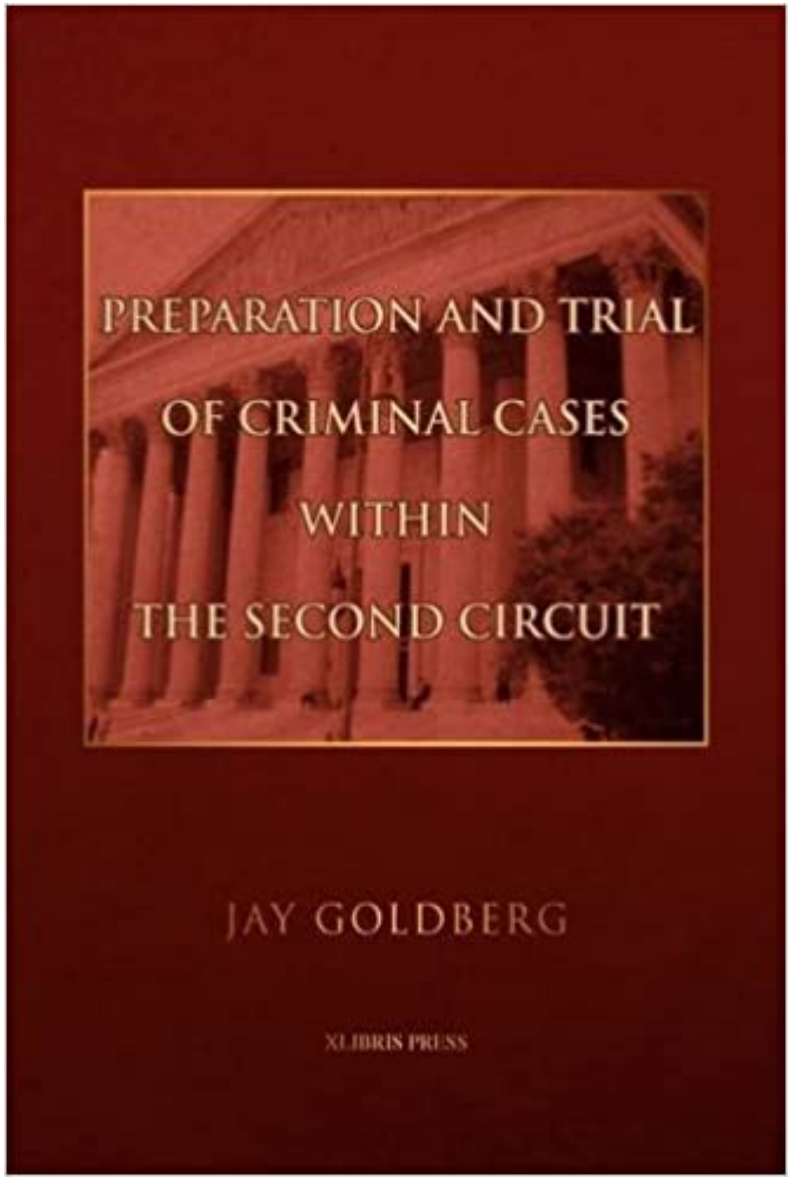
All Available on **Amazon**!

- **One man's journey through the practice of law with some of the world's most powerful and colorful characters, including Donald Trump, Robert F. Kennedy, Willie Nelson, Miles Davis and Armand Hammer.**
- **Former President of the Criminal Bar Association Richard Levitt called Goldberg "one of the foremost litigators of this or any generation."**
- **Former Chief of the Criminal Division of the United States Attorney's Office S.D.N.Y. Frederick Hafetz said: "I consider you to have the best killer trial skills I have ever seen in my 47 years of practice, and I have worked with the best, courtroom presence, capturing the jury's attention through devastating cross and summations that have jurors on the edge of their seats."**
- **New York Supreme Court Justice Arthur Lonschein said: "[Jay Goldberg] holds the distinction of being one of the most skilled, if not the most skilled trial lawyer in the United States."**

Preparation and Trial of Criminal Cases Within the Second Circuit ~ Goldberg

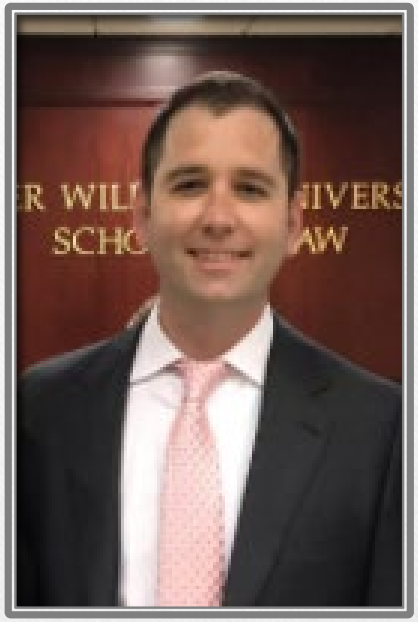
Link to book on Amazon

Synopsis Follows



Alex Huot practices criminal law in the Southern District of New York and Eastern District of New York, as well as in the New York State courts. He began his career working with Jay Goldberg and is a co-author of ***The Courtroom is My Theater.*** In September 2019, Alex represented one of the defendants that Daniel Hernandez aka Tekashi 6ix9ine testified against. He cross-examined Tekashi 6ix9ine and is likely the first attorney to have a witness define the word "trolling" on the record.

The Courtroom is My Theater - https://www.amazon.com/Courtroom-Theater-Representation-Industrialists-Entertainers/dp/1642930717



Alex Huot

alexstephenhuot@gmail.com

T: 203-623-7421

Table of Contents

Overview

It is early in the practice of law that one becomes familiar with Justice Sutherland's words in Berger v. United States: 293, US 78, 88 (1935). Changing the tense somewhat, prosecutors and law enforcement officials generally could be counted, he opined as "ministers of justice", not striking foul blows, interested in doing justice and with a goal of just not winning. This case was often cited by courts content on the blanket acceptance (but not so much now) of a law enforcement team that Justice Sutherland believed took the moral high ground.

This in large part is sheer myth. For most prosecutors and the law enforcement team winning is everything. Tricks, concealment and the like are often resorted to. See Goldfarb "The Price of Justice" (2020 Turner Publishing Company).

Justice is often lost in the mix. See Scheck, "The Innocence Project". Gerstman (Pace University Press) detailing Prosecutorial and Law Enforcement Misconduct.

Goldfarb asks why are not offending prosecutors and such law enforcement officials charged and convicted of offenses?

There is no need for the use of trickery and deceit in the interrogation process.

Miranda v. Arizona: 348 U.S 436 (1966) is a prophylactic rule- we just do not engage in such conduct in a constitutionally mandated society and so too, neither should we engage in the kind of conduct here under consideration.

And, this is not the only lies engaged in by law enforcement.

As one official opined, no official high or low can affect one's liberty and enjoyment of life as a malevolent law enforcement official, and - there are too many for this offensive practice herein described to continue.

PROBLEMS

Frazier v. Cupp: 394 U.S 731 (1969)
https://en.wikipedia.org/wiki/Frazier_v._Cupp
see full article following

Effects of personality, interrogation techniques and plausibility in an experimental false confession paradigm:
https://bpspsychub.onlinelibrary.wiley.com/doi/pdf/10.1348/135532507X193051
see full article following

They Spent 36 Years Behind Bars for Murder. Someone Else Did It.:
https://www.nytimes.com/2019/11/25/us/baltimore-men-exonerated-murder.html
see full article following

Court Weighs Police Role in Coercing Confessions: https://www.nytimes.com/2014/01/15/nyregion/court-weighs-police-role-in-coercing-confessions.html
see full article following

Central Park Jogger Case:
https://en.wikipedia.org/wiki/Central_Park_jogger_case
see full article following

Frazier v. Cupp

Frazier v. Cupp, 394 U.S. 731 (1969), was a United States Supreme Court case that affirmed the legality of deceptive interrogation tactics.[1]

Contents

Background

Acting on a tip, police picked up and interrogated Martin E. Frazier, a 20-year-old U.S. Marine, about his possible involvement in the murder of Russell Anton Marleau.[2] Frazier, along with his cousin, Jerry Lee Rawls, were seen at a bar with the victim before the murder.[2]

During the interrogation, police falsely informed Frazier that Rawls had already confessed and implicated him in the murder.[1] Frazier denied any involvement in the crime and suggested speaking with an attorney, but police continued to question him.[1] Police elicited a confession, which was used against him at trial.

Frazier was convicted of the murder of Russell Anton Marleau. Rawls pleaded guilty to the same offense.[2]

Arguments during appeal

Frazier appealed his conviction to the United States Supreme Court on three main points.

1. The defense argued Frazier was denied his Sixth Amendment right to cross-examine the prosecution's witness, Rawls, because Rawls refused to answer questions after the prosecution referenced elements from his prior statements to police.[1]

Frazier v. Cupp	
Supreme Court of the United States	
Argued February 26, 1969 **Decided April 22, 1969**	
Full case name	*Frazier v. Cupp*
Citations	394 U.S. 731 (https://supreme.justia.com/us/394/731/case.html) (*more*) 89 S. Ct. 1420; 22 L. Ed. 2d 684
Holding	
On its own, police deception in interrogations did not automatically constitute misconduct.	
Court membership	
Chief Justice Earl Warren **Associate Justices** Hugo Black · William O. Douglas John M. Harlan II · William J. Brennan Jr. Potter Stewart · Byron White Abe Fortas · Thurgood Marshall	
Case opinion	
Majority	Marshall, joined by Warren, Black, Douglas, Harlan, Brennan, Stewart, White
Fortas took no part in the consideration or decision of the case.	
Laws applied	
U.S. Const. amend. VI	

2. The defense claimed, under *Escobedo v. Illinois* and *Miranda v. Arizona*, Frazier was denied his right to counsel during his interrogation because questioning continued after he suggested speaking with an attorney. The defense also claimed Frazier's confession was involuntary and should have been suppressed.[1]
3. The defense argued evidence used against Frazier was obtained during an illegal search of a gym bag used jointly by Frazier and Rawls.[1]

Decision

1. The Court stated the trial judge followed necessary protocol by instructing the jury to disregard the references to Rawls's statements. The Court agreed the prosecution did not emphasize Rawls's statements over other evidence and the statements alone was not "touted to the jury as a crucial part of the prosecution's case".[1]
2. The Court ruled Frazier did not formally request an attorney, as required for *Escobedo v. Illinois* to apply, and *Miranda v. Arizona* did not apply because the original trial took place in 1965, one year before *Miranda*. The Court also ruled that the statement, on its own, did not render the confession involuntary based on a "totality of the circumstances" view.[1]
3. The Court dismissed the illegal search argument, citing consent was legally obtained from Rawls and his mother. The Court ruled Rawls, a co-owner of the gym bag, was authorized to give consent to search the bag, even though items in certain compartments of the bag belonged to Frazier.[1]

The Court stated:

> The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient, in our view, to make this otherwise voluntary confession inadmissible.[1]

Subsequent history

Later case law has interpreted *Frazier v. Cupp* as the case permitting police deception during interrogations. The language of the ruling did not specifically state which forms of police deception were acceptable, but the ruling provided a precedent for a confession being voluntary even though deceptive tactics were used.

References

1. *Frazier v. Cupp*, 394 U.S. 731 (https://supreme.justia.com/cases/federal/us/394/731/) (1969).
2. Fulero, S. M., & Wrightsman, L. S. (2009). *Forensic Psychology*. Belmont, CA: Thomson Wadsworth.

Further reading

- Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2004). *Criminal Interrogation and Confessions*, 4th ed. Sudbury, MA: Jones and Bartlett Publishers. ISBN 9780763747213. OCLC 53307765 (https://www.worldcat.org/oclc/53307765).
- Magid, L. (2001). "Deceptive Police Interrogation Practices: How Far Is Too Far?", *Michigan Law Review*, 99, 1168–1210. Retrieved from https://www.jstor.org/stable/1290529. "A compelling

argument has not yet been made that drastic limits on the use of deceptive interrogation techniques are either required or advisable."
- Sasaki, D. W. (1988). "Guarding the Guardians: Police Trickery and Confessions". *Stanford Law Review*, 40, 1593–1616. Retrieved from https://www.jstor.org/stable/1228783.

External links

- Text of *Frazier v. Cupp*, 394 U.S. 731 (1969) is available from: CourtListener (https://www.courtlistener.com/opinion/107913/frazier-v-cupp/) Justia (https://supreme.justia.com/cases/federal/us/394/731/) Library of Congress (http://cdn.loc.gov/service/ll/usrep/usrep394/usrep394731/usrep394731.pdf) Oyez (oral argument audio) (https://www.oyez.org/cases/1968/643)

Retrieved from "https://en.wikipedia.org/w/index.php?title=Frazier_v._Cupp&oldid=958405951"

This page was last edited on 23 May 2020, at 16:33 (UTC).

Text is available under the Creative Commons Attribution-ShareAlike License; additional terms may apply. By using this site, you agree to the Terms of Use and Privacy Policy. Wikipedia® is a registered trademark of the Wikimedia Foundation, Inc., a non-profit organization.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Legal and Criminological Psychology (2008), 13, 71–88
© 2008 The British Psychological Society

The British Psychological Society

www.bpsjournals.co.uk

Effects of personality, interrogation techniques and plausibility in an experimental false confession paradigm

Jessica R. Klaver[1]*, Zina Lee[1,2] and V. Gordon Rose[1]

[1]Department of Psychology, Simon Fraser University, Canada
[2]Department of Psychology, The University of Alabama, USA

Purpose. The goal of the present study was to investigate the effects of personality variables, interrogation techniques and the plausibility level of an alleged transgression on the experimental elicitation of false confessions.

Methods. Two hundred and nineteen undergraduate students assessed on measures of compliance, self-esteem, locus of control and interrogative suggestibility participated in the Kassin and Kiechel (1996) paradigm. Experimental manipulations included minimization and maximization interrogation techniques and high and low plausibility of the alleged typing mistake to examine rates of false confession and internalization.

Results. The overall false confession and internalization rates across all conditions were 43 and 10%, respectively. An increased likelihood of false confession behaviour was associated with higher Shift scores on the Gudjonsson Suggestibility Scale, the use of minimization interrogation techniques and an increase in the plausibility of the allegation. Females were more likely to falsely confess than males in the high plausibility condition, whereas Caucasian and Asian participants were equally likely to falsely confess. Personality variables, such as compliance, most influenced the behaviour of males and Asians.

Conclusions. The results of this study offer insight into false confession behaviour, suggesting that individuals who have a tendency to change their responses in the face of negative feedback may be more prone to false confession behaviour. The findings also serve to highlight the dangers of using minimization interrogation techniques and elucidate the limited generalizability of the paradigm to situations in which the alleged transgression is less plausible.

A confession has traditionally been viewed as the most influential type of evidence in criminal proceedings (McCormick, 1972; Wigmore, 1970). In simulated juror studies, confession evidence has demonstrated a stronger impact on verdicts than eyewitness testimony or character evidence (Kassin & Neumann, 1997). Further, the mere presence

*Correspondence should be addressed to Jessica R. Klaver, Department of Psychology, Simon Fraser University, 8888 University Drive, Burnaby, BC, V5A 1S6, Canada (e-mail: jklavera@sfu.ca).

DOI:10.1348/135532507X193051

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

of a confession can increase the rate of guilty verdicts regardless of knowledge that the confession is involuntary and instructions to disregard it when making verdict decisions (Kassin & Sukel, 1997).

In real-life criminal settings, most suspects who confess during police interrogations are guilty and most confessions are corroborated (Leo & Ofshe, 1998). However, numerous cases of wrongful conviction resulting from false confessions have been documented (Bedau & Radelet, 1987; Borchard, 1932; Leo & Ofshe, 1998; Radelet, Bedau, & Putnam, 1992; Rattner, 1988). The prevalence of false confessions is unknown, but growing evidence points to an alarming rate of occurrence, with false confessions now recognized as one of the leading sources of erroneous convictions of innocent individuals (Connors, Lundregan, Miller, & McEwan, 1996; Drizin & Leo, 2004; Scheck, Neufeld, & Dwyer, 2000). Given the powerful sway of confession evidence and hence the perilous influence of false confessions, it is crucial to examine factors that may be involved in producing false confessions. This study aimed to investigate individual and situational factors that may contribute to the experimental elicitation of false confessions.

Individual variables related to false confessions

False confessions generally arise in the context of complex social interactions, resulting from a combination of the individual psychological makeup of the suspect and situational factors related to the police interrogation setting (Kassin & Gudjonsson, 2004). Several demographic, cognitive, personality, mental health and physiological factors have been identified theoretically or empirically as relevant to the generation of false confessions.

False confessions have been linked to younger age (e.g. adolescence, Brandon & Davies, 1973; Goldstein, Condie, Kalbeitzer, Osman, & Geier, 2003) low intelligence or mental retardation (Brodsky & Bennett, 2005; Clare & Gudjonsson, 1993, 1995; Fulero & Everington, 2004; Gudjonsson & MacKeith, 1994; Perske, 2000; Redlich, 2004), mental disturbance (Irving, 1980; Irving & McKenzie, 1989; Redlich & Appelbaum, 2004) and physiological factors, such as sleep deprivation (Blagrove, 1996) and alcohol or drug intoxication and withdrawal (Davison & Gossop, 1996; Gudjonsson, Hannesdottir, Peteursson, & Bjnornsson, 2002; Pearse, Gudjonsson, Clare, & Rutter, 1998; Santtila, Alkiora, Magnus, & Neimi, 1999; Sigurdsson & Gudjonsson, 1995, 1996a, 2001).

False confessions have also been associated with personality variables, such as antisocial personality characteristics (Gudjonsson, Sigurdsson, Bragason, Einarsson, & Valdimarsdottir, 2004; Gudjonsson, Sigurdsson, & Einarsson, 2004; Gudjonsson, Sigurdsson, Finnbogadottir, & Jakobsdottir Smari, 2006; Sigurdsson & Gudjonsson, 1996b, 1997, 2001), anxiety (Gudjonsson, 1999a, 1999b), depression (Gudjonsson, Sigurdsson, Asgeirsdottir, & Sigfusdottir, 2006), compliance (Gudjonsson, 1990, 1991, 1999a, 1999b), suggestibility (Gudjonsson, 1990, 1991, 1992, 1993; Trowbridge, 2003) and low self-esteem (Gudjonsson,1999*b*; Gudjonsson, Sigurdsson, Bragason, *et al.*, 2004). One type of suggestibility that has been specifically linked to false confession behaviour is interrogative suggestibility, which refers to the 'extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected' (Gudjonsson & Clark, 1986, p. 84).

Although many individual variables have been linked to false confession behaviour, there are several others that have yet to be examined. For example, locus of control (Rotter, 1966) may be an important factor influencing false confession behaviour.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Specifically, individuals with an external locus of control, who believe that powerful others, fate, or chance primarily determine events, may be at differential risk for false confession in comparison with those with an internal locus of control, who believe that events result primarily from their own behaviour and actions. Further, false confession behaviour has yet to be comprehensively investigated across different gender or ethnic groups.

Influence of the police interrogation setting

Although many individual factors are important in terms of increasing vulnerability to falsely confessing, situational variables also exert a large influence on the likelihood of false confessions. One such contextual factor is the police interrogation setting, during which the primary goal of investigators is to obtain a confession from a criminal suspect. In recent decades, interrogation strategies have become less physical and more psychological in nature (Leo, 2004; Skolnick & Leo, 1992). This change is reflected in contemporary police interrogation training manuals, such as the popular *Criminal Interrogation and Confessions* (Inbau, Reid, Buckley, & Jayne, 2001), which offers a variety of recommendations for obtaining confessions.

Police interrogation manuals justify deceitful tactics as necessary tools for criminal interrogation (Underwager & Wakefield, 1992; Wakefield & Underwager, 1998). Such techniques are widely used by police investigators in North America and have generally been considered legally admissible (*Frazier v. Cupp*, 1969; *R. v. Oickle*, 2000). Observational studies of police interrogations have revealed that psychologically manipulative tactics are commonly used in modern-day police practice (Leo, 2004). Common interrogation strategies include undermining the suspect's confidence in a denial of guilt, appealing to the importance of cooperation, offering moral justifications or psychological excuses, confronting suspects with false evidence of their guilt, using praise and flattery, appealing to the expertise or authority of the detective, appealing to the suspect's conscience and minimizing the moral seriousness of the offense.

Kassin and colleagues (Kassin, 1997; Kassin & McNall, 1991) summarized the interrogation strategies recommended by Inbau as falling into two general categories: maximization and minimization. Maximization strategies intimidate the suspect by using tactics such as making false claims about evidence and exaggerating the seriousness of the charges. Minimization strategies give the suspect a false sense of security using sympathy, flattery, offering legal or moral face-saving excuses for actions, conceptualizing actions as accidental, blaming the victim and underplaying the seriousness of the charges. Research has demonstrated that minimization techniques lead individuals to believe that they will receive leniency for confessing, even when it is not explicitly promised (Kassin & McNall, 1991).

Inbau *et al.* (2001) argue that their interrogation strategies rarely lead to false confessions because the police typically do not interrogate innocent suspects. Although the possibility of false confessions is recognized, it is presumed that their potential is minimized because police can distinguish truths from lies at high rates of accuracy. However, there appears to be little empirical evidence to support their claim that interrogators are able to distinguish guilty and innocent suspects (Kassin, 2005; Meissner & Kassin, 2002; Vrij, 2000). Because interrogation techniques used to obtain confessions from guilty suspects are similar to those that produce false confessions in some innocent suspects (Drizin & Colgan, 2004; Gudjonsson & MacKeith, 1988; Ofshe, 1989; see also Henkel & Coffman, 2004), innocent individuals subjected to

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

powerful and psychologically manipulative interrogation techniques are at risk for false confession.

Experimental investigation of false confession behaviour

Research on false confessions has primarily comprised analyses of cases involving disputed confessions or known false confessions (Gudjonsson, 1999a, 1999b). Considerable ethical constraints preclude the manipulation of variables in real-world settings to study false confessions. However, a paradigm has been developed to investigate the phenomenon experimentally (Kassin & Kiechel, 1996). Participants are required to type letters on a computer keyboard at a fast rate, but warned that pressing the ALT key on the keyboard will cause the computer to malfunction and the data to be lost. After 1 minute, an experimenter inconspicuously reboots the computer, feigns distress and accuses the participant of pressing the forbidden key by asking, 'Did you hit the ALT key?'

If the participant denies the allegation, general interrogation statements are used to induce the participant to sign a written confession. Shortly thereafter, the participant encounters a confederate upon returning to the waiting room. The dependent variables of interest in this design are false confession and internalization. A false confession is operationalized as whether or not the participant signs the written statement admitting guilt and internalization is coded as whether or not the participant accepts personal responsibility for pressing the ALT key in response to the private inquiry by the confederate.

This computer paradigm has been remarkably successful in eliciting false confessions and internalization in adolescents and undergraduate students and is thus promising in terms of exploring factors influencing false confession behaviour. In the original study (Kassin & Kiechel, 1996), 69% of participants signed the false confession and 28% internalized responsibility. Further, in a condition in which participants were instructed to type at a faster speed and were presented with a false witness, 100% of participants falsely confessed to pressing the ALT key.

Researchers have assessed personality variables and introduced various manipulations into the paradigm in order to investigate factors potentially related to false confession behaviour. Forrest and colleagues (Forrest, Wadkins, & Larson, 2006; Forrest, Wadkins, & Miller, 2002) have investigated the roles of gender, stress and personality variables in the paradigm. Females were more likely to falsely confess and internalize responsibility than males and males had higher internalization rates in stressful conditions compared with the conditions without stress. False confession was related to an increased susceptibility to leading questions on a measure of interrogative suggestibility and internalization was related to the personality variables of external locus of control, anxiety and authoritarianism.

Horselenberg and colleagues (Horselenberg, Merckelbach, & Josephs, 2003; Horselenberg *et al.*, 2006) found high false confession rates in the paradigm when false evidence was presented by an authority figure in addition to an immediate negative consequence of monetary loss. Further, fantasy proneness scores distinguished false confessors from nonconfessors. Candel, Merckelbach, Loyen, and Reyskens (2005) used the paradigm with a sample of young children, finding that, of the 36% of children who falsely confessed, 89% also internalized responsibility.

Redlich and Goodman (2003) examined the impact of age, interrogative suggestibility and the presentation of false evidence in the paradigm. Younger participants (aged 12–13 and 15–16) were more likely to sign the false confession than

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

college students, with the 15- and 16-year olds being especially influenced by the presentation of false evidence. Additionally, participants who had a tendency to succumb to leading questions were more likely to sign the false confession.

Russano, Meissner, Narchet, and Kassin (2005) designed a novel paradigm to investigate both true and false confession behaviour. Interrogation techniques and the offer of a 'deal' were manipulated in conditions where cheating did or did not take place on a problem-solving task. Implying leniency by using minimization interrogation techniques increased the likelihood of false confession in comparison with a condition without interrogation. Further, participants presented with a deal explicitly offering leniency in terms of consequences were more likely to falsely confess than those who were not offered the deal.

The present study

The goal of the present study was to further examine factors that may be related to the experimental elicitation of false confessions using the Kassin and Kiechel (1996) paradigm. First, although there is an accumulating body of theoretical and clinical evidence supporting the potential impact of personality variables on confession behaviour (Gudjonsson, 2003), researchers have yet to consistently demonstrate these effects empirically using this paradigm (e.g. Horselenberg *et al.*, 2003). In this study, the effects of compliance, interrogative suggestibility, self-esteem and locus of control on false confession and internalization rates were examined.

Second, there is little theoretical or empirical consensus on the effects of gender and ethnicity on false confession and internalization behaviour (Forrest *et al.*, 2002; Gudjonsson & Sigurdsson, 1994; Gudjonsson, Sigurdsson, Bragason, *et al.*, 2004). This study aimed to investigate differences in false confession and internalization rates in males vs. females and across ethnicities to determine whether there were gender- or ethnicity-specific differences in scores on personality measures related to false confession and internalization behaviour.

Third, it is unclear which types of interrogation techniques may differentially impact false confession and internalization behaviour. To date, only a mix of general interrogation statements has been used to pressure participants to sign the written confession in the paradigm. This study used interrogation statements adapted from Forrest *et al.* (2002) to compare the effects of minimization and maximization interrogation techniques, as described by Kassin (1997).

Finally, the role of plausibility in the paradigm is unknown. The original experimental design calls for the computer to crash immediately following instructions to press a key adjacent to the forbidden ALT key. Thus, pressing the ALT key is a highly plausible, unintentional and momentary transgression likely to be admitted and internalized by many. In this study, the plausibility of the alleged act was manipulated by adding a condition in which participants were accused of pressing the ESC key, one markedly farther from the typing area. In this way, the generalizability of the paradigm to circumstances involving less plausible allegations was examined.

Method

Participants

Participants were 219 undergraduate students at a western Canadian university. The modal age of participants was 18 years (range 18–45 years). Participants were 79%

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

($N = 174$) female and 21% ($N = 45$) male. The ethnicity of the sample varied, including 49% ($N = 107$) Caucasian, 36% ($N = 80$) Asian and 15% ($N = 31$) identified as another ethnicity. Thirty-four per cent ($N = 74$) of participants indicated English as a second language and the mean self-reported English fluency of these students was 8.3 out of 10.

Materials

Gudjonsson Suggestibility Scale (GSS; Gudjonsson, 1987, 1997)

The GSS is a memory task designed to measure interrogative suggestibility. Measures on the GSS include Memory Recall, Yield 1, Yield 2 and Shift. The GSS involves an experimenter reading aloud a short story and then asking the participant to recall everything he or she remembers from the story. The Memory Recall score is the number of story elements recalled correctly. Following the recall, the experimenter asks 20 questions related to the story, 15 of which are leading questions. Yield 1 is the number of leading questions answered in the affirmative by the participant.

After the 20 questions have been answered, the experimenter gives the participant 'negative feedback' by stating that the questions must be repeated because several responses were incorrect. The 20 questions are then repeated and Yield 2 is the number of affirmative responses to leading questions following the negative feedback. Total Yield 1 and Yield 2 scores range from 0 to 15. The Shift score is the number of distinct changes in the nature of any reply to a question following the administration of the negative feedback.

Total Shift scores range from 0 to 20. Mean GSS Recall, Yield 1, Yield 2 and Shift scores were 19.3 ($SD = 5.6$), 5.2 ($SD = 3.3$), 7.3 ($SD = 4.0$) and 4.5 ($SD = 2.9$), respectively. On the GSS Recall, females ($M = 19.8$, $SD = 5.4$) scored higher than males ($M = 17.1$, $SD = 5.8$), $t(201) = 2.85$, $p = .005$, and Caucasians ($M = 20.6$, $SD = 5.6$) scored higher than Asians ($M = 17.4$, $SD = 5.1$), $t(170) = 3.86$, $p =< .001$. On GSS Yield 1, Asians ($M = 6.1$, $SD = 3.2$) scored higher than Caucasians ($M = 4.6$, $SD = 3.4$), $t(170) = 2.84$, $p = .005$, indicating a greater tendency to acquiesce to suggestive questions.

Gudjonsson Compliance Scale (GCS; Gudjonsson, 1989, 1997)

The GCS is a 20-item self-report questionnaire measuring the tendency to conform to requests made by others, particularly authority, to please them or avoid conflict and confrontation. Each statement is endorsed as true or false and total GCS scores range from 0 to 20, with higher GCS scores indicating higher levels of compliance. The mean GCS score was 9.0 ($SD = 3.8$) and the internal consistency (Cronbach's α) of the measure was .77. On the GCS, Asians ($M = 10.8$, $SD = 4.1$) scored higher than Caucasians ($M = 8.1$, $SD = 3.2$), $t(183) = 4.96$, $p < .001$.

Rosenberg Self-Esteem Scale (Rosenberg, 1965)

The Rosenberg Self-Esteem Scale is a 10-item self-report scale measuring feelings of self-worth. Each item is scored on a 4-point Likert scale. Scores on this scale range from 0 to 30, with 30 indicating the highest level of self-esteem. The mean Self-Esteem Scale score was 22.6 ($SD = 4.8$) and the internal consistency of the measure was .86. Ratings of self-esteem were higher for males ($M = 24.0$, $SD = 4.2$) compared with females ($M = 22.2$,

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

$SD = 4.9$), $t(215) = 2.20$, $p = .029$, and higher in Caucasians ($M = 23.0$, $SD = 4.9$) compared with Asians ($M = 21.3$, $SD = 4.9$), $t(183) = 2.38$, $p = .018$.

The Rotter Internal–External Locus of Control Scale (Rotter, 1966)

The Rotter Locus of Control Scale, presented to participants as an inventory of personal beliefs, is a 29-item self-report scale assessing the extent to which an individual feels in control of his or her life circumstances. Items on the scale are forced-choice, with one response reflecting a belief in internal control and the other a belief in external control. The total score, which ranges from 0 to 23, is the number of external choices endorsed. Thus, a high score on the scale indicates an external locus of control, whereas a low score indicates an internal locus of control. The mean Locus of Control Scale score was 11.2 ($SD = 3.8$) and the internal consistency of the measure was .72. Females ($M = 11.5$, $SD = 3.8$) scored higher than males ($M = 9.8$, $SD = 3.7$), $t(215) = 2.72$, $p = .007$, indicating a more external locus of control.

Procedure

Participants were invited to take part in a task investigating their personality, memory and typing skills. Informed consent was obtained from participants and all were treated in accordance with ethical standards set forth by the American Psychological Association. In small groups, participants completed several personality questionnaires, including the Rosenberg Self-Esteem Scale, Rotter Locus of Control Scale and the Gudjonnson Compliance Scale. They also completed a demographics questionnaire inquiring about age, gender, ethnicity, English fluency and educational background. As they finished the questionnaires, participants were led individually to a different room in order to complete the GSS and the typing task with a male Caucasian experimenter. The GSS was presented as a test of memory skills and read aloud by the experimenter. After completion of the GSS, participants were informed that the final activity of the session involved a typing test examining their ability to type letters quickly onto a computer keyboard.

The typing task used in this study was adapted from the paradigm developed by Kassin and Kiechel (1996). A metronome was used to ensure that letters were consistently read at a rate of 67 letters per minute. Two experimental manipulations were introduced into the design. First, the plausibility of the alleged act was varied. In the high plausibility condition, participants were warned not to press the ALT key because doing so would cause the program to crash and data to be lost. In this condition, a replication of Kassin and Kiechel, the reading of the letters aloud is designed so that the participant is instructed to press the Z key immediately preceding the crashing of the computer. Due to the close proximity of the Z and the ALT keys on the keyboard, pressing the ALT key is a highly plausible act during this moment of the task. In the low plausibility condition, participants were warned not to press the ESC key. The ESC key, located in the upper left of the keyboard, was considerably farther from the Z key, thus reducing the plausibility that it could be pressed during the course of the typing task.

Second, statements adapted from Forrest *et al.* (2002) reflecting two different types of interrogation strategies were used to induce the participant to sign the written statement falsely confessing to pressing the forbidden key. In the minimization condition, the experimenter offered statements designed to give the participant a false sense of security about the apparent transgression by normalizing the act, deeming it an accident and blaming the computer. The following statements were read, in order, until either the participant agreed to sign the confession or all the statements had

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

been read: 'Don't worry. It was just an accident. You didn't mean to hit the ALT/ESC key. Several participants so far have pressed the ALT/ESC key during this task. Are you sure you didn't press it?' 'This program seems not to be working lately. The ALT/ESC key is too sensitive, and registers even when it is barely pressed. Is that what happened?'

In the maximization condition, the experimenter used tactics designed to induce feelings of intimidation and exaggerate the seriousness of the alleged transgression. The experimenter read the following statements, in order, until either the participant agreed to sign the confession or both statements had been read: 'We have run over 50 people in the past three weeks. The computer hasn't crashed any of those times. I know that the only time it crashes is when the ALT/ESC key is pressed. You must have pressed it, didn't you?' 'That file contained all the data collected so far in this study. There is no way to recover the data. It looks like the entire project may be delayed now. Why did you press the ALT/ESC key?'

In all conditions, participants were asked to sign a written confession stating, 'I pressed the ALT key and caused the computer to crash. All data were lost.' Regardless of whether the written confession was signed, the experimenter stated that, as a result of the computer problems, the experimental session would need to be rescheduled in order for the participant to be awarded course credit. The experimenter indicated that he needed to exit the room in order confer with the project supervisor. After the experimenter exited the room, a third experimenter, a female Caucasian confederate posing as a student in the area, entered the study room stating, 'I heard a lot of noise. What happened in here?' The response of the participant was recorded verbatim.

The two dependent measures recorded in this study were false confession and internalization, both coded dichotomously (present or absent). A false confession was evaluated according to whether or not the participant signed the written confession. Internalization was measured from responses to the inquiry made by the confederate. In order to reduce bias due to the confederate not being blind to the experimental conditions, the criterion for internalization was an unambiguous response by the participant clearly assuming full personal responsibility for pressing the forbidden key during the computer task. For example, if the participant answered in the affirmative (e.g. 'I pressed the ALT/ESC key and the computer turned off') the response was coded as internalization; however, if the participant indicated uncertainty (e.g. 'I think so', 'I'm not sure', 'maybe' or 'he said I pressed the ALT/ESC key'), the response was not coded as internalization.

Immediately following the conversation with the confederate, each participant was thoroughly debriefed in person as to the nature of the experimental design and the necessity of the deception involved. Participants were reassured that no additional sessions would need to be rescheduled in order for course credit to be obtained. No participants reported any serious adverse effects resulting from participation in the study protocol. Most expressed relief that they had not in fact caused any damage to the computer. Following verbal debriefing, participants were asked to reconfirm their consent to the use of their data by signing their name to the statement, 'I understand the true purpose of the study I have completed and consent to the use of my data.' All participants agreed to this request. In order to maintain the integrity of the experimental design, participants were asked to refrain from discussing the details of the study with other potential participants until the estimated completion date of the study. None of the participants indicated during debriefing that they were aware in advance of the true purpose of the study. Upon completion of the session, participants were thanked and received course credit for their psychology class.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Results

False confession and internalization

All but a small number of participants ($N = 4$) initially denied the allegation that they had pressed the forbidden key; the data for the individuals who did not deny and thus were not subjected to interrogation was removed from subsequent analyses. The overall false confession and internalization rates across all conditions were 43 and 10%, respectively. In the high plausibility condition in which participants were accused of pressing the ALT key, a replication of Kassin and Kiechel (1996), 59% of participants signed the false confession and 16% internalized responsibility. In the low plausibility condition, 13% of participants signed the false confession and none internalized responsibility. Not surprisingly, false confession and internalization behaviour were positively correlated, $\phi = .39$, $p < .001$. Also as expected, there were no cases in which an individual internalized but did not sign the false confession. Frequencies and percentages of false confession and internalization for all conditions are presented in Table 1.

Table 1. Frequency and Percentage of False Confession and Internalization by Plausibility and Interrogation Condition

	False confession		Internalization	
	Minimization *N* (%)	Maximization *N* (%)	Minimization *N* (%)	Maximization *N* (%)
High plausibility (ALT key)	50 (70%)	29 (47%)	14 (20%)	7 (11%)
Low plausibility (ESC key)	7 (23%)	2 (5%)	0 (0%)	0 (0%)

A logistic regression was used to determine the impact of gender, ethnicity, personality variables, plausibility level and interrogation technique on the likelihood of false confession (Table 2). The model was significant, $\chi^2(10) = 66.10$, $p < .001$, with 73% of participants correctly classified. An increased likelihood of false confession was significantly related to GSS Shift scores, the plausibility level of the alleged act and the type of interrogation technique used. Specifically, each 1-point increase in Shift score was associated with a 1.26 times higher likelihood of signing the false confession. Participants accused of pressing the ALT key in the high plausibility condition were 16.24 times more likely to sign the false confession when compared with those accused of pressing the ESC key in the low plausibility condition. Participants subjected to minimization interrogation techniques were 4.31 times more likely to sign the false confession than those subjected to maximization interrogation techniques.

Another logistic regression was used to determine the impact of gender, ethnicity, personality variables, plausibility level and interrogation technique on the likelihood of internalization. This model was non-significant with no variables influencing internalization rates.

Gender and ethnicity differences in false confession and internalization rates

To examine gender and ethnicity differences on behaviour in the paradigm, false confession and internalization rates were compared between males and females and between Caucasians and Asians for all conditions. Gender- and ethnicity-specific

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Table 2. Logistic Regression Results for Variables Predicting the Likelihood of False Confession

	B	S.E. (*B*)	Wald (*df* = 1)	*p*	Odds ratio
Gender (male)	−.78	.52	2.24	.13	
Ethnicity (Caucasian)	−.56	.44	1.62	.20	
GSS Yield 1	0.07	0.08	0.80	.37	
GSS Yield 2	−0.12	0.09	2.03	.15	
GSS shift	0.23	0.10	5.87	.02	1.26
GCS	0.05	0.06	0.62	.43	
Locus of control	0.01	0.05	0.06	.81	
Self-esteem	−0.03	0.05	0.30	.58	
Plausibility level (high)	2.79	0.52	28.67	<.001	16.24
Interrogation (Min)	1.46	0.41	12.51	<.001	4.31

Note. GSS, Gudjonsson Suggestibility Scale (Gudjonsson, 1987, 1997); GCS, Gudjonsson Compliance Scale (Gudjonsson, 1989, 1997). Odds ratios for non-significant predictor variables were omitted.

differences in scores on personality measures in relation to false confession and internalization behaviour were also examined in all conditions.

There were no overall gender differences in false confession or internalization rates. However, there was an overall trend suggesting a higher false confession rate in females (46%) when compared with males (31%), $\chi^2(1) = 3.0$, $p = .08$. Further, in the high plausibility condition in which participants were accused of pressing the ALT key, the false confession rate was higher in females (65%) than in males (39%), $\chi^2(1) = 5.9$, $p = .02$, $r_{pb} = .21$. Males who signed the false confession scored higher on compliance ($M = 10.3$, $SD = 4.9$) when compared with those who did not sign the false confession ($M = 7.4$, $SD = 3.6$), $t(37) = 2.1$, $p = .04$. Males who internalized had higher Yield 1 scores ($M = 8.8$, $SD = 4.4$) when compared with those who did not internalize ($M = 5.1$, $SD = 3.0$), $t(37) = 2.3$, $p = .03$. Also, males who internalized had higher compliance scores ($M = 13.3$, $SD = 6.1$) than those who did not internalize ($M = 7.8$, $SD = 3.6$), $t(37) = 2.7$, $p = .01$.

There were no overall ethnicity differences in false confession or internalization rates between Caucasians and Asians, the two most highly represented ethnic groups. Caucasians who signed the false confession had higher Shift scores ($M = 5.4$, $SD = 3.3$) when compared with those who did not sign ($M = 3.9$, $SD = 3.1$), $t(96) = 2.3$, $p = .03$. Asians who signed the false confession had higher compliance scores ($M = 5.4$, $SD = 3.3$) than those who did not sign the false confession ($M = 12.4$, $SD = 4.2$), $t(72) = 2.7$, $p = .01$. Asians who signed the false confession also had a more external locus of control ($M = 13.4$, $SD = 3.5$) when compared with those who did not sign the false confession ($M = 10.3$, $SD = 3.8$), $t(72) = 3.6$, $p = .001$. Additionally, Asians who signed the false confession had lower self-esteem scores ($M = 19.8$, $SD = 4.8$) when compared with those who did not sign the false confession ($M = 22.0$, $SD = 4.5$), $t(72) = 2.0$, $p = .04$. Asians who internalized responsibility had higher compliance scores ($M = 14.4$, $SD = 4.1$) than those who did not internalize ($M = 10.8$, $SD = 3.9$), $t(72) = 2.0$, $p = .05$.

Discussion

The goal of the present study was to evaluate the impact of various individual and situational factors on false confession and internalization behaviour in an experimental

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

false confession paradigm. The results of this study further demonstrate the ability of the paradigm to successfully elicit false confession and internalization behaviour in an undergraduate sample. The overall false confession and internalization rates in the current study were 43 and 10%, respectively. In the high plausibility condition in which participants were accused of pressing the ALT key, a replication of Kassin and Kiechel (1996), the false confession and internalization rates were 59 and 16%, respectively.

The internalization rate in this condition was lower than the 28% found in the original study. This discrepancy may be attributable to a more stringent criteria used for coding internalization in the current study. Specifically, internalization was coded only for a clear acceptance of responsibility for pressing the forbidden key during the typing task. Any ambiguity in the response was coded as no internalization. This result may also be due to the varied ethnic composition of the sample in this study, as internalization frequencies were almost three times lower for Asian ($N = 5$) when compared with Caucasian participants ($N = 14$), although this difference was not statistically significant.

Interrogation techniques, plausibility level, and false confession behaviour

In contrast to past studies utilizing a mixed list of general interrogation statements to pressure participants into signing a written false confession, this study directly compared two distinct sets of interrogation techniques – minimization and maximization – modelled after those recommended and used in real-life criminal interrogation settings (Inbau *et al.*, 2001; Kassin, 1997). Overall, false confession rates were highest when participants were pressured to admit to a highly plausible transgression while being subjected to minimization interrogation techniques. Compared with maximization statements, participants were over four times more likely to sign the false confession if minimization techniques were used to induce the confession. Thus, in a controlled laboratory setting, undergraduate students were more likely to sign false confessions admitting to pressing a forbidden computer key when interrogated by an experimenter who feigned sympathy and blamed external sources. This is consistent with recent research by Russano *et al.* (2005) who used a novel paradigm, described earlier, to demonstrate that minimization techniques reduced the diagnostic value of an elicited confession by increasing the rate of false confessions.

Despite important differences between real-life circumstances and the paradigm used in this study, the dangers of using minimization interrogation techniques deserve attention. The use of such techniques may be a powerful situational factor impacting the likelihood of false confession behaviour. Using minimization techniques, investigators take advantage of natural defence mechanisms, such as rationalization and projection, used by individuals to justify or minimize transgressions. A seemingly sincere and empathic investigator rationalizes the criminal act, projects blame onto others, minimizes the seriousness of the crime and frames a confession as an opportunity for the suspect to tell his or her story. Thus, suspects are offered a dignified way to 'save face' while admitting their involvement in a crime.

In the experimental false confession paradigm, participants are typically accused of causing the computer to crash by pressing the ALT key during the typing task, a highly plausible action. Thus, in order to examine the role of plausibility in the paradigm, a condition was added in which participants were accused of pressing the ESC key, one markedly further from the typing area of the keyboard. Compared with those accused of the highly plausible act of pressing the ALT key, participants accused of the less plausible act of pressing the ESC key were more than 16 times less likely to sign the false

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

confession. Further, no participant accused of pressing the ESC key internalized responsibility for the alleged transgression.

This finding indicates a striking effect of plausibility in the paradigm and is consistent with the literature on event plausibility. For example, Pezdek and colleagues (Pezdek, Finger, & Hodge, 1997; Pezdek & Hodge, 1999) have demonstrated that events can be suggestively planted in memory to the degree that the suggested event is plausible. In both children and adults, implausible false childhood memories were recalled significantly less often than plausible false memories. Thus, the generalizability of the current paradigm may be limited to conditions in which the alleged act is highly plausible.

Impact of personality, gender and ethnicity on false confession and internalization

Personality, gender and ethnicity were investigated as individual factors potentially related to behaviour in the paradigm. Interestingly, most personality variables, including compliance, self-esteem, locus of control and various indices of interrogative suggestibility, were unrelated to false confession or internalization behaviour. This is in line with previous research indicating a lack of relationship between personality measures and behaviour in the paradigm (Horselenberg *et al.*, 2003, 2006).

However, consistent with Redlich and Goodman (2003), participants with higher Shift scores were more likely to sign the false confession. Interestingly, there was some evidence that this finding was specific to Caucasian participants. Thus, individuals who have a tendency to change their responses in the face of negative feedback may be more prone to false confession behaviour. The emergence of a consistent relationship between Shift scores and false confession behaviour in the paradigm supports the utility of this score as an indicator of vulnerability to interrogation techniques involving the presentation of negative feedback following a denial of responsibility.

Given that personality variables have repeatedly been linked to false confession behaviour both theoretically and in case studies (Gudjonsson, 2003), it is interesting that the effect has been difficult to demonstrate experimentally in the paradigm. There are several possible reasons for the general finding of a lack of relationship between personality variables and false confession behaviour. First, it may be personality factors other than those that have been examined impact behaviour more strongly in the paradigm. Second, it is plausible that the powerful situational demands of an interrogation setting transcend any personality influences (see Kendrick, Neuberg, & Cialdini, 2002). Finally, this paradigm may not be as useful as other methods, such as case studies, to investigate personality influences on false confession behaviour.

Consistent with Forrest *et al.* (2002), we found a gender difference in false confession behaviour, with females falsely confessing more often than males in the high plausibility (ALT key) condition. This finding may be attributed to gender differences in coping strategies used in stressful situations (Gudjonsson & Sigurdsson, 2003). However, the finding should be interpreted with caution, as the sample was predominantly female, and past research has been equivocal in directly relating gender to false confession behaviour.

It is likely that the relationship between gender and false confession behaviour is complex. For example, the interaction between the gender of interrogator and the gender of the suspect may be an important predictor of behaviour. Furthermore, gender and personality variables could interact to produce certain types of behaviour in interrogation settings. Accordingly, in this sample, an interesting finding was that

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

personality factors, such as compliance and a tendency to acquiesce to leading questions, were related to false confession and internalization behaviour in males only. Thus, although females were generally more susceptible to falsely confessing in the paradigm, personality factors played a larger role in the behaviour of males.

Importantly, this is the first study to demonstrate false confession and internalization behaviour in an Asian sample using this paradigm, suggesting that the utility of the paradigm generalizes across ethnic groups. There were no differences in false confession or internalization rates between Asian and Caucasian participants. However, personality factors, such as compliance, were more related to false confession and internalization behaviour for Asians than for Caucasians. Thus, unique personality factors may be related to confession behaviour for different ethnic groups. The importance of this finding is highlighted by the recent work of Chang (2004) who identified culture-specific persuasive questioning used to extract confessions in Chinese criminal cases, including techniques designed to capitalize on power differences and invoke shame in defendants.

Limitations and future research

A major limitation of the present study is the restricted ecological validity of the experimental design. First, the current paradigm is limited by its ability to represent real-life legal situations. For example, there may have been few perceived consequences for falsely confessing to the momentary and unintentional allegation of pressing the forbidden key. Second, although an attempt was made to operationalize minimization and maximization interrogation techniques within the paradigm, the variety of statements used may have introduced imprecision in comparing their effects. Third, the current methodology was used to compare minimization to maximization interrogation techniques, but was unable to directly assess the independent effects of each technique because there was no control condition without interrogation statements. Fourth, there is a possibility that the administration of the GSS before the typing task may have impacted the tendency to falsely confess, as participants may have been either compelled to behave consistently in these persuasive tasks or primed by the suggestibility task to act similarly in a later task designed to induce false beliefs.

Finally, for ethical reasons, experimental designs aimed at investigating false confession behaviour cannot cause undue stress to participants (Costanzo & Leo, 2007). For example, the conceptualization and measurement of internalization in the current protocol is less than ideal, as this construct typically implies change across a longer term occurring in situations different from the one in which compliance is obtained (Kelman, 1958, 1961). A delayed assessment of internalization would be more favourable, although the potential negative psychological ramifications of delayed debriefing may preclude such a design.

Despite these limitations, it is important to continue the investigation of these phenomena using experimental designs. Future research should explore other individual and situational factors that may be related to false confession behaviour. In terms of personality factors, variables of interest include anxiety and coping style, which have been theoretically linked to aspects of interrogative suggestibility (Forrester, McMahon, & Greenwood, 2001; Gudjonsson, 1988, 1995; Howard & Hong, 2002). False confession behaviour could also be examined in other groups using this paradigm, including children and older adults.

Alternate interrogation techniques or tactics adapted from interrogation training manuals could also be introduced as experimental manipulations in the false confession

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

paradigm. For example, a 'good cop, bad cop' condition could be created in order to examine the combined effects of minimization and maximization techniques, which are typically used sequentially in interrogations. Further, minimization techniques could be deconstructed in order to examine which components are most influential in eliciting false confessions. The experimental study of confession behaviour would also benefit from further examination of factors impacting true confession behaviour, using newly developed paradigms (see Russano *et al.*, 2005). A continued investigation of the factors that contribute to false confessions and confession behaviour in general will greatly inform our understanding of the phenomenon and aid in efforts to prevent the occurrence of false confessions and their liberty-depriving consequences.

Acknowledgements

This study is based on a paper presented at the 2003 meeting of the American Psychology-Law Society in Edinburgh, Scotland. This research was supported in part by an American Psychology-Law Society Grant-in-Aid to the third author and a Social Sciences and Humanities Research Council of Canada doctoral fellowship to the second author. We would like to thank Amanda Murphy and Sandi Holman for their assistance with data collection.

References

Bedau, H., & Radelet, M. (1987). Miscarriages of justice in potentially capital cases. *Stanford Law Review*, *40*, 21–197.

Blagrove, M. (1996). Effects of length of sleep deprivation on interrogative suggestibility. *Journal of Experimental Psychology: Applied*, *2*, 48–59.

Borchard, E. M. (1932). *Convicting the innocent: Errors of criminal justice*. New Haven, CT: Yale University Press.

Brandon, R., & Davies, C. (1973). *Wrongful imprisonment*. London: Allen & Unwin.

Brodsky, S. L., & Bennett, A. D. (2005). Psychological assessments of confessions and suggestibility in mentally retarded suspects. *Journal of Psychiatry and Law*, *33*, 359–366.

Candel, I., Merckelbach, H., Loyen, S., & Reyskens, H. (2005). I hit the shift key and then the computer crashed: Children and false admissions. *Personality and Individual Differences*, *38*, 1381–1387.

Chang, Y. (2004). Courtroom questioning as a culturally situated persuasive genre of talk. *Discourse and Society*, *15*, 705–722.

Clare, I. C. H., & Gudjonsson, G. H. (1993). Interrogative suggestibility, confabulation, and acquiescence in people with mild learning disabilities (mental handicap): Implications for reliability during police interrogation. *British Journal of Clinical Psychology*, *32*, 295–301.

Clare, I. C. H., & Gudjonsson, G. H. (1995). The vulnerability of suspects with intellectual disabilities during police interviews: A review and experimental study of decision-making. *Mental Handicap Research*, *8*, 110–128.

Connors, E., Lundregan, T., Miller, N., & McEwan, M. (1996). *Convicted by juries, exonerated by science: Case studies in the use of DNA evidence to establish innocence after trial*. Washington, DC: National Institute of Justice.

Costanzo, M., & Leo, R. A. (2007). Research and expert testimony on interrogations and confessions. In M. Costanzo, D. Krauss, & K. Pezdek (Eds.), *Expert psychological testimony for the courts* (pp. 69–98). Mahwah, NJ: Erlbaum.

Davison, S., & Gossop, M. (1996). The problem of interviewing drug addicts in custody: A study of interrogative suggestibility and compliance. *Psychology, Crime, and Law*, *2*, 185–195.

Drizin, S., & Leo, R. (2004). The problem of false confessions in the post-DNA world. *North Carolina Law Review*, *82*, 891–1007.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Drizin, S. A., & Colgan, B. A. (2004). Tales from the juvenile confession front: A guide to how standard police interrogation tactics can produce coerced and false confessions from juvenile suspects. In G. D. Lassiter (Ed.), *Interrogations, confessions, and entrapment* (pp. 127–162). New York: Kluwer Academic.

Forrest, K. D., Wadkins, T. A., & Larson, B. A. (2006). Suspect personality, police interrogations, and false confessions: Maybe it is not just the situation. *Personality and Individual Differences*, *40*, 621–628.

Forrest, K. D., Wadkins, T. A., & Miller, R. L. (2002). The role of pre-existing stress on false confessions: An empirical study. *Journal of Credibility Assessment and Witness Psychology*, *3*, 23–45.

Forrester, L. M., McMahon, M., & Greenwood, K. M. (2001). The relationship between coping strategies and interrogative suggestibility. *Psychiatry, Psychology, and Law*, *8*, 23–37.

Frazier v. Cupp, 394 U.S. 731 (1969).

Fulero, S. M., & Everington, C. (2004). Mental retardation, competency to waive Miranda rights, and false confessions. In G. D. Lassiter (Ed.), *Interrogations, confessions, and entrapment* (pp. 163–179). New York: Kluwer Academic.

Goldstein, N. E. S., Condie, L. O., Kalbeitzer, L., Osman, D., & Geier, J. L. (2003). Juvenile offenders' *Miranda* rights comprehension and self-reported likelihood of offering false confessions. *Assessment*, *10*, 359–369.

Gudjonsson, G. H. (1987). A parallel form of the Gudjonsson Suggestibility Scale. *British Journal of Clinical Psychology*, *26*, 215–221.

Gudjonsson, G. H. (1988). Interrogative suggestibility: Its relationship with assertiveness, social-evaluative anxiety, state anxiety and method of coping. *British Journal of Clinical Psychology*, *27*, 159–166.

Gudjonsson, G. H. (1989). Compliance in an interrogative situation: A new scale. *Personality and Individual Differences*, *10*, 535–540.

Gudjonsson, G. H. (1990). One hundred alleged false confession cases: Some normative data. *British Journal of Clinical Psychology*, *29*, 249–250.

Gudjonsson, G. H. (1991). Suggestibility and compliance among alleged false confessors and resisters in criminal trials. *Medicine, Science, and the Law*, *31*, 147–151.

Gudjonsson, G. H. (1992). *The psychology of interrogations, confessions, and testimony*. London: Wiley.

Gudjonsson, G. H. (1993). Confession evidence, psychological vulnerability and expert testimony. *Journal of Community and Applied Social Psychology*, *3*, 117–129.

Gudjonsson, G. H. (1995). The effects of interrogative pressure on strategic coping. *Psychology, Crime, and Law*, *1*, 309–318.

Gudjonsson, G. H. (1997). *The Gudjonsson Suggestibility Scales manual*. UK: Psychology Press/Earlbaum.

Gudjonsson, G. H. (1999a). The IRA funeral murderers: The confession of PK and the expert psychological testimony. *Legal and Criminological Psychology*, *4*, 45–50.

Gudjonsson, G. H. (1999b). The making of a serial false confessor: The confessions of Henry Lee Lucas. *Journal of Forensic Psychiatry*, *10*, 416–426.

Gudjonsson, G. H. (2003). *The psychology of interrogations and confessions: A handbook*. New York: Wiley.

Gudjonsson, G. H., & Clark, N. K. (1986). Suggestibility in police interrogation: A social psychological model. *Social Behavior*, *1*, 83–104.

Gudjonsson, G. H., Hannesdottir, K., Petursson, H., & Bjornsson, G. (2002). The effects of alcohol withdrawal on mental state, interrogative suggestibility and compliance: An experimental study. *Journal of Forensic Psychiatry*, *13*, 53–67.

Gudjonsson, G. H., & MacKeith, J. A. C. (1988). Retracted confessions: Legal, psychological and psychiatric aspects. *Medicine, Science, and the Law*, *28*, 187–194.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Gudjonsson, G. H., & MacKeith, J. A. C. (1994). Learning disability and the police and criminal evidence act 1984. Protection during investigative interviewing: A video-recorded false confession to double murder. *Journal of Forensic Psychiatry*, *5*, 35–49.

Gudjonsson, G. H., & Sigurdsson, J. F. (1994). How frequently do false confessions occur? An empirical study among prison inmates. *Psychology, Crime, and Law*, *1*, 21–26.

Gudjonsson, G. H., & Sigurdsson, J. F. (2003). The relationship of compliance with coping strategies and self-esteem. *European Journal of Psychological Assessment*, *19*, 117–123.

Gudjonsson, G. H., Sigurdsson, J. F., Asgeirsdottir, B. B., & Sigfusdottir, I. D. (2006). Custodial interrogation, false confession and individual differences: A national study among Icelandic youth. *Personality and Individual Differences*, *41*, 49–59.

Gudjonsson, G. H., Sigurdsson, J. F., Bragason, O. O., Einarsson, E., & Valdimarsdottir, E. B. (2004). Confessions and denials and the relationship with personality. *Legal and Criminological Psychology*, *9*, 121–133.

Gudjonsson, G. H., Sigurdsson, J. F., & Einarsson, E. (2004). The role of personality in relation to confessions and denials. *Psychology, Crime, and Law*, *10*, 125–135.

Gudjonsson, G. H., Sigurdsson, J. F., Finnbogadottir, H., & Jakobsdottir Smari, U. (2006). The relationship between false confessions and perceptions of parental rearing practices. *Scandinavian Journal of Psychology*, *47*, 361–368.

Henkel, L. A., & Coffman, K. J. (2004). Memory distortions and false confessions. *Applied Cognitive Psychology*, *18*, 567–588.

Horselenberg, R., Merckelbach, H., & Josephs, S. (2003). Individual differences and false confessions: A conceptual replication of Kassin and Kiechel (1996). *Psychology, Crime, and Law*, *9*, 1–8.

Horselenberg, R., Merckelbach, H., Smeets, T., Franssens, D., Ygram Peters, G., & Zeles, G. (2006). False confessions in the lab: Do plausibility and consequences matter? *Psychology, Crime, and Law*, *12*, 61–75.

Howard, R., & Hong, N. S. (2002). Effects of coping style on interrogative suggestibility. *Personality and Individual Differences*, *33*, 479–485.

Inbau, R. E., Reid, J. E., Buckley, J. P., & Jayne, B. C. (2001). *Criminal interrogations and confessions* (4th ed.). Gaithersburg, MD: Aspen Publications.

Irving, B. L. (1980). *Police interrogation: A case study of current practice*. Research Studies No. 2. London: HMSO.

Irving, B. L., & McKenzie, I. K. (1989). *Police interrogation: The effects of the police and criminal evidence act*. London: The Police Foundation.

Kassin, S. M. (1997). The psychology of confession evidence. *American Psychologist*, *52*, 221–233.

Kassin, S. M. (2005). On the psychology of confessions: Does innocence put innocents at risk? *American Psychologist*, *60*, 215–228.

Kassin, S. M., & Gudjonsson, G. H. (2004). The psychology of confessions: A review of the literature and issues. *Psychological Science in the Public Interest*, *5*, 35–69.

Kassin, S. M., & Kiechel, K. L. (1996). The social psychology of false confessions: Compliance, internalization, and confabulation. *Psychological Science*, *7*, 125–128.

Kassin, S. M., & McNall, K. (1991). Police interrogations and confessions: Communicating promises and threats by pragmatic implication. *Law and Human Behavior*, *15*, 233–251.

Kassin, S. M., & Neumann, K. (1997). On the power of confession evidence: An experimental test of the 'fundamental difference' hypothesis. *Law and Human Behavior*, *21*, 469–484.

Kassin, S. M., & Sukel, H. (1997). Coerced confessions and the jury: An experimental test of the 'harmless error' rule. *Law and Human Behavior*, *21*, 27–46.

Kelman, H. C. (1958). Compliance, identification, and internalization: Three processes of attitude change. *Journal of Conflict Resolution*, *2*, 51–60.

Kelman, H. C. (1961). Processes of opinion change. *Public Opinion Quarterly*, *25*, 57–78.

Kendrick, D. T., Neuberg, S. L., & Cialdini, R. B. (2002). *Social psychology: Unraveling the mystery* (2nd ed.). Boston: Allyn and Bacon.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Leo, R. A. (2004). The third degree. In G. D. Lassiter (Ed.), *Interrogations, confessions, and entrapment* (pp. 37–84). New York: Kluwer Academic.

Leo, R. A., & Ofshe, R. J. (1998). The consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation. *Journal of Criminal Law and Criminology*, *88*, 429–497.

McCormick, C. T. (1972). *Handbook of the law and evidence* (2nd ed.). St. Paul, MN: West.

Meissner, C. A., & Kassin, S. M. (2002). He's guilty!: Investigator bias in judgments of truth and deception. *Law and Human Behavior*, *26*, 469–480.

Ofshe, R. J. (1989). Coerced confessions: The logic of seemingly irrational action. *Cultic Studies Journal*, *6*, 1–14.

Pearse, J., Gudjonsson, G. H., Clare, I. C. H., & Rutter, S. (1998). Police interviewing and psychological vulnerabilities: Predicting the likelihood of a confession. *Journal of Community and Applied Social Psychology*, *8*, 1–21.

Perske, R. (2000). Deception in the interrogation room: Sometimes tragic for persons with mental retardation and other developmental disabilities. *Mental Retardation*, *38*, 532–537.

Pezdek, K., Finger, K., & Hodge, D. (1997). Planting false childhood memories: The role of event plausibility. *Psychological Science*, *8*, 437–441.

Pezdek, K., & Hodge, D. (1999). Planting false childhood memories in children: The role of event plausibility. *Child Development*, *70*, 887–895.

Radelet, M. L., Bedau, H. A., & Putnam, C. E. (1992). *In spite of innocence: Erroneous convictions in capital cases*. Boston: Northeastern University Press.

Rattner, A. (1988). Convicted but innocent: Wrongful conviction and the criminal justice system. *Law and Human Behavior*, *12*, 283–293.

Redlich, A. D. (2004). Mental illness, police interrogations, and the potential for false confession. *Law and Psychiatry*, *55*, 19–21.

Redlich, A. D., & Appelbaum, P. S. (2004). Mental illness, police interrogations, and the potential for false confession. *Psychiatric Services*, *55*, 19–21.

Redlich, A. D., & Goodman, G. S. (2003). Taking responsibility for an act not committed: The influence of age and suggestibility. *Law and Human Behavior*, *27*, 141–156.

Rosenberg, M. (1965). *Society and adolescent self-image*. Princeton, NJ: Princeton University Press.

Rotter, J. B. (1966). Generalized expectancies for internal versus external control of reinforcement. *Psychological Monographs*, *80*, 1–28.

Russano, M. B., Meissner, C. A., Narchet, F. M., & Kassin, S. M. (2005). Investigating true and false confessions within a novel experimental paradigm. *Psychological Science*, *16*, 481–486.

R. v. Oickle, [2000] 2 S.C.R. 3.

Santtila, P., Alkiora, P., Magnus, E., & Neimi, P. (1999). A post office robbery involving two validated false confessions: The role of interrogative suggestibility, anxiety, memory disturbance and withdrawal symptoms. *Journal of Forensic Psychiatry*, *10*, 399–415.

Scheck, B., Neufeld, P., & Dwyer, J. (2000). *Actual innocence: Five days to execution and other dispatches from the wrongly convicted*. New York: Doubleday.

Sigurdsson, J. F., & Gudjonsson, G. H. (1995). Alcohol and drug intoxication during police interrogation and the reasons why suspects confess to the police. *Addiction*, *89*, 985–998.

Sigurdsson, J. F., & Gudjonsson, G. H. (1996a). Illicit drug use among 'false confessors' A study among Icelandic prison inmates. *Nordic Journal of Psychiatry*, *50*, 325–328.

Sigurdsson, J. F., & Gudjonsson, G. H. (1996b). The psychological characteristics of 'false confessors': A study among Icelandic prison inmates and juvenile offenders. *Personality and Individual Differences*, *3*, 321–329.

Sigurdsson, J. F., & Gudjonsson, G. H. (1997). The criminal history of 'false confessors' and other prison inmates. *Journal of Forensic Psychiatry*, *8*, 447–455.

Sigurdsson, J. F., & Gudjonsson, G. H. (2001). False confessions: The relative importance of psychological, criminological and substance abuse variables. *Psychology, Crime, and Law*, *7*, 275–289.

Copyright © The British Psychological Society
Reproduction in any form (including the internet) is prohibited without prior permission from the Society

Skolnick, J. H., & Leo, R. A. (1992). The ethics of deceptive interrogation. *Criminal Justice Ethics*, *11*, 3–13.
Trowbridge, B. C. (2003). Suggestibility and confessions. *American Journal of Forensic Psychology*, *21*, 5–23.
Underwager, R., & Wakefield, H. (1992). False confessions and police deception. *American Journal of Forensic Psychology*, *10*, 49–66.
Vrij, A. (2000). *Detecting lies and deceit: The psychology of lying and the implications for professional practice*. London: Wiley.
Wakefield, H., & Underwager, R. (1998). Coerced or nonvoluntary confessions. *Behavioral Sciences and the Law*, *16*, 423–440.
Wigmore, J. H. (1970). *Evidence*. (Vol. 3, revised by J. H. Chadbourne). Boston: Little, Brown.

Received 17 January 2007; revised version received 25 February 2007

Sign in to nytimes.com with Google
Dede Stockton
dedestock9@gmail.com
Dede Stockton
dede@dsavirtualworld.com
3 more accounts

They Spent 36 Years Behind Bars for Murder. Someone Else I

Three men were imprisoned as teenagers for the shooting of a middle school student over hi
they didn't do it.

By Timothy Williams

Published Nov. 25, 2019 Updated Nov. 28, 2019

The three teenagers were arrested on Thanksgiving Day, 1983, and deemed the perpetrators of a brazen crime: They had shot and killed a 14-year-old boy as he walked down the hallway of his junior high school to lunch. They wanted the boy's jacket, a popular Georgetown Starter style, the authorities said, and that motive — chilling and petty — drew outrage in Baltimore, where a jury soon convicted the teenagers of murder and sent them away for life.

Thirty-six years later, prosecutors announced that the convictions had been in error. Another teenager, the prosecutors now acknowledge, had been the real killer.

On Monday, three men — now graying and in their 50s — walked out of prison, freed after spending all of their adult lives behind bars. Alfred Chestnut, Ransom Watkins and Andrew Stewart appeared relieved but also perplexed as they emerged to tell a cluster of waiting news cameras about their years in prison, waging what often seemed like a hopeless fight to prove their innocence in the long-ago murder that they had always insisted they did not commit.

"I've been always dreaming of this," said Mr. Chestnut, who was flanked by his mother and his fiancée. "All my friends in prison know that I've always been talking about this, dreaming about this all of the time. Even when I was a kid, you know? 'Why is this happening to me?'"

From left, Alfred Chestnut, Andrew Stewart and Ransom Watkins. Todd Kimmelman/Miap, via Agence France-Presse — Getty Images

As part of a series of recent examinations of old, questionable cases, a unit of the Baltimore prosecutor's office found numerous errors in the investigation of the school shooting case. The new review concluded that a different student, now deceased, actually shot DeWitt Duckett, the junior high school student who was killed as he walked through Harlem Park Junior High School in Baltimore.

On Monday, Charles Peters, a Baltimore circuit court judge, accepted the state's attorney's request to exonerate the three men.

"My heart breaks for all three of these men, who must now reconcile that we live in a world that could take 36 years away from innocent men," said Marilyn Mosby, the state's attorney, who took over the prosecutor's office in 2015, decades after the original trial. "Today isn't a victory. Today it's a tragedy that these men had 36 years of their lives stolen."

Around the country, it has become increasingly common for prosecutors' offices to assign investigators to re-examine convictions when evidence suggests an error might have been made.

From San Francisco to Brooklyn, prosecutors now have teams of specialized investigators
have been freed every year because of findings of significant errors or evidence of police or
Mosby's office has cleared six other people of serious crimes since she took over.

The case of the three men released on Monday stood out for the length of time the men had
sent to prison: They spent more than twice as long behind bars as they had growing up at h
were innocent, and they told people that every chance they got. Even when they had chanc
had been unable to get it because they were unwilling to admit to the killing.

Ms. Mosby's office said that the case against the three men was plagued with misconduct, i
state's attorney at the time, that unfairly tipped the case in prosecutors' favor. Mr. Shoup died in 2016.

The three men, who were then 16-year-old high school students, had ditched classes on Nov. 18, 1983, and had been at the junior high visiting friends until a security guard kicked them off campus.

About 30 minutes later, DeWitt, the junior high student, was walking to lunch with friends when someone demanded his jacket. After a struggle, he was shot with a .22-caliber handgun in the neck and collapsed. He died two hours later.

The school shooting drew close attention at the time, and police officers had been under immense pressure to swiftly solve the case, prosecutors said.

Among failings of the earlier investigation, Ms. Mosby's office said, were denials by Mr. Shoup that his office possessed evidence that might cast doubt on the guilt of the three. Yet multiple witnesses at the time, Ms. Mosby's office said, had actually identified a different person, Michael Willis, then 18, as the gunman.

Mr. Willis died in a shooting in 2002.

The new evidence was only revealed after Mr. Chestnut, now 52, submitted a public records request in 2018 and was eventually granted access to the court file that had been sealed by the trial judge.

The file also showed that four juvenile witnesses, who told the court that Mr. Chestnut and the others had been involved in the shooting, had actually failed multiple times to identify them in photo arrays before the trial.

The witnesses, who were junior high school students, have since recanted, according to the court documents. They told investigators that they had been coached and pressured by police officers, who met with them a number of times without their parents present.

Sign in to nytimes.com with Google
Dede Stockton
dedestock9@gmail.com
Dede Stockton
dede@dsavirtualworld.com
3 more accounts

The New York Times https://www.nytimes.com/2014/01/15/nyregion/court-weighs-police-role-in-coercing-confessions.html

Court Weighs Police Role in Coercing Confessions

By James C. McKinley Jr.

Jan. 14, 2014

New York State's highest court heard arguments in two murder cases on Tuesday that plumbed the question of how far the police can go in lying to suspects during interrogations — even to the point of telling suspects a dead victim is still alive, but might survive if they confess to precise details of the crime.

The question being considered by the Court of Appeals focused on when a police officer's lies in an interview room cross a line and become coercion. It is a question that has gained attention in legal circles recently, as more false convictions based on coerced confessions have come to light in high-profile cases like the Central Park Five.

"What is acceptable pressure?" Chief Judge Jonathan Lippman asked Kelly L. Egan, a lawyer representing the Rensselaer County district attorney's office. "What's O.K. and what's not O.K. in terms of deception?"

Mr. Lippman was asking about the case of Adrian Thomas, who was convicted in 2009 of murdering his infant son on the strength of a confession he made after detectives in Troy, N.Y., lied to him repeatedly during a long interrogation. Found listless in his crib, the boy, Matthew, was taken a hospital with pneumonia and a severe infection. Doctors also found evidence on X-rays of severe head trauma and told the police of their findings.

Among other things, the Troy detectives told Mr. Thomas repeatedly that the baby's condition was an accident and that he would not be arrested. Several times they threatened to arrest his wife if he did not confess to abusing the baby, prompting him to say he would "take the rap." Later they told him his son, who was already brain-dead, might die if he did not help doctors by describing how he hurt the boy.

After two days, Mr. Thomas admitted he had thrown the infant down onto a bed forcefully three times and had hit the baby's head accidentally against his crib. The boy would soon be declared dead. Convicted at trial of depraved indifference murder, Mr. Thomas is now serving a 25-year-to-life term in prison.

The police in New Rochelle, N.Y., used similar tactics to lure Paul Aveni into making a statement that led to his conviction for criminally negligent homicide in the 2009 death of his girlfriend, Angela Camillo. Though Ms. Camillo had already died of a drug overdose, a detective told Mr. Aveni that doctors were trying to revive her and needed to know what drugs she had taken to keep her alive. Mr. Aveni immediately admitted he had injected her with heroin and had given her Xanax.

An appellate court in Albany upheld Mr. Thomas's conviction, ruling the tactics the Troy police had employed "were not of the character as to induce a false confession."

But an appeals panel in Brooklyn reversed Mr. Aveni's conviction and threw out his statements: The police had implicitly threatened him that "his silence would lead to Camillo's death, and then he could be charged with her homicide."

During arguments, several judges — among them Judge Lippman, Robert S. Smith and Eugene F. Pigott — expressed sympathy for Mr. Thomas's contention that his confession was made under unfair pressure.

But the judges also grilled Mr. Thomas's lawyer, Jerome K. Frost, over where they should draw the line: The court has ruled in past cases that a police officer may deceive suspects, but only if the final confession is voluntary and the officer's lies do not create a risk the suspect will also lie about what he did.

"We have precedent that says the police can use deception," Judge Victoria A. Graffeo said. "What we are trying to figure out is when you enter this area of inappropriate pressure?"

"Don't threaten to arrest people's wives whom you know are innocent," Mr. Frost answered.

"That's a narrow rule," Judge Pigott said.

"My rule is you don't threaten a person's vital interests — custody of children, freedom of their spouses," Mr. Frost said.

Judge Smith said telling someone his child will die if he does not clearly confess makes a suspect's words less than voluntary. "How can it not overborne your will if you think there is even a small chance of saving your child's life?" he asked Ms. Egan, the lawyer for Rensselaer County. He added that Mr. Thomas had only admitted to scenarios suggested to him by the police. "In all these hours of testimony, the defendant didn't come up with anything that the police didn't feed him first," he said. "Isn't that troubling?"

Judge Lippman seemed to agree. "What about the officers saying 67 times we know what happened is an accident?" he asked Ms. Egan. "And 140 some odd times that he wouldn't be arrested. How do you square that with a voluntary statement on his part?"

Ms. Egan said the officers had told Mr. Thomas only that he would not be arrested immediately. She insisted the detectives had done nothing that would cast doubt on the veracity of Mr. Thomas's statement.

Central Park jogger case

The **Central Park jogger case** (events also referenced as the **Central Park Five case**) was a criminal case in the United States over the aggravated assault and rape of a white woman in Manhattan's Central Park on April 19, 1989, occurring during a string of other attacks in the park the same night.[1] Five black and Latino youths were convicted of assaulting the woman, and served sentences ranging from six to twelve years. All later had their charges vacated after a prison inmate confessed to the crime.

From the outset the case was a topic of national interest, with the commentary on social issues evolving as the details emerged. Initially, the case led to public discourse about New York City's perceived lawlessness, criminal behavior by youths, and violence toward women. After the exonerations, it became a high-profile example of racial profiling, discrimination, and inequality in the media and legal system.[2][3][4][5] All five defendants subsequently sued the City of New York for malicious prosecution, racial discrimination and emotional distress; the City settled the suit in 2014 for $41 million.

Contents

Central Park jogger case

Date	April 19, 1989
Time	9–10 p.m. (EDT)
Duration	Approximately 1 hour
Location	Central Park, New York City, U.S.
Non-fatal injuries	Trisha Meili and eight others
Arrests	20–24
Accused	Five male teenagers indicted for raping a woman and other charges; another was given a plea deal and pleaded guilty to assault; four other teenagers were indicted for assault and other charges related to attacks on other persons that night in the park.
Convicted	Five male youths were tried in two trials for the rape and violent assault of Trisha Meili whilst she was on a evening jog (the 6th made a plea deal in 1991 for a lesser charge and had a lesser sentence). Four of the five in the Meili case were convicted in 1990 of rape, assault, and other charges; one of these

Attacks

North Woods, one of several places where crimes were reported

At 9 p.m. on April 19, 1989, a group of an estimated 30–32 teenagers who lived in East Harlem entered Manhattan's Central Park at an entrance in Harlem, near Central Park North.[6] Some of the group committed several attacks, assaults, and robberies against people who were either walking, biking, or jogging in the northernmost part of the park and near the reservoir, and victims began to report the incidents to police.[7]

Within the North Woods, between 105th and 102nd streets, they were reported as attacking several bicyclists, hurling rocks at a cab, and attacking a pedestrian, whom they robbed of his food and beer, and left unconscious.[6][8] The teenagers roamed south along the park's East Drive and the 97th Street transverse, between 9 and 10 p.m.[6] Police attempted to apprehend suspects after crimes began to be reported between 9 and 10 p.m.

	was convicted of attempted murder; one was convicted on lesser charges but as an adult. The other five defendants pleaded guilty to assault before trial and received lesser sentences.
Charges	▪ Assault ▪ Robbery ▪ Riot ▪ Rape ▪ Sexual abuse ▪ Attempted murder
Verdict	Guilty; sentences ranged from 5–10 years for four juveniles, and 5–15 years for a 16-year-old who was classified as an adult because of the violent nature of the crime.
Convictions	Four of the teenagers in the Meili case served 6–7 years in juvenile facilities; one, sentenced as an adult, served 13 years. Four unsuccessfully appealed their convictions in 1991. After another man was identified as the rapist in 2002, these five convictions were vacated, and the state withdrew all charges against the men.
Litigation	The five men sued

At least some of the group traveled further south to the area around the reservoir, where four men jogging were attacked by several youths. Among the victims was John Loughlin, a 40-year-old schoolteacher, who was severely beaten and robbed between 9:40 and 9:50.[6] He was hit in the head with a pipe and stick, knocking him briefly unconscious.[6][8][9] At a pre-trial hearing in October 1989, a police officer testified that when Loughlin was found, he was bleeding so badly that he "looked like he was dunked in a bucket of blood".[10]

the city for discrimination and emotional distress; the city settled in 2014 for $41 million. They also sued New York State, which settled in 2016 for $3.9 million total.

It was not until 1:30 a.m. that night that a female jogger was found in the North Woods area of the park. She had been pulled to the north some 300 feet off the path known as the 102nd Street Crossing; the path of her feet dragged through the grass was marked so clearly that it could be photographed. It was 18" wide. There was no evidence in the grass of footprints of multiple perpetrators. She was brutally beaten, suffering major blood loss and skull fractures; she was later revealed to have been raped.

After her discovery, the police increased the intensity of their effort to identify suspects in this attack and took more teenagers into custody. The jogger was not identified for about 24 hours, and it took days for the police to retrace her movements of that night. By the time of the trial of the first three suspects in June 1990, *The New York Times* characterized the attack on the jogger as "one of the most widely publicized crimes of the 1980s".[11]

Assault on Trisha Meili

Trisha Meili was going for a regular run in Central Park shortly before 9 p.m.[8][12] While jogging in the park, she was knocked down, dragged nearly 300 feet (91 m) off the roadway,[13] and violently assaulted.[6] She was raped and beaten almost to death.[14] About four hours later at 1:30 am, she was found naked, gagged, and tied, and covered in mud and blood, in a shallow ravine in a wooded area of the park about 300 feet north of the path called the 102nd Street Crossing.[6][9][14] The first policeman who saw her said: "She was beaten as badly as anybody I've ever seen beaten. She looked like she was tortured."[15]

Map of North Woods in Central Park,showing the approximate location where Trisha Meili was found after being assaulted

Meili was so badly injured that she was in a coma for 12 days. She suffered severe hypothermia, severe brain damage, severe hemorrhagic shock, loss of 75–80 percent of her blood, and internal bleeding.[16][17][18][19] Her skull had been fractured so badly that her left eye was dislodged from its socket, which in turn was fractured in 21 places, and she suffered as well from facial fractures.[16][17]

The initial medical prognosis was that Meili would die of her injuries.[16] She was given last rites.[14] Because of this, the police treated the attack as a probable homicide. Alternatively, doctors thought that she might remain in a permanent coma due to her injuries. She came out of her coma after 12 days. She

was then treated for seven weeks in Metropolitan Hospital in East Harlem. When Meili first emerged from her coma, she was unable to talk, read, or walk.[14][17]

In early June, Meili was transferred to Gaylord Hospital, a long-term acute care center in Wallingford, Connecticut, where she spent six months in rehabilitation.[16][20][18] She did not walk until mid-July 1989.[21] She returned to work eight months after the attack.[22] She largely recovered, with some lingering disabilities related to balance and loss of vision. As a result of the severe trauma, she had no memory of the attack or any events up to an hour before the assault, nor of the six weeks following the attack.[21] During the trial of the defendants, Meili was not cross-examined due to the amnesia caused by her assault.[23]

At a time of concern about crime in general in the city, which was suffering high rates of assaults, rapes, and homicides, these attacks provoked great outrage, particularly the brutal rape of the female jogger. It took place in the public park that is "mythologized as the city's verdant, democratic refuge".[9] New York Governor Mario Cuomo told the *New York Post*: "This is the ultimate shriek of alarm."[24]

Earlier violent incidents that night

As identified by the Morgenthau report and *The New York Times* in a 2002 review of the case, several acts of violence were perpetrated that night by a group of more than 30 teenagers. These were:[6][8]

- Michael Vigna, a competitive bike rider hassled about 9:05 p.m. by the group, one of whom tried to punch him.
- Antonio Diaz, a 52-year-old man walking in the park near 105th Street, was knocked to the ground by teenagers about 9:15 p.m., who stole his bag of food and bottle of beer. He was left unconscious but soon found by a policeman.
- Gerald Malone and Patricia Dean, riding on a tandem bike, were attacked on East Drive south of 102nd Street about 9:15 p.m. by boys who tried to stop them and grab Dean; the couple called police after reaching a call box.

The remaining victims were attacked by members of the large group while jogging near the reservoir:

- David Lewis, banker, attacked and robbed about 9:25–9:40
- Robert Garner, attacked about 9:30 p.m.
- David Good, attacked about 9:47 p.m.
- John Loughlin, the 40-year-old teacher, severely beaten and kicked about 9:40–9:50 p.m. near the reservoir and left unconscious. He was also robbed of a Walkman and other items.

Three of the victims were black or Hispanic, like most of the suspects, complicating any narrative to attribute the attacks solely to racial factors.[1]

Trisha Meili

Patricia Ellen Meili[25] was born on June 24, 1960 in Paramus, New Jersey, and raised in Upper St. Clair, Pennsylvania, a suburb of Pittsburgh.[26] She is the daughter and youngest of three children of John Meili, a Westinghouse senior manager, and his wife Jean, a school board member.[27][28][29] She attended Upper St. Clair High School, graduating in 1978.[16]

Meili was a Phi Beta Kappa economics major at Wellesley College, where she received a B.A. in 1982.[27][30] The chairman of Wellesley's economics department said: "She was brilliant, probably one of the top four or five students of the decade."[28] In 1986, she earned an M.A. from Yale University and an M.B.A. in finance from the Yale School of Management.[16] She worked from the summer of 1986 until the attack as an associate and then a vice president in the corporate finance department and energy group of Salomon Brothers, an investment bank.[15][16][27][31]

Meili lived on East 83rd Street between York and East End avenues in the Yorkville section of the Upper East Side of Manhattan. At the time of the attack, she was 28 years old.[15][16][27]

In most media accounts of the incident at that time, Meili was simply referred to as the "Central Park Jogger", but two local TV stations violated the media policy of not publicly identifying the victims of sex crimes and released her name in the days immediately following the attack. Two newspapers aimed at the African-American community—*The City Sun* and the *Amsterdam News*—and the black-owned talk radio station WLIB continued to cover the case as it progressed.[24] Their editors said this was in response to the media having publicized the names and personal information about the five suspects, who were all minors before they were arraigned.[5] The *Open Line* hosts on WRKS were credited with helping continue to cover the case until the convicted youths were cleared in 2002 of the crime.[32]

In 2003, Meili publicly revealed her identity as the jogger in her memoir “I Am the Central Park Jogger: A Story of Hope and Possibility.” [33]

Arrests and investigation

Arrests of youths

The police were dispatched at 9:30 pm and responded with scooters and unmarked cars. Through the night, they apprehended about 20 teenagers. They took custody of Raymond Santana, 14; and Kevin Richardson, 14; along with three other teenagers at approximately 10:15 pm on Central Park West and 102nd Street.[6][8][9] Steven Lopez, 14, was arrested with this group within an hour of the several attacks that were first reported to police.[34] He was also interrogated.[35]

The severely beaten Meili was not found until 1:30 a.m. on April 20. Her discovery increased the urgency of police efforts to apprehend suspects. Antron McCray, 15; Yusef Salaam, 15; and Korey Wise (then known as Kharey Wise), 16, were brought in for questioning later that day (April 20), after having been identified by other youths in the large group as participants in or present at some of the attacks on other victims.[8] Korey Wise said he had not been involved, and accompanied Salaam because they were friends.[9] These were the six suspects indicted for the attack on the female jogger (later identified as Meili).

They took into custody 14 or more other suspects over the next few days and arrested a total of ten suspects who were ultimately tried for the attacks. Among them were four African American and two Hispanic American teenagers who were indicted on May 10 on charges of assault, robbery, riot, rape, sexual abuse, and the attempted murders of Meili and an unrelated man, John Loughlin.

The police arrested additional suspects over 48 hours after the night of April 19 and interrogated numerous others. Among these was Clarence Thomas, 14, who was arrested on April 21, 1989, on charges related to the rape of the female jogger. After further investigation, he was never indicted, and all

charges were dismissed against him on October 31, 1989.[8] Also arrested in this period on charges of attacks against other persons in the park, and later indicted, was Jermaine Robinson, 15; Antonio Montalvo, 18; and Orlando Escobar, 16.[8]

The five juveniles who later became known as the Central Park Five were interrogated for at least seven hours each before the detectives attempted to record their statements as videotaped confessions (https://centralpark5joggerattackers.com/videos/).[6] The videotaped confessions were not started until April 21. Santana, McCray, and Richardson made video statements in the presence of parents.[6] Wise made several statements unaccompanied by any parent, guardian or counsel.[6] Lopez was interviewed on videotape in the presence of his parents on April 21, 1989, beginning at 3:30 a.m. He named others of the group by first names in the group attacks on other persons but denied any knowledge of the female jogger.[36] None of the six had defense attorneys during the interrogations or videotape process.

When taken into custody, Salaam told the police he was 16 years old and showed them identification to that effect. If a suspect had reached 16 years of age, his parents or guardians no longer had a right to accompany him during police questioning, or to refuse to permit him to answer any questions.[37] After Salaam's mother arrived at the station, she insisted that she wanted a lawyer for her son, and the police stopped the questioning. He neither made a videotape nor signed the earlier written statement, but the court ruled to accept it as evidence before his trial.[8]

Salaam allegedly made verbal admissions to the police. He confessed to being present at the rape only after the detective falsely told him that fingerprints had been found on the victim's clothing and if his matched, he would be charged with rape.[9] He said years later, "I would hear them beating up Korey Wise in the next room", and "they would come and look at me and say: 'You realize you're next.' The fear made me feel really like I was not going to be able to make it out."[38]

The prosecutor planned to try the defendants in two groups and then scheduled the sixth defendant to be tried last. The latter pleaded guilty in January 1991 on lesser charges and received a reduced sentence.

Prosecution of the five remaining defendants—Kevin Richardson, Antron McCray, Raymond Santana, Korey Wise, and Yusef Salaam—in the rape and assault case was based primarily on confessions which they had made after lengthy police interrogations. None of the defendants had legal counsel during questioning. Many consider the interrogation techniques to have been coercive and they have been subject to wide criticism. Within weeks, they each withdrew their confessions, pleaded not guilty, and refused plea deals on the rape and assault charges. None of the suspects' DNA matched the DNA collected from the crime scene: two semen samples that both belonged to one unidentified man. No substantive physical evidence connected any of the five teenagers to the rape scene, but each was convicted in 1990 of related assault and other charges. Subsequently, known as the **Central Park Five**, they received sentences ranging from 5 to 15 years. Four of the defendants appealed their convictions, but these were affirmed by appellate courts. The four juvenile defendants served 6–7 years each; the 16-year-old was tried and sentenced as an adult and served 13 years in an adult prison. The five other defendants, indicted for assaults of other victims, pleaded guilty to reduced charges and received less severe sentences.

April 21 press conference and media coverage

On April 21, senior police investigators held a press conference to announce having apprehended about 20 suspects in the attacks of a total of nine people in Central Park two nights before and began to offer their theory of the attack and rape of the female jogger. Her name was withheld as a victim of a sex crime. The police said up to 12 youths were believed to have attacked the jogger.[39]

The main suspects were a sub-group within the loose gang of 30 to 32 teenagers who had assaulted strangers in the park as part of an activity that the police said the teenagers referred to as "wilding". New York City senior detectives said the term was used by the suspects when describing their actions to police.[39] The police described the attacks as "random" and "motiveless", saying they had "terrorized" people in the park. This account of the term "wilding" was soon disputed by investigative reporter Barry Michael Cooper, who said that it originated in a police detective's misunderstanding of the suspects' use of the phrase "doing the wild thing", lyrics from rapper Tone Loc's hit song "Wild Thing".[40][41] There was massive media coverage of the conference, with the rape and beating of the female jogger especially recounted in dramatic, inflammatory language.

Normal police procedures stipulated that the names of criminal suspects under the age of 16 were to be withheld from the media and the public. But this policy was ignored when the names of the arrested juveniles were released to the press before any of them had been formally arraigned or indicted.[24] For example, the name of Kharey Wise (he later adopted the use of Korey as his first name) was published in an April 25, 1989 article in the *Philadelphia Daily News* about the attack on the female jogger.[19]

By that time, more information had been published about the primary suspects in the rape, who did not seem to satisfy typical profiles of perpetrators. Common factors had been ruled out. Reporters had found that some came from stable, financially secure families; police had ruled out drugs or major robbery, and most had no criminal records. On April 26, 1989, *The New York Times* published a cautionary editorial against the use of labels and questioning why such "well-adjusted youngsters" could have committed such a "savage" crime.[1]

After the major media's decisions to print the names, photos, and addresses of the juvenile suspects, they and their families received serious threats. Other residents living at the Schomburg Plaza, where four suspects lived, were also threatened. Because of this, editors of *The City Sun* and the *Amsterdam News* chose to use Meili's name in their continuing coverage of the events.[42]

Reverend Calvin O. Butts of the Abyssinian Baptist Church in Harlem, who came to support the five suspects, said to *The New York Times*, "The first thing you do in the United States of America when a white woman is raped is round up a bunch of black youths, and I think that's what happened here."[24]

On May 1, 1989, Donald Trump, then a real estate magnate, called for the return of the death penalty for murder in full-page advertisements published in all four of the city's major newspapers. Trump said he wanted the "criminals of every age ... to be afraid".[2][43] The advertisement, which cost an estimated US$85,000 (equivalent to $175,000 in 2019),[2][43] said, in part,

> Mayor Koch has stated that hate and rancor should be removed from our hearts. I do not think so. I want to hate these muggers and murderers. They should be forced to suffer ... Yes, Mayor Koch, I want to hate these murderers and I always will. ... How can our great society tolerate the continued brutalization of its citizens by crazed misfits? Criminals must be told that their CIVIL LIBERTIES END WHEN AN ATTACK ON OUR SAFETY BEGINS![44]

According to defendant Yusef Salaam, quoted in a February 2016 article in *The Guardian*, Trump "was the fire starter" in 1989, as "common citizens were being manipulated and swayed into believing that we were guilty."[45] Salaam said his family received death threats after papers ran Trump's full-page ad urging the death penalty.[45]

Indictments

May 4, 1989

- Michael Briscoe, 17, was initially arrested for the rape of the female jogger, but his indictment was for riot and assault related to the attack of David Lewis, one of the four male joggers near the reservoir. In a plea deal arranged in June 1990, he pleaded guilty to assault and was immediately sentenced to a year in prison, with credit for time served.[8]
- Jermaine Robinson, 15, was indicted on multiple counts of robbery and assault in the attacks on Lewis and John Loughlin, another jogger near the reservoir. In a plea deal, he pleaded guilty on October 5, 1989, to the robbery of Loughlin and was sentenced to a year in a juvenile facility.[8]

The full-page advertisement was taken out by Trump in the May 1, 1989, issue of the *Daily News*.

May 10, 1989

Six youths were indicted with attempted murder and other charges in the attack on and rape of the female jogger, and additional charges related to the attack of David Lewis, the attack and robbery of John Loughlin, and riot:[8][35]

- Steve Lopez, 14,
- Antron McCray, 15
- Kevin Richardson, 14,
- Yusef Salaam, 15,
- Raymond Santana, 14, and
- Korey Wise, 16.

Each of the youths pleaded "Not guilty." The families of Lopez,[34] Richardson,[35] and Salaam[46] were able to make the $25,000 bail imposed by the court. The two other youths under 16 were returned to a juvenile facility to be held there until trial.[35] Classified as an adult at 16, Korey Wise was separated from the others from the first and held in an adult jail at Rikers Island until trial.

Four of the six youths who were indicted for the rape lived at the Schomburg Plaza, 1309 Fifth Avenue, at the northeast corner of Central Park near 110th Street; two lived further north of there. The ones at Schomburg included friends Salaam and Wise, who lived in the northwest tower,[47][48] and Kevin Richardson and Steve Lopez who lived elsewhere in the complex. They had seen each other in the neighborhood.[47] The Schomburg was a large, mixed-income complex with two 35-story towers and an associated multi-story rectangular building. Designed for families, the complex was built in 1974 and was partially subsidized by the city and federal government; it had 600 households, in apartments ranging in size from studios to five bedrooms.[49]

January 10, 1990

- Orlando Escobar, 16, was indicted for three counts of robbery, two counts of assault, and one count of riot-related to the attack on John Loughlin. In a plea deal, he pleaded guilty on March 14, 1991, to attempted robbery in second degree, and was sentenced to 6 months' incarceration and 4½ years' probation.[8]

- Antonio Montalvo, 18, was charged with two counts of robbery and one of assault, related to the attack on Antonio Diaz. In a plea deal, he pleaded guilty on January 29, 1991, to a robbery in second degree, and was sentenced to 1 year.[8]

Pretrial evidence

Four of the five had confessed to police about other attacks in the park in other areas on the night of April 19, including the assault and robbery of John Loughlin, to which they said they were witnesses or participants. Salaam's unsigned statement also covered the range of actions and crimes.[8] According to *The New York Times*, their accounts of these other attacks were accurate, unlike their confessions to the assault on the jogger.[50] Only Wise made any statement about the different times and locations of the jogger attack, and detectives had taken him to the park to the crime scene before he made his videotaped confession.[51]

Each of the suspects had made different errors in time and place about the jogger attack in their confessions, with most placing it near the reservoir.[8] None of the five said that he had raped the jogger, but each confessed to having been an accomplice to the rape.[8] Each youth said that he had only helped restrain the jogger, or touched her, while one or more others had raped her. Their confessions varied as to who they identified as having participated in the rape, including naming several youths who were never charged.[8] In his untaped confession, Salaam claimed to have struck the jogger with a pipe at the beginning of the incident.[8]

Although four suspects (all except Salaam) confessed on videotape (https://centralpark5joggerattackers.com/videos/) in the presence of a parent or guardian (who had generally not been present during the interrogations), each of the four retracted his statement within weeks. Together they claimed that they had been intimidated, lied to, and coerced by police into making false confessions. While the confessions were videotaped, the hours of interrogation that preceded the confessions were not.[52]

Numerous pretrial hearings were conducted by Judge Thomas B. Galligan of the State Supreme Court of Manhattan, who had been assigned the case. Since 1986 judges were generally assigned by lottery,[53] but the court administrator assigned him to this case.[54] In one of the pre-trial hearings, on February 23, 1990, Galligan ruled that he would accept the videotaped confessions and Salaam's unsigned statement as prosecution evidence at trial, despite defense counsel's objections.[55] He said that Salaam's statement was being admitted as evidence because Salaam had lied to police about his age and showed them false identification.[56]

Analysis indicated that none of the suspects' DNA matched either of the two DNA samples collected from the crime scene (from the jogger's cervix and running sock), but results were reported as "inconclusive" by the police.[55][52]

Trials

In 1990 the six suspects (incl. Steve Lopez) indicted in the attack on the female jogger and other crimes were scheduled for trial. The prosecution arranged to try the six defendants in the Meili case in two separate groups. This enabled them to control the order in which certain evidence would be introduced to the court.[52]

Lopez was scheduled to be tried in January 1991, after the two other groups of defendants in the rape and assault case. He had denied any knowledge of the rape in his videotaped confession, but was implicated by other defendants' statements. Like the five others, he was also indicted on charges related

to the attack and robbery of Loughlin.[8][50][57]

First trial

In the first trial, which began June 25 and ended on August 18, 1990, defendants Antron McCray, Yusef Salaam, and Raymond Santana were tried. Each of the teenagers had his own defense counsel.[58] The jury consisted of four white Americans, four black Americans, three Hispanic Americans, and one Asian American.[59] Meili testified at the trial, but her identity was not given to the court. None of the three defense attorneys cross-examined her.[8]

The jury deliberated for 10 days before rendering its verdict on August 18. Each of the three youths was acquitted of attempted murder, but convicted of assault and rape of the female jogger, and convicted of assault and robbery of John Loughlin, a male jogger who was badly beaten that night in Central Park.[8][60] Salaam and McCray were 15 years old, and Santana 14 years old, at the time of the crime.[8] As such, they were each sentenced by Judge Thomas B. Galligan to the maximum allowed for juveniles, 5–10 years each in a youth correctional facility.[7]

Second trial

The second trial, of Kevin Richardson and Korey Wise, began October 22, 1990[61] and also lasted about two months, ending in December.[8] Kevin Richardson, 14 years old at the time of the crime, had been free on $25,000 bail before the trial.[62]

Assistant District Attorney Elizabeth Lederer had a lengthy opening statement, and Wise broke down at the defense table after it, weeping and shouting that she had lied. He was removed temporarily from the courtroom. Richardson's defense counsel made a motion for a mistrial, because of the potential effect on the jury, but the judge rejected it. The trial proceeded.[62]

The defense attorneys noted that each youth had limited intellectual ability and said that neither was capable of preparing the written statements or videotaped confessions submitted by the prosecution as evidence.[62] They contended that the confessions had been coerced from youths vulnerable to pressure because of their age and their intellectual capacity.[61]

Meili testified again at this trial; again, her name was not given in court. This time one of the defense counsels, Wise's lawyer, cross-examined her. She later said in an interview on *Oprah*: "I'll tell you what—I didn't feel wonderful about the boys' defense attorneys, especially the one who cross-examined me. He was right in front of my face and, in essence, calling me a slut by asking questions like 'When's the last time you had sex with your boyfriend?'"[21] Wise's lawyer had also asked her whether she had ever been assaulted by men in her life, suggested that a man she knew may have attacked her, and implied that her injuries were not as severe as they had been presented.[63]

Richardson was the only one of the five defendants to be convicted of attempted murder of Meili, in addition to sodomy and assault of her, and robbery and riot in the attack on John Loughlin, another jogger in the park.[64] He was sentenced to 5–10 years in a juvenile facility.[8]

Korey Wise, 16 years old at the time of the crime, was acquitted of rape and attempted murder.[64] At trial, Melody Jackson—the sister of one of Wise's friends—testified that while incarcerated in the Rikers Island he had told her that he had restrained and fondled the jogger.[7][65] Wise was convicted of lesser charges of sexual abuse, assault, and riot in the attack on the female jogger and on Loughlin.[64] Because

of his age and the violent nature of the felony charge, he was tried and sentenced as an adult, receiving 5–15 years in adult prison.[8] After the verdict, Wise shouted at the prosecutor: "You're going to pay for this. Jesus is going to get you. You made this up."[64]

Jurors who agreed to interviews after the trials said that they were not convinced by the youths' confessions, but were impressed by the physical evidence introduced by the prosecutors: semen, grass, dirt, and two hairs described as "consistent with" the victim's hair[7]:6 that were recovered from Richardson's underpants.[66]

According to an FBI expert who gave evidence at the trial, all five defendants could be excluded as being the man who had left the semen samples inside Meili and on a sock.[52] In total, 14 men were tested, including the defendants and Meili's former boyfriend, and all were excluded.[52] The semen belonged to another, unidentified male.[52] Years later, more advanced DNA testing also revealed that the hairs in Richardson's clothes did not match the victim.[67]

Sentencing and appeals

After the guilty verdicts, the judge sentenced the defendants to the maximum for the charges and their ages. The four youths under 16 were sentenced to 5–10 years each. They had been held in a juvenile facility since their arrest. Wise at 16 was tried and sentenced as an adult because of the nature of the violent felony charges against him, under the Juvenile Offender Law of 1978. He was sentenced to 5–15 years.

Four of the five youths appealed their convictions in the rape case the following year, but Santana did not appeal. Each of the convictions was upheld.[7][8]

The sentences each of them served is as follows:

- Yusef Salaam served 6 years and 8 months in juvenile detention from 1990 to 1996 and was released on parole.
- Raymond Santana served 6 years and 8 months in juvenile detention from 1990 to 1996 and was released on parole. In 1998, he violated his parole and was sentenced to 3½–7 years' prison on drug charges. He was released and exonerated in 2002.
- Kevin Richardson served 7 years in juvenile detention from 1990 to 1997 and was released on parole.
- Antron McCray was sentenced to 5–10 years in juvenile detention. He served 6 years from 1990 to 1996 and was released on parole.
- Korey Wise was sentenced to 6–15 years in prison on sexual abuse, assault and riot. He served 13 years and 8 months in multiple state prisons: Rikers' Island Prison in 1990, Attica Correctional Facility in 1991, Wende State Penitentiary in 1993 and Auburn State Correctional Facility in 2001. In this prison, Wise met Matias Reyes, who was later found to have had actually assaulted and raped Meili. Reyes confessed and Wise was released in 2002.

On appeal, Salaam's attorneys charged that he had been held by police without access to parents or guardians. The majority appellate court decision upheld his conviction, noting that Salaam had initially lied to police about his age, claiming to be 16 and backing up his claim with a forged transit pass that, falsely, indicated that he was 16. This was the age at which a suspect could be questioned without a parent or guardian present. When Salaam informed police of his true age, they allowed his mother entry to the interrogation room.[56]

Biases affecting the convictions

In a 2016 *Guardian* article, defense counsel William Warren was reported saying that he thought Trump's ads in 1989 had played a role in securing conviction by the juries, saying that "he poisoned the minds of many people who lived in New York City and who, rightfully, had a natural affinity for the victim."[45] He noted, "Notwithstanding the jurors' assertions that they could be fair and impartial, some of them or their families, who naturally have influence, had to be affected by the inflammatory rhetoric in the ads."[45] In 2019 *Time* magazine also assessed Trump's ads in 1989 as having adversely affected the case for the defendants.[68]

In a 1991 *New York Review of Books* article, which was the first mainstream piece arguing that the Five's convictions had been wrongful, Joan Didion suggested the verdicts stemmed from a cultural crisis, writing that "So fixed were the emotions provoked by this case that the idea that there could have been, for even one juror, even a moment's doubt in the state's case... seemed, to many in the city, bewildering, almost unthinkable: the attack on the jogger had by then passed into narrative, and the narrative was ... about what was wrong with the city and about its solution".[69]

January 1991 plea bargain for Lopez

Although Assistant District Attorney Elizabeth Lederer had said she would not accept a plea deal for any of the defendants indicted in the rape case, she did come to agreement with Steve Lopez and his attorney in the court on January 30, 1991, prior to a new jury being selected for his trial. He was considered the final of the six defendants in the jogger trial. Because Lopez had not acknowledged participating at all in the rape in his statement to police, and prosecution witnesses had withdrawn from testifying, based on what they said was fear of self-recrimination or "fear of their own safety", according to Lederer, the prosecution's case was extremely weak.[34] Although some of the five defendants who had been convicted had accused Lopez in their statements of the most severe violence against the jogger, these could not be used against him because of their convictions.

After agreeing to the plea deal, Judge Galligan allowed Lopez to remain free on $25,000 bail until sentencing.[34] He was sentenced in March 1991 to 1½ to 4½ years, after pleading guilty to the mugging of jogger John Loughlin. Because Lopez was younger than 16 at the time of the crime, he was sentenced to serve his time in a juvenile facility.[70]

Serving time

The four youngest of the five convicted defendants each served between six and seven years in juvenile facilities. Richardson, Salaam, and Santana attended classes. Each earned a GED and also completed an associate degree while there.[71]

Richardson and Salaam were released in 1997.[46] Afterward Salaam talked about how important family was. He was part of an Islamic community and served as a spiritual leader at his youth facility, but talked about how important his mother's visits had been. He was held at a juvenile facility in upstate New York about five miles from the Canadian border and hours from New York City, but she came to see him three times a week.[46]

Wise had to serve all of his time in adult prison, and encountered so much personal violence that he asked to stay in isolation for extended periods. He was held at four different prisons, having asked for transfers in the hope of improving his situation.[72] He was released in August 2002, the last of the five men to leave prison.[52][73]

Through this period, each of the five continued to maintain their innocence in the rape and attack of Meili, including at hearings before parole boards. While they acknowledged "witnessing or participating in other wrongdoing" in the park, they each maintained innocence in the attack of Meili.[50]

Convictions vacated in 2002

Assailant

In 2001, convicted serial rapist and murderer Matias Reyes was serving a life sentence in New York state. He had never been identified as a suspect in the Central Park attack on Meili, although he had been at large at the time.[74] Reyes was believed to have raped another woman in the same area of the park during the day on April 17, two days before the attack on Meili. Initially the Meili case was investigated as a homicide, and the April 17 rape was investigated as a rape assault, which resulted in a lack of comparison of the DNA recovered in the two cases.[75] The NYPD did not have a DNA database until 1994; after that, detectives and prosecutors had access to common information about DNA from evidence and taken from suspects in certain crimes.[75] During the summer of 1989, Reyes raped four more women, killing one; and was interrupted after robbing a fifth.[7]

In 2001 Reyes met Wise when they were held at the Auburn Correctional Facility in upstate New York.[76][77][78] That year, Reyes informed a corrections officer that he had raped Meili.[79][80][81] In 2002, Reyes told officials that on the night of April 19, 1989, he had assaulted and raped the female jogger. He was 17 years old at the time of the assault and said that he had committed it alone.[82][83] He also said that he had intended to burglarize the victim's apartment.[84][85] Reyes was then working at an East Harlem convenience store on Third Avenue and 102nd Street, and living in a van on the street.[83][86] Some police sources claim the confession was made to gain favor and protection from Wise, who police claimed was regarded as having influence over New York inmates.[87]

District Attorney Robert Morgenthau's office was notified of the confession in 2002.[88] Morgenthau appointed a team led by Assistant District Attorneys Nancy Ryan and Peter Casolaro to investigate the case, based on Reyes's confession and a review of evidence.[52] Reyes provided officials with a detailed account of the attack, details of which were corroborated by other evidence which the police held. In addition, his DNA matched the DNA evidence at the scene, confirming that he was the sole source of the semen found in and on the victim "to a factor of one in 6,000,000,000 people".[7] Reyes' DNA matched the semen found on Meili, and he provided other confirmatory evidence.[89][90] In announcing these facts, Morgenthau also said that the perpetrator had tied up Meili with her T-shirt in a distinctive fashion that Reyes used again on later victims in crimes for which he was convicted.[7]

Based on interviews and other evidence, the team believed that Reyes had acted alone: The rape appeared to have taken place in the North Woods area after the main body of the thirty teenagers had moved well to the south, and the timeline reconstruction of events made it unlikely that he was joined by any of the defendants. In addition, Reyes was not known to have been associated with any of the six indicted defendants. He lived at 102nd Street, in what locals considered another neighborhood. None of the six defendants in the rape mentioned him by name in association with the rape.[7]

Reyes' confession occurred after the statute of limitations had passed and the Central Park Five had already served their sentences.[91][74][92] Reyes claimed he came forward because "it was the right thing to do".[93] At the time of his confession, Reyes had been convicted and sentenced to life in state prison

for raping and robbing four other women in the summer of 1989, murdering one of them and robbing another. In a plea deal, he pleaded guilty to the top counts in each of the five cases on November 1, 1991.[7]

DNA analysis of the strands of hair found on the clothing of two of the defendants, conducted with advanced technology not available at the time of their trial, established that the hair did not belong to the victim, despite what the prosecution had testified to at trial.[67]

Based on the newly discovered evidence, each of the five men who had been convicted of charges related to the rape of Meili filed motions to have their convictions set aside and for the court "to grant whatever further relief may be just and proper."[7]

After an investigation into the defendants' innocence was conducted in 2002 by Robert Morgenthau, District Attorney for New York County, the city withdrew all charges against the men, and the defendants' sentences were vacated. In 2003, the five men sued the City of New York for malicious prosecution, racial discrimination, and emotional distress; they reached a $41 million settlement with the city government in 2013, and an additional $3.9 million in monetary compensation from the state in 2016.

Convictions vacated

In late 2002, as a result of his team's review, the confession by Reyes, and DNA testing that confirmed Reyes was the sole source of semen, District Attorney Robert Morgenthau recommended vacating the convictions of the five defendants who had been convicted and sentenced to prison.[7]

Yusef Salaam in 2009, seven years after his conviction was vacated

The DA's office questioned the veracity of the confessions, pointing to the many inconsistencies between them and their lack of correspondence to established facts. Nancy Ryan, an ADA in Morgenthau's office, filed an affirmation supporting motions by the defendants to vacate their convictions in December, 2002:

> A comparison of the statements reveals troubling discrepancies. ... The accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place. ... In many other respects the defendants' statements were not corroborated by, consistent with, or explanatory of objective, independent evidence. And some of what they said was simply contrary to established fact.[7]

In addition to the confessions, the filing noted that a "reconstruction of the events in the park has bared a significant conflict, one that was hinted at but not explored in depth at the trials: at the time the jogger was believed to have been attacked, the teenagers were said to be involved—either as spectators or participants—in muggings elsewhere in the park."[6] Ryan continued: "Ultimately, there proved to be no physical or forensic evidence recovered at the scene or from the person or effects of the victim which connected the defendants to the attack on the jogger, or could establish how many perpetrators participated."[7] In light of the "extraordinary circumstances" of the case, the affirmation further

recommended that the court also vacate the convictions for the other crimes, including robbery and assault, to which the defendants had confessed. Given that the defendants' confessions to the other crimes were made at the same time and in the same statements as those related to the attack on Meili, the DA's office argued that, had the newly discovered evidence been available at the original trials, it could have caused juries to question the defendants' confessions in those crimes as well.[7]

The DA's recommendation to vacate the convictions was, and continues to be strongly opposed by lead detectives on the case and other members of the police department.[94] Police Commissioner Raymond Kelly complained at the time that Morgenthau's staff had denied his detectives access to "important evidence" needed to conduct a thorough investigation.[95]

Linda Fairstein, who had directed the original prosecution, has agreed with the decision to vacate the rape charges but believes the separate assault charges on other individuals in the park should have remained. [96] Morgenthau would later express regret assigning the case to Fairstein, saying "I had complete confidence in Linda Fairstein. Turned out to be misplaced. But we rectified it."[97]

The five defendants' convictions were vacated by New York Supreme Court Justice Charles J. Tejada on December 19, 2002. As Morgenthau recommended, Tejada's order vacated the convictions for all the crimes of which the defendants had been convicted.[95] All five of the defendants had completed their prison sentences at the time of Tejada's order; their names were cleared in relation to this case. This also enabled them being removed from New York State's sex offender registry. In addition to having had difficulty getting employment or renting housing, as registered offenders, they had been required to report to authorities in person every three months.[95][98] The city government also withdrew all charges against the men.[99][89] Meili later commented that she wished the matter would have been retried, rather than settled out of court, and that she believed her attack was not the result of a single person.[100]

Aftermath

Lawyers for the five defendants repeated their assessment that Trump's advertisements in 1989 had inflamed public opinion about the case. After Reyes confessed to the crime and said he acted alone, defense counselor Michael W. Warren said, "I think Donald Trump at the very least owes a real apology to this community and to the young men and their families."[43] Protests were held outside Trump Tower in October 2002 with protestors chanting, "Trump is a chump!"[43] Trump did not apologize.[43]

Armstrong Report

Following these events, in 2002, New York City Police Commissioner Raymond Kelly commissioned a panel to review the case, "To determine whether the new evidence [from the Reyes affidavit and related evidence, and Morgenthau's investigation] indicated that police supervisors or officers acted improperly or incorrectly, and to determine whether police policy or procedures needed to be changed as a result of the Central Park jogger case."[75][101] The panel was chaired by attorney Michael F. Armstrong, the former chief counsel to the Knapp Commission, which in 1972 had documented widespread corruption in the NYPD. Two other attorneys were included: Jules Martin, a former police officer and now New York University Vice President; and Stephen Hammerman, deputy police commissioner for legal affairs.[101][102][103][104][105] The panel issued a 43-page report in January 2003.[101][75]

In its January 2003 Armstrong Report, the panel "did not dispute the legal necessity of setting aside the convictions of the five defendants based on the new DNA evidence that Mr. Reyes had raped the jogger."[101] But it disputed acceptance of Reyes's claim that he alone had raped the jogger.[101][102] It

said there was "nothing but his uncorroborated word" that he acted alone.[101] Armstrong said the panel believed "the word of a serial rapist killer is not something to be heavily relied upon."[101]

The report concluded that the five men whose convictions had been vacated had "most likely" participated in the beating and rape of the jogger and that the "most likely scenario" was that "both the defendants and Reyes assaulted her, perhaps successively."[101] The report said Reyes had most likely "either joined in the attack as it was ending or waited until the defendants had moved on to their next victims before descending upon her himself, raping her and inflicting upon her the brutal injuries that almost caused her death."[101]

Despite the analysis conducted by the District Attorney's Office, New York City detectives supported the 2003 Armstrong Report by the police department. The panel said there had been "no misconduct in the 1989 investigation of the Central Park jogger case."[101]

As to the five defendants, the report said:

> We believe the inconsistencies contained in the various statements were not such as to destroy their reliability. On the other hand, there was a general consistency that ran through the defendants' descriptions of the attack on the female jogger: she was knocked down on the road, dragged into the woods, hit and molested by several defendants, sexually abused by some while others held her arms and legs, and left semiconscious in a state of undress.[101][102]

Lawsuits against New York City

In 2003, Kevin Richardson, Raymond Santana Jr., and Antron McCray sued the City of New York for malicious prosecution, racial discrimination, and emotional distress. The other two defendants later joined the lawsuit. Under Michael Bloomberg's mayoral administration,[106] the City refused to pursue a settlement for the lawsuits based on a conclusion that the defendants had had a fair trial.

Speaking at a news conference in 2002, Bloomberg spoke of his confidence regarding the actions of the police department. "As far as I can tell, the N.Y.P.D. did exactly what they should have done a number of years ago when the terrible incident took place...If we see any reason to think that we acted inappropriately, [Police] Commissioner Kelly will certainly take appropriate measures. But so far we believe that the N.Y.P.D. did act appropriately."[107]

In 2011, Celeste Koeleveld, then New York City's Executive Assistant Corporation Counsel for Public Safety, gave a public statement on behalf of the city in 2011 after receiving public criticism from Councilman Charles Barron for failing to resolve the lawsuits:[108][109]

> "The charges against the plaintiffs and other youths were based on abundant probable cause, including confessions that withstood intense scrutiny, in full and fair pretrial hearings and at two lengthy public trials... Nothing unearthed since the trials, including Matias Reyes's connection to the attack on the jogger, changes that fact."

After a change in City administration, with the election of Mayor Bill de Blasio (who had run on a campaign promise to resolve the matter), the city settled in 2014 with the five defendants for $41 million. At a press conference in 2014, de Blasio made a public statement about the settlements.[110]

> "An injustice was done and we have a moral obligation to respond to that injustice...I think that the way we've proceeded was [with] an understanding that that had to be rectified, in a way that made sense and a way that was mindful and careful, but I think we're on the right track...And I think the moral issue is quite clear and obviously was made clear by the court decisions in recent years."

In 2016, the five men received an award of $3.9 million against the State of New York for additional damages caused by the economic and emotional devastation caused by their incarceration.The original lawsuit had requested $51 million in addition to the previously awarded $41 million.[111][112][113][114][115][116]

Settlements

Under newly elected Mayor Bill de Blasio, New York City announced a settlement in June 2014 in the case for about $40 million.[117][118][119] Santana, Salaam, McCray, and Richardson each received around $7.1 million from the city for their years in prison, while Wise received $12.2 million because he had served six additional years. The city did not admit to any wrongdoing in the settlement.[120] The settlement averaged roughly $1 million for each year of imprisonment that each of the men had served.[121]

As of December 2014, the five men were pursuing an additional $52 million in damages from New York State in the New York Court of Claims, before Judge Alan Marin.[73] Speaking of the second suit, against the state, Santana said: "When you have a person who has been exonerated of a crime, the city provides no services to transition him back to society. The only thing left is something like this—so you can receive some type of money so you can survive."[73] They received a total settlement of $3.9 million from the state in 2016, with varying amounts related to the period of time that each man had served in prison.[122]

Trisha Meili publishes book

Meili returned to work at the investment bank. In April 2003, Meili confirmed her identity to the media when she published a memoir entitled *I Am the Central Park Jogger*. She began a career as an inspirational speaker.[18][123][124] She also works with victims of sexual assault and brain injury in the Mount Sinai Hospital sexual assault and violence intervention program. She had resumed jogging in 1989 three or four months after the attack, and over the years added a variety of other exercise and yoga practice.[125] She continues to manifest some after-effects of the assault, including memory loss.[16][17][28][126]

Trisha Meili in 2005

Settlement and exonerations disputed

In 2014, after New York City had settled the wrongful conviction suit, some figures returned to the media to dispute the court's 2002 decision to vacate the convictions. Also retired New York City detective Edward Conlon, who had been involved with the case, in an article published in October 2014 in *The Daily Beast*, quoted incriminatory statements allegedly made by some of the youths after they had been taken into custody by police in April 1989.[127]

Similarly, two doctors who had treated Meili after the attack said in 2014, after the settlement, that some of her injuries appeared to be inconsistent with Reyes's claim that he had acted alone.[128][129] But a forensic pathologist who testified at the 1990 trial said that it was impossible to tell from the victim's injuries how many people had participated in the assault, as did New York City's chief medical examiner in 2002.[129] Meili, who had no memory of what happened, said at the time of the settlement that she believed there had been more than one attacker and expressed her regret that the case had been settled.[130]

Donald Trump also returned to the media, writing a 2014 opinion article for the New York *Daily News*. He said the settlement was "a disgrace", and that the men were likely guilty: "Settling doesn't mean innocence. ... Speak to the detectives on the case and try listening to the facts. These young men do not exactly have the pasts of angels."[131] During his 2016 presidential campaign, Trump again said that the Central Park Five were guilty and that their convictions should not have been vacated.[132] The men of the Central Park Five criticized Trump at the time for his statement, stating they had falsely confessed under police coercion.[133][134] Other critics included U.S. Senator John McCain, who said that Trump's responses were "outrageous statements about the innocent men in the Central Park Five case." He cited this as among his reasons to retract his endorsement of the candidate.[135]

Legislative and other justice reforms

Because of the great publicity surrounding the case, the exoneration of the Central Park Five highlighted the issue of false confession.[136] The issue of false confessions has become a major topic of study and efforts at criminal justice reform, particularly for juveniles.[137] Juveniles have been found to make false confessions and guilty pleas at a much higher rate than adults.[138]

Advances in DNA analysis and the work of non-profit groups such as the Innocence Project have resulted in 343 people being exonerated of their crimes from as of July 31, 2016 due to DNA testing.[139] This process has revealed the strong role of false confessions in wrongful convictions. According to a 2016 study by Craig J. Trocino, director of the Miami Law Innocence Clinic, 27 percent of those persons had "originally confessed to their crimes."[137]

Members of the Five have been among activists who have advocated for videotaped interrogations and related reforms to try to prevent false confessions. Since 1989, New York and some 24 other states have passed laws requiring "electronic records of full interrogations".[137] In some cases, this requirement is limited to certain types of crimes.

Lives of the men after vacated judgment

Antron McCray was the first to move away from New York. He is married, has six children, and lives and works in Georgia.[71]

Kevin Richardson is married and lives with his family in New Jersey. According to the Innocence Project, he has acted as an advocate with Santana and Salaam to reform New York State's criminal justice practices, advocating methods to prevent false confessions and eyewitness misidentifications.[71] Among their goals was required videotaping of interrogations by law enforcement; such a law was passed by the New York State legislature and went into effect on April 1, 2018.[140]

Yusef Salaam has been an advocate for reform in the criminal justice system and prisons, particularly for juveniles. He has spoken against practices leading to false confessions and eyewitness misidentifications, which can lead to wrongful convictions. He also works as a motivational speaker. Living in Georgia, he is

married with ten children. He serves as a board member of the Innocence Project.[71][141] As noted, Salaam was an advocate for the law passed in New York in 2018 requiring videotaping of accused subjects in all custodial interrogations for serious crimes.[140] In 2016, he received a Lifetime Achievement Award from President Barack Obama.[71]

Raymond Santana had been out of prison for six months before he was found guilty of possessing of crack cocaine in 1998 and reincarcerated for a term of 3.5 to 7 years. He was released in 2002 when the prosecutor, agreeing that his sentence had been higher due to his subsequently vacated conviction for raping Meili, reduced it to the 18-48 months that would typically have been given to a first-time offender.[142] He currently lives in Georgia, not far from McCray.[71] He serves as a criminal justice advocate with the Innocence Project and spoke in New York to audiences with Richardson and Salaam to advocate passage of the New York State justice reform law that passed in 2017. He has also appeared with other involved men in presentations at local schools and colleges.[140] In 2018 he started a clothing company, Park Madison NYC, named for the avenues near his former home in New York. Some of his merchandise commemorates the men of the Central Park Five.[143]

Korey Wise (who changed his first name from Kharey after being released from prison) still lives in New York City, where he works as a speaker and justice reform activist. He donated $190,000 of his 2014 settlement to the chapter of the Innocence Project at the University of Colorado Law School, to aid other wrongfully convicted people to gain exoneration. They renamed the project in his honor as the Korey Wise Innocence Project.[144]

Contemporaneous cases compared by the media

The Central Park events, which were attributed at the time to members of the large group of youths who attacked numerous persons in the park, including whites, blacks and Hispanics, were covered as an extreme example of the violence that was occurring in the city, including assaults and robberies, rapes and homicides. Focusing on rapes in the same week as the one in Central Park, *The New York Times* reported on April 29, 1990, on the "28 other first-degree rapes or attempted rapes reported across New York City".[52] The fourth one, on April 17, took place during the day in the park and is now tied to Reyes.[52]

Later after the Central Park rape, when public attention was on the theory of a gang of young suspects, a brutal attack took place in Brooklyn on May 3, 1989.[145][146] A 30-year-old black woman was robbed, raped and thrown from the roof of a four-story building by three young men. She fell 50 feet, suffering severe injuries.[145] The incident received little media coverage in May 1989, when the focus was on the Central Park case.[147] The woman's injuries required extensive hospitalization and rehabilitation.[147]

The New York Times continued to report on the case, and followed up on prosecution of suspects. Tyrone Prescott, 17, Kelvin Furman, 22, and another young man, Darren Decotea (name corrected a few days later as Darron Decoteau),[148] 17, were apprehended within two weeks and prosecuted for the crimes. They arranged plea deals with the prosecution in October 1990 before trial; the first two were sentenced to 6 to 18 years in prison.[147] Decoteau had made a plea deal in February in which he agreed to testify against the other two. He was sentenced on October 10, 1990 to four to twelve years in prison.[148] Social justice activists and critics have pointed to the lack of extensive coverage of the attack of the woman in Brooklyn as showing the media's racial bias; they have accused it of overlooking violence against minority women.[147]

Representation in other media

- Ken Burns, Sarah Burns and her husband David McMahon premiered their *The Central Park Five*, a documentary film about the case, at the Cannes Film Festival in May 2012.[149] Documentarian Ken Burns said he hoped the material of the film would push the city to settle the men's case against it.[76] On September 12, 2012, attorneys for New York City subpoenaed the production company for access to the original footage in connection with its defense of the 2003 federal civil lawsuit brought against the city by three of the convicted youths.[150] Celeste Koeleveld, the city's executive assistant corporation counsel for public safety, justified the subpoena on the grounds that the film had "crossed the line from journalism to advocacy" for the wrongfully convicted men.[150] In February 2013, U.S. Judge Ronald L. Ellis quashed the city's subpoena.[151]
- On May 31, 2019, *When They See Us,* a four-episode miniseries, was released on Netflix. Ava DuVernay co-wrote and directed the drama. Its release and wide viewing on Netflix prompted renewed discussion of the case, the criminal justice system, and of the lives of the five men.
- An opera, also called *The Central Park Five*, premiered in Long Beach, California, performed by the Long Beach Opera Company, on June 15, 2019.[152] The music is by composer Anthony Davis and the libretto by Richard Wesley. Davis won the 2020 Pulitzer Prize for Music for this work.[153][154] An earlier version, *Five*, had premiered in Newark, New Jersey, by the Trilogy Company.[155]

See also

- List of wrongful convictions in the United States
- Scottsboro Boys
- Martinsville Seven
- Willie McGee (convict)

ARTICLES

A Double Standard in The Law of Deception:
American Criminal Law Review (Vol. 55: 487)
https://www.law.georgetown.edu/american-criminal-law-review/wp-content/uploads/sites/15/2018/04/55-2-A-Double-Standard-in-the-Law-of-Deception-When-Lies-to-the-Government-Are-Penalized-and-Lies-by-the-Government-Are-Protected.pdf
See full article following

THE LIMITS OF DECEPTION: AN END TO THE USE OF LIES AND TRICKERY IN CUSTODIAL INTERROGATIONS TO ELICIT THE —TRUTH?:
http://www.albanylawreview.org/Articles/Vol77_3/77.3.0931%20Heyl.pdf
see full article following

Police Trickery In Inducing Confessions:
https://scholarship.law.upenn.edu/penn_law_review/vol127/iss3/
see full article following

Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations
https://scholarship.law.cornell.edu/clr/vol102/iss2/4/
see full article following

ARTICLES-PAGE 2

Deceptive Police Interrogation Practices: How Far is too Far?
https://repository.law.umich.edu/mlr/vol99/iss5/10/
see full article following

A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques:
https://ir.lawnet.fordham.edu/ulj/vol33/iss3/3/

Police Interrogations, False Confessions, and Alleged Child Abuse Cases:
https://repository.law.umich.edu/mjlr/vol50/iss3/7/

Guarding the Guardians: Police Trickery and Confessions:
https://www.jstor.org/stable/1228783?seq=1

A DOUBLE STANDARD IN THE LAW OF DECEPTION: WHEN LIES TO THE GOVERNMENT ARE PENALIZED AND LIES BY THE GOVERNMENT ARE PROTECTED

Bonnie Trunley*

INTRODUCTION

The law of deception "giv[es] legal force to everyday norms of interpretation and truth-telling."[1] Societal consensus establishes that lying is wrong and that, when the lies of an individual cause a specific harm, that individual should pay for the harm. Conversely, when a lie does not result in harm, although many may consider the lie immoral, society does not require punishment or liability. The American legal system reflects this idea in "the torts of negligent misrepresentation, defamation, and slander; . . . civil and criminal securities fraud laws; and laws prohibiting false advertising."[2] These areas of the law differ in how they deal with deceptive acts. A common element in each of these legal regimes, however, is the requirement that some actual harm resulted from the deceptive act: a harm requirement.[3] The harm requirement ensures that individuals are only liable for their deceit when they cause an actual injury and also provides a remedy for those harmed by such deceit, provided they can show proof of actual harm. The law also regulates deception in the context of citizen interaction with law enforcement and other government officials.[4] In that context, however, the element of actual harm—despite being nearly ubiquitous throughout the law of deception—disappears.[5]

This area of the law deals with the actions of both citizens who attempt to deceive law enforcement officials and officials who attempt to deceive citizens. In the first category—the actions of ordinary citizens—deceptive acts or false statements to government officials are criminalized under 18 U.S.C. § 1001.[6] This

---

* Bonnie Trunley is a graduate of Georgetown University Law Center (J.D., 2017) and Clark University (B.A., 2013, *summa cum laude*, M.P.A., 2014). She formerly served as an Executive Editor of the *American Criminal Law Review* © 2018, Bonnie Trunley.

1. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 453 (2012).
2. *Id.* at 454.
3. *See, e.g.*, Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342 (2005) (stating that economic loss and loss causation are two of the elements of securities fraud); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997) (listing the final element of a Lanham Act section 43(a) false advertising claim as injury or likely injury to the plaintiff); Tolliver v. Visiting Nurse Ass'n of Midlands, 771 N.W.2d 908, 914–15 (Neb. 2009) (holding that tort of fraudulent misrepresentation is generally an economic tort asserted to recover financial losses).
4. *See infra* Parts II, III.
5. *See infra* Parts II, III.
6. 18 U.S.C. § 1001 (2012).

law aims to prevent the loss of information during law enforcement investigations and to deter individuals who would lie to impede such investigations.[7] Law enforcement officials, however, often expect that suspects may lie to them in criminal investigations, which brings into question whether an actual harm exists where law enforcement officials know they are being lied to, particularly when the lie in question is a simple denial of guilt.[8] The broad application of § 1001 leads to some instances in which no harm occurs, yet the deceiver is still punished—a stark contrast to other areas of the law of deceit that prevent liability without actual harm. The law protects the second category—deceit by government officials (e.g., police officers and prosecutors)—such that officials are not held liable for the lies they tell to suspects or defendants, regardless of the real harm such lies may cause.[9] While not all lies by government officials result in harm, when they do, it is nearly impossible to hold those officials responsible for such deceit. This approach differs drastically from how the law treats lies by citizens both to the government and to each other.

The result is a double standard in the law of deception that governs interactions between private citizens and law enforcement officials. In most areas of the law that govern deceptive acts, a deceived individual must show an actual harm arising from the deceptive act to recover. The opposite is true for deception between citizens and law enforcement. When citizens lie to the police, they face punishment regardless of whether harm resulted. Yet when police lie to citizens, they remain free of liability even when actual harm results. Injured citizens are thus robbed of a remedy that most areas of the law would provide simply because the government, rather than another citizen, deceived them. Individuals who lie or deceive law enforcement but cause no injury, however, are penalized for lies that the law otherwise would not punish. To remedy this double standard, the law that governs citizen interactions with law enforcement should adopt some form of the harm requirement present throughout most of the law of deceit. A harm requirement would allow harmed citizens to hold those who deceive them accountable and would prevent the unfair punishment of citizens whose lies cause no harm.

The law that governs deceit between citizens and law enforcement centers on a strange double standard, and the harm requirement common in the law of deception in other contexts offers a ready solution. Part I of this Note will provide an overview of three areas of the law that deal with deception: the common law of deceit, the law of false advertising, and securities law; and will highlight the harm requirements prominent in each. Part II of the Note will explore lies made to law enforcement officials, initially outlining the legal standard applied to such lies and subsequently arguing that in some circumstances no actual harm results from such

---

7. *See* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1522–23 (2009).

8. *See id.* at 1568.

9. *See infra* Part III.

lies. Part III will discuss lies and deceit perpetrated by law enforcement officials. It will first examine the legal standards that apply to lies police use in undercover work, to conduct searches and seizures, and to facilitate custodial interrogations, as well as the legal and ethical standards that apply to deceptive conduct by prosecutors, particularly in the plea-bargaining process. Part III will further review real harms that occur as a result of lies by both police and prosecutors. The concluding remarks will discuss the practical realities that explain why this double standard exists and argue that the standards applied to deception of and by government officials should be modified to incorporate some version of the harm requirement present in the other areas of the law of deception. The harm requirement presents a needed solution to the problematic double standard in the law of deception that governs deceit between citizens and law enforcement.

I. LAW OF DECEPTION AND THE HARM REQUIREMENT

Generally, for a private individual or entity to be held liable for deception of another, some actual harm must have resulted from the deceit.[10] This Part reviews three major areas in which the law deals with deception—the common law, advertising law, and securities law—and discusses the harm requirements prominent in each as a contrast to the absence of such a requirement in the law governing interactions between citizens and law enforcement.

A. Common Law

The common law addresses deceit in a variety of ways but consistently includes a harm requirement before the perpetrator may be held liable. The examples discussed here include the torts of fraudulent misrepresentation, defamation, and injurious falsehoods, and they reflect how the common law typically treats deception. The Second Restatement of Torts describes the tort of fraudulent misrepresentation, often simply referred to as the tort of deceit, as: "One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it, is subject to liability to the other in deceit *for pecuniary loss caused to him* by justifiable reliance upon the misrepresentation."[11]

This definition is broken down into five basic elements: (1) there is a representation made by the speaker; (2) the representation is false; (3) there is scienter, or intention to deceive on the part of the speaker; (4) there is reliance by the hearer on the misrepresentation; and (5) there are damages.[12] For the purposes of this Note,

---

10. *See supra* note 3.

11. RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (emphasis added).

12. *See* Meese v. Miller, 436 N.Y.S.2d 496, 499 (App. Div. 1981). States differ in the way they state these elements as well as how the elements are broken down. *Compare* Int'l Totalizing Sys., Inc. v. PepsiCo, Inc., 560 N.E.2d 749, 753 (Mass. App. Ct. 1990) (holding that "plaintiff must prove 'that the defendant [or its agent] made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act

the final element is the critical component. To bring an action for fraudulent misrepresentation, the person deceived must suffer some actual harm.[13]

The Supreme Court in *United States v. Alvarez* emphasized the importance of the specific harm requirement in instances of fraud.[14] The Court held that the Stolen Valor Act, which prohibited lying about receiving certain military honors, was unconstitutional as a content-based restriction under the First Amendment.[15] However, Justice Breyer in his concurrence distinguished the unconstitutional Stolen Valor Act from areas of the common law that "make the utterance of certain kinds of false statements unlawful."[16] These areas of the common law, Breyer emphasized, are limited in scope because they contain specified harm requirements, something missing from the Stolen Valor Act.[17] Breyer noted limitations found in common law, such as "requiring proof of specific harm to identifiable victims; . . . specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; . . . [and] limiting the prohibited lies to those that are particularly likely to produce harm."[18] The remarks of the Supreme Court Justices underscore the significance of the harm requirement as a limitation on laws imposing liability for deceptive statements or acts, a limitation missing from the law of deception dealing with lies by and to government officials.

The torts of defamation and injurious falsehoods contain harm requirements as well. However, these torts restrict liability to instances where plaintiffs show specific types of harm. Liability for defamation requires: (1) a false and defamatory statement concerning another; (2) unprivileged publication to a third party; (3) fault on the part of the publisher (amounting to at least negligence); and (4) either actionability irrespective of special harm or the existence of special

---

thereon, and that the plaintiff relied upon the representation as true and acted upon it to [its] damage'") (citations omitted), *with* M. B. Kahn Constr. Co. v. South Carolina Nat'l Bank, 271 S.E.2d 414, 415 (S.C. 1980) (articulating the elements as "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury"), *and* Town & Country Chrysler Plymouth v. Porter, 464 P.2d 815, 817 (Ariz. Ct. App. 1970) (articulating the elements as "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury").

13. Often this harm is a pecuniary loss, but the Restatement of Torts also provides a cause of action for fraudulent misrepresentations that result in "physical harm to the person or to the land or chattel of another." RESTATEMENT (SECOND) OF TORTS § 557A (AM. LAW INST. 1977). Section 525 only addresses pecuniary loss arising from a fraudulent misrepresentation. Physical harm and economic loss deriving from such physical harm as a result of a fraudulent misrepresentation are covered by section 557A of the Restatement. *Id.* §§ 525 cmt. h, 557A.

14. United States v. Alvarez, 567 U.S. 709, 725–26 (2012).

15. *Id.* at 730.

16. *Id.* at 734 (Breyer, J., concurring).

17. *Id.*

18. *Id.*

harm—defined as pecuniary loss—caused by the publication.[19] Liability may exist irrespective of special harm in cases concerning the imputation of a criminal offense, a loathsome disease, a matter incompatible with the individual's business or profession, or serious sexual misconduct.[20] In these circumstances, the law assumes damage to reputation based on the nature of the allegations, so the plaintiff need not prove special harm.[21] When the harm that results from the defamatory statement does not fall into one of these categories, the defamed person must show that the defamatory statement caused special harm,[22] defined as "the loss of something having economic or pecuniary value."[23]

An action for publication of injurious falsehoods is similar to an action for defamation, but the plaintiff bears a higher burden of proof on certain elements. Publication of an injurious falsehood occurs when a publisher (1) publishes a false statement; (2) knows the publication "is false or acts in reckless disregard of its truth or falsity;"[24] (3) intends to harm the pecuniary interests of another or knows or should know that such harm will result; and (4) pecuniary loss results.[25] Unlike certain defamation actions where damages are presumed because of the nature of the falsehood, the publisher of an injurious falsehood is only liable for the proved pecuniary losses that result from the publication.[26] This harm often arises through the action of third parties who act in reliance upon the statement.[27] Each of these torts—fraudulent misrepresentation, defamation, and publication of injurious falsehoods—contain requirements that a plaintiff suffers harm before he or she can recover.[28] Although these are not the only torts to deal with deception, they share a rule common among most law of deception: without harm, there is no recovery and with actual harm, there is the potential for recovery.[29] This common rule exists for both advertising law and securities law, but it is absent where law enforcement officials are concerned.

B. Advertising Law

The law of advertising may not, on its face, appear to deal with deception, but the laws that regulate advertising deal primarily with false advertisements, or

---

19. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977). When the falsehoods are written and published to others, these elements constitute the tort of libel, and when spoken they constitute the tort of slander. Comment b to section 575 defines special harm as pecuniary or economic loss. *Id.* § 575 cmt. b.

20. *Id.* §§ 571–74.

21. *Id.* § 570.

22. *Id.* § 575.

23. *Id.* § 575 cmt. b.

24. *Id.* § 623A(b).

25. RESTATEMENT (SECOND) OF TORTS § 623A (AM. LAW INST. 1977).

26. *Id.*

27. *Id.* § 623A cmt. b.

28. *See id.* §§ 525, 558, 623A.

29. *See generally* Klass, *supra* note 1 (providing a general discussion of the law of deception and the harm requirement).

advertisements that deceive the consuming public. The two main statutory provisions that regulate false advertising are section 5 of the Federal Trade Commission Act (FTCA)[30] and section 43(a) of the Lanham Act.[31] The Federal Trade Commission (FTC) uses the FTCA to bring enforcement actions against false advertisers.[32] Section 5 of the FTCA prohibits the use or dissemination of "unfair or deceptive acts or practices in or affecting commerce."[33] The statute directs the FTC to prevent people and companies from using such "unfair or deceptive acts or practices"[34] and to define what constitutes an "unfair or deceptive act or practice."[35] The FTC has defined "unfair or deceptive acts or practices" as: (1) "a representation, omission or practice" (2) that is likely to mislead consumers acting reasonably in the circumstances and (3) is material.[36] While the FTC has the authority to define what constitutes an "unfair or deceptive act or practice," the FTCA mandates that the FTC does not have the authority to declare an act or practice unlawful unless:

> [T]he act or practice *causes or is likely to cause substantial injury to consumers* not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.[37]

This section of the FTCA, which explicitly states that an act or practice must either cause or be likely to cause "substantial injury to consumers"[38] means that the FTC must find that a practice causes or is likely to cause harm to consumers to be considered an "unfair or deceptive act or practice." The FTC has complied with this mandate in its definition of materiality, the third element of what constitutes an "unfair or deceptive act or practice." In a policy statement synthesizing how the FTC enforces its deception mandate, the FTC defines "material" as an act or practice that "is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely because consumers are likely to have chosen differently but for the deception."[39] Thus, the FTC, in compliance with the FTCA, has limited "unfair or deceptive acts or practices" for which persons or companies may incur liability to those that result in actual injury or harm to consumers.

---

30. Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2012).

31. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2012).

32. *See, e.g.*, Kraft, Inc. v. FTC, 970 F.2d 311, 313 (7th Cir. 1992) (one of many enforcement actions brought by the FTC under section 5 of the FTCA).

33. 15 U.S.C. § 45(a)(1).

34. *Id.* § 45(a)(2).

35. *Id.* § 57a(a)(1)(B).

36. FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (1983) (appended to *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110 app. at 174 (1984)) [hereinafter FTC POLICY STATEMENT ON DECEPTION].

37. 15 U.S.C. § 45(n) (emphasis added).

38. *Id.*

39. FTC POLICY STATEMENT ON DECEPTION, *supra* note 36 (emphasis added).

The Lanham Act, which competitors use to litigate false advertisements, contains an explicit harm requirement in the language of the statute.[40] The statute reads:

> [A]ny person who . . . uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact . . . shall be liable in a civil action by any person who believes that *he or she is or is likely to be damaged* by such act.[41]

The elements that a competitor must show to bring a successful false advertising claim under the Lanham Act are: (1) existence of a false or misleading statement of fact in a commercial advertisement, (2) in interstate commerce, (3) that actually deceives or has the tendency to deceive an appreciable number of consumers in the intended audience, (4) that is material, and (5) that is likely to cause injury to the plaintiff.[42] This last element is a continuation of the thread that runs through each of these areas of the law of deception—the actual harm requirement. Like the harm requirement at common law, both the FTCA and the Lanham Act require that a deceitful advertisement actually harm the individual for liability to result. This limitation serves the same purpose in advertising law as it does in common law: making remedies available for injured individuals while preventing the unfair punishment of advertisers whose deceit does not cause harm. As noted above, this limiting principle does not apply to deception in the context of law enforcement.

C. Securities Law

Securities law, like the common law and advertising law, regulates fraud and deceit in several ways.[43] The broadest regulation of deceit is Rule 10b-5,[44] promulgated under § 10(b) of the Securities Exchange Act of 1934.[45] Section 10(b) of the Act serves as a fraud catch-all provision that makes it unlawful for any person to (a) employ an artifice to defraud, (b) make any untrue statement of a material fact or omit to state a material fact, or (c) engage in any act or practice that would operate as a fraud or deceit, in connection with the purchase or sale of a

---

40. 15 U.S.C. § 1125(a)(1) (2012).

41. *Id.* (emphasis added).

42. *Id.*; Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co., 228 F.3d 24, 33 n.6 (1st Cir. 2000) (citing Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997)).

43. Securities law is a broad and complex area of law. There are many nuances, including variation in standards for omissions versus representations, insider trading regulation, and regulations governing omissions or misrepresentations during registration and public offerings. This Note focuses on the general standard for Rule 10b-5 fraud actions as an example of the importance of the harm element and how it works in the securities context.

44. Rule 10b-5, 17 C.F.R. § 240.10b-5 (2016).

45. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

security.[46] To hold a company or individual liable for securities fraud, plaintiffs use Rule 10b-5, under which a plaintiff must show: (1) the existence of a material statement or omission, (2) that the statement was made with scienter (knowledge or intent), (3) that the statement was made in connection with the purchase or sale of a security by the plaintiff, (4) that the plaintiff relied on the statement, (5) that the plaintiff suffered economic loss, and (6) loss causation.[47]

To recover, a plaintiff in a Rule 10b-5 securities fraud action must show both loss causation and damages, the two elements related to actual harm.[48] Loss causation requires the plaintiff to show that the misrepresentation actually resulted in the plaintiff's loss—a proximate cause requirement.[49] Although this kind of causation may be easily and quickly proven in the previously discussed areas of common law and advertising law, it is more complex in the securities field. If the specific securities related misrepresentation has not caused the plaintiff's harm or loss, he or she cannot recover.[50] For example, if an extraneous factor like a bursting stock bubble or a spike in industry prices caused the plaintiff's losses, that plaintiff will not be able to show loss causation.[51] This can be burdensome for plaintiffs.[52] They often must show that a change in stock prices occurred at the time the misrepresentations were made and that an opposite change in prices occurred when the misrepresentations were remedied, such as when the company disclosed the false or misleading nature of the original representations.[53] However, this burdensome requirement ensures that a company is not held liable for an individual's losses not caused by the company's deceit.

The Supreme Court in *Blue Chip Stamps v. Manor Drug Stores* clarified the importance of the damages requirement to the ability of any plaintiff to bring an action under Rule 10b-5.[54] The Court held that, in order to have standing to bring a suit under § 10(b) and Rule 10b-5, a plaintiff must have actually purchased or sold a security at the time the alleged misrepresentations were made.[55] Otherwise, the harm would be too speculative.[56] Without this rule, anyone could allege that he was dissuaded from purchasing or selling stock, and the sole proof of his reliance and subsequent damages would be his own, potentially uncorroborated, oral testimony.[57] Furthermore, the Court noted that § 10(b) limits damages to "actual

46. *Id.*
47. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).
48. *See id.* at 342.
49. *See* AUSA Life Ins. Co. v. Ernst & Young, 206 F.3d 202, 209 (2d Cir. 2000).
50. *See* Bastian v. Petren Res. Corp., 892 F.2d 680, 684 (7th Cir. 1990).
51. *Id.*
52. *See In re* Merrill Lynch & Co. Research Reports Sec. Litig., 289 F. Supp. 2d 416, 419 (S.D.N.Y. 2003).
53. *See Dura Pharm., Inc.*, 544 U.S. at 342–43.
54. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975).
55. *Id.*
56. *Id.* at 755.
57. *Id.* at 746.

damages to that person on account of the act complained of."[58] The Court in *Dura Pharmaceuticals v. Broudo* further emphasized that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection. . . ."[59]

Thus, like the harm requirement in both advertising law and the common law of deceit, individuals must show actual harm resulted from deceit in the securities context in order to recover.[60] Each of these three fields of law deals with the regulation of deceit, ensuring that those who suffer actual harm can hold the responsible party liable while protecting deceivers from having to pay what would essentially be punitive damages where no actual harm occurs. While this discussion does not cover every facet of the law of deception, it illustrates the importance that the law generally places on the harm requirement when one party acts to deceive another, whether in the form of direct lies, omissions, or implied misrepresentations. The harm element in each of these areas of law acts as a limiting factor, ensuring that both recovery and liability are tied to the existence of actual injury. This is missing from the law that regulates lies to and by law enforcement.

II. LIES TO LAW ENFORCEMENT OFFICIALS

In the areas of law previously discussed—common law of deceit, advertising law, and securities law—a plaintiff must show the actual harm he suffered directly resulted from the defendant's fraud or deceit.[61] The effect of the harm element is twofold (1) ensuring that liars and deceivers are only held legally responsible when their actions result in actual harm and (2) providing individuals who suffer injuries as a result of deceitful conduct a potential avenue for remedy. This harm requirement and its limiting effect are conspicuously missing in the context of deceit in private citizens' encounters with law enforcement. This Part will examine the legal standard that applies when individuals lie to law enforcement officers and will explore whether any harm results from such deceit.

A. Legal Standard

Lying to a law enforcement official in the course of a federal investigation in order to minimize the extent of one's misconduct—otherwise known as "defensive deception"[62]—is punishable by a fine and imprisonment of up to five years.[63] Section 1001 provides that:

---

58. *Id.* at 734; 15 U.S.C. § 78bb(a)(1) (2012).

59. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005).

60. *Id.* at 342.

61. *See supra* Part I.

62. *See* Griffin, *supra* note 7, at 1516.

63. 18 U.S.C. § 1001(a) (2012) (stating imprisonment may be up to eight years if the offense involves terrorism).

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title. . . .[64]

Historically, the statute only penalized falsehoods that served to cheat the government out of property or money.[65] The statute has since been split into a false claims statute[66] and a false statement statute, § 1001 being the false statement statute.[67] Section 1001 has been applied to numerous federal agencies,[68] so that the potential for a violation exists in interactions with government officials beyond traditional law enforcement agents like police officers. Furthermore, § 1001 punishes an expansive amount of conduct including "not only conduct that impedes an investigation but also evasions or understatements that merely fail to expedite it."[69]

In *Brogan v. United States*, the Court expanded the scope of § 1001 to impose liability for an "exculpatory no"—a simple denial of guilt—which was not previously a punishable offense.[70] The exculpatory no doctrine previously allowed a defendant to escape § 1001 liability for a basic denial of guilt, as well as in circumstances where (1) the speaker was not under oath, (2) the statement did not impair the basic functions of law enforcement, and (3) the truthful answer would have incriminated the speaker.[71] The doctrine aimed to prevent the application of the statute to cases where false statements did not pervert governmental func-

---

64. *Id.*

65. *See* Jeffrey L. God, Casenote, *Demise of the Little White Lie Defense - The Supreme Court Rejects the "Exculpatory No" Doctrine Under 18 U.S.C. § 1001:* Brogan v. United States*, 118 S. Ct. 805 (1998)*, 67 U. CIN. L. REV. 859, 860 (1999).

66. 18 U.S.C. § 287 (2012).

67. 31 U.S.C. § 3729 (2012); *see also* God, *supra* note 65, at 861.

68. *See, e.g.*, United States v. Rodgers, 466 U.S. 475, 479 (1984) (Federal Bureau of Investigation and United States Secret Service); United States v. Tracy, 108 F.3d 473, 476–77 (2d Cir. 1997) (United States Attorney's Office); United States v. Bilzerian, 926 F.2d 1285, 1300–01 (2d Cir. 1991) (Securities and Exchange Commission); United States v. Estus, 544 F.2d 934, 935–36 (8th Cir. 1976) (United States Postal Service); Preuit v. United States, 382 F.2d 277, 277–78 (9th Cir. 1967) (Federal Housing Administration); United States v. Haim, 218 F. Supp. 922, 929 (S.D.N.Y. 1963) (Bureau of Customs).

69. Griffin, *supra* note 7, at 1517.

70. Brogan v. United States, 522 U.S. 398, 408 (1998).

71. *Id.* at 401 (stating that an "exculpatory no" is usually a simple denial of guilt); *see also* United States v. Medina de Perez, 799 F.2d 540, 544 n.5 (9th Cir. 1986). The Ninth Circuit's test, which is generally representative of the tests used by other circuits applying the exculpatory no doctrine, is: (1) the false statement must be unrelated to a privilege or claim against the government; (2) the declarant must be responding to inquiries initiated by a federal agency or department; (3) the false statement must not impair the basic functions entrusted by law to the government entity; (4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and (5) a truthful answer would have incriminated the declarant. *Id.* at 544 & n.5.

tions.[72] In *Brogan*, the Court recognized that preventing the perversion of governmental functions may have been Congress' rationale for enacting § 1001, but it held that the plain language of the statute forbids all deceptive practices, including an "exculpatory no."[73]

According to *Brogan*, even an "exculpatory no" in the form of a simple denial of guilt is an actionable false statement under the statute.[74] In her concurrence in *Brogan*, Justice Ginsburg noted that prosecution for an "exculpatory no" under § 1001 is far removed from the congressional intent behind the statute.[75] She characterized the statute's goals as prohibiting lies to government officials that are designed to "elicit a benefit from the Government or to hinder Government operations."[76] The intent behind § 1001 appears to follow the harm principle present in other areas of the law of deception: when important government interests are harmed by an individual's deceit, there is potential liability for that harm. Where lies to the government truly pervert important governmental interests and functions, such as law enforcement and maintaining the integrity of the criminal justice system, Congress's criminalization of such lies comports with a form of the harm requirement. In this way, § 1001 resembles obstruction of justice or perjury statutes, which serve similar ends and criminalize deception of the government. An important distinction, however, is the overbreadth of § 1001, particularly post-*Brogan*. Both perjury and obstruction of justice charges are limited in their application and are crimes that cause institutional harms to the criminal justice system when perpetrated.[77] Section 1001 however, "makes almost any falsehood actionable, without regard to the stage of the investigation or the relevance of the statement to underlying wrongdoing . . . [and] is sufficiently broad to reach nondisclosure . . . [and] denials that mislead no one."[78]

The way prosecutors apply § 1001 has exacerbated the overbreadth problem.[79] Normally, false statement charges under § 1001 supplement the charges for underlying crimes.[80] A recent trend, however, has seen an uptick in cases in which no stand-alone offense can be proven, so a false statement to the government is the only crime charged.[81] In these cases, "it is the interaction with the government

72. *See* God, *supra* note 65, at 864–65.

73. *Brogan*, 522 U.S. at 403–04. The Court's decision relied heavily on the plain text of the statute and noted that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so." *Id.* at 408.

74. *Id.* at 408.

75. *Id.* at 408–09 (Ginsburg, J., concurring).

76. *Id.*

77. *See* Griffin, *supra* note 7, at 1523–24.

78. *Id.* at 1522–23; *see also* Steven R. Morrison, *When is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111 (2009) (providing further critique of the overbreadth and application of § 1001).

79. *See* Griffin, *supra* note 7, at 1522–23.

80. *Id.* at 1516.

81. *Id.*

itself rather than conduct with freestanding illegality that forms the core violation."[82] As Justice Ginsburg points out, even the Solicitor General in oral arguments for *Brogan* observed that § 1001 had the potential to be used to turn "completely innocent conduct into a felony."[83] Section 1001 and its broad interpretation have made deception and false statements that do not necessarily cause harm actionable in their own right simply because they are made by a citizen in the course of an encounter with law enforcement.

B. Where is the Harm?

When § 1001 is used to penalize an "exculpatory no" or a lie that is disbelieved by law enforcement, the statute does not prevent the loss of government information or the hindrance of an investigation but provides a tool for prosecutors to penalize "otherwise unreachable defendants or forc[e] cooperation with an inquiry."[84] Lies to law enforcement do not necessarily result in lost information or hindered investigations. Given the frequency of commonplace deception and lies in everyday interactions between individuals,[85] lies to law enforcement are not unique and should be anticipated.[86] Law enforcement officials understand that a witness will answer questions in a manner that protects herself and minimizes the possibility of criminal liability.[87] The harm Congress sought to prevent with § 1001 was the perversion of government functions.[88] In the criminal context, the relevant government functions include investigating criminal conduct and uncovering the truth.[89] If impeding such investigations represents the harm, the question remains: do all lies to the government covered by § 1001 result in this kind of harm? When § 1001 covers an "exculpatory no" or a lie that law enforcement does not believe, the answer is no.[90]

Courts have, however, held that regardless of whether or not law enforcement agents believe a false statement to be true, § 1001 applies.[91] The Supreme Court conceded in *Brogan* that "perhaps . . . a *disbelieved* falsehood does not pervert an investigation."[92] This allows for an instance in which a law enforcement agent knows that a civilian has lied to him or her and thus does not rely on the

---

82. *Id.* at 1515.

83. Brogan v. United States, 522 U.S. 398, 411 (1998) (Ginsburg, J., concurring) (quoting Transcript of Oral Argument at 36, *Brogan* 522 U.S. 398 (No. 95–1579)).

84. Griffin, *supra* note 7, at 1518.

85. *Id.* at 1518–19.

86. *Id.* at 1519.

87. *Id.* at 1520; *see also* Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) ("It probably is the normal instinct to deny and conceal any shameful or guilty act.").

88. *See Brogan*, 522 U.S. at 408–09 (Ginsburg, J., concurring).

89. *Id.* at 402.

90. *See* Griffin, *supra* note 7, at 1533–34.

91. *See, e.g.*, United States v. Sarihifard, 155 F.3d 301, 305 (4th Cir. 1998) (holding that a statement was material even though agents called the defendant a liar immediately after it was made).

92. *Brogan*, 522 U.S. at 402.

information, avoiding any potential harm from the lie, yet the civilian faces criminal liability under the statute.[93] This is not a mere hypothetical. Some courts have found that the false statement need not have actually influenced the investigating agency for the speaker to be criminally liable,[94] and others have held that the statement need not even have been received by the investigating agency in order for a defendant to be found guilty.[95] These cases demonstrate the application of § 1001 regardless of whether harm results from the deception.

Although the government has a strong interest in investigating crimes without impediment, broad application of § 1001 criminalizes conduct that does not impede investigations or cause any other harms.[96] Not only does this standard prevent some cases from receiving the full investigation they deserve,[97] it flies in the face of the well-settled principle found throughout the law of deception that in order for an individual to be held liable for lies or deceit, some actual harm must result. The incorporation of a harm requirement similar to the one present in other areas of the law that penalize deceit would go a long way toward remedying the overbroad application of § 1001. The limitations a harm requirement would bring to the regulation of deceit in the context of civilian interaction with law enforcement would help bring this area of law in line with the rest of the law of deception.

III. LIES BY LAW ENFORCEMENT OFFICIALS

In contrast to the liability imposed on civilians regardless of harm under § 1001, law enforcement officials are generally not liable for their own lies and deceptions, which often do result in concrete harms. The broad criminalization of citizen lies to government officials paired with the near immunity granted to lying law enforcement officials presents a troubling double standard. Part III explores the legal standards applied to deception by two types of law enforcement agents—first, the

---

93. *See, e.g.*, United States v. Whitaker, 848 F.2d 914, 916 (8th Cir. 1988) (holding that false statement may be material even if agent who hears it knows it is false); United States v. Campbell, 848 F.2d 846, 852–53 (8th Cir. 1988) (holding that it is not necessary to show government relied on statement); United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984) (holding that false statement may be material under § 1001 even if agency did not rely on it); United States v. Keller, 730 F. Supp. 151, 159–60 (N.D. Ill. 1990) (holding that statement may be material even if agent who hears it already knows the truth).

94. *See, e.g.*, United States v. Gafyczk, 847 F.2d 685, 691 (11th Cir. 1988) (holding actual influence unnecessary); United States v. Kwiat, 817 F.2d 440, 445 (7th Cir. 1987) (holding liability depends on reasonably anticipated effect at the time the statement was made, not on the actual result); United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980) (holding lack of *actual* influence was immaterial where the statement had the *capacity* to pervert the functioning of the agency), *abrogated on other grounds by* United States v. Gaudin, 515 U.S. 506, 512 (1995).

95. *See, e.g.*, United States v. Corsino, 812 F.2d 26, 31 (1st Cir. 1987) (holding statement may be material even if agency ignored or never read it), *abrogated on other grounds by* United States v. Gonsalves, 435 F.3d 53, 72 (1st Cir. 2006); United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. 1981) (holding the same).

96. Griffin, *supra* note 7, at 1521.

97. *Id.* at 1524. When police officers and prosecutors know they can charge under § 1001 once a lie has been told, they may halt an investigation because they do not need to prove all of the elements of a crime in order to impose criminal liability on a defendant. *See id.*

police and second, prosecutors—highlighting the practical difficulties of imposing liability on such agents for their deceit; this Part then discusses the real harms that may befall the individuals whom those agents deceive.

A. Police Legal Standards

This Section focuses on lies told by police officers to the suspect or suspects of a crime, usually for the purpose of identifying, apprehending, and charging the perpetrator of a specifically identified crime. Deceptive practices, in the form of lies by police officers, are found in three primary contexts: undercover work, searches and seizures, and interrogations.[98] The law accommodates lies by police in each of these three areas, with the main restrictions on police conduct coming from the Constitution and subsequent court interpretations of the rights found therein. The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures" and mandates that "no Warrants shall issue, but upon probable cause."[99] The Fifth Amendment provides individuals with the right against self-incrimination, ensuring that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself," and also contains a due process clause, which guards against deprivation "of life, liberty, or property, without due process of law."[100] Finally, the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[101] While these Amendments appear to protect a broad range of rights, particularly for the criminally accused, the Supreme Court has not interpreted these rights to protect criminal suspects from police officers who lie to them.

Undercover work by police or their informants inevitably involves lying, but neither police nor their informants are generally liable for lies they tell as undercover agents. The primary means of challenging the lies police or informants tell during undercover work comes from the Fourth Amendment protection against unreasonable searches and seizures.[102] Lies told while undercover, however, have been almost uniformly found to be constitutional under the Fourth Amendment under the "third-party doctrine."[103] The Supreme Court has found that citizens assume the risk that their associates—third parties—are government agents, and any expectation of privacy or confidentiality is unreasonable and not protected by

98. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778 (1997).

99. U.S. CONST. amend. IV.

100. U.S. CONST. amend. V.

101. U.S. CONST. amend. VI.

102. *See* Slobogin, *supra* note 98, at 778–81.

103. *See, e.g.*, Lewis v. United States, 385 U.S. 206, 206–07 (1966) (holding that Fourth Amendment is not violated when undercover agent calls suspected drug dealer and arranges to buy marijuana at dealer's home).

the Fourth Amendment.[104] This means that, generally, lies undercover police tell suspects are permissible because everyone assumes the risk that he or she is speaking to a government agent when interacting with another person.

There are three limits on the use of undercover officers or informants: (1) the entrapment defense, (2) the Due Process Clause of the Fifth Amendment, and (3) the Sixth Amendment right to counsel.[105] These restrictions are limited in scope and rarely impact police undercover work. Courts will seldom overturn convictions based on entrapment because the claim requires proof that the individual was not predisposed to commit the crime in question.[106] Absence of predisposition is incredibly difficult to show, and often undercover operations are aimed at individuals who are predisposed to the criminal conduct.[107] The Due Process clause has been interpreted to prevent police activity that "shocks the conscience,"[108] but deception alone rarely, if ever, passes this high bar.[109] Finally, the right to counsel guaranteed by the Sixth Amendment only applies to a formally charged defendant. The Sixth Amendment protection thus rarely applies to undercover police work, which usually takes place prior to indictment.[110]

Police may also lie to conduct searches or seizures, often providing a pretextual reason for the search or seizure.[111] Courts have generally approved pretextual searches and seizures as long as actual authority to conduct the search itself exists, even if the officers provide the pretextual reason to the person searched.[112] These kinds of lies are considered "techniques of the trade,"[113] and police generally know that as long as they can provide a legal explanation, the search or seizure will be upheld.[114]

Explicit lies about the extent of an officer's authority to perform a search or seizure are unconstitutional under the Fourth Amendment.[115] Police at times

---

104. *See* Hoffa v. United States, 385 U.S. 293, 303 (1966); Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting) ("The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society.").

105. *See* Slobogin, *supra* note 98, at 779–81.

106. *See id.* at 779–80.

107. *See id.*

108. *Id.* at 780 & n.22.

109. *See id.* at 780. Examples of Due Process violations that may "shock the conscience" include: obtaining evidence through physical force, the commission of a serious crime, or outrageous "overinvolvement" in a crime. *See* Hampton v. United States, 425 U.S. 484, 491–93 (1976) (Powell, J., concurring); Slobogin, *supra* note 98, at 780.

110. Slobogin, *supra* note 98, at 780–81.

111. *Id.* at 781–82.

112. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (holding pretextual traffic stop was constitutional because the subjective mental state of the police is irrelevant to Fourth Amendment analysis); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989) (finding legality of arrest depends on whether there is authority for it).

113. Slobogin, *supra* note 98, at 783.

114. *Id.* at 785.

115. *Id.* at 784.

overstate their authority, lying, for example, about having a warrant or the content of a warrant in order to gain consent for a search or seizure.[116] Although such deception violates the Fourth Amendment, the officer does not incur liability and the defendant's recourse is limited. The court may exclude evidence gained as a result of the lie from the government's case in chief at trial, but only if the court finds the police conduct deliberate and culpable and deems exclusion capable and worth the cost of deterrence.[117] Thus, even if police use this unconstitutional tactic, they may face no real repercussions, and instances where evidence is actually excluded at trial are rare.[118]

Finally, courts generally do not find lies by police during custodial interrogations problematic.[119] In fact, the leading police interrogation manual preaches the merits of deception as an interrogation technique, suggesting that police officers show fake sympathy, reduce guilt through lies, exaggerate the crime, lie to indicate that there is already enough evidence to convict, and lie about confessions made by co-defendants.[120] While only voluntary confessions may be constitutionally admitted at trial, courts have found that deception during an interrogation is just one factor in assessing voluntariness and does not on its own render a confession involuntary.[121] *Miranda v. Arizona* established the only real protection from coercive questioning that currently stands between a suspect in custody and the police.[122]

In *Miranda*, the Court required warnings to inform suspects of the applicable constitutional rights—namely, the right to counsel and the right to remain silent—as a constitutional protection against psychologically coercive techniques.[123] The Court's reasoning suggested that police-dominated custodial interrogation can "overcome a person's will to refrain from self-incrimination,"[124] but it held that the required warnings

---

116. *Id.* at 781–82.

117. Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.").

118. *See id.* at 146–48.

119. *See, e.g.*, State v. Ulch, No. L-00-1355, 2002 WL 597397, at *4 (Ohio Ct. App. Apr. 19, 2002) (holding that appellant's due process rights were not violated where a detective lied during an interrogation while encouraging appellant to make a statement); State v. Myers, 596 S.E.2d 488, 492 (S.C. 2004) (finding defendant's confession valid in the absence of evidence that defendant's will was overborne or that the confession was not voluntary).

120. Slobogin, *supra* note 98, at 785–86. Instances where the exclusionary rule has been applied due to lies by police include: where police misled the magistrate in their application for a warrant, where the warrant was so obviously invalid that no officer could reasonable rely on it, and where the magistrate abandoned his or her neutral and detached posture. *Id.*

121. Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 943 (2014).

122. Miranda v. Arizona, 384 U.S. 436, 471 (1966); *see also* Heyl, *supra* note 121, at 937–38.

123. *Miranda*, 384 U.S. at 471.

124. *See* Heyl, *supra* note 121, at 937.

would be enough to eliminate the police-dominated atmosphere essential to what causes a person's will to be overborne.[125] As a result of the *Miranda* decision, courts considering the constitutionality of the coercive tactics police use in custodial interrogation have focused primarily on whether the officers provided *Miranda* warnings rather than whether police deception created coercion.[126]

Constitutional protections do exist for individuals when they interact with police officers, but those protections are strictly limited in scope. A number of justifications explain why the law allows police officers such broad discretion to lie and deceive suspects. For instance, this discretion enables law enforcement to more easily apprehend criminals, protect innocent victims, and address unique circumstances, such as hostage situations.[127] Society cannot, however, guarantee that police officers will always lie for approved purposes. Additionally, the harms that may befall citizens to whom the police lie, as discussed in Part IV.B, are particularly serious. The lack of accountability for police lies that result in harm is troubling, particularly in contrast to the remedies available for harm that results from the lies of other members of society. In most other contexts, when a person is deceived and suffers an actual harm as a result, the law does more to provide the harmed person a means to hold the deceiver liable than it does to protect the deceiver.

B. Harms to Suspects

Numerous harms may arise from the deceptive acts of police officers in the course of undercover work, searches and seizures, and custodial investigations, but two are related and particularly significant: false confessions and wrongful convictions. Many of the harms that arise from police officers' lies are self-evident upon reflection: a suspect may disclose information or evidence that leads to his or her arrest and eventual prosecution to an undercover officer, or one may consent to a search or seizure on a pretextual basis. A suspect in custody may waive his or her constitutional right against self-incrimination while in a police-dominated interrogation and be subsequently "compel[led] . . . to speak where he would not otherwise do so freely."[128] When an innocent individual is deceived, the harm may not be apparent from the outcome of the interaction, whereas when police lies induce an individual hiding criminal activity to divulge that information, the harm seems

125. *Miranda*, 384 U.S. at 467.

126. *See* Heyl, *supra* note 121, at 937–38; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 116–17 (1997) (noting that the Due Process *May 16, 2013, at A23)Process Cmakerto unilaterally make these decisions (minimal) e,ion of Constitution similar to ICCPR; can*Clause still provides little to no protection against coercive interrogation techniques).

127. *See* Slobogin, *supra* note 98, at 775–76.

128. *Miranda*, 384 U.S. at 467.

more fully realized, if unsympathetic. The harm that befalls the suspect hiding criminal activity does not induce much sympathy in society because the goal of the criminal justice system is to catch and prosecute criminals. Innocent individuals, however, suffer real injuries as a result of police lies, such as having their privacy and other rights violated. One of the most problematic harms affects exclusively innocent people: false confessions.

False confessions, and wrongful convictions based on those false confessions, present a real problem that "occur[s] with alarming frequency."[129] In New York State alone, "scores of innocent people have confessed during custodial interrogations . . . to committing brutal crimes,"[130] and as many as fifty trial convictions involving just one detective had been reopened because that detective's "overbearing and allegedly illegal tactics may have sent innocent men to prison."[131] The psychological interrogation techniques implemented by police, which often include lies and deception, are so effective that— if not used properly— they can result in confessions from innocent people.[132] One of the leading causes of wrongful convictions is false confessions.[133]

The primary injury that results from a false confession and wrongful conviction is apparent: an individual suffers harm when he or she pays a fine or serves jail time for a crime he or she did not commit. In fact, at the federal level, § 2513 of Title 28 of the United States Code provides that an individual who was unjustly (wrongfully) convicted and incarcerated may collect up to $50,000 in damages for each year of incarceration, and individuals who were incarcerated and unjustly sentenced to death may collect up to $100,000 for each year they were incarcerated.[134] Many states have similar compensation statutes.[135] Forcing an individual to pay for a crime that he or she did not commit constitutes a miscarriage of justice. When this occurs as a result of police deception, the lying officer should be held responsible, just as the law holds typical deceivers liable for the harm they cause.

---

129. Steve A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920–21 (2004).

130. Heyl, *supra* note 121, at 931.

131. *Id.*; *see also* Frances Robles, *A Conflict is Seen in a Review of a Detective's Conduct*, N.Y. TIMES, May 16, 2013, at A23.

132. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

133. *See* Craig J. Trocino, *You Can't Handle the Truth: A Primer of False Confessions*, 6 U. MIAMI RACE & SOC. JUST. L. REV. 85, 85 (2016). As of January 29, 2016 there had been 325 DNA exonerations by the Innocence Project since 1989, 27% of which were caused by false confessions. *Id*. at 85 n.1. For examples in New York alone, *see* Heyl, *supra* note 121, at 931–32.

134. 28 U.S.C. § 2513(e) (2012).

135. *See* Stephanie Slifer, *How the Wrongfully Convicted are Compensated for Years Lost*, CBS NEWS (Mar. 27, 2014), http://www.cbsnews.com/news/how-the-wrongfully-convicted-are-compensated/. In New York for example, Marty Tankleff spent seventeen years in prison before being exonerated, and in January 2014 he won a settlement of nearly $3.4 million in his wrongful conviction suit against the state of New York. *Id.*

There are a number of secondary harms that arise from false confessions and wrongful convictions. Coerced false confessions harm the crime victim and the public at large because the real perpetrator remains free to commit more crimes.[136] Moreover, confessions, once obtained, can halt investigations in their tracks, which prevents police from pursuing other avenues of investigation.[137] When police extracted the false confession of five young boys in the "Central Park Jogger" rape case, the true perpetrator, Matias Reyes, was free to rape a pregnant woman in her apartment, where she died from stab wounds three hours later while her three young children were locked in another room.[138] The harms from a false confession also resonate throughout the criminal trial process: prosecutors may be less likely to negotiate for plea bargains; defense lawyers may be more likely to see a case as hopeless and pressure a client to plea to any deal available; pretrial release by bail can be more difficult to obtain; and sentencing may be more severe.[139] False confessions and wrongful convictions also injure public confidence in and the perceived legitimacy of the criminal justice system.[140] These are only some of the most egregious harms that can result from police deception. Unlike most areas of the law of deception, the avenues for holding deceptive police officers responsible when they cause these harms are few and far between. There is no easy solution to finding the balance between which police lies to protect and which lies to punish, but the practical immunity that police officers currently enjoy with regard to deception does not appear to strike the right balance.

C. Prosecutor Legal Standards

Deception by prosecutors may occur during the plea-bargaining process, where lies are particularly problematic. Deception in this context may occur when a prosecutor threatens to heighten charges against a defendant or prosecute third parties to induce a defendant to agree to a plea bargain although the prosecutor may have no intention of taking such actions. Prosecutors do not have the express authority to deceive defendants in this way, but the broad prosecutorial discretion prosecutors enjoy throughout the plea-bargain process makes challenging any deception that may occur during that process exceptionally difficult.[141] Thus, if a defendant seeks to hold a prosecutor liable for deception in the plea-bargain process, he or she must attempt to challenge an entirely discretionary decision.[142]

---

136. *See* Trocino, *supra* note 133, at 86.

137. *Id.*

138. *Id.* at 87.

139. *Id.* at 91.

140. James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1631 (2013).

141. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

142. *See id.*

This results in practical immunity for prosecutors because their decisions are heavily guarded by their discretion.

Prosecutorial discretion includes decisions not to pursue charges, decisions to pursue charges, and decisions about what charges to pursue.[143] Decisions not to charge often go unchallenged due to separation of powers concerns and reluctance on the part of courts to become "superprosecutors" by second-guessing the prosecutor's decision not to bring a case.[144] As stated by the Second Circuit, "federal courts have traditionally and . . . uniformly refrained from overturning, at the insistence of a private person, discretionary decisions of federal prosecuting authorities not to prosecute . . . ."[145] Greater room for prosecutor deception exists when prosecutors actually bring charges. For example, a prosecutor may threaten to charge a defendant with a higher crime to induce the defendant to plead guilty, even if the prosecutor has no such intention. Such a deception cannot, however, be challenged, so long as the prosecutor has probable cause to believe that the defendant committed the offense.[146] This is the case even where a prosecutor threatens heightened charges in order to dissuade a defendant from exercising his or her constitutional rights.[147]

Because constitutional challenges to prosecutorial discretion are so difficult to bring prior to the initiation of trial,[148] the main limitations on prosecutorial deception during plea bargaining come from professional standards of conduct. The American Bar Association's Model Rules of Professional Conduct for Attorneys specifically address the special responsibilities of a prosecutor.[149] Rule 3.8(a) states that a "prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[150] This rule, where adopted,[151] places an ethical restriction on prosecutorial discretion such that prosecutors should not prosecute if they have *actual knowledge* that no probable

143. *See*, *e.g.*, *id.*; Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379–80 (2d Cir. 1973).

144. *See Inmates of Attica Corr. Facility*, 477 F.2d at 380.

145. *Id.* at 379.

146. *Bordenkircher*, 434 U.S. at 364 ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

147. *Id.* at 364–65 (holding that even where a prosecutor threatened, and actually brought, heightened charges in order to deter defendant from exercising constitutional right to a jury trial, no violation of the Due Process Clause of the Fourteenth Amendment occurred).

148. *See* United States v. Goodwin, 457 U.S. 368, 384 (1982) (holding that challenges of vindictive prosecution are not valid in the pre-trial setting, but only apply to actions taken after an adjudication of guilt).

149. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2014).

150. *Id.* r. 3.8(a).

151. Not all jurisdictions have adopted the exact language from the Model Rules. For example, Massachusetts's rules state that prosecutors should refrain from prosecuting charges where the prosecutor "lacks a good faith belief that probable cause to support the charge exists" and adds that prosecutors should "refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation." MASS. SUP. JUD. CT. R. 3:07 (2017).

cause exists to support a charge.[152] To file charges, the individual prosecutor need only subjectively think that the person more likely than not committed the crime.[153]

This has been interpreted as a very liberal standard. In one case, even though a prosecutor's conduct was found incompetent, the court determined he had not violated a state version of Rule 3.8 because he did not have actual knowledge that the indictments he pursued lacked the support of probable cause.[154] In another case, a court held that the actual knowledge standard could not be replaced with a negligence or "reasonably should know" standard.[155] Even though the prosecutor should have known that his indictment was not supported by probable cause, the court held he had not violated a state version of Rule 3.8 because he in fact did not know.[156] Similar to the Model Rules of Professional Conduct, the American Bar Association's Criminal Justice Section Standards for Prosecution Function state that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause."[157] These standards present incredible difficulty for a deceived defendant seeking to challenge the prosecutor's deceitful claim that he will bring a charge or the actual bringing of the charge. The defendant must prove the prosecutor's state of mind—that he had no intention of bringing the charge or that he actually knew that no probable cause existed to support the threat of indictment.

The heavy protection of discretion may grant a prosecutor practical immunity for deceit during the plea-bargain process. First, how does a defendant determine whether a prosecutor has *actual knowledge* that a charge is not supported by probable cause? Doctrinal rules suggest that a prosecutor's actual knowledge is based on the following: "(1) only the government's evidence is included . . . without reference to the defense's claims, (2) the credibility (or lack thereof) of the government's witnesses is not worthy of consideration, and (3) legally inadmissible hearsay may be taken into account."[158] As noted above, even where an individual thinks she can show a problem with a prosecutor's charging decision, "judges appear hesitant to question executive department law enforcement decisions before they reach fruition in court."[159] Second, prosecutorial misconduct does not in itself provide a ground for relief for a criminal defendant unless a constitutional right is implicated and the misconduct has prejudiced the defen-

---

152. *See, e.g.*, Livingston v. Va. State Bar, 744 S.E.2d 220, 226 (Va. 2013); *In re* Lucareli, 611 N.W.2d 754, 755 (Wis. 2000).

153. Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188 (2010).

154. *Livingston*, 744 S.E.2d at 226–27.

155. *In re Lucareli*, 611 N.W.2d at 761–62.

156. *Id.*

157. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3 (4th ed. 2015).

158. Medwed, *supra* note 153, at 2188–89.

159. *Id.* at 2190.

dant.[160] Finally, there is a serious lack of transparency surrounding prosecutorial charging decisions.[161] The nature of the process by which criminal charges proceed is one of deference to prosecutors and extreme secrecy.[162] In fact, Rule 11 of the Federal Rules of Criminal Procedure prohibits judges from participating in the plea-bargaining process in any way.[163] While prosecutors are not specifically authorized to deceive or lie to defendants in order to come to a plea deal, the difficulty of challenging or even recognizing when such a deception has taken place results in practical immunity for such lies.[164]

D. Harm to Defendants

Manifold harms befall the defendants whom prosecutors deceive. Some of those harms are similar to those that befall suspects to whom police lie. For example, when an innocent defendant accepts a plea bargain because of deceptive practices by prosecutors, an innocent person is punished for a crime he or she did not commit. The Supreme Court in *North Carolina v. Alford* specifically authorized defendants to plead guilty without an express admission of guilt.[165] These kinds of pleas have become known as Alford pleas. Once again, innocent people going to jail for crimes they did not commit results in decreased public confidence in the criminal justice system and a risk to public safety while the true perpetrator walks free.[166] Another harm also results from Alford pleas: when a defendant enters a guilty plea, he or she "waives most nonjurisdictional constitutional rights, such as the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination."[167] The guilty plea also results in a waiver of the right to challenge certain errors or defects committed by the government prior to plea entry including: illegal search and seizure, coerced confession, entrapment, improper selection of a grand jury, denial of the right to a speedy trial, sufficiency of arrest, and certain prosecutorial defects and statutory claims.[168] When a defendant accepts a plea bargain and enters the plea of guilty, these rights are instantly out of reach for that defendant. The waiver of constitutional rights by an

---

160. *See, e.g.*, United States v. Isgro, 974 F.2d 1091, 1094 (9th Cir. 1992); *cf.* United States v. Jamil, 707 F.2d 638, 645–46 (2d Cir. 1983) (rejecting suppression of evidence despite prosecutor's alleged violation of ethics rule barring communication with represented person).

161. Medwed, *supra* note 153, at 2191.

162. *Id.* at 2191–92.

163. FED. R. CRIM. P. 11(c)(1).

164. Rule 11 of the Federal Rules of Criminal Procedure sets a practical limit on prosecutorial discretion in plea bargaining because it requires a judge to determine that the plea being entered is voluntary before accepting a plea of guilty. *Id.* R. 11(b)(2). However, a judge addressing a defendant in open court will not be able to deduce everything that went on during the plea-bargaining process, and in fact the court may not participate in plea discussions. *Id.* R. 11(c)(1).

165. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

166. *See supra* Part III.B.

167. *Guilty Pleas*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 472, 506 (2016).

168. *Id.* at 507–08.

innocent defendant is a waiver of rights specifically designed to protect the innocent and certainly results in harm. The deprivation of constitutional rights may seem like a conceptual harm, but the existence of a statutory provision—§ 1983 of Title 42 of the United States Code—that provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution"[169] indicates that society considers the violation of a constitutional right a real harm.

The harms to the victims of deceptive schemes and lies perpetrated by police officers and prosecutors are real and concrete. If individuals other than government officials caused them, these injuries would meet the actual harm requirement that underlies liability in other areas of the law that regulate deception. Even though the harms are not directly pecuniary in nature (a common requirement in other areas of the law of deception), the harms are certainly actual and may result in pecuniary damage indirectly.[170] It bears repeating that this state of affairs stands in stark contrast to the criminalization of false statements made to government officials by citizens, regardless of harm. Inconsistent with the law of deception in other contexts, this double standard should be remedied with the implementation of a harm requirement.

CONCLUSION

The law deals with deception in a variety of settings. At common law, the torts of deceit and defamation allow individuals harmed by another's deception to hold the deceiver liable for any resulting damages. In advertising law, the government can punish those who publish false and deceitful advertisements that harm the consuming public, and competitors can hold each other liable for damages suffered because of false advertising. In securities law, buyers and sellers of a company's securities can hold that company liable for deceptions that result in harm to those buyers or sellers. The consistent element among each of these areas of law is actual harm. Without some measurable damage that occurs due to a deceptive practice, defendants cannot be found liable under any of the above-mentioned legal schemes.

This format for how the law handles deceit is flipped on its head in two ways when individuals encounter government agents in the law enforcement context. First, deceitful statements or actions by an individual interacting with a law enforcement official are automatically criminalized, although harm in the form of perversion of government interests is often lacking. Second, when those same law enforcement officials lie to or deceive individuals and actual—often extreme—harm results, the deceitful officials are in effect immune from liability. This double standard stands in stark opposition "to the general abhorrence of falsehoods in

169. 42 U.S.C. § 1983 (2012).

170. *See supra* Part III.B (discussing harm to suspects); *see also* 28 U.S.C. § 2513(e) (2012) (providing monetary remedies for constitutional violations).

other legal contexts."[171] Most legal contexts include "severe punishment of those who lie."[172] In contrast, the law generally tolerates government lies.[173]

The realities of our criminal justice system provide some explanation and justification for why this double standard exists. False statements to government officials can cause similar institutional harms to those caused by perjury and obstruction, such as undermining the integrity of the criminal justice system and the courts, and obscuring information necessary to enforce the law and protect public safety.[174] Additionally, we allow police officers to lie to suspects to facilitate important goals, such as saving lives, protecting innocent victims in hostage situations, calming worried citizens, and catching criminals.[175] Likewise, prosecutorial discretion, even when it may involve deception, is not easily challenged because of the need for individualized justice and the finite resources of law enforcement agencies.[176] Often the harms that result from the lies told by police and prosecutors are not the product of malicious intent on the part of either, but rather come from negligence and a lack of training.[177]

These rationales for the criminalization of lies to the government and protection of deceit by the government do not justify the expansive scope of this double standard. While heightened standards for perjury and obstruction charges work to prevent actual harm to the justice system, many false statement charges exist regardless of actual harm to any government interest, and in fact, may serve to insulate the prosecution's underlying case from scrutiny and preclude judicial oversight.[178] The fact that police officers can use deceit to catch actual criminals does not mean they should be insulated from culpability when their lies result in false confessions and wrongful convictions that cause serious harm. Similarly, the preservation of resources and individualized justice that may result from prosecutorial discretion in plea bargaining does not justify the possibility that deceit in the process may result in innocent people waiving constitutional rights and being punished for crimes they did not commit. The legal implications of deceit in interactions between citizens and law enforcement officials are important enough that, as a society, we should modify our legal standards to incorporate the actual harm requirement, an essential limitation in the law of deception.

171. Heyl, *supra* note 121, at 941.
172. *Id.*
173. *Id.*
174. *See* Griffin, *supra* note 7, at 1523.
175. *See* Slobogin, *supra* note 98, at 775–78.
176. Medwed, *supra* note 153, at 2189.
177. Ofshe & Leo, *supra* note 132, at 983.
178. *See* Griffin, *supra* note 7, at 1524.

THE LIMITS OF DECEPTION: AN END TO THE USE OF LIES AND TRICKERY IN CUSTODIAL INTERROGATIONS TO ELICIT THE "TRUTH"?

*Dorothy Heyl**

The State of New York has a long and ignominious history of wrongful convictions related to false confessions. From George Whitmore, a nineteen year old eighth grade drop-out who was watching Reverend Dr. Martin Luther King Jr.'s "I Have a Dream" speech in Wildwood, New Jersey at the time two "career girls" were murdered in a Manhattan apartment,[1] to the five young minorities wrongfully convicted for raping a jogger in Central Park,[2] scores of innocent people have confessed during custodial interrogations in New York to committing brutal crimes.[3] In fact, after Illinois, New York has the most wrongful convictions based on false confessions in the nation.[4]

And the shocking number is likely to grow. In Brooklyn, the District Attorney's Office has reopened as many as fifty trial convictions involving a detective named Louis Scarcella, whose overbearing and allegedly illegal tactics may have sent innocent men to prison.[5] A panel has been appointed to review the

* Dorothy Heyl is Of Counsel to Milbank, Tweed, Hadley & McCloy, LLP. As part of Milbank's *pro bono* program, she has worked extensively with the Innocence Project over the past few years on *amicus* briefs in appellate courts involving the two leading causes of wrongful convictions, false confessions and eyewitness misidentifications. This article is an expansion of an *amicus* brief prepared by the author for The Innocence Network, and filed on behalf of Adrian Thomas in the case of *People v. Thomas*.

[1] *See* Paul Vitello, *George Whitmore Jr. is Dead at 68; Falsely Confessed to 3 Murders in 1964*, N.Y. TIMES, Oct. 16, 2012, at A29. A true crime thriller by ROBERT K. TANENBAUM, ECHOES OF MY SOUL (2013), tells the dramatic story of the case, including the trial that resulted in the conviction of the actual killer, Richard Robles.

[2] *See* SARAH BURNS, THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING ix (2011).

[3] *See* Michael Schwirtz, *Bill to Aid Those Giving False Confessions*, N.Y. TIMES, Feb. 20, 2014, at A19; Editorial, *Authorities Must be Wary of False Confessions*, CHI. SUN-TIMES (Feb. 10, 2014, 8:13 PM), http://www.suntimes.com/opinions/25450396-474/authorities-must-be-wary-of-false-confessions.html.

[4] *See Authorities Must be Wary of False Confessions*, *supra* note 3.

[5] *See* Frances Robles, *A Conflict is Seen in a Review of a Detective's Conduct*, N.Y. TIMES, May 16, 2013, at A23.

convictions[6] and the Legal Aid Society is coordinating with a large group of Manhattan law firms that have taken on individual cases involving Scarcella.[7] Case files relating to Scarcella have been subpoenaed and are being reviewed by a state supreme court justice.[8] As chronicled in the New York Times, Scarcella and others in Brooklyn precincts appear to have used especially coercive techniques to induce confessions in the 1980s and 1990s.[9] But the problem of false confessions is not limited to Brooklyn. In fact, none of the six cases involving disputed confessions heard by the New York Court of Appeals over the past three years involved interrogations by Brooklyn detectives. Interrogations in these cases: *Warney v. State of New York*,[10] *People v. Bedessie*,[11] *People v. Guilford*,[12] *People v. Oliveras*,[13] *People v. Aveni*,[14] and *People v. Thomas*,[15] took place (respectively) in Rochester, Queens, Syracuse, Bronx, Westchester, and Rensselaer Counties. The phenomenon of unreliable, coerced confessions is as broad in New York State as it is deep and longstanding.

That may well change, after a landmark decision by the Court of Appeals this term in *People v. Thomas*.[16] While the court broke no new ground conceptually—following its own and U.S. Supreme Court precedent—the court announced that some police interrogation tactics, when used in combination, cross the line between "voluntary" admissible confessions and "involuntary" or coerced inadmissible confessions.[17] In particular, three types of deception used in the Adrian Thomas case were found by the appellate division to pass muster under the conventional analysis of voluntariness, and defended by the District Attorney's Office, as

[6] Frances Robles, *Panel to Review up to 50 Trial Convictions Involving a Brooklyn Homicide Detective*, N.Y. TIMES, July 2, 2013, at A20.

[7] *See* Vivian Yee, *As 2 Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES, Feb. 7, 2014, at A18.

[8] Frances Robles, *Judge to Review Files on Brooklyn Detective*, N.Y. TIMES, Nov. 14, 2013, at A26.

[9] *See id.*; Robles, *supra* note 5.

[10] Warney v. New York, 947 N.E.2d 639 (N.Y. 2011).

[11] People v. Bedessie, 970 N.E.2d 380 (N.Y. 2012).

[12] People v. Guilford, 991 N.E.2d 204 (N.Y. 2013).

[13] People v. Oliveras, 933 N.E.2d 1241 (N.Y. 2013).

[14] People v. Aveni, 6 N.E.3d 1124 (N.Y. 2014).

[15] People v. Thomas, 8 N.E.3d 308 (N.Y. 2014).

[16] *Id.*

[17] *Id.* at 313–14. The court cited and followed *People v. Guilford* in stating that it is the People's burden to prove that the defendant's statements were made voluntarily, using the test established by the Supreme Court in *Culombe v. Connecticut*. *Id.* Further, the *Thomas* court cited *Miranda v. Arizona* to emphasize that statements may be deemed "involuntary" if they are the result of physical or *psychological* coercion. *Id.* at 313.

perfectly acceptable uses of deception by the police officers.[18] The three lies told to Thomas with which the court took issue were that his wife would be picked up for questioning; that Thomas could save his child's life by confessing; and that the police viewed what happened to his son as accidental.[19] After this decision, police departments will need to exercise caution in conducting interrogations, and should not assume that any form of deception is permissible.[20]

I. *PEOPLE V. THOMAS*: BACKGROUND

Adrian Thomas, a twenty nine year old African-American man from Douglas, Georgia, with a tenth-grade education, met his wife Wilhemina Hicks of Troy, New York, at a chicken processing plant in Douglas where they both worked on the production line.[21] They married, moved to Troy, and together had seven children.[22] The last two, twins, were born two months premature, when Mr. Thomas was twenty five years old.[23] The family lived in a two-bedroom apartment, with the five oldest children sleeping in one bed, and the twins sleeping in bed with the parents.[24] The apartment was neatly maintained and the children clean and well behaved.[25] There was no history of hospitalizations or medical records indicating suspected child abuse of any of the children.[26]

On the evening of Saturday, September 20, 2008, one of the twins, Matthew, was feverish, wheezing, and crying excessively.[27] The

---

[18] *Thomas*, 8 N.E.3d at 313 (citing People v. Thomas, 941 N.Y.S.2d 772, 730–31 (App. Div. 3d Dep't 2012), *rev'd*, 8 N.E.3d 308 (N.Y. 2014)); *see generally* Respondent's Brief at 50–57, *Thomas*, 8 N.E.3d 308 (No. 08-0174) (discussing the "totality of the circumstances" test used to determine the voluntariness of a confession); Brief for District Attorneys Association of the State of New York as Amici Curiae at 7, *Thomas*, 8 N.E.3d 308 (No. 08-0174) ("Some police deception can be an appropriate investigative tool . . . and a statement should not be 'deemed' involuntary on the basis of deceptive police conduct that did not coerce it.").

[19] *Thomas*, 8 N.E.3d at 314–16.

[20] James C. McKinley, Jr., *Police Coercion Cited in Order for Retrial*, N.Y. TIMES, Feb. 21, 2014, at A21 ("Art Glass, the acting district attorney in Rensselaer County, where Mr. Thomas was prosecuted, said the ruling was likely to force police departments to be more careful during interviews. 'The court didn't provide any bright-line rule or set down any clear boundaries you can't cross,' Mr. Glass said. 'I think what it tells them is to be cautious, more cautious than they have been.'").

[21] Brief for The Innocence Network as Amici Curiae Supporting Defendant-Appellant at 21, *Thomas*, 8 N.E.3d 308 (No. 08-0174).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] People v. Thomas, 8 N.E.3d 308, 311 n.2 (N.Y. 2014).

[27] Brief for The Innocence Network, *supra* note 21, at 21.

parents cooled him down and comforted him, and put him to bed with his twin brother at around 11:30 p.m.[28] At around 3:00 a.m., Matthew woke up with a fever, and Mr. Thomas prepared formula for the twins.[29] After the feeding, Mr. Thomas fell asleep, assured by his wife that Matthew's fever had gone down.[30] The next morning, Mr. Thomas was awakened by his wife, who told him that "the baby is not moving [or] breathing."[31] As his wife performed CPR, he called 911 and the baby was taken in an ambulance to the emergency room at nearby Samaritan Hospital.[32] There, he was found to have hypotension and extremely low blood pressure, white blood cell count, and temperature.[33] The emergency room physician ordered a blood test and gave septic shock as the most likely explanation of her differential diagnosis.[34] Matthew was transferred to the pediatric intensive care unit at Albany Center, arriving there shortly after noon on Sunday, September 21, 2008.[35] A CT scan found fluid collections in his brain, but no skull fracture.[36] That afternoon, the baby was put on life support.[37] Even though the CT scan found no skull fracture, a physician at Albany Medical believed initially that Matthew's symptoms and condition were the result of a skull fracture.[38] He told the Troy Police, "This baby has a fractured skull. This baby was murdered."[39] He said, "The baby was slammed into something very hard like a high speed impact in a vehicle."[40]

On Sunday evening, the Troy Police and Child Protective Services (CPS) visited the Thomas apartment, where Mr. Thomas was caring for his children and took the six children from the home.[41] At midnight, the police returned to the apartment and Thomas agreed to accompany them to the police station.[42] At trial, the prosecution contended that the interrogation that followed was not "custodial,"

[28] *Id.* at 21–22.
[29] *Id.* at 22.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 22–23.
[39] *Id.* at 23.
[40] *Id.*
[41] *Id.*
[42] *Id.*

triggering no Miranda rights.[43] Presumably, since Thomas was given Miranda warnings, the Court of Appeals did not express any view on the custodial nature of the interrogation.[44]

Over the next two hours, the police questioned Thomas in a room set up for video monitoring on the events leading up to Matthew's hospitalization.[45] At around 2 a.m., Thomas expressed a suicidal urge, and the police had him committed to a psychiatric ward.[46] When he was released the next evening, the police resumed the questioning for over the next seven hours, videotaping throughout.[47] Thomas signed three statements over the course of the interrogation, admitting in the last one that on three occasions "he [had] 'slammed' Matthew down on a mattress just 17 inches above the floor."[48] Counsel for Thomas sought unsuccessfully to have the statements excluded from evidence at trial, and Thomas was convicted, following a jury trial, of murdering his son.[49] He was sentenced to a term of twenty five years to life and had served over five years of the sentence before the Court of Appeals' decision, which ordered a new trial with the statements excluded from evidence.[50] On June 12, 2014, Thomas was acquitted by the jury in the retrial, and is now a free man.[51]

II. PSYCHOLOGICAL INTERROGATION, *MIRANDA* AND THE VOLUNTARINESS STANDARD

The psychological techniques employed in the interrogation of Adrian Thomas have been used for decades. These techniques are designed to convince a person who is believed to have committed a crime that it is in his or her best interest (rather than a self-destructive decision) to give in to police demands for a confession.[52] Social scientists specializing in the phenomenon of "false confessions" have explained that "[a]n interrogator strives to

[43] *Id.* at 24.

[44] *See generally* People v. Thomas, 8 N.E.3d 308 (N.Y. 2014). (discussing the voluntariness of Thomas' statement, rather than the interrogation being custodial in nature).

[45] *Id.* at 311.

[46] *Id.*

[47] *Id.*

[48] *See id.* at 309.

[49] *Id.* at 309, 313.

[50] *Id.* at 317; People v. Thomas, 941 N.Y.S.2d 722, 725 (App. Div. 3d Dep't 2012), *rev'd*, 8 N.E.3d 308 (N.Y. 2014).

[51] Bob Gardinier, *Stunning 'Not Guilty,'* TIMES UNION (Albany, N.Y.), June 13, 2014, at A1.

[52] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

neutralize the person's resistance [to confessing] by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs."[53] To accomplish this, the police isolate a suspect from family and friends in a police-dominated environment that is "stress-inducing by design."[54] The interrogation is "structured to promote a sense of isolation and increase the anxiety and despair" arising from continued assertions of innocence.[55] The strategies to achieve this result with presumably guilty suspects are explained in police manuals, the most prominent of which is Inbau & Reid, *Criminal Interrogations and Confessions*, published in 1962, revised over the years, and still in print.[56] The psychologically based Reid Technique, which has replaced the brutal means of persuasion found unconstitutional in *Brown v. Mississippi*,[57] has been widely adopted by police departments[58] and has not been viewed by courts as impermissibly coercive.[59] That is, courts have generally found that confessions elicited using the Reid Technique are "voluntary," absent some other circumstance indicating that they were coerced and thus "involuntary."[60]

To understand why an overtly manipulative method of obtaining confessions has usually been viewed as not "coercive," it is necessary to understand two developments in the jurisprudence on

---

[53] *Id.*

[54] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010); *see* Ofshe & Leo, *supra* note 52, at 997–98.

[55] Kassin et al., *supra* note 54, at 6.

[56] *See* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); *see also* Kassin et al., *supra* note 54, at 7 (describing the Reid Technique first published in *Criminal Interrogation and Confessions* as "the most influential approach" to criminal interrogation).

[57] Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[58] *See* Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1330 (2011).

[59] Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 800 (2003).

[60] *See, e.g.*, State v. Thaggard, 527 N.W.2d 804, 811–12 (Minn. 1995) (finding confession voluntary where defendant understood the *Miranda* warning, had prior experience with the criminal justice system, and was interrogated for a short period of time by a single police officer, and where defendant was allowed a bathroom break, was not intoxicated, and there were no threats or physical intimidation by the officer); State v. Ulch, No. L-00-1355, 2002 Ohio App. LEXIS 1866, at *11 (Ohio Ct. App. Apr. 19, 2002) (holding that appellant's due process rights were not violated where a detective lied during an interrogation when employing the Reid Technique to encourage appellant to make a statement); State v. Myers, 596 S.E.2d 488, 492 (S.C. 2004) (finding defendant's confession valid in the absence of evidence that defendant's will was overborne or evidence that the confession was not voluntary where defendant was advised of his rights three times, interrogations did not last more than a few hours, and defendant was well rested and offered food).

the due process rights of defendants in criminal cases (and, correspondingly, rights under New York Criminal Procedure Law, which has followed the same pattern).[61] The first development is *Miranda v. Arizona*,[62] and the related case of *Colorado v. Connelly*.[63]

In *Miranda v. Arizona*, the Supreme Court acknowledged in dicta that police-dominated interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely."[64] However, even while explaining how the Reid method psychological techniques can overcome a person's will to refrain from self-incrimination, the Supreme Court addressed the problem of psychologically coercive techniques only by seeking to eliminate the "police-dominated" atmosphere needed for them to succeed, i.e., through the requirement of warnings advising suspects in custody of their constitutional rights to counsel and to remain silent.[65] The Court's observations in *Miranda* as to the coercive nature of psychological interrogation remain dicta, and the requirement for providing *Miranda* warnings to suspects in custody has since come to dominate courts' analyses as to whether defendants' confessions are admissible evidence.[66] Notably, three dissenting justices in *Miranda* pointed out that under the reasoning of the majority, *all* custodial interrogations were deemed coercive, and that, assuming only some were coercive, the majority could have, but did not, specify means to identify or deter actually coercive interrogations (such as requiring observers or setting time limits).[67] The only deterrent to coercive custodial interrogations established in *Miranda* was *Miranda* warnings, which the dissent assumed would rarely be waived.[68] This has been far from the case, as indicated by the six cases recently heard by the New York Court of Appeals, including *Thomas*, in which *Miranda* rights were waived.[69]

Colorado v. Connelly did not involve the psychological techniques used in custodial interrogations, but rather the apparently

---

[61] *See* N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2014).

[62] Miranda v. Arizona, 384 U.S. 436 (1966).

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

[64] *Miranda*, 384 U.S. at 467.

[65] *Id.* at 471.

[66] *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (applying the same reasoning as *Miranda* regarding the questioning of unwarned suspects).

[67] *Miranda*, 384 U.S. at 533–34 (White, J., dissenting).

[68] *Id.* at 536.

[69] *See* George C. Thomas III, *Missing* Miranda*'s Story: Gary L. Stuart,* Miranda*: The Story of America's Right to Remain Silent*, 2 OHIO ST. J. CRIM. L. 677, 687 (2005) ("[S]tudies show that roughly eighty percent of suspects waive *Miranda* and talk to the police.").

unreliable confession of a schizophrenic man who was in a psychotic state at the time he confessed to a murder.[70] The Supreme Court found that there had been no "police overreaching," so the confession should not have been suppressed as involuntary.[71] That holding is not the influential part of the decision. Rather, *Connelly* held that the unreliability of the confession was not a matter of constitutional concern, and in the post-*Connelly* era, the coercive nature of psychological techniques in custodial interrogations has generally not been viewed as a violation of due process.[72] The overwhelmingly common approach is to evaluate the due process of a custodial interrogation only in terms of whether proper *Miranda* warnings were provided, understood, and intelligently waived, and not to evaluate the coercive effect of the psychological techniques.[73]

The second development is the separate law developed under the "voluntariness" standard, which remains the legal framework for analyzing the use of psychological techniques in obtaining confessions under the Due Process Clause of the United States Constitution, and New York law.[74] *Miranda* did not disturb the doctrine that the admissibility of a defendant's statements made while in custody must be judged solely by whether they were "voluntary."[75] Involuntary (or coerced) confessions are viewed as a violation of due process under the United States Constitution.[76] So, for example, in *Miller v. Fenton*,[77] the Court explained:

> This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique

[70] Colorado v. Connelly, 479 U.S. 157, 161 (1986).

[71] *See id.* at 169–70.

[72] *See, e.g.*, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 106, 116–17 (1997) (noting that *Connelly* did not substantially change the post-*Miranda* due process test and therefore the Due Process Clause still provides little to no protection against coercive interrogation techniques); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 782–83 (2013) (noting that, when determining whether a confession was voluntary under the Due Process Clause, the reliability of the confession is not a concern).

[73] *See* Leo et al., *supra* note 72, at 787–90.

[74] *Id.* at 783; *see, e.g.*, People v. Anderson, 364 N.E.2d 1318, 1319–20 (N.Y. 1977) (discussing whether or not the defendant's confession was involuntary and therefore invalid under the Due Process Clause based on the "totality of the circumstances"); People v. Dunbar, 958 N.Y.S.2d 764, 770–71 (App. Div. 2d Dep't 2013) (discussing the "voluntariness test" the court uses to determine whether a suspect's confession is valid under the Due Process Clause).

[75] *See* Leo et al., *supra* note 72, at 782–83; *Dunbar*, 958 N.Y.S.2d at 770–71.

[76] Leo et al., *supra* note 72, at 781 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[77] Miller v. Fenton, 474 U.S. 104 (1985).

> characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown v. Mississippi* . . . was the wellspring of this notion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession.[78]

Assuming a suspect was properly given *Miranda* warnings and knowingly and intelligently waived the rights to remain silent and to an attorney, the test for admissibility of custodial confession is whether, based on the totality of circumstances, "the government agents' conduct 'was such as to overbear [a defendant's] will to resist and bring about confessions not freely self-determined.'"[79] As the Supreme Court explained in *Withrow v. Williams*,[80] the totality of the circumstances test for voluntariness presents courts with a list of factors, none accorded more weight than the others:

> Those potential circumstances include not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health. They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation.[81]

The concept of "voluntariness," with its elevated, elusive concept of "free will," has not served defendants well. Missing from this list is any guidance as to the possible coerciveness of specific interrogation techniques. Instead, it is a loose, multi-factor standard, lacking a bright-line rule, which has afforded police departments tremendous leeway and granted excessive discretion to trial courts.[82] Indeed, the term "involuntary" has been termed a

---

[78] *Id.* at 109 (citations omitted).

[79] United States v. Kaba, 999 F.2d 47, 51 (2d Cir. 1993) (citing United States v. Guarno, 819 F.2d 28, 30 (2d Cir. 1987)) (quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961)).

[80] Withrow v. Williams, 507 U.S. 680 (1993).

[81] *Id.* at 693–94 (citations omitted).

[82] *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 86–87, 262 (2013) (critiquing multi-factor tests).

"convenient shorthand" for the complex conclusion that a confession violates the Due Process guarantee of the Fourteenth Amendment of the U.S. Constitution.[83] And, as the Court explained in *Schneckloth v. Bustamonte*,[84] the cases analyzing the admissibility of confessions "yield no talismanic definition of 'voluntariness' mechanically applicable to the host of situations where the question has arisen."[85] Rather, as noted in *Culombe v. Connecticut*, "[t]he notion of 'voluntariness' is itself an amphibian."[86]

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.[87]

"It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.' Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect."[88] On one hand, the ambiguous meaning of "voluntary" is unfortunate, in light of the heavy freight it bears of some of the foundational beliefs of our criminal justice system.[89] On the other hand, the commodiousness of the "totality of the circumstances" and "voluntary" standards permits courts the leeway to craft a meaningful standard for identifying the kinds of psychological interrogation techniques that can "overbear" a person's "will."[90] The use of deception is one such technique. In *Thomas*, the court fleshed out the voluntariness standard in a manner that should

---

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

[84] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[85] *Id.* at 224.

[86] *Id.* at 605.

[87] Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72–73 (1966); see Judge Posner's biting analysis of "proximate cause" in POSNER, *supra* note 82, at 65–66.

[88] *Schneckloth*, 412 U.S. at 224–25.

[89] *See* Miller v. Fenton, 474 U.S. 104, 109–10 (1985); Culombe v. Connecticut, 367 U.S. 568, 602, 605 (1961).

[90] *Culombe*, 367 U.S. at 602, 631–35.

prompt police departments to rethink the Reid method and the use of deception in interrogations.[91] What happened in the *Thomas* case, according to the court, was that a "set of highly coercive deceptions . . . were of a kind sufficiently potent to nullify individual judgment."[92] The deceptions were "lethal" to the self-determination of Adrian Thomas, "an unsophisticated individual without experience in the criminal justice system."[93] In finding the inculpatory statements involuntary, the court tied the problem of deception to a bedrock constitutional principle: "[w]hat transpired during defendant's interrogation was not consonant with and, indeed, completely undermined, defendant's right not to incriminate himself—to remain silent."[94] So what was so egregious about the *Thomas* interrogation?

III. PERMISSIBLE DECEPTION

It comes as a surprise to lawyers and lay people alike that the police are permitted to lie to suspects when interrogating them.[95] This seems contrary to the general abhorrence of falsehoods in other legal contexts, and the severe punishment of those who lie, including for lying to the federal government.[96] The tolerance for lying is apparently one-sided: you cannot lie to the government, but the government can lie to you. However, the rationale for this double standard—that misrepresentations to a reluctant suspect can lead to a "true" confession—falls away when the resulting confession is false.

A decades-old Supreme Court case, *Frazier v. Cupp*,[97] is often cited for the proposition that police can use deception in custodial interrogations. The case involved the classic prisoner's dilemma, a strategy used when two suspects are thought to have committed a crime together and both deny their involvement.[98] The police separate them so neither is aware of what the other suspect is

[91] People v. Thomas, 8 N.E.3d 308, 309–17 (N.Y. 2014).

[92] *Id.* at 314.

[93] *Id.*

[94] *Id.*

[95] *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 451 (1996).

[96] *See* 18 U.S.C. § 1001(a) (2012).

[97] Frazier v. Cupp, 394 U.S. 731 (1969).

[98] *Compare id.* at 737–38 (describing the police interrogation tactics used against the petitioner), *with* Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1018 (2014) (describing the traditional example of a prisoner's dilemma).

saying.[99] Their joint interest would be best served if neither incriminated the other (or themselves), but they separately have an individual interest in avoiding punishment and therefore blame the other.[100] The police take advantage of their lack of information about what the other is saying and misrepresent to one suspect that the other suspect has provided incriminating information about her.[101] This misrepresentation has two goals: first, to make the suspect infer that the evidence against her is so strong that confessing is a rational choice; and second, to make the suspect turn against the other suspect out of a (fabricated) sense of betrayal.[102] If the ploy works with both suspects, the police have elicited two confessions, achieved with deceptive statements about the other suspect's statements.

In *Frazier v. Cupp*, the Court found that the "prisoner's dilemma" strategy was not coercive in the context of a brief interrogation of adults of average intelligence.[103] Two cousins, who were suspects in a murder investigation, had confessed to the crime during custodial interrogations, and were convicted.[104] In a habeas appeal, one of the cousins argued that his confession should not have been admitted because, *inter alia*, the officer questioning him had falsely told him that his cousin (Rawls) had been brought in and he had confessed.[105] Rather than address head on the permissibility or not of the deception, the Court held, "[t]he questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[106]

This, of course, dodges the question. What if the questioning had gone on for hours? What if the petitioner was not mature, or of below average intelligence? One suspects that the narrow holding resulted from the Court's reluctance to prohibit a highly effective investigative technique that may not, in fact, pose the risk of false

---

[99] Norris & Redlich, *supra* note 98, at 1018.

[100] Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1388 n.82 (2009); Norris & Redlich, *supra* note 97, at 1018.

[101] David B. Lipsky & Ariel C. Avgar, *Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47, 69–70 (2006).

[102] *See* Brescia, *supra* note 100, at 1388 n.82.

[103] Frazier v. Cupp, 394 U.S. 731, 739 (1969).

[104] *Id.* at 732, 737–38.

[105] *Id.* at 737–38.

[106] *Id.* at 739.

confessions. In the interrogation of Adrian Thomas, the police falsely told him that his wife had told them

> [t]hat Saturday evening the child had suddenly stopped screaming when Mr. Thomas was alone with him, and "she said he started acted funny after that." When Mr. Thomas retells how he had comforted his child and did not notice anything different about him until Sunday morning, Sgt. Mason pretends to level with him: "I ain't going to bullshit you man, all right, your wife said you must have done it last night . . . you must have slammed the baby last night." Mr. Thomas resist[ed] the ploy, even when a police officer [told] him that "She signed the paperwork."[107]

It may be that the kind of deception at issue in *Frazier v. Cupp* does not pose the risk of false confessions that other kinds of deception do.

This holding on a fairly innocuous form of deception has often been taken as carte blanche for the use of deception in interrogations. Courts across the nation have found that the use of deception, trickery, and ruses is just one of the factors in a voluntariness analysis and does not automatically render a confession involuntary.[108] *Frazier v. Cupp* is the likely basis for the

---

[107] Brief for The Innocence Network, *supra* note 21, at 25–26 (footnotes omitted).

[108] *Ex parte* Jackson, 836 So. 2d 979, 984 (Ala. 2002); Sovalik v. State, 612 P.2d 1003, 1007 (Alaska 1980); State v. Carrillo, 750 P.2d 883, 894–95 (Ariz. 1988); Goodwin v. State, 281 S.W.3d 258, 265, 267 (Ark. 2008); People v. Smith, 150 P.3d 1224, 1241–42 (Cal. 2007); State v. Klinck, 259 P.3d 489, 495–96 (Colo. 2011); Baynard v. State, 518 A.2d 682, 691 (Del. 1986); *In re* D. A. S., 391 A.2d 255, 258, 259 (D.C. 1978); Martin v. State, 107 So. 3d 281, 298 (Fla. 2012); Moore v. State, 199 S.E.2d 243, 244 (Ga. 1973); State v. Kelekolio, 849 P.2d 58, 70 (Haw. 1993); State v. Bentley, 975 P.2d 785, 788 (Idaho 1999); People v. Melock, 599 N.E.2d 941, 953 (Ill. 1992); Luckhart v. State, 736 N.E.2d 227, 231 (Ind. 2000); State v. Oliver, 341 N.W.2d 25, 31 (Iowa 1983); State v. Randolph, 301 P.3d 300, 309–10 (Kan. 2013); Springer v. Commonwealth, 998 S.W.2d 439, 447 (Ky. 1999); State v. Holmes, 5 So. 3d 42, 73–74 (La. 2008); State v. Nightingale, 58 A.3d 1057, 1069–70, 1070 (Me. 2012); Commonwealth v. Selby, 651 N.E.2d 843, 848–49 (Mass. 1995); People v. Fundaro, No. 301194, 2012 Mich. App. LEXIS 186, at *14–15 (Mich. Ct. App. 2012), *lv. denied*, 815 N.W.2d 445 (Mich. 2012); State v. Thaggard, 527 N.W.2d 804, 810 (Minn. 1995); Davis v. State, 551 So. 2d 165, 169 (Miss. 1989); State v. Flowers, 592 S.W.2d 167, 169 (Mo. 1979); State v. Phelps, 696 P.2d 447, 452 (Mont. 1985); State v. Nissen, 560 N.W.2d 157, 170 (Neb. 1997); Sheriff, Washoe Cnty. v. Bessey, 914 P.2d 618, 621 (Nev. 1996); State v. Wood, 519 A.2d 277, 279 (N.H. 1986); State v. Cooper, 700 A.2d 306, 320 (N.J. 1997); State v. Evans, 210 P.3d 216, 226 (N.M. 2009); State v. Jackson, 304 S.E.2d 134, 147–48 (N.C. 1983), *vacated*, 479 U.S. 1077 (1987); State v. Murray, 510 N.W.2d 107, 113–14 (N.D. 1994) (Levine, J., concurring); State v. Wiles, 571 N.E.2d 97, 112 (Ohio 1991); Pierce v. State, 878 P.2d 369, 372 (Okla. Crim. App. 1994); State v. Quinn, 623 P.2d 630, 639 (Or. 1981); Commonwealth v. Jones, 322 A.2d 119, 126 (Pa. 1974); State v. Marini, 638 A.2d 507, 513 (R.I. 1994); State v. Von Dohlen, 471 S.E.2d 689, 694–95 (S.C. 1996); State v. Wright, 679 N.W.2d 466, 469 (S.D. 2004); McGee v. State, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969); State v. Galli, 967 P.2d 930, 936–37 (Utah 1998), *superseded by*

statement in *Thomas* that "[i]t is well established that not all deception of a suspect is coercive."[109] The court may also have been thinking of "mere deception," the phrase in New York cases pertaining to the limited circumstances in which police are permitted to misrepresent certain facts, such as the fact that a victim has died.[110] Under New York precedent, deception crosses the line from "mere deception" to impermissible coercion when it is combined with a promise or threat, or other coercive techniques that together deprive one of the ability to make a rational decision or induce a potentially false confession.[111] Clearly there is a limit to deception, but courts have not articulated where the line is drawn.

IV. DECEPTION INHERENT IN THE REID METHOD

One of the core principles of psychological interrogation is that confessions can be elicited from reluctant suspects if the seriousness of the crime that they are suspected to have committed is "minimized." Police are taught to suggest exculpatory explanations to a suspect, such as self-defense, so that the suspect does not feel judged or blameworthy. As the Supreme Court explained in *Miranda* concerning the Reid method:

> The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to

statute, UTAH CODE ANN. § 76-3-401 (West 2013), *as recognized in* State v. Epling, 262 P.3d 440, 447 (Utah 2011); Rodgers v. Commonwealth, 318 S.E.2d 298, 304 (Va. 1984); State v. Braun, 509 P.2d 742, 745 (Wash. 1973); State v. Worley, 369 S.E.2d 706, 717 (W. Va. 1988); State v. Ward, 767 N.W.2d 236, 246 (Wis. 2009); Garcia v. State, 777 P.2d 603, 606 (Wyo. 1989); *see* Lewis v. State, 404 A.2d 1073, 1081–82 (Md. 1979) (remanding to lower court where the issue of police coercion impacting voluntariness will be addressed); Wilson v. State, 311 S.W.3d 452, 462–64 (Tex. Crim. App. 2010) (discussing police deception when interrogating versus fabricating evidence); State v. Bacon, 658 A.2d 54, 64 (Vt. 1995) (explaining that while police falsely told defendant that they talked to another inmate, the confession was still voluntary); State v. Lawrence, 920 A.2d 236, 258–59 (Conn. 2007) (discussing the dissent's understanding of police tactics in wrongful convictions).

[109] People v. Thomas, 8 N.E.3d 308, 313 (N.Y. 2014).

[110] People v. Pereira, 258 N.E.2d 194, 195 (N.Y. 1970) (quoting People v. McQueen, 221 N.E.2d 550, 554 (N.Y. 1966)) ("No contention is made . . . nor is there evidence that any promise or threat was made to appellant, and the law is well settled that in the absence of such factors mere deception is not enough.").

[111] *See, e.g.*, People v. Tarsia, 405 N.E.2d 188, 193 (N.Y. 1980) (finding confession voluntary where defendant was *not* told that voice-stress test was omniscient and police officers "did not browbeat Tarsia with accusations of untruthfulness").

> minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.[112]

As the Court explained further, to elicit a confession of self-defense from a suspect suspected of a revenge murder, the police supply all the details for the innocent explanation of the shooting, and when the suspect agrees (putting the gun in his hand and agreeing that he pulled the trigger), the police then refer to circumstantial evidence that negates the self-defense explanation.[113] "This should enable him to secure the entire story."[114] In other words, the ostensibly innocent admission is a crucial step in a multi-step process of extracting a confession to a criminal act.

In *Thomas*, the court found the minimization techniques used to be impermissibly deceptive.[115] "The premise of the interrogation was that an adult within the Thomas-Hicks household must have inflicted traumatic head injuries on the infant,"[116] and yet the police officers told Thomas "67 times that what had been done to his son was an accident, 14 times that he would not be arrested, and eight times that he would be going home."[117] Also, whenever Mr. Thomas protested that he had not intentionally hurt his child, the police officer provided "an elaborate explanation" of why seemingly violent actions would not be viewed as intentional.[118] These representations were, according to the court, "undeniably instrumental in the extraction of defendant's most damaging admissions."[119]

People v. Thomas does not entirely prohibit the use of minimization techniques to secure confessions, but it does leave open the possibility that even limited minimization through false assurances could jeopardize the validity of a confession: "Had there been only a few such deceptive assurances, perhaps they might be deemed insufficient to raise a question as to whether defendant's

---

[112] Miranda v. Arizona, 384 U.S. 436, 450 (1966).
[113] *Id.* at 451–52.
[114] *Id.* at 452.
[115] People v. Thomas, 8 N.E.3d 308, 316–317 (N.Y. 2014).
[116] *Id.* at 311.
[117] *Id.* at 316.
[118] *Id.*
[119] *Id.*

confession had been obtained in violation of due process."[120] There is enough wiggle room in this statement ("*perhaps* they *might* be deemed insufficient") to rein in the use of deceptive minimization as a standard interrogation technique in New York. The court did not take the view that there is no problem with the use of false assurances, in moderation, to obtain confessions.

V. BASELESS THREATS

After more than an hour of interviewing Thomas without obtaining any inculpatory statements, the police officers tried a new tactic.[121] They told him that they were going to the hospital to "scoop" his wife out.[122] This ploy, unlike the lie that his wife had provided incriminatory information about him, worked extremely well. Thomas agreed to "'take the fall' for his wife."[123] He told the officers that he had not harmed his child, and he did not believe that his wife had either, but that he would take responsibility in order to keep her out of trouble.[124] The officers purported to reject this offer to lie (it was caught on tape after all), but, as the court found, "it is clear that defendant's agreement to 'take the fall'—an immediate response to the threat against his wife—was pivotal to the course of the ensuing interrogation and instrument to his final self-inculpation."[125]

The Court found the threat to arrest Thomas's wife "patently coercive," relying on a Supreme Court case, *Garrity v. New Jersey*,[126] which holds that interrogators may not threaten that the assertion of Fifth Amendment rights will result in harm to the vital interests of the interrogated person.[127] *Garrity* involved confessions by state employees questioned during a corruption inquiry who had been told that they would lose their jobs if they declined to answer questions on the basis of their Fifth Amendment privilege against self-incrimination.[128] The Court relied on one other case, *People v. Avant*,[129] which followed *Garrity* and involved government employees who would forfeit the right to bid on contracts if they

[120] *Id.*
[121] *Id.* at 311.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 314.
[126] Garrity v. New Jersey, 385 U.S. 493 (1967).
[127] *Id.* at 496–97; *Thomas*, 8 N.E.3d at 314, 316–17.
[128] *Thomas*, 8 N.E.3d at 314.
[129] People v. Avant, 307 N.E.2d 230 (N.Y. 1973).

declined to answer questions.[130] Neither case involved a custodial interrogation of a suspect under arrest in a criminal investigation, and neither involved the use of a threat against a suspect who has not asserted a Fifth Amendment right to remain silent, but is rather telling the police an exculpatory narrative.

Since there are cases closer to the facts than *Garrity*, including *Rogers v. Richmond*,[131] one can infer that the Court relied on the "Rule of *Garrity*" to announce a black-letter rule: when interrogating suspects who are not incriminating themselves, police cannot threaten to deprive them of a vital interest. The opinion suggests that such threats, standing on their own, are sufficient to render the resulting confession involuntary, and thus inadmissible.[132]

VI. THE MEDICAL RUSE

The other "patently coercive representation made to [Thomas] . . . was that his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life."[133] The opinion points out that this representation was made to Thomas twenty one times.[134] As demonstrated by a portion of the transcript quoted in the opinion, the representations that Thomas could save his child's life by disclosing information were dramatically manipulative:

> SERGEANT MASON: The doctors need to know this. Do you want to save your baby's life, alright? Do you want to save your baby's life or do you want your baby to die tonight?
>
> DEFENDANT: No, I want to save his life.
>
> SERGEANT MASON: Are you sure about that? Because you don't seem like you want to save your baby's life right now. You seem like you're beating around the bush with me.
>
> DEFENDANT: I'm not lying.
>
> SERGEANT MASON: You better find that memory right now, Adrian. You've got to find that memory. This is important for your son's life man. You know what happens

---

[130] *Thomas*, 8 N.E.3d at 314.

[131] Rogers v. Richmond, 365 U.S. 534 (1961) (involving a suspect who persistently denied involvement in a crime until the police said his wife would be taken into custody, at which point he admitted culpable conduct, which is cited elsewhere in the opinion for a different point).

[132] *Id.* at 548 n.5.

[133] *Thomas*, 8 N.E.3d at 314–15.

[134] *Id.*

> when you find that memory? Maybe if we get this information, okay, maybe he's able to save your son's life. Maybe your wife forgives you for what happened. Maybe your family lives happier ever after. But you know what, if you can't find that memory and those doctors can't save your son's life, then what kind of future are you going to have? Where's it going to go? What's going to happen if Matthew dies in that hospital tonight, man?[135]

This exhortation was thoroughly dishonest since the infant was brain-dead at the time, with no hope of recovery, and any statements by Thomas would help neither the child, Thomas, nor his family.[136] The police officers took advantage of Thomas's lack of medical expertise, falsely claiming that one of them "had experience with head injuries during his military service in Operation Desert Storm."[137] They accused Thomas of "lying" by not admitting to striking his child's head, when they themselves were demonstrably lying to him, and they had no reliable information to contradict Thomas.[138]

The court struggled with the idea that pleading with a parent to save the life of a dying child could give rise to a violation of the Constitution, observing in dicta, "[p]erhaps speaking in such a circumstance would amount to a valid waiver of the Fifth Amendment privilege if the underlying representations were true."[139] But, as the court added, "here they were false."[140] In other words, the deception is the key difference between police conduct that might pass muster and that which does not. Citing no authority, the court used a novel analysis of the situation this deception posed for Thomas: "These falsehoods were coercive by making defendant's constitutionally protected option to remain silent seem valueless."[141] This finding does not take into account that Thomas was not, in fact, seeking to remain silent (rather he was repeatedly asserting his version of what happened), or the crucial question of whether the deception and exhortations "overbore" his will.[142] The explanation is likely that the court took pains to hold that the three kinds of deceptive statements, taken in

---

[135] *Id.* at 311–12 (internal quotation marks omitted).
[136] *See id.* at 311.
[137] *Id.* at 312.
[138] *See id.* at 311.
[139] *Id.* at 315.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 316.

combination as the "totality of the circumstances," made Thomas's confession involuntary, and refrained from holding that any of the three types of deception alone coerced the inculpatory statements, making them inadmissible.[143] The result is the unclear legal standard of whether a medical ruse renders a Fifth Amendment right "seem valueless."

The court was clear-headed, however, in addressing an analytical error by the appellate division, which held that the repeated misrepresentations that the doctors could save the child's life if Thomas testified truthfully did not render his statements involuntary because appealing to parental concerns did not create a substantial risk that he might falsely incriminate himself.[144] Even if it were the case that a medical ruse could lead to the truth, that is irrelevant under the Due Process Clause, which looks to coercion, separate and apart from the truthfulness of any statements elicited, as the Supreme Court held in *Rogers v. Richmond*.[145] The court pointed out that under Criminal Procedure Law section 60.45, if an interrogation technique "creates a substantial risk that the defendant might falsely incriminate himself," the resulting statements are "involuntarily made."[146] But this additional protection provided by New York statutory law does not override the constitutional prohibition of using "involuntary" statements against defendants, regardless of whether they are true, as the court recognized.[147]

VII. CONTAMINATION AND THE RISK OF FALSE CONFESSIONS

In a development that bodes well for the return of reliability as a measure of admissible confessions, the Court of Appeals, in the final section of the *Thomas* opinion, used section 60.45 of the New York Criminal Procedure Law as a means to address the extremely troubling contamination of Thomas's statements by the interrogating officers and the likelihood that Thomas's incriminating statements were indeed false.[148] This analysis, based on New York statutory law, supplements, without undermining, the court's holding that coerced statements are involuntary, and thus

[143] *Id.* at 316.
[144] *Id.* at 315.
[145] *Id.* at 315–16 (quoting Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).
[146] *Thomas*, 8 N.E.3d at 315 (citing N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2014)).
[147] *Id.*
[148] *Id.* at 315–16.

inadmissible, even if the statements elicited are actually true. Indeed, the court indicated in the oral argument of a companion case, *People v. Aveni*, argued the same day as *Thomas*, some discomfort with the notion that the defendant's statement in that case may well have been true.[149] In *Thomas*, by comparison, there was every reason to believe Thomas's "confession" was false.[150]

Contamination occurs when the officers conducting an interrogation, either knowingly or not, disclose nonpublic details of a crime to the suspect, who then incorporates the details into his narrative. The details appear to corroborate the confession and become powerful evidence throughout the prosecution of the suspect.

Americans learned about the unconscious phenomenon of contamination when a retired detective named Jim Trainum reviewed an old case file on a woman who had confessed to killing a man but was not charged because she had a strong alibi. He suspected that she had gotten away with murder because of the insider things she knew about the victim, such as that he was wearing his wedding ring and where his credit card had been used. When he looked back at the file he learned that the interrogation had accidentally been videotaped. To his surprise, he found that the tape showed exactly how an innocent person could have known the insider deals: they had shown her the credit card slips, and a crime scene photograph that showed a wedding ring![151]

Contamination occurred in nine out of ten false confession cases in New York studied by Professor Brandon Garrett.[152] This high correlation is because there is a direct connection between contamination and the specious trustworthiness of a confession that is in fact false. In *Warney v. State of New York*, involving whether a statement was "voluntary" in the context of a statute governing the eligibility of wrongfully convicted persons for state compensation,

---

[149] *See* Transcript of Oral Argument at 69–72, People v. Aveni, 6 N.E.3d 1124 (N.Y. 2014) (No. 19), *available at* http://www.nycourts.gov/ctapps/arguments/2014/Jan14/Transcripts/011414-18-19-Oral-Argument-Transcript.pdf. The court upheld the decision below in *Aveni* in favor of the defendant on technical grounds, not deciding whether coerced, but true, statements should be excluded. *Aveni*, 6 N.E.3d at 1126.

[150] *See Thomas*, 8 N.E.3d at 315–16.

[151] Jim Dwyer, *After Baby Hope Confession, Assessing the Value of Taped Interrogations*, N.Y. TIMES, Oct. 25, 2013, at A20 (recounting the experiences of Washington Detective Jim Trainum in relation to a decision by the New York City Police Commissioner to begin videotaping suspect interrogations in serious cases).

[152] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 *passim* (2010).

Judge Smith observed in his concurring opinion that numerous details in Warney's confession "point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless."[153] Judge Smith concluded that "a confession cannot fairly be called 'uncoerced' that results from the sort of calculated manipulation that appears to be present here—even if the police did not actually beat or torture the confesser, or threaten to do so."[154] This "calculated manipulation" was police contamination.[155]

In *Thomas*, the contamination consisted of the police officers informing Thomas of non-public (and most likely erroneous) information provided by the treating physician—that the child's head had been hurled at a high speed against a hard surface.[156] For hours, Thomas provided no information that supported that explanation of the child's death.[157] Instead, as the court found, every single inculpatory fact was suggested to Thomas by the police.[158] The videotape of the confession (key excerpts of which can be seen in the documentary Scenes of a Crime) contains chilling images of an officer forcefully throwing down a notebook to dramatize how Thomas allegedly threw his son onto a bed.[159] But, as the court pointed out, Thomas merely engaged in a "closely directed enactment" of what he was bidden to do, with the direction he should not "'sugar–coat' it."[160]

Holding that the various misrepresentations and false assurances used to elicit and shape Thomas's admissions "manifestly raised a substantial risk of false incrimination," the court ruled that the "confession provided no independent confirmation that he had in fact caused the child's fatal injuries."[161] In other words, no aspect of Thomas's dramatic reenactment provided any assurance that the confession was actually true, since the police officers had

---

153 Warney v. New York, 947 N.E.2d 639, 646 (N.Y. 2011) (Smith, J., concurring).

154 *Id.*

155 *Id.*; *see also* Garrett, *supra* note 152, at 1053–54 (discussing how police sometimes manipulate the suspect to "parrot back an accurate-sounding narrative" of a crime, thus resulting in "confession contamination").

156 People v. Thomas, 8 N.E.3d 311 (N.Y. 2014).

157 *See id.* at 312.

158 *Id.* at 316–17.

159 *See* SCENES OF A CRIME (New Box Prod. LLC 2014).

160 *Thomas*, 8 N.E.3d at 317.

161 *Id.*

contaminated the process by telling him what happened, and how he had done it. Testimony by the treating physicians—that the child had sustained severe head trauma, causing his death—did not corroborate the confession.[162] The court found that "[t]he agreement of [Thomas's] inculpatory account with the theory of injury advanced by those doctors can be readily understood as a congruence forged by the interrogation."[163]

Reading between the lines of this dense application of Criminal Procedure Law section 60.45, one senses a movement, however tentative, by the court toward reintroducing the unreliability or untrustworthiness of coerced confessions as a rationale for reining in high-pressure interrogation techniques.[164] The untrustworthiness of coerced confessions has historically been viewed as one of the main reasons that they have been kept from juries. As the Supreme Court explained in *Jackson v. Denno*:[165]

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[166]

Unfortunately, the focus on these higher ideals has moved courts away from the practical reality of false confessions in this age of far too many wrongful convictions. Advocates for reform have urged courts to develop means for discriminating between reliable and unreliable confessions, such as requiring some corroboration of a disputed confession with a fact not known to the suspect.[167] In dismissing the medical diagnosis as no corroboration for Thomas's

---

[162] *Id.* at 317.

[163] *Id.*

[164] *See id.* 315–16.

[165] Jackson v. Denno, 378 U.S. 368 (1964).

[166] *Id.* at 385–86 (quoting Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960); Spano v. New York, 360 U.S. 315, 320–21 (1959)).

[167] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 522.

dramatic enactment, the court suggested the potential value of such an exercise.

VIII. CONCLUSION

The *Thomas* decision represents a significant step forward, in recognizing that deceptive interrogation techniques can be coercive, and create a substantial risk of false confessions. While the court refrained from providing a bright-line test, its unanimous opinion will put an end to the belief by some police officers, prosecutors, and judges that deception is permissible in an interrogation, regardless of the kind of deception or its impact on a suspect. As courts and prosecutors gain experience with the rich documentary record that will be provided by the ever-increasing practice of videotaping entire confessions, the *Thomas* opinion will provide guidance on the limits of deception under the Due Process Clause of the Constitution and Criminal Procedure Law section 60.45.

University of Pennsylvania
Law Review
FOUNDED 1852

Formerly
American Law Register

VOLUME 127 JANUARY 1979 No. 3

POLICE TRICKERY IN INDUCING CONFESSIONS

WELSH S. WHITE †

I. INTRODUCTION: SCOPE OF THE PROBLEM

Use of trickery or deceit in the questioning of criminal suspects is a staple of current police interrogation practices. The prevalence of this technique is attested to not only by its frequent appearance in reported cases,[1] but also, and perhaps more signifi-

† Visiting Professor of Law, University of Pennsylvania; Professor of Law, University of Pittsburgh. B.A. 1962, Harvard University; LL.B. 1965, University of Pennsylvania. I am particularly indebted to Professor Yale Kamisar of the University of Michigan Law School for his interest, his guidance (including the many helpful suggestions he made upon reading an earlier draft of this Article), and his legal writings that have illuminated this area of the law for the past two decades. I am also indebted to Professor Louis B. Schwartz of the University of Pennsylvania Law School for his helpful criticism on an earlier draft of this Article, and to David Cicola, a third year student at the University of Pittsburgh School of Law for his excellent research assistance.

[1] In three of the most recent Supreme Court cases dealing with the admissibility of confessions, it appears that the confessions were obtained at least in part by police trickery. *See* Brewer v. Williams, 430 U.S. 387 (1977) (confession obtained after deeply religious murder suspect heard "Christian burial" speech); Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam) (confession obtained after police falsely told suspect that his fingerprints had been found at the scene of the crime); Michigan v. Mosley, 423 U.S. 96 (1975) (confession obtained after police falsely told suspect that another suspect had named him as the gunman). In *Williams*, the police trickery was not discussed because the Court found a violation of the suspect's sixth amendment right to counsel. 430 U.S. at 397-98. In *Mathiason* and *Mosley*, the Court noted that the validity of the police conduct was not within the scope of its review. 429 U.S. at 495-96; 423 U.S. at 99. For recent lower court cases in which it appears that police trickery was utilized to obtain confessions, see, for example, United States *ex rel.* Galloway v. Fogg, 403 F. Supp. 248 (S.D.N.Y. 1975) (police misrepresented to the suspect the extent to which other persons had implicated him); Moore v. Hopper, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd mem.*, 523 F.2d 1053 (5th Cir. 1975) (police falsely told murder suspect that murder weapon had been recovered); State v. Cobb, 115 Ariz. 484, 566 P.2d 285 (1977) (police falsely told robbery suspect that his fingerprints were found at the scene of the crime); People v. Groleau, 44 Ill. App. 3d 807, 358 N.E.2d 1192 (1976) (police falsely told murder suspect that victim was still alive).

cantly, by the central importance it is given in police interrogation manuals.[2] For example, Inbau and Reid's widely-read manual, *Criminal Interrogation and Confessions*,[3] outlines twenty-six specific techniques to be used in interrogating a suspect;[4] most of these techniques will inevitably involve some form of deception because they require an officer to make statements that he knows are untrue or to play a role that is inconsistent with his actual feelings.[5] The effectiveness of these techniques is amply documented by the authors as they recount case after case in which a strategic lie or a timely false show of sympathy was instrumental in leading a suspect to confess.[6]

A conscientious police officer (or one with an unusually high degree of legal sensitivity) might wonder, however, exactly what, if any, limit the Constitution places upon the admission of confessions obtained by deceitful interrogation techniques. If this officer attempted to discover the answer in the opinions of the United States Supreme Court, he would encounter grave difficulties. Dictum in *Miranda v. Arizona*[7] indicates that police are precluded from using trickery to induce a waiver of a suspect's fifth and sixth amendment rights.[8] Moreover, in applying the established rule that only voluntary statements can be admitted into evidence at a criminal trial, the Court has excluded confessions obtained through deception[9] and expressed judicial distaste for certain deceptive practices.[10]

---

[2] *See* CRIMINAL INVESTIGATION AND INTERROGATION (rev. ed. S. Gerber & O. Schroeder 1972); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (4th ed. 1978); F. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION (1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973). For an indication of the extent to which these tactics are in fact used, see Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 41-43, 52-57 (1965).

[3] F. INBAU & J. REID, *supra* note 2.

[4] *Id.* 26-108.

[5] For an excellent general discussion of the definition of deception and lying, see S. BOK, LYING: MORAL CHOICE IN PUBLIC LIFE (1978).

[6] *See* F. INBAU & J. REID, *supra* note 2, at 42, 49.

[7] 384 U.S. 436 (1966).

[8] *Id.* 476.

[9] Massiah v. United States, 377 U.S. 201 (1964) (tape of incriminating statements made to confederate who was acting under cover for prosecution held inadmissible as interrogation violative of fifth and sixth amendments); Spano v. New York, 360 U.S. 315 (1959) (lies by police officer who was suspect's childhood friend were one element in finding that confession was obtained by means violative of due process); Leyra v. Denno, 347 U.S. 556 (1954) (confession induced by psychiatrist who was introduced to the suspect as the medical doctor whom he had requested held inadmissible as involuntary).

[10] *See* Miranda v. Arizona, 384 U.S. 436, 449-55 (1966); Spano v. New York, 360 U.S. 315, 323 (1959).

Nevertheless, the conscientious officer would find that the Court has neither held nor even indicated that any particular type of police trickery would, in and of itself, render a resulting confession inadmissible.

In the absence of definitive guidance from the Supreme Court, the conscientious police officer might naturally refer to the principles that are lucidly expressed in the Inbau and Reid police manual. The benchmark to be used in judging the permissibility of deceptive practices is simply stated: "Although both 'fair' and 'unfair' interrogation practices are permissible, nothing shall be done or said to the subject that will be apt to make an innocent person confess." [11] Although Inbau and Reid offer no catalogue of prohibited practices,[12] the test does provide a clear and direct focus. At first blush, the test acts as a substantial safeguard for the innocent suspect; in addition, it is supported by plausible moral and pragmatic justifications,[13] as well as by considerable state court authority.[14]

Unfortunately, however, the Inbau-Reid test is not wholly consistent with Supreme Court doctrine. First, the Court's voluntariness standard does not focus solely on the reliability of a particular confession; rather, it also requires a determination that the means of obtaining the confession were consistent with our accusatorial system of criminal justice.[15] Even the guilty person has the right to demand that his guilt be demonstrated by the State. Therefore, examination of the "totality of the circumstances" must reveal that a suspect's statement was "the product of his free and rational choice." [16] In order to protect more fully the suspect's freedom of choice, the Court has held that certain coercive interrogation techniques result in an "involuntary" confession as a matter of law, irrespective of the likelihood that they did or could produce a *false*

---

[11] F. INBAU & J. REID, *supra* note 2, at 218.

[12] Leaving aside any quibbles one might have with the standard of certainty provided by the term "apt," neither the test as stated nor the remainder of the manual informs an interrogating officer of the types of interrogation techniques that are "apt" (or likely) to induce a false confession.

[13] F. INBAU & J. REID, *supra* note 2, at 217-18.

[14] *See, e.g.*, Canada v. State, 56 Ala. App. 722, 725, 325 So. 2d 513, 515 (Crim. App.), *cert. denied*, 295 Ala. 395, 325 So. 2d 516 (1976) (tricks acceptable unless "likely" to produce false confessions); R.W. v. State, 135 Ga. App. 668, 671, 218 S.E.2d 674, 676 (1975) ("test in determining voluntariness is whether an inducement, if any, was sufficient, by possibility, to elicit an untrue acknowledgment of guilt"); Commonwealth v. Baity, 428 Pa. 306, 315, 237 A.2d 172, 177 (1968) (trick permissible as long as it has "no tendency to produce a false confession").

[15] *See* notes 83-104 *infra* & accompanying text.

[16] Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (per curiam).

confession and irrespective of their effect on the actual defendant before the court. Thus, in *Ashcraft v. Tennessee*,[17] Justice Black, speaking for the Court, found that an unbroken thirty-six hour interrogation was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom." [18]

In addition to the concern for freedom of choice, the modern voluntariness standard has a fairness component. In *Spano v. New York*,[19] for example, the Court expressed concern not only with excluding confessions obtained by potentially coercive methods but also with insuring that the police "obey the law while enforcing the law." [20] The Court's disapproval of the police tactics employed in *Spano* and a number of other cases [21] indicates that in deciding when the police are "obeying the law," the Court will measure the police conduct against certain basic standards of fairness that are fundamental to our system of justice.[22] Consequently, even reliable confessions should be inadmissible when they are induced by modes of police trickery that are inconsistent with basic notions of fairness.

Moreover, the impact of the fifth and sixth amendments on police interrogation practices must be considered. *Malloy v. Hogan* [23] held that the fifth amendment privilege against self-incrimination is applicable to the states, and *Miranda v. Arizona* [24] established that it applies at the stationhouse. *Miranda* holds that suspects subjected to custodial interrogation have an absolute right to remain silent,[25] that the police must give them certain warnings to insure protection of this right,[26] and that a suspect must be

---

[17] 322 U.S. 143 (1944).

[18] *Id.* 154.

[19] 360 U.S. 315 (1959).

[20] *Id.* 320.

[21] Watts v. Indiana, 338 U.S. 49, 55 (1949) (plurality opinion) (Frankfurter, J.) ("Protracted, systematic and uncontrolled subjection of an accused to police interrogation . . . is subversive of the accusatorial system."); Malinski v. New York, 324 U.S. 401, 418 (1945) (Frankfurter, J., concurring) (despite prosecutor's justification of the police procedures as necessary, delaying arraignment and questioning suspect while he was naked was "so below the standards by which the criminal law . . . should be enforced as to fall short of due process of law").

[22] *See generally* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 431 (1954).

[23] 378 U.S. 1 (1964).

[24] 384 U.S. 436 (1966).

[25] *Id.* 444. Of course, in view of the post-*Miranda* cases, it is by no means clear that the privilege applies at the station house in all situations. *See* text accompanying notes 53-62 *infra*.

[26] 384 U.S. at 444.

given a "continuous opportunity" to exercise these rights.[27] In short, *Miranda* holds that for reasons drawn from the fifth amendment privilege, suspects subjected to custodial interrogation must be afforded the protection provided by the warnings not only at the beginning of the interrogation, but also throughout the interrogation process.[28] In addition, the Court's recent holding in *Brewer v. Williams*[29] indicates that, quite aside from the protections provided by *Miranda,* some suspects subjected to police interrogation have an independent sixth amendment right to an attorney.[30] Accordingly, any police practice that undermines the protections provided by either *Miranda* or the sixth amendment right to an attorney should be constitutionally impermissible.

To summarize, then, an officer who wants to comply with the constitutional limits on the use of trickery in inducing confessions must be concerned with more than simply avoiding tricks that are likely to induce false statements. In addition, he must curb the use of trickery that has the effect of rendering the resulting confession involuntary or that negates the effect of protections provided by the fifth and sixth amendments.

These general principles, however, do not provide the concrete guidance needed to determine the legitimacy of particular police practices. Regrettably, other authoritative sources do not provide much additional assistance. The draftsmen of the American Law Institute's Model Code of Pre-Arraignment Procedure considered the problem of trickery in police interrogation,[31] but failed to issue any definitive guidelines. The model code currently offers only general restatements of the existing law,[32] and two somewhat cryptic

---

[27] *Id.*

[28] The Court was adamant that the suspect be afforded an opportunity to reassert his rights even though he had initially waived them. *See* text accompanying notes 44-47 *infra.* In order to safeguard the suspect's "continuous opportunity" to change an initial decision not to assert his rights, one state supreme court held that the warnings must be repeated if the nature of the interrogation process has caused a dissipation of their effect. *See* Commonwealth v. Wideman, 460 Pa. 699, 334 A.2d 594 (1975). However, several courts have held that even a break in the interrogation process of two or three days did not mandate restatement of the warnings. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 578 (4th ed. 1974).

[29] 430 U.S. 387 (1977).

[30] *Id.* 397-98.

[31] MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, §§ 140.2, 140.4, 140.6, 150.2 (Proposed Official Draft, 1975).

[32] *Id.* §§ 140.2 ("No law enforcement officer shall attempt to induce an arrested person to make a statement by indicating that such person is legally obligated to do so.") & 140.6 ("No law enforcement officer shall take any action which is designed to, or which under the circumstances creates a significant risk that it will, result in an untrue incriminating statement by an arrested person.").

statements suggesting that statements obtained through the use of "unfair" police trickery should be inadmissible.[33]

This cautious approach is certainly understandable. The effect of police trickery cannot be considered in a vacuum. Trickery that is relatively innocent in one context might have a devastating effect on certain suspects when employed in a different setting. The multiplicity of available interrogation practices renders the articulation of clear rules extremely difficult. The fact that suspects possess varying degrees of sensitivity and resistance to deceptive tactics inevitably hampers the development of a comprehensive approach to the problem. Finally, the subtle messages that can be communicated through changes in vocal inflection and nonverbal communication pose a formidable factfinding task for the Court. These and other problems support the conclusion that it is inappropriate to attempt to promulgate comprehensive guidelines relating to the permissible limits on police trickery in inducing confessions.[34]

Nevertheless, there is a need to provide more meaningful guidance to the police and lower courts. The thesis of this Article is that it is possible to identify certain interrogation tactics that are likely to create an unacceptable risk of depriving the suspect of his constitutional rights. The Article will first examine in detail the constitutional limitations on the admissibility of confessions, and will introduce a per se approach that strikes a tolerable balance between the competing interests of predictability and flexibility. The Article will then demonstrate that several widely-used interrogation tactics should be prohibited on such a per se basis.

The context in which these categories of deception are considered will be primarily one in which the suspect's fifth or sixth amendment rights, or both, are applicable, but have been validly

---

[33] No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by . . . (b) any other method which, in light of the person's age, intelligence and mental and physical condition, unfairly undermines this ability to make a choice whether to make a statement or otherwise cooperate.

Id. § 140.4

If a law enforcement officer induces an arrested person to make a statement in the absence of counsel which deals with matters that are so complex or confusing that, in light of such person's age, intelligence, and mental and physical condition, there is a substantial risk that such statement may be misleading or unreliable or its use may be unfair, such statement shall not be admitted in evidence against such person in a criminal proceeding.

Id. § 150.2(9)

[34] For an elaboration of the reasons in support of this conclusion, see Bator & Vorenberg, *Arrest, Detention, Interrogation and Rights to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73-74 (1966).

waived.[35] There are two reasons for focusing the analysis in this manner. First, although the Supreme Court has indicated that an effective waiver of the *Miranda* and *Brewer v. Williams*[36] rights cannot be achieved through police trickery,[37] the restrictions on police deception in the post-waiver situation are less than clear.[38] Second, the police manuals advise law enforcement officials to obtain a waiver before employing any of the suggested interrogation tactics.[39] The lack of clear constitutional standards and the apparent police belief that deception is appropriate in this context suggest the need for a detailed examination of the legitimacy of police trickery in this area.

II. Constitutional Limitations on Police Trickery

A. *The Current Status of Miranda*

As has already been noted,[40] the *Miranda* requirements are calculated to insure adequate fifth amendment protection for suspects subjected to custodial interrogation. Custodial interrogation was defined as questioning by police officers "after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way."[41] The Supreme Court provided that, at the beginning of such interrogation, in the absence of "other procedures which are at least as effective in apprising accused per-

[35] That is, the suspect has been given his *Miranda* warnings or has been informed of his right to an attorney and soon thereafter has made statements or taken action that under existing law would constitute a valid waiver of his rights. As will be demonstrated more fully below, the fifth and sixth amendments and the voluntariness requirement provide continuing protection to the suspect, even after an initial waiver.

[36] 430 U.S. 387 (1977).

[37] The *Miranda* majority stated: "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda v. Arizona, 384 U.S. 436, 476 (1966). In *Brewer v. Williams*, the Court explicitly stated that the stringent waiver standard first formulated in *Johnson v. Zerbst* applied to waiver of the right to counsel. Brewer v. Williams, 430 U.S. 387, 404 (1977) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). *See* notes 78-80 *infra* & accompanying text. Accordingly, the *Miranda* prohibition on trickery in inducing a waiver would appear to apply with equal force in the *Williams* context.

[38] Professors Kamisar, LaFave, and Israel have pointed to the uncertainty in this area of the law. Y. Kamisar, W. LaFave, & J. Israel, *supra* note 28, at 589-90.

[39] According to one widely used manual, "all but a very few of the interrogation tactics and techniques presented in our earlier [pre-*Escobedo*, pre-*Miranda*] publication are still valid if used after the recently prescribed warnings have been given to the suspect under interrogation, and after he has waived his self-incrimination privilege and his right to counsel." F. Inbau & J. Reid, *supra* note 2, at 1, *quoted in* Y. Kamisar, W. LaFave, & J. Israel, *supra* note 28, at 589.

[40] *See* text accompanying notes 26-28 *supra*.

[41] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

sons of their right of silence and in assuring a continuous opportunity to exercise it," [42] the interrogating officer must advise the suspect that he has a right to remain silent, that anything he says can be used against him, and that he has a right to have retained or appointed counsel present at the interrogation.[43] Moreover, the Court stated that a suspect may waive these rights, "provided the waiver is made voluntarily, knowingly, and intelligently." [44] As noted above,[45] the Court emphasized that even after an initial waiver, the suspect has a continuing opportunity to assert the right to remain silent or the right to an attorney at any point prior to the completion of the interrogation.[46]

The Burger Court has limited *Miranda* in important respects.[47] For present purposes, two limitations are particularly significant. First, by its decisions in *Beckwith v. United States* [48] and *Oregon v. Mathiason*,[49] the Court appears to have restricted its definition of "custodial interrogation" to situations that involve "coercive environments" similar to those considered by the Court in *Miranda* itself.[50] Thus, unless a suspect is actually subjected to the coercive pressures generated by involuntary restraints and interrogation in a police station-like atmosphere,[51] *Miranda* seems to be inapplicable.

Second, the Court concluded in *Michigan v. Tucker* [52] that the use in a criminal trial of statements obtained in violation of *Miranda*

---

[42] *Id.* 467.

[43] *Id.* 444.

[44] *Id.*

[45] *See* text accompanying notes 27 & 28 *supra.*

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

[47] For an excellent critical analysis of the post-*Miranda* cases, see Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

[48] 425 U.S. 341 (1976) (questioning of suspect in private house held not to require *Miranda* warnings).

[49] 429 U.S. 492 (1977) (per curiam) (private questioning of a suspect, who came to police station "voluntarily" at officer's request, held not to require *Miranda* warnings).

[50] As Professor Stone has noted, "Mathiason was questioned in a police station behind closed doors, he was on parole, and he was informed, not just that he was being investigated, but that the police already believed him to be guilty." Stone, *supra* note 47, at 154. Despite the similarity between the coercive pressures confronting Mathiason and those confronting the *Miranda* defendants, the Supreme Court summarily concluded that *Miranda* did not apply because *Miranda* was concerned with custodial interrogation and "[i]t was *that* sort of coercive environment to which Miranda by its terms was made applicable, and *to which it is limited.*" 429 U.S. 492, 495 (1977) (latter emphasis added).

[51] In Orozco v. Texas, 394 U.S. 324 (1969), the Court held that *Miranda* applied when the defendant was arrested at his home. However, in light of *Beckwith* and *Mathiason*, the current vitality of *Orozco* is questionable.

[52] 417 U.S. 433 (1974). For an incisive analysis of *Tucker*, see Stone, *supra* note 47, at 115-25.

does not, in itself, violate the fifth amendment privilege. The Court perceived the *Miranda* warnings as a prophylactic rule devised to insure that statements are voluntarily made.[53] Under *Tucker,* statements obtained in violation of *Miranda* will generally be inadmissible,[54] but their use by the prosecution will not violate the fifth amendment unless there is a violation of the traditional voluntariness test.[55] *Tucker,* in effect, equates the privilege against self-incrimination with voluntariness, a test that was not designed to insure the suspect's awareness of his constitutional rights.[56] In short, it can be inferred from this decision that the Court has rejected interpreting *Miranda* to provide a constitutionally mandated guarantee that suspects will be afforded the opportunity for intelligent exercise of the right to remain silent at each point in the interrogation.[57] Nevertheless, although the *Tucker* Court viewed the *Miranda* warnings as a prophylactic device, rather than as a constitutionally mandated procedure, the scope of the protection afforded by the *Miranda* warnings was not altered.

In order to comprehend fully the limitations that *Miranda* imposes on police interrogation tactics in the post-waiver context, it is necessary to examine more precisely the requirement that the suspect be permitted to reassert the right to silence and the right to counsel. It should first be recalled that the purpose of the warnings is to reduce the possibility of coercion throughout the inter-

---

[53] Michigan v. Tucker, 417 U.S. 433, 444 (1974): "The Court recognized [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the privilege against compulsory self-incrimination was protected."

[54] *But see* Harris v. New York, 401 U.S. 222 (1971) (holding that statements obtained in violation of *Miranda* may be admissible for the purpose of impeaching the defendant's credibility).

[55] [Respondent's] statements could hardly be termed involuntary as that term has been defined in the decisions of this Court. . . . [T]he police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standard laid down by this court in *Miranda* to safeguard that privilege.

Michigan v. Tucker, 417 U.S. 433, 445-46 (1974).

[56] In determining the issue of a confession's "voluntariness," the Court has indicated that police failure to advise the suspect of his right to remain silent or his right to counsel will be afforded significant, but not decisive, weight. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) ("voluntariness is a question of fact to be determined from all the circumstances, and while the suspect's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.").

[57] For an argument favoring this interpretation of *Miranda,* see Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions,* 1975 WASH. U. L.Q. 275, 331-36.

rogation process. If the *Miranda* warnings are to serve this necessary prophylactic function effectively, police trickery that distorts their meaning or vitiates their effect should render a resulting confession inadmissible. No one would argue that a specific verbal denial of the possibility of reassertion is a permissible interrogation tactic. However, as will be demonstrated below,[58] certain types of police misconduct achieve the same result without explicit misrepresentation of the law. If the reassertion right is to have any real content, the police should be required to desist from any trickery that significantly distorts the meaning and effect of the *Miranda* warnings.

B. *The Independent Right to an Attorney*

The aforementioned narrowing of the situations in which the *Miranda* warnings are required definitely enhances the significance of the interrogated suspect's independent right to an attorney that was enunciated in *Brewer v. Williams*.[59] In *Williams,* the Court found it unnecessary to reach a claim that the pretrial police interrogation of the defendant violated *Miranda*.[60] Rather, the Court held that the defendant was "deprived of a different constitutional right—the right to the assistance of counsel." [61] Reaffirming *Massiah v. United States,*[62] the Court held that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." [63]

As a result of the *Williams* decision, suspects subjected to police interrogation may assert violations of either *Miranda* or the separate sixth amendment right. A detailed examination of the interrelationship between the fifth and sixth amendment rights is beyond the scope of this Article.[64] *Williams,* however, leaves unanswered two questions that are particularly significant in determining the right to counsel doctrine's applicability to police trickery in inducing confessions. First, when does the right to counsel attach? And

---

[58] *See* notes 150-88 *infra* & accompanying text.

[59] 430 U.S. 387 (1977).

[60] *Id.* 397-98. The Court also found it unnecessary to reach defendant's claim that his confession was involuntary. *Id.*

[61] *Id.*

[62] 377 U.S. 201 (1964).

[63] 430 U.S. at 398.

[64] For an extraordinarily perceptive analysis of this interrelationship, see Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is "Interrogation"? When Does It Matter?,* 67 GEO. L.J. 1 (1978).

second, to what extent does the existence of the right depend upon the suspect's assertion of it?

Williams establishes that the right to counsel attaches *at least* at the formal beginning of the adversary process. Of course, unless the right attaches at an earlier point, *Williams* would exert no influence on the vast amount of police interrogation that occurs before the suspect is formally arraigned. For that reason, interpretation of the "at least" language is crucial to an understanding of the constitutional limitations on police trickery. Earlier cases, including not only *Escobedo v. Illinois*,[65] which arguably has little precedential value,[66] but also *United States v. Hoffa*,[67] have apparently operated on the assumption that in this context the suspect's sixth amendment right comes into effect at the point of arrest.[68] More recent cases, such as *Brewer v. Williams*,[69] *United States v. Mandujano*,[70] and *Kirby v. Illinois*,[71] may indicate that the Court is now leaning toward a rule under which the sixth amendment right to counsel will never come into effect prior to the formal initiation of criminal charges;[72] however, at least with respect to police interrogation, the question remains open.

In the context of police interrogation, the *Hoffa* and *Escobedo* approach appears to be correct. At the point of formal arrest, the police are likely to be as committed to prosecution as they will be when charges are formally brought. Because the police objectives and tactics are likely to be identical at the arrest and post-

[65] Escobedo v. Illinois, 378 U.S. 478 (1964). *Escobedo* held that the suspect's sixth amendment right to an attorney comes into effect as soon as he becomes the "focus" of the police investigation. *Id.* 490-91.

[66] *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (Stewart, J.) ("The Court has limited the holding of *Escobedo* to its own facts . . . .").

[67] 385 U.S. 293 (1966).

[68] In *Hoffa*, the Court appeared to base its conclusion that the surreptitious governmental interrogation did not violate the suspect's sixth amendment right to counsel upon the fact that the defendant had not yet been arrested. *Id.* 310.

[69] 430 U.S. at 398-99 (dictum). In justifying its decision, the Court particularly emphasized that judicial proceedings were initiated against the defendant at the time of the interrogation. Moreover, the Court's prominent citation of *Kirby v. Illinois* may be significant in view of *Kirby*'s holding that in the context of a pre-indictment show-up defendant's right to counsel did not attach until judicial proceedings had been initiated against him.

[70] 425 U.S. 564, 581 (1976) (plurality opinion) (Burger, C.J., joined by White, J., Powell, J., and Rehnquist, J.) (finding on the basis of *Kirby* that a grand jury target being questioned by the grand jury has no right to the presence of counsel because "[n]o criminal proceedings had been instituted against [him], hence the Sixth Amendment right to counsel had not come into play.").

[71] 406 U.S. 682 (1972) (holding that the right to counsel did not apply to a pre-indictment show-up).

[72] *See generally* Kamisar, *supra* note 64, at 83.

arraignment stages, interrogation following arrest should be viewed as a part of the adversary process and therefore as the event that triggers the suspect's sixth amendment rights. *Kirby*'s holding that the sixth amendment right to counsel at a pretrial confrontation commences only after the initiation of formal proceedings is distinguishable because, unlike the situation in *Kirby,* pretrial interrogation may involve the privilege against self-incrimination. Even when it takes place in a non-custodial setting, pretrial interrogation has the potential effect of forcing an individual "to be made the deluded instrument of his own conviction" [73] in violation of the fifth amendment privilege. Because of this critical interplay between the fifth and sixth amendments,[74] insofar as police interrogation is concerned, the suspect's sixth amendment right to an attorney should attach at the point of formal arrest.

In considering the extent to which the existence of the suspect's independent right to counsel depends upon his assertion of it, three different situations should be analyzed: (1) when, as in *Williams,* the suspect has asserted the right and is represented by counsel; (2) when the right has attached and the suspect has not had the opportunity to assert or waive it; [75] and (3) when there has been an initial waiver of the right.[76]

On its facts, the holding in *Williams* extends only to the first situation—at the time of the interrogation, the defendant was represented by counsel. Significantly, however, the Court attached no importance to the fact that Williams had already asserted his right to an attorney. Rather, the Court emphasized that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." [77] In fact, the Court explicitly stated that "the right to counsel does not

---

[73] 2 W. HAWKINS, A TREATISE OF PLEAS OF THE CROWN 595 (8th ed. J. Curwood London 1824) (1st ed. London 1716-21), *quoted in* Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (plurality opinion) (Frankfurter, J.). Although Frankfurter quoted Hawkins with the avowed purpose of identifying one of the principles imbedded in due process (or fundamental justice), it is apparent that the privilege against self-incrimination protects the same interest. It is worth noting that *Culombe* antedated Malloy v. Hogan, 378 U.S. 1 (1964), which held that the fifth amendment applies to the states.

[74] *See* United States v. Mandujano, 425 U.S. 564, 602-03 (1976) (Brennan, J., concurring).

[75] *See, e.g.,* United States v. Satterfield, 558 F.2d 655 (2d Cir. 1976) (statement of accused held inadmissible when prosecution failed to meet the "heavy burden" of showing a knowing waiver of the right to counsel although the accused had not requested an attorney).

[76] *See, e.g.,* United States v. Putnam, 557 F.2d 1181 (5th Cir. 1977).

[77] Brewer v. Williams, 430 U.S. 387, 401 (1977).

depend on a request by the defendant." [78] Thus, the second situation appears to be within the reasoning of *Williams*.

The third case—when the suspect has specifically declined to exercise his right to counsel—is undoubtedly the most difficult one. In *Williams*, the Court made it clear that a suspect may waive his right to an attorney, provided that waiver meets the standards of intentionality and awareness promulgated in *Johnson v. Zerbst*.[79] The real question is whether the suspect's initial waiver precludes him from reasserting the right. In the *Miranda* context, an initial waiver does not have this effect.[80] Although distinctions might be drawn between the *Miranda* protections and the independent right to counsel,[81] there is good reason to require that both rights be capable of reassertion. Whether the suspect changes his mind about the need for an attorney in order to protect his right against self-incrimination (in which case *Miranda* rights are applicable) or to protect his chances at the forthcoming trial (as in the *Williams-Massiah* situations), he should be allowed a continuous opportunity to assert his right. The right to a fair trial is no less fundamental than the fifth amendment privilege, and the right to have counsel present during the interrogation protects both constitutional interests with equal force. As with *Miranda* rights, the sixth amendment right to have counsel present at post-arrest interrogation should be continuously available to the suspect.[82]

C. *The Current Definition of an Involuntary Confession*

As Justice Harlan noted in his *Miranda* dissent, the Court has infused the concept of voluntariness "with a number of different values." [83] Justice Harlan focused on the three paramount concerns that have shaped the test of admissibility: first, an abhorrence

---

[78] *Id.* 404.

[79] "[I]t was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" *Id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[80] *See* note 28 *supra* & accompanying text.

[81] Unlike the independent sixth amendment right, the *Miranda* protections are needed to shield the suspect from police coercion. Because the coercive influences of the custodial setting may quickly operate to overcome an individual's will, affording the individual subjected to these influences a continuous opportunity to assert his rights may be particularly important.

[82] With respect to a defendant's right to an attorney at trial, lower court cases have indicated that an initial waiver of the right will not preclude a subsequent assertion of it unless the assertion will "disrupt orderly procedure." *See* Arnold v. United States, 414 F.2d 1056, 1059 n.1 (9th Cir. 1969) (dictum), *cert. denied*, 396 U.S. 1021 (1970). *Accord*, Fields v. State, 507 S.W.2d 39 (Mo. App. 1974).

[83] Miranda v. Arizona, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting).

of convictions based upon unreliable confessions; [84] second, a feeling that police practices utilized to obtain confessions should not impose an intolerable degree of pressure upon the will of individual suspects; [85] third, a belief that such practices should not be contrary to the standards of fairness that are fundamental in our system of justice.[86] A quick review of the court's development of these three strands of voluntariness is helpful for an understanding of the relevance to the problem of police trickery.[87]

Early state court cases tended to focus almost exclusively on the reliability interest.[88] This emphasis was probably attributable to the shocking factual settings of the early Supreme Court confession cases.[89] Writing for a unanimous Court in *Ward v. Texas*,[90] Justice Byrnes poignantly inveighed against the police practices that left the defendant in that case "willing to make any statement that the officers wanted him to make." [91] In addition, Justice Brynes pointed to previous cases in which the Court had invalidated convictions obtained under circumstances that raised severe questions about their reliability.[92]

---

[84] *See* text accompanying notes 88-95 *infra.*

[85] *See* text accompanying notes 96-101 *infra.*

[86] *See* text accompanying notes 19-22 *supra.*

[87] The history and development of the "voluntariness" standard have been recounted in greater detail elsewhere. *See generally* O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT (1973); Bator & Vorenberg, *supra* note 34; Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Kamisar, *What is an Involuntary Confession?* 17 RUTGERS L. REV. 728 (1963) [hereinafter cited as *Involuntary Confessions*]; Paulsen, *supra* note 22; *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966).

[88] *See generally Developments in the Law, supra* note 87, at 964-69.

[89] In a 1963 article, Professor Kamisar drew the following conclusions about the role that the reliability interest has played in voluntariness doctrine:

> Although what the court is *prepared* to do cannot adequately be explained in this manner, *on their facts*, the *decided* cases can be viewed as an application of two "reliability" standards: First, taking into account the personal characteristics of the defendant and his particular powers of resistance, did the police methods create too substantial a danger of falsity? Second, without regard to the particular defendant, are the interrogation methods utilized in this case . . . sufficiently likely to cause a significant number of innocent persons to falsely confess, that the police should not be permitted to proceed in this manner?

Involuntary Confessions, supra note 87, at 755 (emphasis in original).

[90] 316 U.S. 547 (1942).

[91] *Id.* 555.

[92] Justice Byrnes stated:

> This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel,

In *Rogers v. Richmond*,[93] however, the Court considered the relationship between reliability and "voluntariness," and sharply distinguished between the two concepts. The Court held that the probable truth of a confession, *i.e.* its reliability, could not be used to support a finding of voluntariness.[94] Justice Frankfurter, writing for the majority, emphasized that the voluntariness standard protects interests other than reliability; in particular, he noted, it forbids the use of coerced confessions to convict a defendant.[95] Thus, although the test is not framed in terms of reliability, it provides some assurance that a confession admitted into evidence is the product of the suspect's perception of the event and not the result of police coercion.

The second strand of the voluntariness test conditions admissibility on a finding that the confession was a product of the suspect's free and rational choice.[96] Because of the case-by-case nature of the inquiry, it is impossible to do more than delineate the various factors that the Court has weighed in determining whether a particular confession was the product of impermissible coercion.[97] As Justice Goldberg recognized in *Haynes v. Washington*,[98] the test requires that the Court assess the effect of police practices upon the "mind and will of an accused," [99] and determine the point at which the pressures created are so great that the accused's will may be properly considered to be "overborne." [100] As will be discussed below,[101] the unpredictability of the voluntariness test greatly limits

---

or who have been taken at night to lonely and isolated places for questioning.

Id. (citing Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 310 U.S. 530 (1940); Canty v. Alabama, 309 U.S. 629 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); Wan v. United States, 266 U.S. 1 (1924)).

[93] 365 U.S. 534 (1961).

[94] *Id.* 543-45.

[95] *Id.* 540-41.

[96] *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (plurality opinion) (Frankfurter, J.); United States v. Mitchell, 322 U.S. 65, 68 (1944). *See generally Developments in the Law, supra* note 87, at 973-84.

[97] *See generally Developments in the Law, supra* note 87, at 973-83.

[98] 373 U.S. 503 (1963).

[99] *Id.* 515.

[100] *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) ("We have said that the question in each case is whether the defendant's will was overborne . . . ."); Spano v. New York, 360 U.S. 315, 323 (1959) ("We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts . . . ."). *See generally Developments in the Law, supra* note 87, at 973.

[101] *See* text accompanying notes 107-14 *infra*.

its usefulness as a legal standard for the control of police trickery in interrogation.

A third important component of the "involuntariness" test relates to the Court's assessment of the fairness or legitimacy of the police tactics employed.[102] In view of the applicable line of authority,[103] a determination of voluntariness may not be based merely on a judgment that the suspect retained some minimal capacity to resist police efforts to induce a confession. Rather, as Justice Harlan's *Miranda* dissent noted, the police must be barred from exerting "a degree of pressure [on] an individual which unfairly impairs his capacity to make a rational choice."[104]

D. *The Need for Per se Rules*

In fashioning a constitutional doctrine concerning the admissibility of suspects' confessions, a court must inevitably do more than merely decide the extent to which police trickery may be tolerated in a free society. In addition, a court must structure the resulting legal rules in a manner that recognizes the institutional realities of the criminal justice system. In particular, a court must take into account the infinite variety of suspects' personality patterns and police interrogation practices. On one level, because criminal suspects do not possess uniform personality characteristics, a court must decide the extent to which the appropriate tests will be tailored to accommodate the individual responses to police pressure by particular criminal suspects. In other words, should a court apply a subjective or objective test, or something in between? A distinct but closely related problem concerns the extent to which a court should prohibit particular interrogation techniques through the promulgation of per se rules (*i.e.*, prohibiting a certain tactic or category of tactics). As will be demonstrated below, the extent to which a per se approach is adopted will have important consequences on police behavior and judicial review.

The pertinent question in the objective-subjective controversy can be rephrased: Should the courts focus primarily upon the police conduct itself and attempt to measure its likely effect upon a typical person who is in the suspect's position or should the courts focus exclusively on the *actual* impact of the police conduct upon the

---

[102] *See* text accompanying notes 19-22 *supra.*

[103] *See* Spano v. New York, 360 U.S. 315 (1959), and cases cited in note 21 *supra.*

[104] Miranda v. Arizona, 384 U.S. 436, 507 n.4 (1966) (Harlan, J., dissenting) (quoting Bator & Vorenberg, *supra* note 34, at 73).

particular suspect who is before the court? An objective approach clearly generates more meaningful guidance for the police and lower courts than its subjective counterpart. Under the latter approach, when the legitimacy of an interrogation tactic varies with the strengths and weaknesses of a particular suspect, an interrogating officer cannot predict the judicial response to the use of a given tactic with any degree of precision. When the dimensions of constitutional standards are so ill-defined, the danger must increase that the police will conduct their interrogations without regard for the constitutional rights of the suspect. Similarly, the subjective approach provides little guidance to the courts. If the question in every case is the effect on a particular suspect, precedent is likely to be of little importance. To the extent possible, therefore, both from the perspectives of law enforcement and judicial administration, courts should develop legal rules that limit interrogation tactics by objective standards.

In fact, although Supreme Court opinions often purport to engage in a subjective inquiry, Professor Kamisar's 1963 study demonstrates that "much more often than not, if not always, when the Court considers the peculiar, individual characteristics of the person confessing, it is only applying a rule of *inadmissibility*. 'Strong' personal characteristics rarely, if ever, 'cure' forbidden police methods; but 'weak' ones may invalidate what are generally permissible methods." [105] Determination of whether the standard was met was based in part upon the Court's evaluation of the effect that the police tactics employed would have upon a typical person in the position of the suspect subjected to the interrogation and in part upon its assessment of the fairness of the tactics employed.[106]

The second question—the extent to which the courts should prohibit particular interrogation tactics through per se rules as opposed to engaging in a consideration of the totality of the circumstances—has not been resolved in a way that provides satisfactory guidance for courts and law enforcement officials. In assessing the legality of police interrogation tactics, the pre-*Escobedo* cases generally did not rely on per se rules. Recognizing that the impact of police practices upon an individual may not be considered in a vacuum, the Court considered the impact of the pressures generated by police tactics in light of their probable cumulative effect.[107] In

[105] *Involuntary Confessions, supra* note 87, at 758 (emphasis in original).

[106] *See generally id.*

[107] *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961); Spano v. New York, 360 U.S. 315, 321, 323 (1959).

a few extraordinary situations, the Court indicated that utilization of a particular police practice would be sufficient in itself to render a resulting confession involuntary.[108] However, for the most part, the Court insisted upon determining voluntariness through a meticulous examination of the "totality of circumstances." [109]

By the early sixties, however, experience had demonstrated that the "totality of circumstances" test was an ineffective means of preventing unacceptable police pressures. The inadequacy of the test is partially attributable to the imperfection of the applicable factfinding procedure.[110] As Professor Kamisar has recently demonstrated, in most cases the traditional litigation process is simply inadequate to determine either the extent or the quality of police pressure applied to individual criminal suspects.[111] Beyond that, however, the "totality of circumstances" test's fatal flaw is its failure to generate precedents that can serve as guidelines for the police and the lower courts.

The failure to formulate rules that apply beyond limited factual settings has had important consequences. Police are most likely to view as legitimate effective interrogation tactics that have not been expressly prohibited.[112] Moreover, in analyzing the myriad circumstances surrounding an interrogation, trial judges unfortunately are tempted to defer to the judgment of the police.[113]

---

[108] In Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944), the Court held that 36 hours of continuous interrogation was "inherently coercive." The strong implication was that when questioning of that duration occurs, the effect of other factors need not be considered. Moreover, even the *Ashcraft* dissent recognized that "violence *per se* is, an outlaw," 322 U.S. at 160 (Jackson, J., dissenting), thus implying that any statement induced by violence or threat of violence would be automatically inadmissible. *Accord,* Payne v. Arkansas, 356 U.S. 560, 567 (1958); Ward v. Texas, 316 U.S. 547, 555 (1942); Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[109] *See generally Developments in the Law, supra* note 87, at 973-84.

[110] *See generally* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785, 806-09 (1970).

[111] *See* Kamisar, *Foreword:* Brewer v. Williams—*A Hard Look at a Discomfiting Record,* 66 GEO. L.J. 209, 234-35 (1977).

[112] Despite the *Miranda* opinion's evident distaste for a number of the tactics contained in the Inbau and Reid manual, *see* 384 U.S. at 449-55, the revised edition (published one year after *Miranda*) advised the police to continue employing the same tactics. *See* F. INBAU & J. REID, *supra* note 2, at 1. Obviously, the authors reasoned that tactics not specifically prohibited could continue to be employed. This perhaps illustrates the validity of Justice Jackson's observation, made in the fourth amendment context, to the effect that "officers interpret and apply themselves and will push to the limit" constitutional doctrines expounded by the Supreme Court. *See* Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

[113] One of the most striking recent examples of this appears in State v. Reilly, No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated,* 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976). *See* text accompanying notes 175 & 176 *infra.* In addition to employing the psychological techniques described below, the police held the immature 18 year old suspect incommunicado, allowed him at most a few hours

Finally, appellate courts may quite legitimately defer to lower court findings of "voluntariness," particularly because they are at least partially factual and, due to the innumerable circumstances that generally are involved, it is unlikely that any given case will be controlled by a prior Supreme Court decision.[114] The net result is that in many cases the courts effectively defer to the police and make their judgment of the legitimacy of interrogation tactics the decisive one.

Per se rules, prohibiting certain categories of police tactics, obviously provide better guidance for the police and increased protection for suspects. Accordingly, the framing of the constitutionally mandated rules limiting police trickery should be undertaken with awareness of these realities. The inquiry envisioned by this Article requires that a court take an additional conceptual step after determining that a given interrogation tactic vitiates the *Miranda* or *Williams* guarantees or results in a coerced confession: whenever possible, the court should identify the objectionable characteristic that emerges from its scrutiny of the facts surrounding an invalid interrogation. If that infirmity creates an unacceptable risk of infringing the typical suspect's constitutional rights, the court should hold that such police conduct is illegal per se. Although the objectionable police conduct may conceivably occur in myriad forms and in various settings, a per se rule would require that police officers design their interrogation techniques to avoid the proscribed conduct in all situations. Although it is impossible to develop prospectively a complete catalogue of prohibited tactics, this Article will utilize the suggested objective approach and conceptual framework to identify several police tactics that create an unacceptable risk of infringing the typical suspect's constitutional rights. Before beginning this task, however, it is necessary to define the standard of probability implicit in the phrase "unacceptable risk" and to specify the degree of subjectivity envisaged in this approach.

The per se rules should prohibit police conduct that is *likely to render* a resulting confession involuntary or to undermine the

---

sleep and no hot food, and interrogated him for virtually 26 continuous hours in order to obtain his confession. Based on a plethora of Supreme Court cases, the confession would appear to be clearly inadmissible. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944), *discussed at* note 108, *supra*. Nevertheless, the lower court admitted it.

[114] For an illustration of the highly deferential attitude that may plausibly be adopted by an appellate court, see Mincey v. Arizona, 98 S. Ct. 2408, 2422-23 (1978) (Rehnquist, J., concurring in part and dissenting in part). *See also* Ashcraft v. Tennessee, 322 U.S. 143, 156-58, 170-73 (1944) (Jackson, J., dissenting).

effect of required *Miranda* warnings or a suspect's independent right to an attorney. Although law enforcement interests rule out a lesser burden of proof (*e.g.*, "possibly render"), the fundamental nature of the suspect's constitutional rights mandates a sensible allocation of the risk of error. This standard of probability (*i.e.*, likely to render) is preferable to requiring a demonstration that the conduct in question invariably or nearly always results in violations. Police should not engage in conduct that is likely to induce a coerced confession or negate constitutional protections (even though it may not invariably do so) because obviously a high risk exists that significant harm (in terms of unlawfully obtained confessions or improper coercion) will ensue. Therefore, prophylactic rules designed to deter the police from engaging in conduct with such a probable effect are appropriate.

In formulating per se rules of this type, a court should not consider police conduct in a vacuum. The likelihood that particular conduct will coerce confessions or undermine fifth or sixth amendment protections depends not only upon the content of the conduct but also upon its probable effect upon a specific suspect. Particularly in the case of psychologically oriented interrogation techniques, conduct that might be totally innocuous when employed in an ordinary interrogation situation may, under certain special circumstances, be likely to have a devastating psychological impact on a suspect. Therefore, the per se rules should be formulated not in terms of prohibiting specific police conduct as such, but as prohibiting police conduct that is likely to produce certain types of effects upon suspects.[115]

For example, if it is determined that the tactic of challenging a suspect's dignity should be prohibited,[116] in deciding whether this per se rule applies a court will have to consider whether a person in the suspect's position (given the individual characteristics of the suspect known to the police)[117] would feel that the police con-

[115] It should be emphasized, however, that the Court's assessment of the officer's intent or good faith should not affect the application of a per se rule. If it is determined that the officer's conduct was in fact likely to have the proscribed effect upon the suspect, the absence of conscious wrongdoing on the officer's part should be constitutionally irrelevant.

[116] *See* notes 245-48 *infra* & accompanying text.

[117] This factor must be taken into account because the guidelines are ultimately designed to regulate police conduct. If the police engage in conduct that from their perspective would appear innocuous, but in fact is likely to have a devastating effect on the suspect, the conduct should not become the subject of a per se rule. However, when innocent conduct induces a confession that is "involuntary" under traditional doctrine, the confession must of course be excluded. *See* Townsend v. Sain, 372 U.S. 293, 308-09 (1963) (benign purpose of interrogating officer does not

duct was a challenge to his dignity.[118] If it is found that the police tactic induces such a feeling, operation of the per se rule will render any resulting confession automatically inadmissible. However, if the court finds that, when viewed from the perspective of a reasonable person in the position of the interrogating officer, the tactic does not constitute a challenge to the suspect's dignity, the per se rule will be inapplicable. Thus, the per se rules will of necessity be phrased in terms of conduct and its likely effect, the latter of which introduces a limited degree of subjectivity into the test.

Obviously, the development and application of per se rules will involve the court in difficult judgments. In determining whether police conduct will be likely to have a particular impact on the typical suspect, the court may have to perform the difficult task of placing itself in the shoes of the suspect as viewed by the interrogating officer. However, given the complexity of the interests at stake, any principled approach in this area inevitably will involve difficult judgments. When compared to the more subjective version of the "totality of circumstances" test, the proposed approach will provide increased clarity in that the police and courts will at least be informed of specific danger zones; that is, they will have notice that tactics that have certain predictable effects are forbidden. The proposed approach has the virtue of allowing the courts to take account of the complex interrelationship between police conduct and its effect on individual suspects while at the same time enabling them to decide cases in a way that will provide concrete guidance for the future.

III. Evaluation of Certain Police Interrogation Tactics

This section of the Article will describe certain categories of interrogation tactics that can validly be subjected to per se prohibitions. No attempt will be made to discuss every widely employed tactic or to develop a general theory that would be applicable to every technique. In order to achieve organizational clarity, the

validate a confession that is in fact involuntary). A confession should also be held invalid, although not on a per se basis, if it is obtained by innocent police conduct that impermissibly vitiates the effect of *Miranda* warnings or the independent right to counsel. Such a result could be obtained under the traditional methodology.

118 For example, in Brewer v. Williams, 430 U.S. 387 (1977), the interrogating detective's "Christian burial" speech and his use of the word "Reverend" in addressing the suspect would be likely to challenge the dignity of a deeply religious person, but would have little effect on the dignity of an ordinary person. Because the detective was aware of the suspect's deep religious convictions, 430 U.S. at 392, the speech could properly be characterized as a challenge to the suspect's dignity.

section will begin by discussing tactics that create problems primarily because of their potential negation of the *Miranda* protections (or the independent right to counsel) and continue with a discussion of those that should be prohibited because of their coercive effects.

A. *Deception About Whether an Interrogation Is Taking Place*

A form of deception that totally undermines the fifth or sixth amendment protections available to an individual occurs when the police deceive a suspect about whether an interrogation is taking place.[119] A classic example of this type of deception occurred in *Massiah v. United States*.[120] In *Massiah*, the defendant and his confederate Colson were arrested and indicted for possession of narcotics aboard a United States vessel. After both were released on bail, Colson, without defendant's knowledge, agreed to cooperate with the government in their efforts to obtain further information relating to the offense.[121] Equipped with a transmitter that broadcasted conversations held in his automobile to another government agent, Colson engaged in a lengthy conversation with defendant; at defendant's trial, incriminating statements made by him during the course of this conversation were introduced into evidence. The Court held the statements inadmissible on the ground that they were obtained in violation of the protections afforded the defendant by his sixth amendment right to counsel.[122]

Of course, the deception utilized in *Massiah* did not deprive the defendant of his right to an attorney in any ordinary sense. As

---

[119] Actually, in light of the post-*Miranda* narrowing of *Miranda*'s applicability, *see* notes 47-57 *supra* & accompanying text, it is likely that the suspect has no fifth amendment protection when this form of deception occurs. Because the suspect is unaware that interrogation is taking place, it is likely that the "custodial interrogation" element of *Miranda* would not be met. *See* text accompanying notes 47-57 *supra*. Therefore, the point at which the sixth amendment right attaches assumes critical importance. This Article has argued that the sixth amendment right should be triggered at the point of formal arrest. *See* notes 64-74 *supra* & accompanying text. However, if the right does not come into effect until after a suspect is formally charged, the police may use undercover agents or private citizens to obtain statements from suspects who are in police custody and who have asserted their *Miranda* rights but have not yet been formally charged. For lower court cases dealing with this issue, see, for example, Commonwealth v. Bordner, 432 Pa. 405, 247 A.2d 612 (1968) (statements inadmissible when police engaged defendant's parents to elicit incriminating statements from him while he was in the hospital); State v. Travis, 116 R.I. 678, 360 A.2d 548 (1976) (statements inadmissible when police placed undercover policeman in defendant's cell shortly after his arrest and defendant had already refused to talk to police before seeing an attorney).

[120] 377 U.S. 201 (1964).

[121] *Id.* 202.

[122] *Id.* 205-06.

Professors Enker and Elsen have pointed out, "so far as the record in *Massiah* reveals, [the defendant] may very well have consulted with his counsel before talking to Colson." [123] Indeed, nothing indicates that the government did anything to prevent him from having his attorney present when he met with Colson in the car.[124] What the government did was not to deprive the defendant of his right to counsel, but rather to render that right useless by not disclosing that the conversation with Colson was, in effect, a part of an adversary process in which an attorney's presence was necessary. Thus, as the Court implicitly recognized, the key to the violation in *Massiah* was the fact that, due to the governmental deception, at the time the defendant made his incriminating statements to Colson he "did not even know that he was under interrogation by a government agent." [125] Due to this deception, the sixth amendment protection that should have been available to defendant was effectively defeated. A practice that makes the suspect unaware that the police are interrogating him, and therefore is likely to remove from his consideration the question whether he should have counsel present, clearly creates an unacceptable risk of infringement of the suspect's constitutional rights. This interrogation technique, therefore, should be the subject of a per se prohibition.

The per se prohibition against deception that defeats the suspect's sixth amendment right by deceiving him about whether an interrogation is taking place should not be limited to post-indictment interrogation (which is the extent of the holding of *Massiah),* but should also be extended to similar conduct that occurs after formal arrest.[126] This stratagem is as likely to be effective in the period *between* arrest and indictment as it is afterward. Further, the per se proscription should apply whether or not the suspect has initially waived his right to an attorney. As was noted previously,[127] the government must afford the suspect a continuous opportunity to assert his right to an attorney throughout the interrogation process. Deception about whether an interrogation is taking place, however, negates this opportunity. When a suspect is deceived about whether the government is seeking to elicit incriminating evidence from

---

123 Enker & Elsen, *Counsel for the Suspect:* Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 56 n.32 (1964).

124 *Id.*

125 377 U.S. at 206.

126 This Article has argued that the sixth amendment right should be triggered at the point of formal arrest. *See* notes 64-74 *supra* & accompanying text.

127 *See* notes 79-81 *supra* & accompanying text.

him,[128] he obviously has little basis upon which to assess or reassess the question whether he needs the assistance of counsel during this phase of the adversary process. Therefore, even if the suspect has initially waived his right to an attorney, police deception about whether an interrogation is currently taking place should also be impermissible per se.

Even if the Court holds that the suspect's right to an attorney is not triggered at the point of arrest,[129] admissions obtained as a result of post-arrest deception about whether an interrogation is taking place should be held inadmissible on the ground that the use of this tactic is inherently unfair. Close examination of the relative strengths of the suspect and the police in this context demonstrates the desirability of extending the fairness strand of voluntariness doctrine to prohibit this practice.[130]

In order to understand the suspect's perspective, it must be noted that he is invariably confined in some manner when this deception is perpetrated.[131] Professor Dix has pointed out that surreptitious attempts to elicit incriminating disclosures place considerable pressure to confess upon any confined suspect. As Dix states, "Mere confinement might increase a suspect's anxiety, and he is

---

128 This would appear to be the appropriate definition of interrogation in the *Massiah-Williams* context, as opposed to the definition of custodial interrogation within the meaning of *Miranda*. One recent circuit court case has held that in view of *Williams'* language relating to the meaning of interrogation, *Massiah's* proscription only applies when the undercover agent engages in direct questions or inquiries and not when he engages the defendant in conversation with a purpose to elicit incriminating responses. Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), *petitions for rehearing and rehearing en banc denied*, 590 F.2d 408 (2d Cir. 1979). As Professor Kamisar's recent article demonstrates, this is an improper interpretation of *Williams*. Kamisar, *supra* note 64, at 5-44 & *passim*. *Accord*, Henry v. United States, No. 77-2338 (4th Cir. Dec. 26, 1978).

129 Professor Kamisar has predicted that *Williams* will not be extended to interrogation that occurs before the initiation of formal adversary proceedings. *See* Kamisar, *supra* note 64, at 83.

130 For a brief discussion of this aspect of voluntariness doctrine, see notes 19-22 *supra* & accompanying text.

131 Under ordinary circumstances, before an arrested suspect can be released, the charges against him must be dropped or he must be brought before a judicial officer for the commencement of formal adversary proceedings. If the charges are dropped, and the suspect is released, the sixth amendment right to counsel probably does not apply to subsequent police interrogation. Although this Article has argued that the right should attach at the point of arrest, it is likely that the dropping of the charge would negate the effect of the prior arrest for purposes of applying *Williams*. Even though the police may continue to focus upon the suspect as a target of their investigation the Court has held that the police are not required to arrest a suspect, and thereby possibly trigger the suspect's sixth amendment rights, even though they have sufficient evidence to take that step. Hoffa v. United States, 385 U.S. 293, 310 (1966). Accordingly, in cases in which the suspect is not confined, he would not be protected by the sixth amendment, even though deception about whether he is being interrogated may in fact occur.

likely to seek discourse with others to relieve this anxiety. That search, of course, may make him more susceptible to an undercover investigator seeking information about the offense for which the suspect has been arrested." [132] Confinement of the suspect increases the power of the police in an important respect. Because the suspect's ability to select people with whom he can confide is completely within their control,[133] the police have a unique opportunity to exploit the suspect's vulnerability. In short, the police can insure that if the pressures of confinement lead the suspect to confide in anyone, it will be a police agent. In view of the government's control over the suspect's channels of communication, it is blatantly unfair to allow the government to exploit the suspect's vulnerability by trickery of this type.

Indeed, in one respect the deception in the "jail plant" situation is more invidious than that involved in *Spano v. New York*,[134] the seminal case dealing with the fairness strand of voluntariness doctrine.[135] In *Spano*, the defendant adamantly resisted police efforts to obtain a statement until he was confronted by Bruno, a fledgling officer who was also defendant's childhood friend, and who by telephone had persuaded Spano to surrender to the police. Pursuant to instruction from his superiors, Bruno falsely told the defendant that his "telephone call had gotten him [Bruno] into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child." [136] After assuming this role four times within the period of an hour, Bruno's deception successfully elicited a confession.

Although the Court held that the confession was involuntary based on the totality of the circumstances,[137] the majority opinion's

---

[132] Dix, *Undercover Investigations and Police Rulemaking*, 53 TEXAS L. REV. 203, 230 (1975). Professor Dix suggests that a *Miranda*-type barrier should preclude use of the "jail plant" tactic. *Id.* Professor Kamisar has argued cogently to the contrary. *See* Kamisar, *supra* note 64, at 61-69.

[133] Justice Marshall's dissenting opinion in Miller v. California, 392 U.S. 616, 616 (1968), noted this aspect of confinement. In *Miller*, an undercover police agent testified at defendant's trial about conversations they had engaged in while they shared a cell prior to the defendant's arraignment. In a per curiam opinion, the Court dismissed the writ of certiorari as improvidently granted. Justice Marshall, and the three Justices who joined in his opinion, would have extended *Massiah* to exclude the agent's testimony. Justice Marshall argued that "[i]ndeed, in one respect at least, this is a clearer case than *Massiah*: unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions." *Id.* 624.

[134] 360 U.S. 315 (1959).

[135] *See* notes 19-22 *supra* & accompanying text.

[136] 360 U.S. at 323.

[137] *Id.* 321.

marked distaste for Bruno's conduct indicated that the use of such a stratagem might in itself invalidate the resulting confession. To be sure, the deception employed in *Spano* can be distinguished from that of the typical "jail plant" situation. First, it is significant that Bruno was a long-time friend of the defendant, as opposed to a previously unknown cellmate. Second, in contrast to the typical "jail plant" situation, the defendant in *Spano* was explicitly and persistently urged to confess in order to avert dire consequences for his friend.[138] The presence of these additionally coercive elements in *Spano* undoubtedly intensified the pressure placed upon the defendant to make an incriminating statement.

However, the broader "illegal methods" [139] language in *Spano* suggests that the Court was concerned more with deception than coercion. When the potential for deception is the focus of comparison, the conventional "jail plant" ploy emerges as the more objectionable interrogation tactic. In *Spano,* the defendant at least knew that his "friend" was a police officer and that his goal was to obtain a confession. By contrast, the suspect exposed to the "jail plant" is deceived completely about his cellmate's identity and purpose. The deception perpetrated in *Spano* unfairly weakened the suspect's ability to resist the police efforts to obtain a confession; the trickery of the "jail plant" ploy affords the suspect no opportunity to apply his powers of resistance because the peril of speaking is hidden from him. Accordingly, the "fairness" aspect of *Spano* should be expanded to prohibit this practice.

Once a general category of trickery has been deemed prohibited per se, a similar technique (especially one arguably within the same category) can be analyzed by comparing it to the tactic already proscribed. To be successful, such a comparison will involve the difficult definitional problems inherent in framing or applying legal rules. In the context of this type of deception, the analysis may be expected to involve distinguishing between impermissible deception about whether an interrogation is taking place and a permissible failure to disclose relevant information. Many of the tactics utilized in the course of an ordinary interrogation may have the effect of making a suspect forget that the police are seeking to elicit incriminating evidence.[140] Presumably, however,

138 The coercive nature of this tactic can be explained by the fact that it takes on the character of a threat. For a discussion of the legitimacy of the use of threats and promises during interrogation, see notes 189-217 *infra* & accompanying text.

139 360 U.S. at 320-21.

140 For example, it is said that in order to establish a rapport that will encourage the disclosure of incriminating information, it is desirable to "[e]stablish confidence

when a suspect has been informed of the police officer's intention to interrogate him and has consented, the police will not be required to preface every attempt to elicit incriminating statements [141] with a reminder to the suspect that they are continuing to interrogate him. On the other hand, the government obviously should not be permitted to argue that no deception occurred in *Massiah* because the defendant never happened to ask Colson whether he was acting as an undercover agent for the government. In between these two extremes, this analysis will involve close comparisons: the adoption of a per se rule will not eliminate the necessity of difficult line-drawing.

People v. Ketchel,[142] which involved an interrogation tactic analogous to deception about whether interrogation is taking place, provides an opportunity to demonstrate the suggested approach. In *Ketchel,* three defendants were arrested for robbery and murder. After talking with them for twenty minutes about the crimes, the police left the three suspects together in a room, after telling them that they were " 'free' to talk." [143] The room had in fact been wired to record the conversation. During the conversation, two of the defendants expressed the possibility that the room might be bugged.[144] Nevertheless, all three of them proceeded to make incriminating statements. In holding that these statements were properly admissible at the defendants' trials, the court applied the traditional voluntariness test [145] and found that "[t]he prior police statements as to the free use of the room could not have been such 'as to overbear [defendants'] will to resist and bring about confessions not freely self-determined' . . . because [defendants] themselves suspected their conversations *were* overheard." [146] Thus, the court implied that police trickery with respect to whether an interrogation is taking place will not be impermissible so long as the

and friendliness by talking for a period about everyday subjects. In other words, 'have a friendly visit.' " *See* F. ROYAL & S. SCHUTT, *supra* note 2, at 61-62. Obviously, the purpose of the "friendly visit" is to distract the suspect from the reality that an interrogation is taking place. *See generally* Kamisar, *supra* note 111.

141 The Court apparently adopted this definition of "interrogation" in Brewer v. Williams, 430 U.S. 387, 399-400 (1977). *See* note 128 *supra.*

142 59 Cal. 2d 503, 381 P.2d 394, 30 Cal. Rptr. 538 (1963), *rev'd en banc,* 63 Cal. 2d 859, 409 P.2d 694, 48 Cal. Rptr. 614 (1966). After retrial on the penalty issue, the Supreme Court of California voided the confessions on the authority of Escobedo v. Illinois, 378 U.S. 478 (1964). People v. Ketchel, 63 Cal. 2d 859, 868, 409 P.2d 694, 699, 48 Cal. Rptr. 614, 619 (1966).

143 59 Cal. 2d at 521, 381 P.2d at 402, 30 Cal. Rptr. at 546.

144 *Id.,* 381 P.2d at 403, 30 Cal. Rptr. at 547.

145 The case was originally decided before *Massiah* or *Miranda.*

146 59 Cal. 2d at 521, 381 P.2d at 403, 30 Cal. Rptr. at 547 (emphasis in original).

suspect subjected to such trickery is aware of the *possibility* that such trickery is being employed.

This approach is misdirected and should not be incorporated into an analysis of a suspect's sixth amendment rights. As noted above, a subjective approach that focuses on the effect of police practices on a particular defendant does not provide effective guidance to the police and courts.[147] Moreover, even if a totally objective approach is not adopted, as long as a defendant is actually deceived, it should not matter whether he was totally deceived, or partially deceived in that he recognized the possibility of deception. After all, anyone who considers the matter will know that there is *always* some possibility of governmental deception. A suspect's constitutional rights should not turn upon the degree of cynicism he expresses.[148]

If it has first been established that deception about whether an interrogation is taking place is impermissible per se,[149] under the suggested approach the question in a case like *Ketchel* should be whether the failure to disclose the fact that the room was bugged can be equated with that deception. In light of *Massiah,* impermissible deception can obviously take place without any overt misstatement. Deception in this context would appear to occur whenever the government fails to disclose to the suspect that it has changed the situation to make it contrary to an ordinary person's reasonable expectations about interrogation. An ordinary person in Massiah's position would not reasonably expect that his friend was acting as a government agent; similarly, an ordinary person occupying the position of the defendants in *Ketchel* would not reasonably expect that the room in which they were conversing was bugged. Because governmental deception of this nature is likely to lead an arrested suspect to believe that no interrogation is taking place, incriminating statements obtained by failing to disclose that the room was bugged should likewise be inadmissible per se.

B. *Deception That Distorts the Meaning of the* Miranda *Warnings*

When the *Miranda* protections are applicable, deception that defeats them definitely occurs when police trickery leads the suspect to believe that the *Miranda* warnings are totally inapplicable. For

147 *See* notes 99-106 *supra* & accompanying text.

148 *Cf.* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 384 (1974) ("[N]either *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.").

149 *See* text accompanying notes 119-27 *supra.*

example, if in the course of an interrogation following a valid waiver, the suspect is questioned by a new officer who tells him that he no longer has a right to remain silent or that statements he makes cannot be used against him, statements made by the suspect in response would clearly be inadmissible.[150]

If *Miranda* is more than an empty formality, statements or tricks that significantly distort the meaning of the warnings should similarly be barred. For example, if a suspect who has initially waived his rights is told that statements he makes to the officers will actually benefit him in a reduction of the charge,[151] this advice appears to conflict with the meaning of the first two *Miranda* warnings. The suspect might naturally infer that although he may have some technical right to remain silent, the right is not a meaningful one in that in reality it is in his best interest to talk. At the same time, he may feel that although his statement can be used against him, that is not nearly as important as the fact that it can be used in his favor. Direct distortion of this magnitude obviously vitiates the effect of the *Miranda* warnings,[152] thus resulting in a violation of the principle that requires that the warnings remain in effect (or at least not be negated by police conduct) throughout the interrogation.

At least some degree of distortion of the *Miranda* warnings occurs whenever the police make a misstatement that relates to the legal effect of the suspect's exercise of his right to remain silent. For example, if after warning the suspect of his rights and obtaining a valid waiver, the police tell the suspect that one of his confederates is going to make an accusatory statement in his presence, and this

---

[150] *Cf.* Commonwealth v. Dunstin, 78 Mass. Adv. Sh. 2302, 368 N.E.2d 1388 (1977), *cert. denied*, 435 U.S. 943 (1978) (incriminating statements held inadmissible when guard told defendant that only statements made under oath at trial could be used against him); Commonwealth v. Hale, 467 Pa. 293, 356 A.2d 756 (1976) (results of tests by police psychiatrist held inadmissible when psychiatrist told accused before testing that the test results would be used only at sentencing).

[151] *Cf.* Fillinger v. State, 349 So. 2d 714 (Fla. App. 1977) (confession held involuntary because defendant was told that if she cooperated, the state attorney would be so informed before establishing the amount of the bond upon which she was to be held); State v. Biron, 266 Minn. 272, 123 N.W.2d 392 (1963) (confession held inadmissible when given after suspect was told that his confession might lead to a juvenile court trial instead of one in criminal court). The contents of the tape recording made of the six-hour Biron interrogation are discussed below. *See* text accompanying notes 199-201 & 217 *infra*.

[152] *Cf.* Commonwealth v. Singleton, 439 Pa. 185, 189-90, 266 A.2d 753, 754-55 (1970) (holding that delivering the second *Miranda* warning by telling suspect that "any statement he gave could be used *'for*, or against him' at trial" is impermissible because it "vitiates the intended impact of the warning" (emphasis added) (footnote omitted)).

statement can be used against him unless he denies it,[153] this incorrect statement of law [154] adds an important caveat to the *Miranda* warnings. In effect, the suspect is told, "You have a right to remain silent, but in the context of your particular situation, exercise of that right will produce damaging evidence that will be used against you." This addition to the *Miranda* warnings so distorts their meaning that it significantly undermines their effect. A substantial likelihood exists that, during the remainder of the interrogation, the suspect, confronted with this information, will base his decision whether or not to assert his constitutional right to remain silent upon the mistaken premise that his silence can be used against him. The interrogator's distortion of the *Miranda* warnings creates an unacceptable risk that the ordinary suspect will be deprived of the protection afforded by the warnings. Therefore, statements obtained as a result of these types of misstatements should be inadmissible per se.

Of course, the police may indirectly achieve distortion of the *Miranda* warnings' meaning without making any misstatements of the law. This may occur when the police verbally impress upon the suspect that it is really in his own best interest for him to talk and tell the truth. For example, the Inbau-Reid manual recommends that the interrogator should inform "the suspect that even if he were your own brother (or father, sister, etc.), you would still advise him to speak the truth." [155]

The validity of practices that indirectly distort the *Miranda* warnings may be tested by comparing their likely effect to the results of direct distortion of the *Miranda* warnings, already the subject of a per se proscription under the suggested analysis. Statements of this type undercut the effect of *Miranda* warnings just as effectively as direct distortions of the warnings' legal scope. After all, the typical criminal suspect is not interested in abstract propositions of law; he wants to know what the score is. He may well believe that because the police are the ones who gave him the *Miranda* warnings, they can be expected to know the warnings' value. If the police advise him that it is really in his best interest to make a

[153] *Cf.* State v. Braun, 82 Wash. 2d 157, 509 P.2d 742 (1973) (police told accused that codefendant's confession would be admissible against him if repeated in his presence). Of course, the police may convey the same message to the suspect tacitly without misinforming him of the effect of his failure to deny. *Cf.* text accompanying note 155 *infra.*

[154] The Court has made it clear that once the *Miranda* warnings have been given, the defendant's silence may not be used against him under any circumstances. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

[155] F. INBAU & J. REID, *supra* note 2, at 60.

full disclosure, the suspect is likely to believe them, and, as a result, the effect of the *Miranda* warnings will be essentially negated. Although the inherent limitations of a system that initially entrusts the protection of the suspect's constitutional rights to the police must be acknowledged, a minimal circumscription of the police's adversarial role is necessary if *Miranda* is to have any content. If we are to attribute constitutional significance to verbal warnings by the police, it is only logical that we attach equal weight to police statements that predictably vitiate the warnings' desired effect. Thus, consistent with the policy against directly undermining the effect of the *Miranda* warnings, their indirect distortion, such as by advice to the suspect that it is in his own best interest to make a full disclosure, should also be prohibited per se.

C. *Deception That Distorts the Seriousness of the Matter Under Investigation*

A slightly different form of trickery occurs when, after having given the suspect his *Miranda* warnings, the police misrepresent the seriousness of the offense. A typical example of this occurs when an interrogating officer falsely informs a murder suspect that the victim is still alive.[156] In analyzing whether this type of trickery impermissibly undermines the effect of the *Miranda* warnings, it is first necessary to determine whether the suspect must be informed of the nature of the charges about which he is being questioned before he may validly waive his *Miranda* rights.

Lower courts generally have held that the interrogating officer need not inform the suspect of the specific nature of the charges involved in order to obtain a valid waiver.[157] The Supreme Court's present view on this issue, however, is not clear. In the landmark case of *Johnson v. Zerbst*,[158] the Court equated waiver of a constitutional right with "an intentional relinquishment or abandonment of a known right or privilege."[159] In cases involving the waiver of

[156] *See, e.g.*, People v. Groleau, 44 Ill. App. 3d 807, 358 N.E.2d 1192 (1976); State v. Cooper, 217 N.W.2d 589 (Iowa 1974). *See also* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 28, at 571.

[157] *See, e.g.*, United States v. Anderson, 533 F.2d 1210, 1212 n.3 (D.C. Cir. 1976); Collins v. Brierly, 492 F.2d 735 (3d Cir.), *cert. denied*, 419 U.S. 877 (1974); United States v. Campbell, 431 F.2d 97 (9th Cir. 1970); People v. Prude, 66 Ill. 2d 470, 363 N.E.2d 371, *cert. denied*, 434 U.S. 930 (1977); People v. Pereira, 26 N.Y.2d 265, 258 N.E.2d 194, 309 N.Y.S.2d 901 (1970). *Contra*, Schenk v. Ellsworth, 293 F. Supp. 26 (D. Mont. 1968). *Cf.* Commonwealth v. Dixon, 475 Pa. 17, 379 A.2d 553 (1977) (suspect must be informed of the "transaction" that gave rise to his detention and interrogation).

[158] 304 U.S. 458 (1938).

[159] *Id.* 464.

trial counsel or of the right to trial, this standard has been held to mean that there can be no valid waiver unless the defendant has fairly full information relating to the consequences of the waiver.[160] Thus, when waiver of these rights is at issue, precise information relating to the nature of the charges against the defendant is clearly required.[161]

In *Schneckloth v. Bustamonte*,[162] a recent case involving waiver of fourth amendment rights, the Court noted in passing that when the suspect's fifth amendment privilege is in effect at the station house, the "standards of *Johnson* were . . . found to be a necessary prerequisite to a finding of a valid waiver." [163] In view of the development that *Johnson* has undergone in the right to trial and right to counsel contexts, this language can easily be relied upon to require that a suspect be informed of the precise nature of the charges about which he is being questioned as a prerequisite to waiver of his *Miranda* rights.

Other elements of the Court's recent analysis of the concept of waiver, however, could be used to support an opposite result. In *Schneckloth*, the Court indicated that two considerations are of particular importance in determining the applicable standard of waiver: first, the extent to which the right at stake bears upon the integrity of the factfinding process; [164] second, the degree of structure that inheres in the context in which the waiver is sought.[165] Either of these considerations could be utilized to dilute the applicable standard of waiver in the *Miranda* context. Compared to the courtroom environment in which the rights to counsel and jury trial are waived, the custodial interrogation setting is relatively un-

160 *See* Boykin v. Alabama, 395 U.S. 238 (1969) (right to trial); Minor v. United States, 375 F.2d 170 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967) (waiver of trial counsel).

161 In the case of waiver of the right to trial, it has been held that the defendant must demonstrate a clear understanding of the charges against him. Henderson v. Morgan, 426 U.S. 637 (1976). In addition, the defendant must have a "full understanding of what the plea connotes and of its consequence." Boykin v. Alabama, 395 U.S. 238, 244 (1969). When the defendant waives his right to counsel, he must understand not only the charges and statutory offenses against him, but also the possible punishments, defenses, and mitigating circumstances, and any facts "essential to a broad understanding of the whole matter." Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality opinion) (Black, J.). *See generally* Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1141-45 (1965).

162 412 U.S. 218 (1973).

163 *Id.* 240.

164 *Id.* 242.

165 *Id.* 243-45. For a critical examination of this aspect of *Schneckloth*, see Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 477-80 (1978).

structured. In light of its analysis in *Schneckloth,* the Court may find that it is "unrealistic" to impose additional requirements beyond delivery of the *Miranda* warnings.[166] Moreover, although *Schneckloth* properly recognized that the *Miranda* rights do have a bearing upon the determination of guilt or innocence,[167] other post-*Miranda* decisions evince a perception on the part of the Court that statements obtained in violation of *Miranda* may be introduced into evidence without jeopardizing the integrity of the factfinding process.[168] Therefore, in keeping with the doctrine of variable waiver articulated in *Schneckloth,*[169] the Court might be expected to hold that a suspect may validly waive his rights under *Miranda* even though he was not informed of the precise nature of the charges forming the subject matter of the interrogation.

Even if the Supreme Court ultimately holds that disclosure of the charge is not a prerequisite to a valid waiver of *Miranda* rights, however, this will not mean that after obtaining a valid waiver without such disclosure, police officers may then misrepresent the seriousness of the charge in order to eliminate any remaining resistance in the suspect. Because the *Miranda* rights must be capable of reassertion at any point in the interrogation process,[170] the mere existence of a waiver does not immunize subsequent police misrepresentation. On the contrary, misrepresentation of the seriousness of the charge cripples the suspect's capacity to reassess the desirability of asserting the rights outlined in the warnings. The presence of inaccurate information about the legal consequences that will accompany ill-considered speech achieves as pernicious an effect as direct distortion of the *Miranda* warnings. Although many doubtlessly constitutional methods of police trickery distort the suspect's perception of his predicament, it is sophistry to make rigid distinctions between the suspect's abstract understanding of his legal rights and his concrete ability to make effective use of them. Prin-

[166] In most cases, of course, it would not be any more difficult for the police to inform the suspect of the charges they are investigating than it is for them to deliver the warnings required by *Miranda.* There might be some cases, however, in which defining the precise nature of the charges under investigation would be difficult. *See, e.g.,* Commonwealth v. Tatro, 76 Mass. App. Ct. Adv. Sh. 568, 346 N.E.2d 724 (Mass. App. Ct. 1976) (homicide charges not contemplated at time accused was questioned about robbery because cause of victim's death had not yet been determined).

[167] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 240 (1973): "The [*Miranda*] Court made it clear that the basis for decision was the need to protect the fairness of the trial itself . . . ."

[168] *See, e.g.,* Hass v. Oregon, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[169] *See* text accompanying notes 164 & 165 *supra.*

[170] *See* note 28 *supra* & accompanying text.

cipled resolution of this problem requires some analysis of the significance of the particular factual distortion in terms of the suspect's ability to exercise the *Miranda* rights.

Whatever balance a court would strike in other areas, the effect of misrepresentation of the charge cannot be overestimated. If suspects ever engage in the type of rational deliberation implicit in a system that depends on warnings, it is a virtual certainty that their perception of the potential punishment will assume critical importance in deciding whether or not to confess. Indeed, with the exception of deception about whether interrogation is taking place,[171] it is difficult to imagine trickery that exerts a more devastating effect on the suspect's ability to utilize his constitutional rights meaningfully. By distorting the suspect's understanding of his legal predicament, police misrepresentation of the charge is very likely to dissipate the effect of the *Miranda* warnings substantially. It therefore creates an unacceptable risk that the suspect will not be able to exercise his constitutional rights effectively. Accordingly, trickery of this type should be impermissible per se.

D. *"A Pretended Friend Is Worse":*[172] *The Assumption of Non-Adversary Roles by Interrogating Officers*

According to Royal and Schutt's treatise on police interrogation, "[r]esistance to the disclosure of [incriminating] information is considerably increased . . . if something is not done to establish a friendly and trusting attitude on the part of the subject."[173] Accordingly, the interrogating officer will often assume a non-adversarial role in which the suspect will perceive him not as an officer who is attempting to elicit incriminating information, but rather

---

[171] *See* notes 119-49 *supra* & accompanying text.

[172] Spano v. New York, 360 U.S. 315, 323 (1959). Both *Spano* and Leyra v. Denno, 347 U.S. 556 (1954), lend some preliminary support to the conclusion advanced in this section. In both cases the Court invalidated confessions obtained by police interrogators who purported to speak to the defendants in a non-adversarial capacity. In *Leyra,* the police psychiatrist who obtained the confession told the defendant he was a doctor who was going to help him with his headaches. 347 U.S. at 559. In *Spano,* a police officer told defendant (who had been his childhood friend) that his job would be in jeopardy if the defendant did not confess, and that loss of his job would be disastrous to his three children, his wife, and his unborn child. 360 U.S. at 323. Although the Court clearly expressed its disapproval of the deceptive practice employed, *id.,* it considered the use of the childhood friend as just "another factor which deserves mention in the totality of the situation," *id.,* and held that this practice combined with other factors in the case to overbear defendant's will, *id.* Thus, the Court did not go so far as to indicate that the deceptive practice alone was sufficient to invalidate the confession.

[173] F. ROYAL & S. SCHUTT, *supra* note 2, at 61-62, *quoted in* Kamisar, *supra* note 111, at 209.

as a friend or counsellor who is truely concerned with the suspect's welfare.[174] For example, in *State v. Reilly*,[175] the chief interrogating officer manipulated the situation so that the eighteen year old suspect would view the officer almost as a father figure.[176] In *State v. Biron*,[177] one of the interrogating officers assumed the role of religious counsellor by speaking to the suspect as a fellow Catholic and enlightening him about the values of confession.[178] Similar

---

[174] This tactic is closely related to deception about whether an interrogation is taking place. *See* notes 119-50 *supra* & accompanying text. Although the assumption of a non-adversarial role may not totally negate the suspect's awareness that he is the subject of a police interrogation, the effective employment of this stratagem will substantially diminish his perception that particular questions are in fact part of the interrogation.

[175] No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct. 1976). *See* J. BARTHEL, A DEATH IN CANAAN (1976). This excellent account of the murder case in which Peter Reilly was convicted of manslaughter but eventually exonerated contains substantial portions of the tape-recorded police interrogation of Reilly. *See id.* 39-130.

[176] *See, e.g., id.* 85:

> S: [interrogator]: Have you ever felt close enough to someone that you could really trust them?
>
> . . . .
>
> P: [suspect]: Nope . . . yes, excuse me. I do have someone that I could speak to like that. That would be Aldo Beligni.
>
> S: Let's you and I try something. You try to feel about me . . .
>
> P: Like a father?
>
> S: Like somebody who's really interested in you, and then . . .
>
> P: Well, I do already. That's why I come out with all this.

[177] 266 Minn. 272, 123 N.W.2d 392 (1963). A six-hour tape recording of the interrogation conducted in *Biron* is on file in the libraries of the University of Michigan and University of Minnesota Schools of Law [hereinafter referred to as *Biron* Tapes]. The case is discussed in Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & C. 182, 184, 185 nn.19 & 20 (1977). The author expresses his gratitude to Professor Kamisar for making portions of the tapes available to the University of Pittsburgh School of Law.

[178] Actually, it might be more accurate to say that the officer attempted to assume the role of a priest-figure. Excerpts from the tape disclose that after the suspect asked to see a priest, Hawkinson, an interrogator who had previously exhibited courtesy and restraint in his dealings with the suspect, entered and the interrogation proceeded as follows:

> H: Mike was telling me that you'd like to see a priest. Is that true?
>
> S: Yes.
>
> H: I'm Catholic, too. I can appreciate that. Any particular one that you'd like to see?
>
> S: No.
>
> H: I think you realize you'll feel a lot better—
>
> S: Yeah, that's true.
>
> H: If you did do it, and you tell about it. I think you know that. It's just like when you go to confession, if you make a good clean confession, well, you feel good, received the next morning. My name is Hawkinson but I am a Catholic, a convert many years ago. In fact this Sunday night, I'm going out to King's house on a retreat for two days.

examples of a role switch appear, or are at least hinted at[179] in many other cases.[180]

In some cases, the suspect's perception of the officer as a friendly figure will create extreme pressures to confess. In the *Reilly* case, for example, it is apparent that the suspect's inordinate desire to gain the acceptance of the interrogator whom he perceived as a father figure[181] compelled him not only to make a statement, but also to try with pathetic eagerness to confess to those details that he sensed the police were seeking.[182] In light of this example,[183] it may be concluded that when the interrogator's shift to a non-adversary role is highly effective or when the suspect is

179 In cases such as *Reilly*, *Biron*, and State v. Miller, 76 N.J. 392, 388 A.2d 218 (1978), *see* note 180 *infra*, in which the interrogation is actually recorded, examples of an interrogating officer's switch to a non-adversary role are much more apparent than in non-recorded cases. This tends to support Professor Kamisar's argument that our traditional litigational tools are simply not calculated to elicit all of the constitutionally relevant facts of secret police interrogation. *See* Kamisar, *supra* note 111.

180 *See* Davis v. North Carolina, 384 U.S. 737, 750-51 (1966) (defendant confessed immediately after officer who was friend of family said a short prayer on his behalf); Spano v. New York, 360 U.S. 315 (1959) (defendant urged to confess by officer who had in fact been a boyhood friend); State v. Miller, 76 N.J. 392, 388 A.2d 218 (1978) (officer told defendant that the murderer was not a criminal who deserved punishment, but a person in need of medical care, and that he would do all he could to help if the defendant spoke about the incident). *Cf.* State v. Thompson, 287 N.C. 303, 214 S.E.2d 742 (1975), *modified*, 428 U.S. 908 (1976) (defendant's father, who was a police sergeant, urged defendant to cooperate with sheriff during interrogation on murder charges).

181 The extent of Reilly's feeling of dependence was fully revealed when he twice inquired of the interrogator if there was a possibility that he might come to live with the officer and his family, J. BARTHEL, *supra* note 175, at 98, 117-18, 127.

182 *See, e.g.*, *id.* 83, 91:

> S: What about a knife, Pete? Remember using a knife?
>
> P: I don't, but a straight razor thing registers.
>
> S: And a knife, Pete.
>
> P: Maybe. Could you give me the details? . . .
>
> . . . .
>
> I mean, was there a knife mark?
>
> S: Pete, you know very well why I won't answer that question. 'Cause you're not being honest . . . . You're trying to maneuver me and trick me into telling you facts that you already know. I know the facts.
>
> P: Well, if you would give me some hints . . . .

183 The after-discovered evidence that led to the ultimate dismissal of Reilly's case appears to establish conclusively that his confession was false. *See* Reilly v. State, 32 Conn. Supp. 349, —, 355 A.2d 324, 333-39 (Super. Ct. 1976), *vacating* No. 5285 (Conn. Super. Ct. April 12, 1974). Moreover, during the course of the interrogation, Reilly said that he must have raped his mother, *id.* 119, a statement that was patently false because no rape was alleged to have occurred.

extraordinarily sensitive to such tactics, a real danger exists that the shift will induce a false confession.[184]

The more pervasive danger, however, is that the interrogator's assumption of a non-adversary role will negate the effect of the second *Miranda* warning. The point of telling the suspect that anything he says can be used against him is to sharpen the suspect's awareness of his position. As the *Miranda* majority stated: "[T]his warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." [185] As Royal and Schutt suggest,[186] when the police effectively assume a non-adversarial role, the essential awareness is likely to be dissipated. The suspect's belief that he is talking to a friend or counsellor who has his best interests at heart will cause the suspect to forget that he is involved in an adversary interrogation in which his constitutional protections are of vital importance.[187] Accordingly, in order to avoid this negation of the protection provided by the second *Miranda* warning, the device of seeking to elicit incriminating information through the assumption of a non-adversarial role should be barred.[188]

E. *Tricks That Take on the Character of Threats or Promises*

In an early interpretation of the fifth amendment privilege, the Court concluded that one category of police tactics will automatically render a resulting confession involuntary. In 1897, the Supreme Court in *Bram v. United States* [189] laid down the rule that in order to be free and voluntary within the meaning of the fifth amendment privilege, a confession must be one that was "not . . . extracted by any sort of threats or violence, nor obtained by any

184 Under Professor Kamisar's analysis, such a danger should in itself operate to render "involuntary" all confessions induced as a result of this particular stratagem. *See Involuntary Confessions, supra* note 87, at 753-55.

185 384 U.S. at 469.

186 *See* text accompanying notes 172 & 173 *supra.*

187 *Id.* 467-69.

188 If it is determined that the suspect (given his characteristics that are known to the police) would be likely to view the interrogating officer as a friend, father-figure, religious counselor, or any other non-adversarial figure, this per se rule would be violated. The fact that the officer was actually manifesting his true concern for the suspect would, of course, be constitutionally irrelevant because the officer's bona fides would not mitigate the potential destruction of the protections afforded by *Miranda. See* note 115 *supra.*

189 168 U.S. 532 (1897).

direct or implied promises, however slight." [190] Although the *Bram* rule originally applied only to the federal government,[191] the Supreme Court explicitly noted in *Brady v. United States* [192] that *Malloy v. Hogan's* [193] incorporation of the fifth amendment privilege made it fully applicable to the states.[194]

The *Bram* doctrine's impact on deceptive police practices depends, of course, upon the interpretation given to the terms "threats" and "promises." Under a broad interpretation of these terms, many police interrogation tactics might be held to constitute implicit threats or promises in the sense that their objective is to make the suspect believe that his situation will be improved in some way if he does confess, or that it will become worse if he does not. On the other hand, some lower courts have been quite adept at interpreting *Bram* in a narrow way that virtually strips the doctrine of its vitality.[195] In view of the Court's reaffirmation of *Bram* in *Brady v. United States*,[196] principled application of the doctrine is necessary.

Interpretation of the *Bram* doctrine depends upon two interrelated and particularly difficult questions. The first concerns the extent to which the terms of a promise or threat must be articulated; the second involves specification of the type of detriments or benefits that legitimately may be offered to a suspect. Both problems present themselves in a variety of contexts. For example, the *Miranda* opinion describes a deceptive practice recommended by the O'Hara manual: "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [197] In this

[190] *Id.* 542-43.

[191] In state cases, post-*Bram* confessions that were clearly given in exchange for direct promises of leniency by the police were found not to be in violation of the fourteenth amendment. *See, e.g.*, Stein v. New York, 346 U.S. 156 (1953) (confession held voluntary when given in exchange for promise that accused's father would be released from jail and brother would not be disciplined for parole violation).

[192] 397 U.S. 742 (1970).

[193] 378 U.S. 1 (1964).

[194] Brady v. United States, 397 U.S. 742, 753 (1970).

[195] *See, e.g.*, United States v. Ferrara, 377 F.2d 16 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (confession voluntary when obtained after federal agent told accused that he would probably be released on reduced bail if he cooperated).

[196] 397 U.S. at 754. *See* text accompanying notes 213 & 214 *infra.*

[197] C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 105-06 (1956), *quoted in* Miranda v. Arizona, 384 U.S. 436, 453 (1966).

situation, because the police make no statement of any kind to the suspect, one could argue that no express or implied threat has been made. Nevertheless, the purpose of the charade is clear. In effect, the police say to the suspect, "Confess to the crime you are charged with, or you will find yourself being prosecuted for crimes that you did not commit." [198]

The interrogation of John Biron [199] included a number of instances in which the benefits of confessing (or detriments of not confessing) were suggested but not clearly delineated. Biron was an eighteen year old youth who was accused of participating in a felony murder with one or two other teenagers. At one point, one of the interrogating officers said to him: "The thing you want to remember is that there's two of you involved and you're both to blame. But if you don't tell the truth, and the other one does, it puts more blame on your part." [200] Another officer employed a metaphor to make essentially the same point:

> Right up to your ears you're implicated. That hole is getting bigger, you're digging it deeper. You're the fellow who's going to determine how long you're going to be buried. . . . You're the one guy who's got the shovel; you're the one fellow who's digging the hole. You just figure out how deep you want to dig that hole, how far down you want to bury yourself; and you just keep right on digging. Of course, if you would start telling the truth, we could throw a little of that dirt back in, and make it a little shallower.[201]

Although neither officer referred specifically to the suspect's legal liability, it appears that the first officer's reference to "blame" was not limited to moral culpability, and the significance of the second officer's metaphor is obvious. The impression created by these officers was that the suspect would maximize his time of incarceration if he did not confess, but might obtain a reduced sentence if he did.

In other situations, the police may attempt to induce a confession by offering the possibility of benefits that do not involve reduc-

---

198 A study of interrogation practices in New Haven indicated that the police have conveyed this same type of message to suspects in post-*Miranda* cases. *Interrogation in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1546 (1967) [hereinafter cited as *Interrogations in New Haven*].

199 *See* notes 177-80 *supra* & accompanying text.

200 *Biron* Tapes, *supra* note 177.

201 *Id.*

tion of legal liability. The benefits offered the suspect may be tangible, such as an opportunity to talk with one's spouse [202] or a chance to receive medical treatment,[203] or intangible, such as an assuagement of guilt feelings or a promise of greater respect from the interrogating officer. In the *Biron* interrogation, for example, one officer continually urged the suspect to "get it off [his] chest" in order to "feel better." [204] The same officer repeatedly told the youth, first by implication, and then explicitly, that the officer would "respect [the suspect] a lot more" if he "told the truth." [205]

In determining the appropriate scope of the *Bram* doctrine, the doctrine's underlying rationale must be explored. As Justice White implied in *Brady v. United States* [206] and as Justice Harlan noted in his dissent in *Miranda v. Arizona*,[207] *Bram* reflects a judgment that certain types of threats or promises are likely to "apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." [208] In the case of threats or promises of the type involved in *Bram* (*i.e.*, those that relate to the suspect's status in the criminal justice system),[209] the basis for this judgment is not difficult to perceive—it is simply improper for the police to place a price tag on the right to remain silent in a context in which the bargain offered to the suspect is likely to prove illu-

---

[202] Haynes v. Washington, 373 U.S. 503 (1963) (confession held involuntary when suspect was held incommunicado for 16 hours, and police refused to allow him to talk to his wife unless he confessed).

[203] *See* United States *ex rel.* Collins v. Maroney, 287 F. Supp. 420, 422 (E.D. Pa. 1968) (statement by narcotics addict in withdrawal held involuntary when given after promise of treatment by physician).

[204] *Biron* Tapes, *supra* note 177.

[205] *Id.* Remarks of this type may be improper because they tend to place the officer in a non-adversarial role, *see* text accompanying notes 172-88 *supra*, or because they are implicit attacks on the suspect's dignity, *see* text accompanying notes 243-48 *infra*.

[206] 397 U.S. 742, 754 (1970).

[207] 384 U.S. 436, 507 (1966) (Harlan, J., dissenting).

[208] *Id.* 507 & n.4 (quoting Bator & Vorenberg, *supra* note 34, at 73).

[209] In *Bram*, the accused was told by a detective that another crewman had seen him commit the murder, 168 U.S. 532, 562 (1897), and that he should tell the detective if he had an accomplice in order to avoid "[having] the blame of this horrible crime on your own shoulders." *Id.* 564. The Court interpreted the first of these statements as a threat, and the second as an offer of a benefit. *See* Dix, *supra* note 57, at 288-89.

It is not always impermissible for the government to offer a legal benefit in exchange for a decision not to exercise a constitutional right. For instance, the court's legitimization of plea bargaining allows this type of bargain to be struck when a defendant's right to trial is at issue. *See* Brady v. United States, 397 U.S. 742, 753-54 (1970). *See generally* Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

sory.[210] Moreover, this type of pressure is likely to exert substantial influence upon the suspect's will. Although the bargain may in fact be illusory, the stress engendered by the custodial interrogation setting is likely to diminish significantly the suspect's ability to evaluate its worth. In some cases, this kind of pressure could very easily cause an innocent person to confess,[211] and in any case, such tactics materially increase the likelihood that an ensuing decision to confess will be a result of this outside pressure rather than a consequence of a rational decision stemming from the suspect's own inner motives.

Because of these considerations, the *Bram* doctrine should apply whether or not the threat or promise is explicitly articulated, as long as the police suggestion is likely to induce a suspect to believe that his legal position (in terms of potential charges, periods of incarceration, or collateral consequences pertaining to his relationship with the criminal justice system)[212] will improve if he confesses or deteriorate if he remains silent. A police statement to the suspect that by "telling the truth" he can "throw a little dirt back in the hole and make it shallower" distorts the suspect's decisionmaking process no less than a direct statement that he will spend less time in prison if he confesses. In fact, the former type of statement may have greater impact. The sinister implications of the suggestive metaphor may infuse the suspect's situation with added terror and further decrease the probability of a rational determination of whether he wants to make a particular statement.

---

[210] Promises made in the context of custodial interrogation are likely to prove illusory because an unaided suspect lacks the capacity to evaluate the actual value of any express or implied commitment made by the police. Thus, in *Brady*, the Court distinguished plea bargaining from the *Bram* doctrine on the ground that, in the former case, the defendant is represented by an attorney who can fully advise him of the value of any bargain offered. *See* note 196 *supra*. It should be noted that, based on this rationale, the *Bram* doctrine might not apply to a situation in which a suspect subjected to custodial interrogation is in fact represented by counsel.

[211] This is especially true when, as is often the case, the implied promise of leniency is combined with police assurance that the suspect has little chance of escaping conviction if he goes to trial. For example, in the *Biron* case, the police repeatedly told the suspect not only that they knew he was guilty, *see* text accompanying notes 217 & 218 *infra*, but also that he would be found guilty (because he would be unable to convince a judge and jury of his innocence!), and then suggested to him that he might be able to escape trial as an adult if he confessed. *See Biron* Tapes, *supra* note 177. Confronted with this choice of alternatives, an innocent suspect might very reasonably decide that it would be in his best interest to confess.

[212] *E.g.*, a promise that the suspect's bail will be set at a lower figure in the event he makes an incriminating statement. *See* United States v. Ferrara, 377 F.2d 16, 17 (2d Cir.), *cert. denied*, 389 U.S. 908 (1967) (distinguishing *Bram*, court held confession obtained after a promise of reduced bail voluntary under all the circumstances). Empirical evidence indicates that this type of inducement is offered to suspects quite frequently. *See Interrogations in New Haven, supra* note 198, at 1545.

The extent to which the *Bram* rule should be extended to prohibit threats or promises that do not touch upon the suspect's legal status is problematic. Even when the inducement has little or no bearing on the suspect's relationship to the criminal justice system, pressures of coercive magnitude may be created. It is indisputable, however, that not all threats and promises carry the same risk of constitutional infirmity. Police tactics that take on the character of threats or promises obviously occur in a multiplicity of forms. In addition, the impact of the tactics varies widely with the sensitivity of the suspect and the strength of the particular inducement. In view of these factors, and because the suggested per se approach calls for a delineation of relatively specific practices that create an unacceptable risk of constitutional deprivation, one might argue that a literal reading of the *Bram* rule is inappropriate.

The rejection of a per se rule for this type of deception can only be justified, however, if the alternative—the totality of the circumstances test—offers meaningful protection against impermissibly coercive threats and promises. Justice White's majority opinion in *Brady v. United States* suggests that the *Bram* rule reflects a judgment that the totality of the circumstances test is unworkable in this context. In *Brady,* the Court upheld the validity of a guilty plea in a situation in which exercise of the right to trial would have subjected the defendant to the possibility of the death penalty. Distinguishing *Bram,* the Court emphasized that the presence of counsel could dissipate "the possibly coercive impact of a promise of leniency." [213] The majority explicitly endorsed the *Bram* rationale, however, in language that bordered on describing it as a per se rule:

> *Bram* is not inconsistent with our holding. . . . *Bram* dealt with a confession given by a suspect in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.[214]

Although Justice White's reference to "leniency" might imply that he was limiting his analysis to promises that relate to the suspect's status within the criminal justice system, his conclusion con-

[213] Brady v. United States, 397 U.S. 742, 754 (1970).

[214] *Id.*

cerning the unworkability of the totality of the circumstances test cannot be limited to promises of that character. Promises and threats involving tangible benefit and detriment obviously vary in terms of coercive effect, as do promises of leniency. Although many promises and threats are less coercive than "even a mild promise of leniency," the difficulty of assessing the effect on the suspect subjected to the interrogation suggests that with respect to this issue the totality of the circumstances test does not provide effective protection for the suspect's constitutional rights.

In addition to the concerns expressed by Justice White in *Brady,* no apparent societal interest supporting the use of threats and promises during interrogation is sufficiently compelling to justify the painstaking effort required by the totality of the circumstances test. It is by no means clear that the employment of such tactics achieves law enforcement gains that outweigh the coercive effects that are engendered. In the context of a type of deception that has a variable likely effect, unless some significant societal interest in such police conduct exists, the suspect's constitutional privilege against self-incrimination is better protected by a per se rule. In summary, although threats and promises of tangible benefits made by police during interrogation in order to elicit a confession vary significantly in terms of coercive effect, they are properly the subject of a per se proscription.

When the police merely suggest to the suspect that a confession will make him feel better or cause them to respect him more, there is no reason to exclude the confession as involuntary. Indeed, the Supreme Court in *Bram* indicated that a confession probably would not be invalidated if the benefit that induced it "was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment." [215] This judgment is proper. Within our constitutional framework, confessions that stem from inner pressures such as a desire to relieve one's conscience or a desire to be respected are clearly voluntary.[216] The fact that police trickery may play a part in magnifying these pressures is not in itself sufficient basis to conclude that such tactics should be forbidden on a per se basis. In such cases, it is preferable to employ traditional voluntariness methodology to exclude the relatively rare confessions that are the result of impermissible coercion.

---

[215] 168 U.S. at 564.

[216] *Cf.* Culombe v. Connecticut, 367 U.S. 568, 576 (1961) (plurality opinion) (Frankfurter, J.): "However, a confession made by a person in custody is not always the result of an overborne will. The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation."

F. *Repeated Assurances That the Suspect Is Known To Be Guilty*

In the *Biron* interrogation, one of the interrogators prefaced his questioning by saying, "I suppose they've told you what you're suspected of doing: *What we already know that you've done.*" [217] The device of impressing the suspect with the interrogators' certainty of his guilt was continually employed throughout the interrogation.[218] In view of the recommendations contained in the police manuals, this is hardly surprising. One of the principal directives in the Inbau-Reid manual is that the interrogator should "Display an Air of Confidence in the Subject's Guilt." [219] In elaborating, the authors note that "[a]t various times during the interrogation the subject should be reminded that the investigation has established the fact that he committed the offense; that there is no doubt about it; and that, moreover, his general behavior plainly shows that he is not now telling the truth." [220]

In justifying this technique, the authors state that it is "not apt to induce a confession of guilt from an innocent subject." [221] However, Professor Driver's examination of social psychological data casts doubt upon this assertion. The evidence indicates that "when an individual finds himself disagreeing with the unanimous judgment of others regarding an unambiguous stimulus, he may yield to the majority even though this requires misreporting what he sees or believes." [222] The psychological pressures of custodial interrogation undoubtedly weaken the defenses of many criminal suspects.[223] A significant danger exists that, confronted with positive assurances of their guilt from authority figures [224] who appear to have a full knowledge of the facts,[225] they will not only "yield to the majority judgment," but adopt the facts that are suggested to them.[226]

---

[217] *Biron* Tapes, *supra* note 177 (emphasis added).

[218] *Id.*

[219] F. INBAU & J. REID, *supra* note 2, at 26-31.

[220] *Id.* 28.

[221] *Id.* 29.

[222] Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 51-52 (1968).

[223] *See id.* 60.

[224] The police manuals advise the interrogating officers to try to appear to the suspects as figures who command respect. *See, e.g.*, F. INBAU & J. REID, *supra* note 2, at 18.

[225] *Id.* 13-17.

[226] *See* Driver, *supra* note 222, at 51-53. State v. Reilly, No. 5285 (Conn. Super. Ct. April 12, 1974), *vacated*, 32 Conn. Supp. 349, 355 A.2d 324 (Super. Ct.

Moreover, the repeated assurances of the suspect's guilt are expressly designed to impress upon him the futility of resistance.[227] In effect, the suspect is being told, "We know you are guilty; so why not admit it?" In identifying the coercive attributes of the interrogation techniques employed in *Culombe v. Connecticut*,[228] Justice Frankfurter particularly emphasized the fact that the interrogating officers continually impressed upon the defendant that their sole purpose was to obtain a confession of guilt,[229] thus indicating a judgment that this type of pressure is likely to have a particularly debilitating effect on the suspect. The cumulative pressures of custodial interrogation and repeated assurances of the suspect's guilt are of sufficient magnitude to justify the conclusion that they create an unacceptable risk of an involuntary confession. Accordingly, the use of this tactic should be forbidden per se.

G. *The "Mutt and Jeff" Routine*

One of the classic deceptive practices recommended in the police manuals is the so-called "Mutt and Jeff" routine. Although this routine has many variations, its basic elements are simple. Jeff, the friendly interrogator, begins the questioning. After Jeff employs a friendly, sympathetic approach for a period of time, Mutt (the unfriendly interrogator) appears and "berate[s] the subject." [230] Jeff then resumes his sympathetic approach.[231] The act may be developed in various ways: the two interrogators may stage an argument in front of the suspect; [232] the suggestion may be made that the suspect will be left with Mutt if he does not cooperate with Jeff; [233] or the same interrogator may assume both roles.[234] One important element common to all the variations, however, is that Mutt will display hostility towards the suspect and make demeaning comments about him. In one variation, the Mutt character may

---

1976), provides a striking example of this phenomenon. After the police repeatedly told him they knew he did it, *see, e.g.*, J. BARTHEL, *supra* note 175, at 84, he at one point unequivocally adopted the details that they suggested to him. *Id.* 124.

227 F. INBAU & J. REID, *supra* note 2, at 30.

228 367 U.S. 568 (1961).

229 *Id.* 631 (plurality opinion) (Frankfurter, J.). The same factor was identified as potentially coercive in earlier cases. *See* Spano v. New York, 360 U.S. 315, 323-24 (1959); Malinski v. New York, 324 U.S. 401, 407 (1945).

230 F. INBAU & J. REID, *supra* note 2, at 62.

231 *Id.* 63.

232 *Id.* 62.

233 *See* C. O'HARA, *supra* note 197, at 104, *quoted in* Miranda v. Arizona, 384 U.S. 436, 452 (1966).

234 F. INBAU & J. REID, *supra* note 2, at 62.

refer to the suspect "as a rather despicable character." [235] Alternatively, if the same interrogator acts out both roles, he may "get up from his chair" and address the suspect as follows: "Joe, I thought that there was something basically decent and honorable in you but apparently there isn't. The hell with it, if that's the way you want to leave it; I don't give a damn." [236]

By labelling one variant of the Mutt and Jeff routine as an interrogation "ploy," [237] and then condemning the use of "patent psychological ploys," [238] the *Miranda* majority implied that the use of this strategy may be inherently coercive. Such a judgment could stem from the implications of Mutt's hostility.[239] After Jeff, his only ally, deserts him, a real risk arises that Mutt's angry statements will be perceived by the suspect as a threat of physical mistreatment.[240] In evaluating the significance of this risk, the context in which the hostility is exhibited must be considered. A suspect who has already spent some time in the debilitating atmosphere of the police station growing increasingly anxious about his fate, is confronted by an authority figure who with obvious hostility conveys to him the message that he is "no good." What visions might this raise in the mind of the already frightened suspect? The suspect does not know that the police will not mistreat him. He does know that he is within their absolute control and that they have the capacity to hurt him in many ways. When he hears an apparently angry officer voice the opinion that he is worthless, it requires little imagination for him to conclude that the officer will treat him in accordance with this estimation. Inbau and Reid assert that Mutt's beration of the suspect helps induce a confession because Jeff's sympathetic treatment becomes more effective.[241] The increased effectiveness of Jeff's treatment, however, can be attributed to the suspect's desire to avoid any further dealings with Mutt and the

---

235 *Id.*

236 *Id.* 63.

237 384 U.S. at 452 (1966).

238 *Id.* 457.

239 Before describing the practice, the Court noted that it involves "a show of some hostility." *Id.* 452.

240 Inbau and Reid take pains to note that "the second (unfriendly) interrogator should resort only to verbal condemnation of the subject; under no circumstances should he ever employ physical abuse or threats of abuse or other mistreatment." F. INBAU & J. REID, *supra* note 2, at 63. However, the authors' inclusion of this warning at this point is in itself significant—it reveals a recognition that when a police officer verbally abuses a suspect, there is a substantial danger that to the suspect the abuse may take on the attributes of a threat.

241 F. INBAU & J. REID, *supra* note 2, at 63.

threat that his manner portends.[242] In short, the risk that the suspect will perceive a threat of mistreatment in Mutt's display of hostility is simply too great to tolerate.

A second reason exists for prohibiting the use of this tactic. The intimidating potential of the Mutt and Jeff routine is magnified by the demeaning message that it conveys to the suspect: "You are no good unless you confess." Significantly, Inbau and Reid conclude that the most effective variation on the Mutt and Jeff theme occurs when the same officer enacts both roles.[243] When an officer who has offered friendship and support to the suspect suddenly changes his mind, and tells him that he is not a decent person, the impact on the suspect's ability to resist police efforts to induce a confession is likely to be significant.

Empirical evidence supports this conclusion. Professor Driver's survey of the psychological evidence indicates that the procedures of arrest and detention can temporarily induce shame and humiliation in nearly anyone,[244] and will create strong pressure to assuage those feelings.[245] If this is true, interrogation practices that exacerbate those feelings, and suggest that only confession can alleviate them, undoubtedly exert extreme pressure on the suspect's decisionmaking process. When the demeaning message is conveyed with the potent force of the Mutt and Jeff technique, a significant likelihood exists that an involuntary confession will be the result. Given the implicit threat of force and the potentially coercive challenge to dignity that the Mutt and and Jeff routine fosters, it is reasonable to conclude that it should be the subject of a per se proscription.

Although the Mutt and Jeff routine is a particularly coercive interrogation tactic and not all challenges to the suspect's honor or dignity will result in the same level of coercion, the use by law enforcement officers of any tactic that challenges a sus-

---

242 The *Reilly* case contains an example of the "Mutt and Jeff" routine with the chief interrogating officer acting out both roles. After Reilly stated that he was really not sure of the facts he was admitting, the interrogator, who was previously friendly and supportive, *see, e.g.*, note 176 *supra*, said to Reilly:

> O.K. I don't want you to play any more headgames with us. And if you want to play this way, we'll take you and lock you up and treat you like an animal . . . . And I think it's about time that you sat up in that chair and you faced us like a man and you realize that trying to talk to two state policemen like they're two goddamn idiots, it's not gonna work.

J. BARTHEL, *supra* note 175, at 109.

243 *See* F. INBAU & J. REID, *supra* note 2, at 63.

244 *See* Driver, *supra* note 222, at 58.

245 *Id.* 58-59.

pect's honor or dignity raises a fundamental question for our system of criminal justice. Despite the rudimentary development of a fairness component in voluntariness doctrine,[246] the Supreme Court has never explicitly endorsed the very basic proposition that criminal suspects have a right to be treated in a manner that reflects a concern for their dignity as human beings. It appears, however, that a basic postulate of the fifth amendment is a concern for protecting the dignity of the individual.[247] Interrogation tactics that are calculated to make the suspect feel that he is not a decent or honorable person unless he confesses constitute direct assaults upon that dignity. More than thirty years ago, the Court intimated that stripping a suspect of his clothes in order to induce a confession was impermissible.[248] In light of our increased sensitivity to the effect of psychological tactics, practices that are calculated to strip individuals of their self-respect should be equally objectionable. Accordingly, such interrogation techniques should be barred as inherently unfair.

IV. Conclusion

Without coherent guidelines, the conscientious interrogating officer who wants to comply with the law but still be effective in properly securing admissible confessions is placed in an impossible position. The deceptive practices recommended by the police manuals are undoubtedly effective, and, based on existing case law, few, if any, of them are clearly illegal. On the other hand, the permissibility of police trickery may not be determined solely by asking whether the trickery in question is likely to induce an unreliable confession, as the manuals suggest. The protections provided by the *Miranda* warnings, the sixth amendment right to an attorney, and the modern version of the "voluntariness" test limit the types of deceptive practices that the police may employ. This Article has attempted to demonstrate that effective protection of these constitutional rights can only be achieved through the formulation of per se rules—that is, whenever the practice under scrutiny creates an unacceptable risk that the ordinary suspect's constitutional rights will be infringed, the practice should be proscribed. Application of this analysis to several widely employed interrogation tactics re-

246 *See* text accompanying notes 19-22 *supra.*

247 *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966); Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (plurality opinion) (Frankfurter, J.). *See generally* L. Levy, Origins of the Fifth Amendment 431-32 (1968).

248 Malinski v. New York, 324 U.S. 401, 407 (1945).

sults in a finding that they should be absolutely prohibited. Although the development and application of such guidelines will undoubtedly challenge the institutional competence of the courts,[249] vigorous judicial scrutiny of police trickery in interrogation is essential if the criminal justice system is truly to operate within constitutional confines.

---

[249] The adoption of this approach will undoubtedly require procedural innovation to insure its effective implementation. Most significantly, Professor Kamisar's suggestion of mandatory recording of police interrogations should be adopted. *See* Kamisar, *supra* note 111, at 236-43.

Cornell Law Review

Volume 102
Issue 2 *January 2017*

Article 4

Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations

Amelia C. Hritz

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

 Part of the Law Commons

Recommended Citation
Amelia C. Hritz, *Voluntariness with a Vengeance: The Coerciveness of Police Lies in Interrogations*, 102 Cornell L. Rev. 487 (2017)
Available at: http://scholarship.law.cornell.edu/clr/vol102/iss2/4

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

NOTE

"VOLUNTARINESS WITH A VENGEANCE"[1]: THE COERCIVENESS OF POLICE LIES IN INTERROGATIONS

Amelia Courtney Hritz†

INTRODUCTION

Police often find themselves navigating difficult moral situations.[2] They may find it necessary to tell lies despite moral reservations because lies can be a useful tool in controlling situations and avoiding the use of force.[3] Police may also justify lies when they lead to a desirable outcome. When police

---

1 Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

† PhD/JD candidate, Developmental Psychology and Law, Cornell University; Editor-in-Chief, *Cornell Law Review*, Volume 102. I would like to thank Stephen Garvey for his guidance and thoughtful comments during the writing of this Note and the members of the Cornell Law Review; especially Victor Pinedo, Sue Pado, Evan Hall, Anthony Wu, Caisa Royer, and Lex Varga; for their detailed editing. I am also grateful for the mentorship of Valerie Hans, John Blume, and Stephen Ceci. Their work inspired me to write this Note. And as always, thank you to my family; especially Suzan Courtney, George Hritz, Mary Beth Hritz, Alex Bodell, Chuck, and Pierre; for their support throughout my time at Cornell.

2 *See* Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying*, 27 AM. BEHAV. SCI. 529, 532–33 (1984).

3 *See id.* at 543; Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 3, 7–9.

use lies to obtain evidence, police may justify the harm caused by lies as outweighed by the good from catching wrongdoers.

During interrogations, however, we must closely scrutinize police practices. In the interrogation room, police officers have a superior bargaining position because they control the environment and place the suspect in a heightened state of vulnerability.[4] In addition, police have a powerful tool of persuasion: they can threaten the suspect with punishment. Through lies, police are able to manipulate suspects by altering their perception of their options. This manipulation shows disrespect for the suspect's individuality, undermines the trust in police, and violates the presumption of innocence.

Even in the hypothetical case in which a guilty suspect is *Mirandized*; knowingly, willfully, and voluntarily waives his *Miranda* rights; is lied to by police; and confesses truthfully, I argue his confession should be excluded because the police lie renders the confession involuntary. In the context of interrogations, police lies are prima facie wrongful and should be completely banned unless necessary to avoid an imminent harm.[5]

Police suspected Adrian Thomas, a twenty-nine-year-old man with a tenth-grade education, of critically injuring his infant son based on the emergency room doctor's opinion that the child's skull was fractured.[6] Police interrogated Thomas for hours, admittedly doing whatever they could to convince him to tell them what they believed to be "the truth." Toward that end, the police told Thomas multiple lies. They told him he could save his child's life if only he explained how his child's head became injured, even though the child was brain-dead and had no hope of recovery. After many hours of denying that he had ever harmed his son, and police telling him that he could save his son's life twenty-one times, Thomas agreed that he may have dropped his son. After further questioning, Thomas agreed that he threw his son on the ground. Eventually Thomas reenacted the crime for the police by throwing a binder on the ground. The police also repeatedly told Thomas that if he confessed he would not be arrested and could go home. The police even solemnly promised Thomas that they were not lying to him. The trial court admitted Thomas's confession and the

---

4 *See Miranda*, 384 U.S. at 449–59.

5 Even in a situation where the lie would promote public safety and the imposition of just deserts, it is still an unjustified wrong and should not be employed by state actors. For a discussion of the utilitarian standard regarding deception, see Skolnick & Leo, *supra* note 3, at 88.

6 SCENES OF A CRIME (New Box Prod. 2011).

jury convicted, despite all of these lies and medical evidence that the son's skull was not broken and that he may have died of an infection, not a head injury.

The psychological techniques used by the police during the interrogation of Thomas are not unique; police have been employing them to extract confessions for decades.[7] While police deception rarely renders a confession inadmissible, the New York Court of Appeals held that Thomas's confession should have been suppressed.[8] The court noted that not all of the lies that the police told Thomas were coercive, but some of them were, including the statement that Thomas could save his son's life by confessing.[9] The court held these extreme forms of deception were overly coercive, so the statements that Thomas made in response were involuntary.[10] This holding should be expanded to recognize that *all* forms of police lies to suspects during interrogations are coercive, and all confessions resulting from these lies should therefore be excluded at trial.

I
THE LAW'S NARROW UNDERSTANDING OF COERCION

Throughout history, police in the United States and England commonly used force to coerce suspects into confessing (the "third degree").[11] The reliability of confessions was naturally suspect, but the practice did not end in the United States until the Supreme Court's 1936 decision in *Brown v. Mississippi*.[12] Many countries have banned the third degree as it "brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public."[13] Without the availability of force, police have turned to psychological methods such as trickery and lies

---

7 Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 935 (2013).

8 People v. Thomas, 8 N.E.3d 308 (N.Y. 2014).

9 *Id.* at 314–15.

10 *Id.* at 316.

11 Examples of torture include waterboarding, putting lighted cigars on a suspect's body, and depriving the suspect of sleep, food, and other needs. Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010).

12 297 U.S. 278, 285–87 (1936); Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 MICH. L. REV. 1168, 1172–73 (2001).

13 Miranda v. Arizona, 384 U.S. 436, 448 (1966) (quoting IV NAT'L COMM'N LAW OBSERVANCE AND ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

to compel confessions.[14] Recognizing the comparable harm lies cause, Great Britain and most other European nations have also banned police from lying in interrogations.[15] In the United States, the Supreme Court has not extended the ban to lies.[16]

While police are able to lie and use trickery to obtain confessions in the United States, they are not able to "coerce" suspects to confess. The Supreme Court acknowledged that lies as well as force can be coercive in custodial interrogations, but rather than ban all police lies, the Court required police to give the *Miranda* warnings.[17] Thus, two safeguards are currently in place to prevent police coercion. First, when police have suspects in custody, they must provide *Miranda* warnings before they can interrogate.[18] This is designed to ensure that suspects are aware of their right to remain silent and their right to an attorney. Second, under the Due Process Clause, suspects must confess voluntarily.[19] The requirement that a confession be voluntary is separate from the *Miranda* warnings.[20] For confessions to be voluntary, the state must prove they were not products of coercion, either physical or psychological,[21] and were given as a result of "free and unconstrained choice by [their] maker."[22]

To determine whether the confession was the product of the maker's own choice, courts examine the totality of the circumstances.[23] Under the totality of the circumstances test,

---

14 *Id.* ("[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented.").

15 Kassin et al., *supra* note 11, at 17.

16 *Miranda*, 384 U.S. at 448.

17 *Id.* at 448 ("[C]oercion can be mental as well as physical . . . [T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.") (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)); *see also* FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 343 (5th ed. 2013) ("[N]o confession following interrogation is completely voluntary in the psychological sense of the word.").

18 Daniel Harkins, *Revisiting* Colorado v. Connelly*: The Problem of False Confessions in the Twenty-First Century*, 37 S. ILL. U. L.J. 319, 330 (2013).

19 Colorado v. Connelly, 479 U.S. 157 (1986); Rogers v. Richmond, 365 U.S. 534 (1961).

20 Paul Marcus, *It's Not Just About* Miranda: *Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 602–03 (2006).

21 *See Miranda*, 384 U.S. at 503; *see also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."). For a review of the law of voluntariness of confessions, see Marcus, *supra* note 20.

22 *Culombe*, 367 U.S. at 602.

23 Frazier v. Cupp, 394 U.S. 731, 739 (1969).

courts consider the behavior of the police officers, the location and length of the interrogation, and the characteristics of the suspects.[24] Relevant characteristics of suspects include age, intellectual function, maturity, mental health, and physical condition (including states like intoxication).[25] The totality of the circumstances also includes whether the suspects were properly *Mirandized* and voluntarily waived their rights.[26] The reliability, or unreliability, of the confession is not itself a part of the due process analysis.[27]

Even though the requirement that suspects confess voluntarily is separate from the requirement that they be *Mirandized,* when courts assess voluntariness, they often place great weight on the *Miranda* warnings.[28] If suspects are properly *Mirandized*, courts rarely deem their confessions involuntary.[29] Relying on *Miranda* to ensure voluntariness is misguided. Asserting one's *Miranda* rights connotes guilt: people only invoke *Miranda* when they have something to hide, or so the thinking goes. Consequently, most suspects waive their *Miranda* rights, leaving *Miranda* with little power to protect against police coercion.[30] Moreover, suspects' decisions to waive *Miranda* can then be used against them to establish the due process voluntariness of any resulting confessions.[31]

---

24 *Connelly*, 479 U.S. at 164 (holding that a suspect's mental illness is not sufficient to render a confession involuntary; there must be state-imposed coercion).

25 Withrow v. Williams, 507 U.S. 680, 693–94 (1993).

26 *Id.*

27 *Connelly*, 479 U.S. at 167; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,* 32 HARV. C.R.-C.L. L. REV. 105, 106 (1997).

28 *See* Heyl, *supra* note 7, at 938 ("The overwhelmingly common approach is to evaluate the due process of a custodial interrogation only in terms of whether proper *Miranda* warnings were provided, understood, and intelligently waived, and not to evaluate the coercive effect of the psychological techniques."); *see also* Gerard E. Lynch, *Why Not a* Miranda *for Searches?*, 5 OHIO ST. J. CRIM. L. 233, 234 (2007) ("It is a firmly established aspect of the *Miranda* story that the decision was the product, in part, of judicial frustration with the difficulty of applying a 'totality of the circumstances' test for determining the voluntariness of confessions.").

29 Magid, *supra* note 12, at 1175–76. (stating that, after *Miranda,* the Supreme Court's decisions have been more favorable toward police interrogations and confessions).

30 *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (observing 182 police interrogations and finding that 78% of suspects waived their *Miranda* rights); *see also* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 215–17 (2004) (finding that 81% of innocent people waived their *Miranda* rights compared to 36% of guilty people in an experimental study).

31 Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1093 (2010).

Consistent with courts' deference to the *Miranda* safeguard, once suspects have been *Mirandized*, courts have deemed confessions to be voluntary despite police lies regarding the seriousness of the charges, promises of leniency, and the presence of physical evidence and accomplice statements.[32] Courts generally do not deem lies to be coercive so long as they do not impact suspects' decisions regarding waivers of *Miranda* rights.[33] A few courts have noted that police lies are improper, but they rarely hold that the lies caused suspects to confess involuntarily.[34] For example, the Supreme Court held that a confession was voluntary in *Frazier v. Cupp* when an adult suspect of average intelligence confessed in response to a police officer's lie about an accomplice confessing during a brief interrogation.[35] As this type of lie is very common in police interrogations, *Frazier* established that police deception is not enough to render a confession involuntary.[36]

The Supreme Court has declined to clearly define when police deception can be overly coercive.[37] The Court characterized most police deception as merely strategic and not "ris[ing] to the level of . . . coercion to speak."[38] Some lower courts have held that certain forms of deception may be so egregious that they violate due process.[39] For example, courts have held that the fabrication of evidence (rather than merely falsely asserting the presence of evidence) is impermissible.[40] This is motivated

---

32 For a review of these cases, see Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 795–803 (2006).

33 *Id.* at 795; *see also* Marcus, *supra* note 20, at 612 (finding a "stunning" number of cases in which judges held confessions to be valid when government officials lied to defendants about significant matters to induce the incriminating statements). In a thorough review, Marcus found only two courts that expressed concern about police lying about evidence: *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (finding the lie to be "reprehensible," and *State v. Register*, 476 S.E.2d 153, 158 (S.C. 1996) (finding the lie to be "deplorable"). Despite their critiques of the lies, in both cases the confessions were admitted into evidence. Marcus, *supra* note 20, at 612.

34 Marcus, *supra* note 20, at 638 (stating that the voluntariness determination is very fact specific and difficult to predict).

35 394 U.S. 731, 739 (1969).

36 Kassin et al., *supra* note 11, at 13.

37 Heyl, *supra* note 7, at 937 (noting that the Supreme Court did not specify means to identify or deter coercive interrogations, such as by requiring time limits on interrogations).

38 Illinois v. Perkins, 496 U.S. 292, 297 (1990).

39 State v. Rettenberger, 984 P.2d 1009, 1015 (Utah 1999) (finding that police misrepresentations must be "sufficiently egregious to overcome a defendant's will so as to render a confession involuntary").

40 Kassin et al., *supra* note 11, at 13.

by a concern that the fabricated evidence could later be mistaken for real evidence by a court.[41]

In addition, courts have acknowledged that other forms of deception may violate due process when the egregiousness of the techniques combines with certain characteristics of the suspect.[42] For example, in *People v. Thomas*, the court held that police lies were coercive when police told Thomas that if he confessed he could save his son's life, his wife would not be picked up for questioning, and police would view what happened to his son as accidental.[43] The court identified numerous other lies that police told Thomas, but found that only these three were improperly coercive. The court reasoned that because these lies threatened to deprive Thomas of vital interests (his wife and child), the combination of the lies were "sufficiently potent to nullify individual judgment."[44] With respect to the lie that a confession could save his son's life, the court noted that it would make the option of remaining silent "seem valueless" to a parent.[45] Moreover, the court considered that Thomas was "unsophisticated" and had no experience with the criminal justice system.[46] The court relied on the totality of the circumstances, finding that a lie on its own was not sufficiently coercive to overcome Thomas's judgment.[47] The holding in *Thomas* should be expanded to include all lies told by police during custodial interrogations as coercive and in violation of due process.[48] In the next sections, I argue that all lies told by police during interrogations are coercive and wrongful. The confessions that result from these lies should be held involuntary as a matter of law.

II
THE WRONGFULNESS OF DECEPTION

The Supreme Court's narrow definition of coercion ignores the wrongfulness and persuasiveness of police lies during in-

41 *Id.*

42 Miller v. Fenton, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

43 8 N.E.3d 308, 311–16 (N.Y. 2014).

44 *Id.* at 314; Heyl, *supra* note 7, at 941, 947.

45 *Thomas*, 8 N.E.3d at 315.

46 *Id.* at 314.

47 Heyl, *supra* note 7, at 949.

48 The current lack of a bright-line rule has given police little guidance on the limits on deceptive interrogation techniques. *Id.* at 939.

terrogations.[49] In determining whether lies by police during interrogations are wrongful, I will first evaluate the extent to which they are coercive. Under the current legal framework, confessions are not admissible at trial when they overcome the suspect's will.[50] Apart from physical force, no other form of police coercion is unmistakably banned.[51] Nonetheless, force and lies are both sufficiently coercive that they should be banned from interrogations.

A. When State Action Is Coercive

Under a broad understanding of coercion, coercion is a technique employed to induce a target to do or not do something. In that way, coercion diminishes the target's freedom and responsibility. On the other hand, coercion is also a useful device in regulation. In fact, coercion is a fundamental tool that governments use to enforce laws. Threats of punishment induce the target to follow the law and limit the target's freedom to acting in the manner the coercer wishes.[52] Therefore, threats of punishment are a form of coercion. Threats of punishment are not wrongful because they are necessary to prevent private acts that have a greater impact on freedom, such as acts of violence and theft of property.[53] To that end, the state's use of coercion facilitates private cooperation and peaceful coexistence. Furthermore, those who are governed have consented to the state having this coercive power for the stability it creates in society.[54] Because coercion is a powerful tool that the citizens have granted the government, it is also important to have measures in place that guide and justify the

---

49 *See*, *e.g.*, Commonwealth v. DiGiambattista, 794 N.E.2d 1229, 1232–33 (Mass. App. Ct. 2003) (disapproving of the use of lies to make the suspect believe there was video evidence against him, but finding the confession voluntary). Before *Miranda*, courts were more likely to find that forms of police deception could render coercions involuntary per se. Gohara, *supra* note 32, at 801.

50 Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

51 Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

52 THOMAS HOBBES, LEVIATHAN 246 (1651), http://www.gutenberg.org/ebooks/3207?msg=welcome_stranger [https://perma.cc/FJ7C-3R3X] (stating that in a civil state there is a power set up to constrain those that would otherwise violate their faith).

53 JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689), *reprinted in* THE WORKS OF JOHN LOCKE 5, 106 (1823), http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/locke/government.pdf [https://perma.cc/H9NG-MLKU].

54 *See id.* at 155–56; *see also* Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL. 1, 9 (2015) (discussing how the coerced party has consented to government coercion in certain circumstances), http://plato.stanford.edu/archives/sum2015/entries/coercion/ [https://perma.cc/SX55-JULC].

coercive actions.[55] Otherwise, a tyrannical government could arrest innocent people by deeming them criminals.[56] In order to determine where governmental coercion should be limited, first I examine when coercion is wrongful.

Coercion typically takes the form of a conditional threat. The coercer claims that he or she will bring about undesirable consequences unless the target does a certain action. This is similar to the structure of an ordinary offer, which is not coercive or wrongful. An offer is not coercive because, unlike a threat, the consequences of an offer are typically desirable to the target. Both coercion and offers are commonly accepted parenting practices. For example: "If you do not clean your room, you cannot watch television," or "If you eat your vegetables, you can have dessert."

The difference between a threat and an offer also rests on the relationship between the proposal and external factors. Robert Nozick illustrates the distinction in his distressing slave owner hypothetical.[57] In this example, the slave owner regularly beats his slave, and one day he tells his slave that he will spare him a beating if the slave does a specified action. Although the offer of sparing the slave a beating will make the slave better off, we typically see this as coercive, and so it is a threat instead of an offer. In this example, the slave would be coerced to do the action in light of the slave owner's regular threat of beatings. Thus, context is also an important factor in determining whether a proposal is coercive.

In addition to the threat and offer distinction, another way to determine whether a proposal is coercive is to examine the relative bargaining power of the parties. We can classify the slave owner's proposal as coercive because the slave owner has superior bargaining power over the slave.[58] Under this analysis, proposals are coercive when two factors are present: (1) the weaker party is dependent on the stronger party (the weaker party has no other options and cannot exchange bargaining partners) and (2) the stronger party has influence over whether some evil will occur to the weaker party (loss of life, health, security).[59] When both of these conditions are present, the stronger party's advantage in bargaining is so strong that the

---

55 *See* LOCKE, *supra* note 53, at 165.

56 *See id.* at 165.

57 *See* Anderson, *supra* note 54, at 23 (citing ROBERT NOZICK, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440 (1969)).

58 *See id.* at 14 (citing Joan McGregor, *Bargaining Advantages and Coercion in the Market*, 14 PHIL. RES. ARCHIVES 23, 25 (1989)).

59 *Id.*

target's choice will be non-free. If stronger parties take advantage of this by doing something seen as harmful or distasteful, the coercion is wrongful. The next section will apply this framework to evaluate when police actions are coercive and wrongful.[60]

Force can also be a means of coercion when it is used to alter or constrain the target's actions. Unlike conditional threats, force employs domination that is physical rather than mental.[61] While threats influence the targets by limiting their choices, force removes choice altogether. The United States now prohibits the use of force to induce suspects to confess. I will compare force and deception in the evaluation of the wrongfulness of police lies.[62]

B. When State Coercion Is Wrongful

Coercion by the state is not per se wrongful as it is deemed necessary to enforce laws, which protect freedom and promote stability.[63] Moreover, not all coercion impedes the target's free will. For example, threats of punishment are justified to coerce individuals to act in manners consistent with the law. On the other hand, coercion is very potent and prone to abuse. State coercion is wrongful when it goes beyond the enforcement of laws and enhances the already superior bargaining power of the state to the detriment of the individuals.

Using the framework for evaluating whether statements are coercive based on the relative bargaining power of the parties,[64] police statements in interrogations can be coercive. The police officer is in a superior bargaining position based on both factors. First, during interrogations the police are in complete control of the environment. When suspects are in custody, the police restrict their ability to freely leave. In addition, the environment of the interrogation is unpleasant.[65] Police can question suspects menacingly for hours in an unfamiliar atmosphere. Furthermore, the suspects are not generally in a position to choose the police officer with whom they speak. Thus, while they are in custody, the suspects are dependent on the police officers. Second, the officer is in control of whether

---

60 *See infra* subparts II.B and D.

61 Klockars, *supra* note 2, at 532.

62 *See infra* subpart II.D.

63 *See supra* subpart II.A.

64 *See supra* subpart II.A.

65 Miranda v. Arizona, 384 U.S. 436, 455 (1966) ("[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.").

the suspect goes to prison, and therefore they have power over an evil that may occur to the suspect. Under the bargaining power framework, because (1) suspects are dependent on police officers and (2) police officers have power over whether the suspect goes to prison, all offers that police make during interrogations are coercive.

In light of the power imbalance between the police officer and the suspect, the police officer must not take advantage of that imbalance; otherwise, the coercive offers made by police are wrongful. Police officers do not take advantage of their power when they only seek to punish crimes to the extent that they are allowed under the law. It is not wrongful for police to offer legal incentives to suspects to confess, which may cause a confession to be in the best interests of the suspect and the police officer. In addition, police may say that they will charge the suspect with a more serious crime if the suspect does not confess. When the more serious punishment is legally acceptable in light of the crime, this is not a wrongful proposal because the police have the authority to impose heightened punishment. Furthermore, the target can make an informed decision about which option to take. In this way, truthful police incentives in interrogations are coercive, but they are not wrongful when they do not go beyond the power of police to enforce the law.

Furthermore, threatening the suspect with undesirable consequences (sanctioned by law) is not wrongful. We have authorized police to make certain choices less appealing than they would be otherwise (like the choice to engage in criminal activity). As a society, we do not feel that we are less free just because our choices to do certain types of behavior have undesirable consequences (particularly behaviors that impinge on the freedom of others).

C. When Lies Are Wrongful

Like conditional threats, lies can limit targets' freedom when agents use lies to induce targets to do or not do something.[66] Individuals make choices based upon estimates of their current situation, and these estimates often rely on information from others.[67] Lies can distort this information and

---

66 One definition of a lie is an intentionally deceptive message which is stated. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 13 (1978); *see also* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 789–801 (1997) (applying Bok's framework to police lies).

67 BOK, *supra* note 66, at 19–20.

therefore distort the situations as the targets of the lies perceive them.[68] Thus, lies can vary targets' estimates of the costs and benefits of a course of action. For example, lies may foster an unnecessary loss of confidence in the targets' best option. In addition, lies may eliminate or obscure the targets' perception of relevant alternatives.[69] This invades the targets' autonomy and ability to make decisions and gives the liar power over the targets' choices. Thus, lies can also be a form of coercion. The coercive quality of lies and our vulnerability to it underlie the importance of truthfulness in our society.

As with all forms of coercion, lies are powerful tools ripe for abuse. Lies are similar to force in that both can influence the way the target behaves and therefore disrespect the target's autonomy.[70] While lies influence the targets' perceptions of their choices, force removes all choice. In addition, both methods can be unreliable and are subject to resistance from the target, either through disbelief in the context of lies or through defiance in the context of force.[71]

Unlike threatening punishment, police do not need to lie to enforce laws. Instead, police can only justify lies based on the possibility that they may achieve a greater good. In light of the harms to society, I first presume lies are wrongful. One need not rule out all lies due to the initial negative weight given to them, however. To that end, one may justifiably lie when there is no other good and truthful alternative, and the harms caused by the lie are outweighed by its benefits.[72] Lying is harmful because it can denigrate the target, coarsen the liar, and diminish the level of trust in society as a whole.[73] Justifications for lying include preventing harm, producing a benefit, contributing to fairness, and correcting injustice.[74] For example, one can justify a lie when it is the only way to save an innocent life. In this situation, one could also justify the use of force. In fact, when force is justifiable, one would always prefer lies if they are a viable alternative.[75]

---

68 *Id.*

69 *Id.* at 19–20.

70 Klockars, *supra* note 2, at 532; *see also* BOK, *supra* note 66, at 18 ("Deceit and violence—these are the two forms of deliberate assault on human beings.").

71 Klockars, *supra* note 2, at 532.

72 BOK, *supra* note 66, at 78–86.

73 *Id.* at 21.

74 *Id.* at 78–86.

75 *Id.* at 41 ("Surely if force is allowed, a lie should be equally, perhaps at times more, permissible.").

Even in these limited situations, society must be wary of sanctioning lying because a liar can easily manipulate these concepts to justify any lie. In order to safeguard against the potential for the spread and abuse of lies, moral philosopher Sissela Bok emphasized that lies must be public so that reasonable people who share the perspective of the deceived and those affected by the lies can evaluate the lie.[76] When people in power tell lies, the potential for spread and abuse is magnified, thus giving rise to the need for clear standards and safeguards.

D. When Police Lies Are Wrongful

The goal of modern American police interrogations is to communicate that a suspect's resistance is futile because the outcome is inevitable, and therefore it is in the suspect's interests to confess.[77] Police will lie to further these goals by minimizing the seriousness of the offense and misrepresenting the strength of the evidence.[78] Lies about the strength of the evidence include presenting supposedly incontrovertible evidence of the suspect's guilt and stating that a codefendant has already confessed.[79] The leading police interrogation manual recommends these practices, which are also known as the "Reid Technique."[80]

In evaluating the wrongfulness of police deception in interrogations, I will examine the extent to which certain forms of coercion improperly constrain the freedom of the suspect. Before examining police lies, I will use these factors to examine police force, which has been banned in interrogations in the United States.

1. *Why Police Force Is Wrongful*

Police force is both coercive and wrongful when used during interrogations. As discussed previously, police are in a superior bargaining position when suspects are in custody.[81] When police have a suspect in custody, the police are in complete control over the suspect's environment and have power over whether the suspect will go to jail. Because of the power imbalance in interrogations, offers that police make to suspects during interrogations are coercive. Coercive offers are only

---

76 *Id.* at 91.
77 Kassin et al., *supra* note 11, at 16–17.
78 Slobogin, *supra* note 66, at 785–86.
79 Kassin et al., *supra* note 11, at 17.
80 INBAU ET AL., *supra* note 17, at 351–52.
81 *See supra* subpart II.B.

wrongful when police take advantage of their superior bargaining power. For example, police do not take advantage of their superior bargaining power when they make truthful offers to suspects that are consistent with enforcing the law.[82] While truthful offers may limit a suspect's options, the use of force takes away those options altogether. The use of force in interrogations involves inflicting physical or mental pain to extract confessions, such as physical violence and torture.[83] Thus, the police are using their already superior power to gain an even greater advantage over the suspect at the expense of the dignity of the suspect. In addition, police use of force damages our trust in the government. As state actors charged with enforcing the law, police are held to a higher moral standard than average citizens.[84] The use of force conflicts with this high standard.

Furthermore, the use of force conflicts with the intent of the privilege against self-incrimination. The privilege developed in response to the use of violence in interrogations throughout Europe in the sixteenth and seventeenth centuries.[85] Seventeenth-century interrogations were often a fishing expedition to elicit incriminating statements from suspects confronted with charges on little evidence. In addition, interrogators employed methods such as torture, detention for long periods, imprisonment in a pillory, and mutilation. The privilege was a major constitutional landmark in the United States Constitution and the Bill of Rights, in contrast to England, where it "slowly 'crept'" into the system.[86] In the United States, the privilege was deemed essential to political freedom in the McCarthy hearings of the 1950s and was reaffirmed in *Miranda v. Arizona* in 1966.[87] This reflects "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'"[88] Because of the violation of the

---

82 *See supra* subpart II.B.

83 *See* Miranda v. Arizona, 384 U.S. 436, 448–49 (1966).

84 *Cf.* Spano v. New York, 360 U.S. 315, 320–21 (1959) ("The abhorrence of society to the use of involuntary confessions . . . turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves").

85 SUSAN EASTON, SILENCE AND CONFESSIONS: THE SUSPECT AS THE SOURCE OF EVIDENCE 5 (2014).

86 *Id.* at 6.

87 *Miranda*, 384 U.S. 436; *see also* EASTON, *supra* note 85, at 6 (summarizing the development of the privilege against self-incrimination in the United States).

88 Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

suspect's dignity, the diminished trust in government, and the conflict with the presumption of innocence, the use of force is wrongful in interrogations.

Like the use of force, forms of police lies in interrogations are also wrongful for the same reasons. As I have already established that police are in a superior bargaining position during interrogations, the remainder of this Part will examine when police lies are an abuse of their power. At the outset, lies should be presumed to be an abuse of police power. Both lies and force are rarely legitimate in societies that respect the autonomy of individuals. In fact, police maintain the only occupation that has the power to use both lies and force.[89]

2. *Why Police Lies Are Wrongful*

Under Bok's framework for evaluating the justifications of lying, I consider the harms of police lies during interrogations. As with force, the harms of police lies include diminished dignity and autonomy of the suspect, damage to our trust in government, and the violation of the presumption of innocence.[90]

The action of deceiving suspects in order to obtain confessions diminishes the dignity of the suspect.[91] When suspects confess in response to police lies, they are not accurately informed of their situations and therefore cannot make intelligent legal decisions. This is in sharp contrast to a defendant's decision to testify at trial. In this situation, the defendant is likely to consider advice from an attorney; and a prosecutor, who is not allowed to lie, will question the defendant.[92] Preventing police from lying will preserve suspects' abilities to make knowing decisions to confess based on circumstances as they correctly believe them to be.

In addition, because police are held to a higher moral standard, the notion that a police officer would lie should cause concern.[93] The assumption that police follow a higher standard makes police lies particularly persuasive. In addition, because suspects are in a state of heightened vulnerability in

---

89 *Id.*

90 *See* Slobogin, *supra* note 66, at 796–800.

91 *See id.* at 796.

92 MODEL RULES OF PROF'L CONDUCT r. 3.4(b) (AM. BAR ASS'N 2014), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_4_fairness_to_opposing_party_counsel.html [https://perma.cc/98LA-5EPJ].

93 After reading thousands of opinions on confessions, Marcus described feeling "unclean and tainted by government activities that are not honorable even given the environment needed for interrogations." Marcus, *supra* note 20, at 643.

an interrogation setting, they are more likely to accept police statements on their face.[94]

Finally, as with the use of force, police lies conflict with the intent of the privilege against self-incrimination. Current interrogation techniques are often premised on obtaining a confession rather than simply gathering evidence. The creators of the "Reid Technique" advise interrogators that they must possess "a great deal of inner confidence in [their] ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness."[95] Thus, by definition, interrogation is a process in which the interrogators presume the guilt of the interrogated, direct the interaction based on their own theory, and measure success by the extraction of an admission from that suspect.[96] This is evident in the interrogation of Thomas when police admittedly did everything they could to get him to tell "the truth."[97] Police may mistakenly assume that lies, like false evidence ploys, will only deceive guilty suspects because innocent suspects will realize that the police are lying. Thus, when police lie to suspects, they often have presumed that the suspect is guilty and are searching only for evidence that confirms their beliefs.

In reality, lies distort the suspect's estimates of the costs and benefits of confessing.[98] For example, when a police officer lies about the presence of evidence, an innocent person may feel that it is necessary to confess to avoid conviction of a more serious offense. Therefore, lies allow police to make conditional offers that attempt to induce the suspect to confess based on false information about the suspect's legal situation. Like force, police lies are an abuse of power because they give police an even greater advantage over the suspect. In light of the harms of police lies, police must never lie unless no truthful, non-coercive alternatives are available.[99]

---

94 *See* Miranda v. Arizona, 384 U.S. 436, 461 (1966) (recognizing the heightened vulnerability that suspects' experience when they are in custody); *see also* Bram v. United States, 168 U.S. 532, 556 (1897) (describing the inherently coercive atmosphere of interrogations).

95 Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, *in* INVESTIGATIVE INTERVIEWING 214 (Tom Williamson ed., 2006); *see also* INBAU ET AL., *supra* note 17 (instructing investigators on the Reid Technique).

96 *See* Slobogin, *supra* note 66, at 796–800.

97 *See supra* note 6 and accompanying text.

98 *See, e.g.*, Magid, *supra* note 12, at 1175 (stating that in *Miranda,* the Court "observed that [deceptive interrogation] techniques created or increased the disadvantage most suspects had in matching wits with their interrogators").

99 Slobogin also noted that lies may encourage police to lie more often in other situations, which could foster corruption. Slobogin, *supra* note 66, at 800.

When a suspect attempts to use knowledge of his or her criminal activity to gain an advantage over the police in the interrogation, police lies do not rise to the same level of coercion. This may occur when suspects have knowledge of the location of a victim and use this to obtain bargaining power in the interrogation. Here, the suspect may be able to coerce the police and exert power over police decision-making. In this situation, police lies are no longer an abuse of power because the police are not in a superior bargaining position.

III
WEIGHING THE BENEFITS OF DECEPTION

Despite the wrongfulness of lying, one might nonetheless believe deception is justified if it comes with some overriding benefit. For example, police lies in interrogations may be justified when lies are necessary to avoid a serious crisis.[100] In a crisis context, it is important to keep in mind that liars can be "counted upon to exaggerate the threat, its immediacy, or its need."[101] Therefore, there must be some showing of imminent danger to another person's interests before recognizing a crisis. These situations should be rare because in most investigations, police are not even sure the suspect is a criminal, much less that harm is imminent.[102]

Police lying may also be justified when it is necessary to protect society from an "enemy."[103] In order to determine that a suspect (who has not been convicted of the crime) is truly an enemy, there must be a public expression of the suspect as the enemy. In order to comply with this requirement, Christopher Slobogin suggested a requirement of ex ante review by a judge, similar to the warrant process, before a police officer may engage in deception. This recognizes the difficultly of having a public debate about whether a suspect who has not been convicted of the crime is a criminal. This suggestion weakens the requirement of the presumption of innocence.[104] In addition, the extent to which lies are necessary to protect society from criminals is hotly debated.

---

100 *See id.* at 792–93.
101 *Id.* (citing BOK, *supra* note 66, at 119–22).
102 *Id.* at 801.
103 *Id.* at 794–95.
104 *See supra* section II.D.2.

A. Empirical Evidence Examining the Benefits of Police Lies

Proponents of police deception argue that even though lying is wrongful, in interrogations it is a necessary evil because of the importance of lies in eliciting confessions,[105] which play an important role in solving crimes.[106] Indeed, confessions are often referred to as the "gold standard" in evidence.[107] Lies are fundamental to modern American interrogation techniques, which are designed to persuade a rational person to confess instead of denying culpability, even when confessing is not in the person's best interests. To that end, police must manipulate suspects' perceptions of their best interests and their viable alternatives.[108] Police may do this by leading suspects to believe that the evidence against them is overwhelming, that they will be convicted regardless of their confession, and that they will receive advantages from confessing.[109] For example, suspects often report that they confessed because they perceived the evidence against them to be overwhelming.[110]

In observations of 182 police interrogations, Richard Leo noted that police officers began interrogations by confronting the suspects with true evidence in 85% of cases but lied about the presence of evidence in 30% of cases.[111] In addition, police offered suspects incentives to confess in 88% of the observed

---

105 *See* Gohara, *supra* note 32, at 809 ("[T]he *Inbau Manual* makes it clear that employing trickery and deceit is essential to an interrogator's strategy for eliciting a confession."); *see also* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997) (describing contemporary American methods of interrogation that seek to "manipulate the individual's analysis of his immediate situation and his perceptions of both the choices available to him, and of the consequences of each possible course of action"); Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 38–43 (2014).

106 *See* Marcus, *supra* note 20, at 607 ("[C]onfessions are 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'") (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)); Shealy, *supra* note 105, at 39 (highlighting that forensic evidence is not always present); *see also* Ofshe & Leo, *supra* note 105, at 983–84 ("A confession—whether true or false—is arguably the most damaging evidence the government can present in a trial.").

107 Kassin et al., *supra* note 11, at 4.

108 *See, e.g.*, Ofshe & Leo, *supra* note 105, at 985 (observing that interrogators must make a suspect believe that confessing to a crime is "rational and appropriate").

109 *See id.* at 985–86.

110 Gisli H. Gudjonsson & Jon F. Sigurdsson, *The Gudjonsson Confession Questionnaire-Revised (GCQ-R): Factor Structure and Its Relationship with Personality*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 953, 954 (1999).

111 Leo, *supra* note 30, at 279 (describing what Leo found after observing 122 interrogations in person and sixty by videotape).

interrogations. In the end, suspects confessed in 64% of the interrogations. This rate increased to 76% when Leo excluded cases in which suspects invoked their *Miranda* rights (leading police to terminate the interrogation). The most successful interrogation techniques included appealing to the suspect's conscience, identifying contradictions in the suspect's story, using praise or flattery, and offering moral justifications for the crime.[112] Lying about the presence of evidence did not significantly increase the probability of soliciting a confession.[113] These results suggest that lies are not necessary for successful police interrogations.

Lies are not only unbeneficial to interrogations; they can actually be harmful, as police lies are likely to encourage an innocent person to confess. Suspects respond to police lies by falsely confessing for two main reasons: social compliance[114] and memory failure.[115] In the case of social compliance, police lies may make it clear to suspects that the police want a confession, which may cause the suspects to tell the police what they want to hear, if only to put an end to the interrogation.[116] Alternatively, the false evidence may persuade a suspect that their chances of exoneration are hopeless and thus confessing is in their best interest if it would lead to a lighter sentence.[117] Police lies about evidence and the strength of their case may also affect cognition by convincing vulnerable suspects that they are guilty even though they have no memory of committing

---

112 *Id.* at 293–94 (finding that these tactics elicited a confession in 90–97% of cases and were the only tactics that made confessions significantly more likely).

113 *Id.* at 294 (finding that false evidence elicited a confession in 83% of cases, which was not significantly higher than the baseline of 76%, which reflects the sample of interrogations after a *Miranda* waiver).

114 This is labeled a "coerced-compliant" false confession. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 125 (1996).

115 This is labeled a "coerced-internalized" false confession. *Id.*

116 For example, Kharey Wise, a member of the exonerated "Central Park Five," said that after police falsely told him that his friends said he was present at a crime scene, he made up facts "just to give them what they wanted to hear." Gohara, *supra* note 32, at 792 (quoting *House of Cards: Experts Say Interrogation Techniques Can Encourage False Confessions* (ABC News television broadcast Sept. 26, 2002)).

117 *See* Ofshe & Leo, *supra* note 105, at 1045–50.

the crime.[118] Police often encourage this belief by telling suspects they may have repressed their memories of the crime.[119]

For example, police repeatedly told Adrian Thomas various lies during the interrogation, including that information he provided about how his son was injured could help save his son's life, even though his son was already brain-dead.[120] This type of police deception left Thomas with little room for dispute since the police said their beliefs were supported by medical evidence.[121] Thomas did not have a background in medicine and likely felt that the medical evidence could not be wrong.

When Thomas said he had no memory of injuring his son, the police officer suggested that Thomas may have repressed his memory.[122] In addition, the officer said: "You better find that memory right now, Adrian, you've got to find that memory. This is important for your son's life man."[123] In this way, the police tried to convince Thomas that he was guilty even though he had no memory of committing the crime.[124] For suspects who are less trusting of their memory due to young age, mental illness, intellectual disability, or a history of drug and alcohol abuse, this type of lie can be highly persuasive.[125] Even if this was not persuasive to Thomas, it was impossible for him to prove he was not repressing his memory.

Throughout the interrogation, the police gave Thomas details suggesting what they believed happened to his son.[126] In fact, every incriminating statement that Thomas made was previously stated by police.[127] The police asked Thomas to reenact what had happened and gave Thomas a binder to represent his son. The police asked Thomas to throw the binder on the ground in the same way he threw his son. By this point, however, police had already told Thomas how they thought

---

118 *See, e.g.*, Amelia Courtney Hritz, JoAnn, Video Presentation at the Convicted by Law, Acquitted by Social Science Panel during Cornell University's Charter Day Weekend (Apr. 25, 2015), https://youtu.be/WkghguFOl9Y [https://perma.cc/6HUY-R5CS] (describing how JoAnn Taylor developed false memories of committing a crime after repeated interrogations by police in which they presented her with false evidence).

119 *See* Ofshe & Leo, *supra* note 105, at 1000.

120 SCENES OF A CRIME, *supra* note 6.

121 Ofshe & Leo, *supra* note 105, at 1031.

122 SCENES OF A CRIME, *supra* note 6.

123 People v. Thomas, 8 N.E.3d 308, 311 (N.Y. 2014).

124 Ofshe & Leo, *supra* note 105, at 1044.

125 Kassin et al., *supra* note 11, at 30.

126 Heyl, *supra* note 7, at 951.

127 *Id.*

Thomas's son sustained his injuries.[128] In addition, this made it clear to Thomas that when the police told him that they wanted the "truth," in reality they wanted him to confess, whether he was guilty or not. As a result, Thomas's confession could not be corroborated with other evidence gathered in the case.

In addition, police repeatedly told Thomas that if he confessed, he would not be arrested and could go home.[129] The police sensed that Thomas did not believe this, so they told him they would solemnly swear that they were not lying. At the beginning of the interview, Thomas may have thought that the cost of confessing was high, but after these lies, he likely saw little harm in it and thought he could gain the immediate advantage of being able to leave the long interrogation.[130]

In critiquing the reliability of Thomas's confession, the court benefitted from a videotape of the entire interrogation.[131] In general, proving that police lies are a contributing factor in eliciting a wrongful confession is very difficult because of the characteristics of false confessions. If police correctly identify the confession as false, they often do not keep a record of it.[132] If police incorrectly identify the confession as true, the case will continue, and the confessor will often plead guilty or be convicted at trial.[133]

Once confessors are convicted, indisputably proving their innocence is difficult.[134] In fact, confessions can only be proven false in rare situations.[135] First, it may be objectively established that the crime did not happen. An example would be if a person who was thought dead turns up alive. Second, it may be objectively established that the defendant could not have committed the crime. For example, direct evidence may suggest that the defendant was in a different location at the time of the crime. Third, authorities may objectively prove the

---

128 The court noted that due to all of the details that the police fed Thomas, the "confession provided no independent confirmation that he had in fact caused the child's fatal injuries." *Thomas*, 8 N.E.3d at 316.

129 *Id.* at 311–12.

130 *See* Ofshe & Leo, *supra* note 105, at 1053.

131 Heyl, *supra* note 7, at 951.

132 *See* Kassin et al., *supra* note 11, at 5 (stating that no governmental or private organizations keep records of false confessions).

133 Ofshe & Leo, *supra* note 105, at 984.

134 *Id.*

135 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 925–27 (2004) (describing the four rare situations in which a disputed confession can be classified as proven to be false beyond any doubt).

guilt of the true perpetrator. Finally, scientific evidence, such as DNA, may conclusively establish the defendant's innocence. Factually innocent defendants have no control over whether these circumstances are present in their case.[136] In the majority of cases, completely removing doubt of a defendant's innocence is impossible. Just as investigators struggle to find objective evidence to convict a defendant (hence the need for confessions), innocent defendants also struggle to find objective evidence to prove their innocence. For example, despite its prevalence on television, it is rare to find scientific evidence like DNA.[137] It is even more difficult to review cases involving minor crimes when there is no post-conviction scrutiny and juvenile cases where files are closely guarded for confidentiality.

DNA exonerations have revealed that police-induced false confessions are one of the leading causes of wrongful convictions. Of the first 325 convictions to be overturned by DNA evidence, 88 (27%) were based on false confessions or admissions.[138] DNA exonerations only include a small subset of cases involving police interrogations, and therefore there is no generally accepted estimate of the prevalence of false confessions.[139] Even with DNA exonerations, confessions are difficult to study because in many cases police record only confessions and not the prior questioning, if they record at all. Other records that could illuminate characteristics of the circumstances leading to the confession are often lacking. This also makes it difficult for researchers to compare true and false confessions.

Researchers have designed experimental studies to examine the relationship between police lies and false confessions. Due to ethical considerations, researchers cannot go to the same lengths that police may go to in pursuit of a confession. On the other hand, they also do not raise the stakes of confessing to the same level that suspects face in criminal cases.[140] A laboratory experiment performed by Kassin and Kiechel demonstrated that misrepresentations about evidence can cause significantly more suspects to confess to an act they

---

136 *Id.* at 927.

137 *Id.* at 925–27.

138 THE INNOCENCE PROJECT, *The Causes of Wrongful Conviction*, http://www.innocenceproject.org/causes-wrongful-conviction [https://perma.cc/V4JSA8TC].

139 Kassin et al., *supra* note 11, at 5.

140 *See, e.g.*, Kassin & Kiechel, *supra* note 114, at 127 (differentiating between experiment subjects being accused of mere unconscious acts of negligence and crime suspects being accused of explicit criminal acts).

did not commit.[141] Overall, 69% of the participants signed a confession admitting to hitting a computer key despite warnings that it would cause an error in the computer system, 28% of the participants displayed an internalization of guilt by telling a stranger that they were responsible, and 9% confabulated details when recreating the event with the experimenter. When a witness falsely confirmed that the participants had hit the computer key, the rates of signing a confession and internalizing guilt increased significantly.[142] When the false evidence was combined with increased typing pace (causing the participants to be more vulnerable because they were in a heightened state of uncertainty about their guilt), 100% signed a confession, 65% internalized, and 35% confabulated details. These results support both the social and cognitive factors involved in false confessions, as suspects signed confessions in response to social pressure but also maintained a belief in their guilt when speaking with a stranger in the absence of the social pressure.[143] The measure of confabulation also displays how false confessions can contain details of the crime, which may make them difficult to differentiate from true confessions.

The Kassin and Kiechel study is limited in that it is highly plausible that the participants accidently hit the computer key and thus may have been uncertain of their innocence.[144] This limitation is minimized in another experimental paradigm in which participants are induced to cheat on a problem-solving task by a confederate.[145] Using this paradigm, Russano and colleagues found that 72% of people who were guilty of cheating confessed and 20% of people who were innocent confessed.[146] Interrogation techniques such as minimization and offering deals increased rates of confession among both inno-

---

141 *Id.*

142 Kassin et al., *supra* note 11, at 17 (describing how the Kassin & Kiechel findings showed that "false evidence nearly doubled the number of students who signed a written confession, from 48 to 94%").

143 Multiple studies have used this paradigm to examine false confessions. For a review, see Christian A. Meissner, Allison D. Redlich, Stephen W. Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt & Susan Brandon, *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXP. CRIMINOLOGY 459 (2014).

144 Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 482 (2005).

145 *See id.* at 483.

146 *Id.* at 484.

cent and guilty people.[147] While this experiment did not measure police lies explicitly, police often lie when using minimization techniques; for example, they may misrepresent the seriousness or nature of the offense.[148] Multiple studies have replicated both the Kassin and Kiechel typing paradigm and the Russano et al. cheating paradigm with various manipulations and have also found that participants are more likely to falsely confess when presented with false evidence.[149]

Despite the difficulty in studying confessions and the various limitations that exist within each method, research has consistently demonstrated that innocent people confess.[150] Furthermore, because false confessions have been demonstrated across a wide array of research methods, the magnitude of various limitations is decreased.[151] There is enough evidence to raise concern about the legitimacy of the *Inbau Manual*'s claim that self-preservation will cause innocent suspects to stand up to interrogation techniques such as deception.[152] In addition, the use of false evidence has been implicated in the vast majority of documented false confessions.[153] At the very least, we do not know the full effects of police deception.[154] As I have shown, deception is *prima facie* wrongful, so the burden is on the people promoting deception to prove that the benefits of lies outweigh the many harms.

CONCLUSION

In order to preserve individual liberty in the interrogation room, police lies should be banned unless warranted by imminent necessity. Like the use of force, evidence of police lies should be sufficient to determine that a confession is not vol-

147 Minimization involves offering sympathy or concern, offering justifications for the transgression, and suggesting it was in their interest to cooperate. *Id.* at 482–83.

148 Skolnick & Leo, *supra* note 3, at 6.

149 *See* Kassin et al., *supra* note 11, at 17 (describing follow-up studies that manipulated the plausibility of the typing error by suggesting that the participant hit a more distant key, increased the harms of confessing by introducing financial consequences, and increased the credibility of the false evidence by introducing fabricated video evidence).

150 For a review, see *id.* at 5.

151 *Id.*

152 INBAU ET AL., *supra* note 17, at 351 ("The ordinary citizen is outraged and indignant when presented with supposed 'evidence' of an act he knows he did not commit."); *see also* Gohara, *supra* note 32, at 825 (noting that the *Inbau Manual* does not back up their claims with empirical evidence).

153 Kassin et al., *supra* note 11, at 12.

154 *See, e.g.*, Shealy, *supra* note 105, at 64–65 (arguing that DNA exonerations are the only conclusive proof of false confessions).

untary. This rule recognizes the fact that a power imbalance exists in the interrogation room, with suspects being more vulnerable and dependent on the police. Police lies are an abuse of this superior power, as they disregard the autonomy of the suspect, enhance distrust in government, and violate the presumption of innocence.

Exceptions to the ban on lying are warranted in the rare situations where there is a crisis and/or a suspect is attempting to exert an improper influence over the police through knowledge of criminal activity. This narrow carve-out of the ban on police deception allows police to lie when suspects are using criminal activity to gain an advantage over police.

The current voluntariness standard almost always allows police to lie in interrogations. This impermissibly places the power to determine when to lie with the police, even though liars can be counted upon to justify lying by exaggerating "the threat, its immediacy, or its need."[155] Furthermore, the current standard relies primarily on the *Miranda* rights to protect suspects, even though most suspects waive these rights. *People v. Thomas* recognized that certain forms of deceptive police tactics can be coercive. Now it is time to take the next step. As with the ban on the use of force in interrogations, it is time to reconsider a ban on police deception because "[i]t is not sufficient to do justice by obtaining a proper result by irregular or improper means."[156]

---

155 BOK, *supra* note 66, at 119–22.

156 Miranda v. Arizona, 384 U.S. 436, 447 (1966) (quoting the IV NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931)).

Michigan Law Review

Volume 99 | Issue 5

2001

Deceptive Police Interrogation Practices: How Far is too Far?

Laurie Magid
Villanova Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

 Part of the Constitutional Law Commons, Criminal Procedure Commons, Fourteenth Amendment Commons, Fourth Amendment Commons, Law Enforcement and Corrections Commons, and the Supreme Court of the United States Commons

Recommended Citation

Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168 (2001).
Available at: https://repository.law.umich.edu/mlr/vol99/iss5/10

This Symposium is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

DECEPTIVE POLICE INTERROGATION PRACTICES: HOW FAR IS TOO FAR?

*Laurie Magid**

I. INTRODUCTION: FOCUSING ON VOLUNTARINESS TO LIMIT THE USE OF DECEPTION

Virtually all interrogations — or at least virtually all successful interrogations — involve some deception.[1] As the United States Supreme Court has placed few limits on the use of deception, the variety of deceptive techniques is limited chiefly by the ingenuity of the interrogator. Interrogators still rely on the classic "Mutt and Jeff," or "good cop, bad cop," routine. Interrogators tell suspects that nonexistent eyewitnesses have identified them, or that still at-large accomplices have given statements against them. Interrogators have been known to put an unsophisticated suspect's hand on a fancy, new photocopy machine and tell him that the "Truth Machine" will know if he is lying. Occasionally, an interrogator will create a piece of evidence, such as a lab report purporting to link the suspect's bodily fluids to the victim. Perhaps most often, interrogators lie to create a rapport with a suspect. Interrogators who feel utter revulsion toward suspects accused of horrible crimes sometimes speak in a kindly, solicitous tone, professing to feel sympathy and compassion for the suspect and to feel that the victim, even if a child, should share the blame. At the very least, the successful interrogator deceives the suspect by allowing the suspect to believe that it somehow will be in the suspect's best interest to undertake the almost always self-defeating course of confessing.

* Special Assistant District Attorney, Delaware County, PA; Commissioner, Pennsylvania Commission on Sentencing; Lecturer, Villanova Law School. B.S. 1982, Wharton School of Business, University of Pennsylvania; J.D. 1985, Columbia Law School.

In writing this Article, I benefited greatly from discussing drafts with Benjamin Abelow, Paul Cassell, Marianne Cox, Diane Edelman, Karen Grigsby, Lori Klein, Richard Leo, Laura Little, Paul Marcus, Joseph McGettigan, Geoffrey Moulton, Margaret Raymond, Louis Sirico, and Welsh White. My research assistants, Timothy Bowers, Ipek Kurul, Bernadette Sparling, and Theresa Vitello, were enormously helpful in researching this Article.

1. As referred to by commentators seeking to limit the use of deceptive interrogation techniques, deception is defined broadly to include everything from express misstatements about the existence of evidence, to the use of false expressions of sympathy for a suspect in order to establish a better rapport.

Because most deception is employed only after the suspect executes a valid waiver of *Miranda*[2] rights, *Miranda* offers suspects little protection from deceptive interrogation techniques. Thus, commentators have increasingly looked to the voluntariness requirement of the Due Process Clause as a basis for limiting these techniques. These commentators have offered a variety of rationales for the voluntariness requirement — such as equality, dignity, and trust — to justify limiting the use of deception. On close scrutiny, however, none of these rationales provides a sound basis for prohibiting or drastically limiting the use of deception during interrogation. Presumably in recognition of the fact that these rationales have somewhat limited resonance with the Court, with legislators, and with the public at large, some commentators have now focused on the reliability rationale for the voluntariness requirement. A confession is unreliable when the person who gives it actually had nothing to do with the crime to which he purports to confess.

Commentators have sought to show that deception causes many false confessions and, thus, the wrongful convictions of many innocent persons.[3] Their efforts have captured the attention not only of the academic community, but also of the popular press.[4] Television, newspapers, and magazines have reported on individual cases in which defendants were convicted after giving purportedly false confessions,[5] and on the academic studies calling for limits on the use of deception during interrogation.[6] Scholars of law and psychology have made sug-

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

3. As discussed in this literature, a false confession does not include a statement making even a partial admission to actual wrongdoing. A false confession consists only of an admission to wrongdoing by an entirely innocent person.

4. *See* Alan W. Scheflin, Book Review, 38 SANTA CLARA L. REV. 1293, 1297 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David W. Canter & Laurence J. Alison, eds., 1997)) (finding that the "field of false confessions is currently a 'hot' topic").

5. *See* James R. Peterson, *True Confession?*, PLAYBOY, July 1, 1999, at 45, *available at* 1999 WL 7387978 (collecting cases of allegedly false confessions); *ABC News: 20/20* (ABC television broadcast, June 18, 1999), *available at* 1999 WL 6790763 (reporting on the confession of twelve-year-old Anthony Harris to murdering his five-year-old neighbor, and the confession of fifteen-year-old Michael Crowe to murdering his younger sister); *CBS News: 48 Hours* (CBS television broadcast, Apr. 13, 2000), *available at* 2000 WL 8422806 (reporting on two teenagers who confessed to murdering four girls in Austin) [hereinafter *48 Hours*]; *60 Minutes* (CBS television broadcast, June 30, 1996) (reporting on the case of Richard LaPointe's allegedly false confession to murder).

6. *See, e.g.*, Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1 (reporting on Leo and Ofshe's study); Thomas H. Maugh II, *Glendale Case Raises Issue of Reliability of Confessions*, L.A. TIMES, Apr. 2, 1998, at A1 (same); Mary McCarty & Tom Beyerlein, *Coming Back to Life After Hell*, DAYTON DAILY NEWS, July 4, 1985, at 1A, *available at* 1995 WL 8952484 (reporting on man released from death row and referring to the Bedau & Radelet study); Clarence Page, *When a Death Sentence is Dead Wrong*, CINCINNATI POST, July 11, 1996, at 19A, *available at* 1996 WL 10557685 (reporting on four men freed from prison and the report by Bedau and Radelet); Peterson, *supra* note 5, at 45 (reporting on Leo and Ofshe study of sixty false con-

gestions for curtailing deceptive interrogation techniques.[7] While some commentators have concluded that few limits on deception techniques are necessary,[8] and a few have advocated prohibiting any interrogation techniques involving deception,[9] still others have proposed limits between these two extremes.[10]

---

fessions); *48 Hours*, *supra* note 5 (reporting that Dr. Ofshe has analyzed sixty cases of police-induced false confessions).

7. *See* Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1131 (1997) ("In the law reviews and psychological journals, one can read a veritable stream of new ideas for restricting — or even eliminating — police interrogation.") [hereinafter Cassell, *Balanced Approaches*].

8. *See, e.g.*, Fred E. Inbau, *Police Interrogation — A Practical Necessity*, 52 J. CRIM. L. & CRIMINOLOGY 16, 20 (1961) ("Although both 'fair' and 'unfair' interrogation practices are permissible, nothing shall be done or said to the subject that will be apt to make an innocent person confess.") [hereinafter Inbau, *Police Interrogation*]; Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 777 (1997) (taking a fairly expansive view on the use of deception by asserting that deceptive practices should be permitted once there has been a judicial determination of probable cause); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 690 (1986) (reviewing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986)) (concluding that "tactics that are likely to induce a false confession" are unacceptable) [hereinafter Grano, *Selling the Idea*].

9. *See* Margaret Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9, 44 (1996) (advocating the prohibition of any lies during questioning) [hereinafter Paris, *Trust*]; Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1612 (1988) (advocating a per se rule against police trickery during interrogation); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 477 (1996) (urging a complete ban on police lying in order to maintain trust relationships between citizens and the police); Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729 (1994).

Some commentators have sought to limit not only deceptive interrogation, but also any interrogation of suspects in the absence of counsel. *See* Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT xvii (1932) (proposing a bar on all interrogation by the police); Donald A. Dripps, *Foreword: Against Police Interrogation — And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 726 (1988) (arguing for a bar on all confessions obtained during custodial interrogation); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) (urging that interrogation be permitted only in the presence of counsel); Young, *supra* at 473-76 (arguing that confessions are seldom necessary, especially if obtained by deception).

10. The most detailed intermediate proposal comes from Professor Welsh White. He argues "that interrogation methods likely to lead to untrustworthy confessions should be prohibited." Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997) [hereinafter White, *False Confessions*]. He advocates substantial limits on deception by proposing, first, that the police be prohibited from falsely leading a suspect "into believing that forensic evidence establishes his guilt," *id.* at 149, and, second, that courts closely scrutinize tactics that mislead the suspect "as to the strength of the evidence against him (or the likelihood of his guilt)," *id. See also id.* at 142-43 (suggesting that courts should restrict interrogation of "vulnerable suspects" such as juveniles and mentally impaired persons). This two-part proposal is far more limited than his 1979 proposal, in which he contended that "the device of seeking to elicit incriminating information through the assumption of a non-adversarial role should be

In order to evaluate these calls for either bans or significant limits on the use of deceptive interrogation techniques, I begin by briefly summarizing the history of the voluntariness requirement to identify its primary policy of preventing unreliable confessions. Next, I critique the rationales for the voluntariness requirement, other than reliability, that have been offered as a basis for limiting deceptive interrogation. After concluding that none of these other rationales offers an appropriate basis for the limits, I examine the reliability rationale for the voluntariness requirement, and I find that it does provide the appropriate basis for setting appropriate limits on deceptive interrogation techniques. I then consider the evidence that reliability has been implicated by the purportedly widespread problem with police-induced false confessions. Finding that the evidence of such false confessions consists entirely of anecdotal accounts, I conclude that the existing evidence falls well short of establishing the significant problem that

---

barred." Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PENN. L. REV. 581, 617 (1979) [hereinafter White, *Police Trickery*].

Professor Albert Alschuler has made suggestions similar to those of Professor White. He acknowledges that "[i]n some circumstances, [the police] should be allowed to express false sympathy for the suspect, blame the victim, play on the suspect's religious feelings, reveal incriminating evidence that in fact exists, confront the suspect with inconsistent statements, and more." Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997) [hereinafter Alschuler, *Constraint*]; *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669 (1996) (proposing that police interrogation be replaced with questioning by a neutral magistrate). But he insists that, in addition to barring threats or promises, courts "should forbid falsifying incriminating evidence and misrepresenting the strength of the evidence against a suspect." Alschuler, *Constraint*, *supra* at 974.

Professors Richard Leo and Richard Ofshe, the authors of a widely-cited article on false confessions, suggest a different approach. They do not advocate direct limits on the use of interrogation techniques involving deception. Instead, they first suggest that interrogations be videotaped. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1120 (1997) ("To further improve interrogation practices and the truth-finding function of the criminal justice system, mandatory taping of interrogations should be adopted.") [hereinafter Ofshe & Leo, *Decision to Confess Falsely*]. They then suggest that judges evaluate the reliability of a confession before admitting it as evidence at trial. *See id.* at 1118. They would have judges determine reliability by considering whether the defendant's "post-confession narrative" and the other evidence in the case corroborate the confession. Such evaluations are objectionable, however, because they would intrude on the traditional role of the factfinder. Judges do not evaluate other types of evidence — such as witness identifications — to determine whether the evidence is corroborated by other evidence. There is no reason to impose a corroboration requirement on statement evidence. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction From False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 526 (1999) (criticizing the corroboration requirement) [hereinafter Cassell, *Guilty and "Innocent"*]. Even if the use of deception were shown to create a false confession problem, the proposed pre-trial evaluation of all confessions would not be the appropriate means of remedying the problem. *See* Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2025-26 (1998) (criticizing Leo's reliability requirement as both unworkable and insufficiently protective) [hereinafter White, *Involuntary Confession*].

has been alleged to exist.[11] On the other hand, greatly limiting deception would impose significant costs on society in terms of reduced numbers of true confessions and reduced convictions of guilty persons.

There is absolutely no question that the conviction of an innocent person because of a false confession is an enormous failing of the criminal justice system. But it does matter whether such occurrences are rare tragedies or a widespread epidemic. Statistically sound studies, based on a random sample of confessions to determine how many are false, can and should be done. At this point, however, given the absence of empirical support, the calls for fundamentally changing the way crime is investigated in this country are not justified.

II. DEFINING VOLUNTARINESS

A. *The Multi-Factor Totality of the Circumstances Test*

The common law originally placed no limits on the methods used to obtain confessions.[12] During the 1700s and 1800s, however, judges in both Great Britain and the United States became increasingly concerned about the reliability of statements obtained by physically abusive means and began to ask whether confessions were voluntarily given.[13] For example, in its 1884 *Hopt v. Utah* decision, the U.S. Supreme Court suggested that abusive interrogation tactics might rebut "the presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement."[14]

Nevertheless, law enforcement personnel continued to employ the "third degree" during interrogation. In 1936, however, with *Brown v. Mississippi*,[15] the Court turned to the Due Process Clause of the Fourteenth Amendment as the basis for examining the voluntariness of confessions in dozens of state cases.[16] The Court held that police use of violence was "revolting to the sense of justice,"[17] stating that "[t]he

11. Thus far, there has been "advocacy research," but not objective "academic research," on the issue of how frequently false confessions occur. *See generally* Victor L. Streib, *Academic Research and Advocacy Research*, 36 CLEV. ST. L. REV. 253 (1988).

12. 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(a), at 442 (2d ed. 1999).

13. *See id.* § 6.2, at 440 ("[A] confession forced from the mind by the flattery of hope, or by the torture of fear" would be excluded because it "comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it." (quoting The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783))).

14. 110 U.S. 574, 585 (1884).

15. 297 U.S. 278, 285-87 (1936).

16. *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2203 ("Due Process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown v. Mississippi* . . . .").

17. *Brown*, 297 U.S. at 286.

rack and torture chamber may not be substituted for the witness stand."[18] In *Brown* and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable.[19] Due process required interrogation procedures that would yield voluntary, and therefore reliable, statements. Courts used a "totality of the circumstances" analysis to determine whether "the interrogation was . . . unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice."[20]

The totality of the circumstances test required courts to consider: the conduct and actions of the officers; the physical surroundings of the interrogation; and the characteristics and status of the defendant, including both physical and mental condition.[21] Some types of police conduct were deemed so coercive that no examination of the particular susceptibilities of the suspect was even necessary.[22] Most notably, physical violence and threats, whether implicit[23] or explicit, could not be directed against any suspect.[24] Physical mistreatment,[25] such as extended periods of interrogation without intervals for sleep, also provided grounds for finding involuntariness.[26]

The Court's pre-*Miranda* cases regularly looked to the characteristics of the particular defendant in deciding whether a confession should be deemed involuntary.[27] When the suspect was a juvenile, mentally ill, retarded, or intoxicated, courts required the police to lessen the intensity and duration of the interrogation or reduce the amount of deception. In other cases, however, the courts provided lit-

18. *Id.* at 285-86.

19. *See, e.g.*, Ward v. Texas, 316 U.S. 547 (1942) (defendant threatened with mob violence); Chambers v. Florida, 309 U.S. 227 (1940) (defendant interrogated for five days with no contact with anyone except the police); White v. Texas, 309 U.S. 631 (1940) (defendant taken into the woods on six nights for interrogation).

20. New York v. Quarles, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring and dissenting).

21. *See* LAFAVE ET AL., *supra* note 12, § 6.2(c), at 448.

22. *See* Stein v. New York, 346 U.S. 156, 182 (1953) (stating that, when the police conduct is outrageous, "there is no need to weigh or measure its effects on the will of the individual victim").

23. *See* Malinski v. New York, 324 U.S. 401 (1945) (defendant was kept naked for three hours, then left in his socks and underwear with a blanket for several more hours).

24. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967); Haynes v. Washington, 373 U.S. 503 (1963) (slapping); Brown v. Mississippi, 297 U.S. 278 (1936) (whipping).

25. *See, e.g.*, Brooks v. Florida, 389 U.S. 413 (1961) (deprivation of food or water).

26. *See* Reck v. Pate, 367 U.S. 433 (1961); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (thirty-six hours of interrogation).

27. *See, e.g.*, Haley v. Ohio, 322 U.S. 596, 599 (1948) (stating, in a case in which a fifteen-year-old African-American defendant was arrested for murder and questioned from midnight to 5:00 a.m. by relays of officers, "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

tle guidance to police regarding which social, emotional, or mental characteristics were relevant in determining how to interrogate a particular suspect.[28]

Even though reliability was surely uppermost in the Court's mind when it decided *Brown v. Mississippi*, the Court gave mixed and confusing signals in subsequent cases about the precise rationale for the voluntariness requirement.[29] For example, in *Jackson v. Denno*,[30] the Court referred to a "complex of values" requiring the exclusion of involuntary confessions. Reliability was just one of these values. Yet, notwithstanding the Court's assertions that there are rationales other than reliability for the voluntariness requirement, reliability still appears to be the single most important factor considered by the Court in deciding whether a confession is voluntary.[31]

B. *Courts Place Few Limits on the Use of Deception During an Interrogation*

Interrogation typically requires at least some deception — from professing unfelt sympathy for the suspect, to exaggerating the strength of the evidence against the suspect, to falsely alleging that a witness has identified the suspect.[32] In the pre-*Miranda* voluntariness

---

28. In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court found that police misconduct was an absolute prerequisite to a finding of involuntariness. Thus, the vulnerabilities of a particular defendant could never alone establish involuntariness.

29. *See* White, *False Confessions*, *supra* note 10, at 112-13 (discussing Rogers v. Richmond, 365 U.S. 534 (1961)). In *Rogers*, the Court said that the issue was not reliability but "whether the behavior of the State's law enforcement officials was such as to overbear [defendant's] will to resist and bring about confessions not freely self-determined — a question to be answered with complete disregard of whether or not [defendant] in fact spoke the truth." *Rogers*, 365 U.S. at 542, 544.

30. 378 U.S. 368 (1964).

31. *See* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 20-21 (1980) (during the 1960s, "in 99 cases out of 100," a confession's voluntariness would be determined on the basis of whether the "interrogation methods employed . . . create[d] a substantial risk that a person subjected to them will falsely confess — whether or not this particular defendant did." (emphasis omitted)); White, *False Confessions*, *supra* note 10, at 113 ("[I]t still appeared that the probable trustworthiness of a confession would be an important factor in determining its admissibility under the due process voluntariness test.").

32. The seminal work on the various types of deception that the police employ during interrogation is contained in the police manual, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986).

In Professor Leo's "typology of interrogatory deception," he catalogues the most frequently used interrogation techniques. *See* Richard A. Leo & Jerome H. Skolnick, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 5-7 (1992). He included: (1) presenting interrogations as noncustodial interviews not subject to *Miranda*; (2) giving the *Miranda* warnings in a way calculated to downplay their importance; (3) misrepresenting the nature or seriousness of the offense; (4) assuming roles to make manipulative appeals to conscience; (5) misrepresenting the moral seriousness of the offense; (6) using vague and indefinite promises; (7) misrepresenting police identity; and (8) fabricating evidence. Professor Leo's description of deceptive tactics is quite similar to that of the *Miranda* Court.

cases, the Court characterized the use of deception during interrogation as just one of the many factors it considered in evaluating the totality of the circumstances surrounding the confession. For example, in *Spano v. New York*,[33] an officer, who was also a close friend of the defendant, told the defendant that he would get in a lot of trouble if the defendant did not confess. The Court found that the use of the defendant's childhood friend, who feigned legal and family difficulties to get the defendant to confess, was unconstitutional. Although the Court held that the defendant's statement was involuntary, the use of deception was not a dispositive factor.[34] In addition to the exploitation of the friendship, the Court's holding relied on the defendant's limited education, his emotional instability, his great fatigue, the pressure used by the interrogating officers over many hours, his requests for an attorney, and his requests to remain silent.[35]

Although the *Miranda* Court appeared to take a negative view of deceptive interrogation techniques, the Court imposed few limits on their use. By detailed reference to police training manuals, the Court took note of widely used techniques, such as "good cop, bad cop" routines and false lineup identification techniques, and observed that the techniques created or increased the disadvantage most suspects had in matching wits with their interrogators.[36] Instead of forbidding such techniques, however, the Court protected suspects by requiring that police inform suspects of their rights to remain silent and to be provided with an attorney before commencing custodial interrogation.[37] *Miranda* was the high-water mark of the Court's negative view of interrogation in general and deceptive interrogation in particular.[38] Since

---

See Miranda v. Arizona, 384 U.S. 436, 449-55 (1966) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (1962) (cataloguing various psychological interrogation techniques)); *see also* White, *Police Trickery*, *supra* note 10, at 602-28 (describing various types of deception used by police during interrogation).

33. 360 U.S. 315 (1959).

34. The Court stated that it deserved mentioning, in the totality of the circumstances inquiry, that one of the officers who questioned the defendant was a childhood friend, who falsely represented to the defendant that he would be in trouble if the defendant did not confess. *Id.* at 323.

35. *See id.* at 321-23 (noting that the cumulation of these factors amounted to "official pressure" that overwhelmed the defendant's will).

36. *See Miranda*, 384 U.S. at 448-58 (listing various types of police deception and observing that they could take a "heavy toll on individual liberty").

37. *Miranda* does limit the use of deception in obtaining a waiver of rights or in responding to requests to invoke the rights. Once the police obtain a valid waiver, however, and absent any express invocations of the right to silence or counsel, *Miranda* leaves the police free to use almost any deceptive tactic.

38. When the Court recently reaffirmed the *Miranda* procedures, in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), the Court did not reaffirm the *Miranda* Court's arguably negative view of confessions. Where the *Miranda* decision is full of great passion and rhetoric, much of it aimed at the most common interrogation procedures, the *Dickerson* opinion is

then, the Court's decisions have reflected a far more positive attitude toward police interrogation and the role of confessions in the criminal justice system.

The Court has directly considered the propriety of deception only once. In *Frazier v. Cupp*,[39] the police misrepresented the strength of their case against the defendant. They falsely told the defendant that his cousin, who had been with him on the night of the crime, had confessed.[40] The Court considered the fact of this deception relevant to, but not dispositive of, the voluntariness issue. The Court has repeatedly declined the opportunity to place any specific limits on the use of deception during interrogation.[41]

In 1986, while considering lies made to an attorney, the Court, in *Moran v. Burbine*, did acknowledge that some police deception might be so "egregious" that it could rise to the "level of a due process violation."[42] Yet the Court neither provided examples of such unacceptable police conduct, nor suggested that the police needed to be particularly careful about using deception during interrogation. Instead, the *Moran* Court emphasized that society has a "legitimate and substantial interest in securing admissions of guilt,"[43] and that " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted."[44] Similarly, in *Illinois v. Perkins*,[45] the Court

---

spare and subdued. Looking primarily to the principle of stare decisis to reaffirm *Miranda*, Chief Justice Rehnquist includes no criticism of specific police techniques.

39. 394 U.S. 731 (1969).

40. *Id.* at 737. The police also falsely claimed to have sympathy for the defendant. *See id.* at 738.

41. *See, e.g.*, United States v. Velasquez, 885 F.2d 1076 (3d Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); People v. Thompson, 785 P.2d 857 (Cal. 1990), *cert. denied*, 498 U.S. 881 (1990); State v. Register, 476 S.E.2d 153 (S.C. 1996), *cert. denied*, 519 U.S. 1129 (1997); State v. Milburn, 511 S.E.2d 828 (W. Va. 1998), *cert. denied*, 528 U.S. 832 (1999). Moreover, in several cases that the Court heard on other issues, deception had been used during interrogation, and the Court made no unfavorable comment about the deception. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 298 (1990) (holding that undercover officer posing as defendant's fellow inmate was not required to give *Miranda* warnings); Duckworth v. Eagan, 492 U.S. 195, 198, 203 (1989) (affirming conviction where police told defendant that they had no way of giving him a lawyer, but that one could be appointed for him when he went to court); Colorado v. Spring, 479 U.S. 564, 577 (1987) (holding that the police need not disclose all possible areas of questioning before an interrogation); Oregon v. Mathiason, 429 U.S. 492, 493-96 (1977) (per curiam) (finding that the police falsely told the defendant that they had found his fingerprints at the scene, but deeming the falsehood irrelevant for *Miranda* purposes); Weatherford v. Bursey, 429 U.S. 545 (1977); Michigan v. Mosley, 423 U.S. 96 (1975) (confessing suspect had been told that another person had named him as the gunman).

42. 475 U.S. 412, 432 (1986).

43. *Id.* at 427.

44. *Id.* at 426 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)). The Court has recognized that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 426 (quoting United States v. Washington, 431 U.S. 181, 186 (1977)); *see also* McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) ("[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . .").

noted that "*Miranda* forbids coercion, not mere strategic deception. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[46] Thus, the "current constitutional doctrine... by and large, has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase."[47] The lower federal courts and state courts have interpreted the Supreme Court's decisions to find that almost no type of deception renders a confession per se involuntary.[48]

C. *Court's Rationales for the Voluntariness Requirement*

Although the Court has never set forth the precise rationale for the voluntariness requirement,[49] the reliability concern provides the

45. 496 U.S. 292 (1990).

46. *Id.* at 297.

47. Slobogin, *supra* note 8, at 777; *see also* Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 818 ("[C]onstitutional law permits courts little room to impose meaningful restrictions on police lying . . . .") [hereinafter Paris, *Lying*]; Paris, *Trust*, *supra* note 9, at 6 ("[A]lthough interrogation in the United States is replete with formal rules and powerful informal customs, it is remarkably unconstrained by strong rules prohibiting interrogators from obtaining confessions by lies or trickery.").

48. Slobogin, *supra* note 8, at 781 ("The message to the police is that, as far as the law is concerned, they have virtual carte blanche to engage in deceptive undercover work."); Young, *supra* note 9, at 451 ("With no absolute prohibition of police lying during interrogation, courts today are free to condone such lying.").

Courts are tolerant of lies about the existence of evidence. *See, e.g.*, Arthur v. Commonwealth, 480 S.E.2d 749, 752 (Va. Ct. App. 1997) (holding that defendant's confession was voluntary, even though the police fabricated fingerprint and DNA reports). *But see* State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (holding that the police could not fabricate a lab report linking the suspect to the victim). The police may also lie about the strength of the government's case, *see id.* § 6.9(c), at 587-90 (citing cases); Holland v. McGinnis, 963 F.2d 1044, 1051-52 (7th Cir. 1992) (police told the defendant a witness saw him with the rape victim); United States v. Velasquez, 885 F.2d 1076, 1087-89 (3d Cir. 1989) (police told the defendant that her accomplice had given a statement against her); United States v. Petary, 857 F.2d 458, 460-61 (8th Cir. 1988) (police told defendant that the codefendant had confessed); Commonwealth v. Jones, 322 A.2d 119, 126 (Pa. 1974) (police told the suspect that the co-defendant had given a statement against him); State v. Galli, 967 P.2d 930, 936 (Utah 1998) (police told the defendant that his co-defendants had implicated him in robberies); LAFAVE ET AL., *supra* note 12, § 6.2, at 447 (collecting cases). Courts look with somewhat more disfavor on lies about the law that will apply to defendant. *See* LAFAVE ET AL., *supra*, § 6.2, at 447.

49. In some instances, the Court has resorted to vague language such as whether a defendant's "will was overborne" during interrogation. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 685 (1993) (considering claim that repeated promises of lenient treatment had overborne defendant's will); Arizona v. Fulminante, 499 U.S. 279, 288 (1991) (concluding that threat of physical violence had overborne defendant's will); Illinois v. Perkins, 496 U.S. 292, 303 (1990) (Brennan, J., concurring); Oregon v. Elstad, 470 U.S. 298, 325 (1985) (Brennan, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973) (listing factors courts consider in determining if "a defendant's will was overborne"). The Court has also referred to an individual's "autonomy" and "dignity" as concerns implicated by the voluntariness requirement. *See* United States v. Balsys, 524 U.S. 666, 703 (1998) (Breyer, J., dissenting); Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Brennan, J. dissenting); Allen v. Illinois, 478

most consistent, and appropriate, explanation for the Court's voluntariness decisions.[50] The reliability rationale requires the Court to consider whether the procedure by which a confession was obtained produces an unacceptably high risk that even an innocent person would confess to a crime if that procedure were used.[51] State court decisions, perhaps even more than the Court's own decisions, have focused on the reliability rationale for the voluntariness inquiry.[52] The Court's rhetoric in some cases does suggest that there is certain conduct that will not be tolerated as fair and just in a civilized society, even if it may result in reliable confessions.[53] Yet, in most instances, the best predictor of what will be deemed unacceptable is still the reliability principle. Although a particular confession may be reliable in fact, interrogation practices used to obtain that confession may be deemed unacceptable because there is a significant likelihood that the practices could produce unreliable confessions in other cases. Thus, the general

---

U.S. 364, 383 (1986) (Stevens, J., dissenting); Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan J., dissenting); Brewer v. Williams, 430 U.S. 387, 423 (1977) (Burger, C.J., dissenting).

50. Reliability was certainly a concern of the Court in *Brown v. Mississippi*, 297 U.S. 278 (1936), where the conviction was based solely on confessions procured by brutal whippings. In its post-*Brown* cases, the Court has, on a number of occasions, referred to the reliability concern. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942) (stating that the police actions made the defendant "willing to make any statement that the officers wanted him to make"); White v. Texas, 310 U.S. 530, 533 (1940) (excluding confession obtained after a Texas Ranger repeatedly took defendant into the woods at night and whipped him); Chambers v. Florida, 309 U.S. 227 (1940).

51. In considering the reliability rationale for the due process voluntariness requirement, a court does not ask whether a confession should be deemed reliable given all of the evidence in the case, other than the confession. Instead, a court must ask whether a government procedure, such as the use of a particular form of deception, generally creates an undue risk that an innocent person will falsely confess. *See* White, *Involuntary Confession*, *supra* note 10, at 2022 ("[T]he Court's Due Process confession cases have always focused on the propriety of the officers' interrogation methods rather than the resulting confessions.").

52. *See, e.g.*, LAFAVE ET AL., *supra* note 12, § 6.2, at 456-59.

53. *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 386 (1964) (stating that confessions obtained through coercion are contrary to "the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will' " (quoting Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960))). The Court has appeared to characterize some police methods, conduct, or behavior, as so offensive or improper, that they are barred even if the reliability of the resulting confession does not appear to be in question. *See, e.g.*, Watts v. Indiana, 338 U.S. 49, 51-55 (1949) (involving a series of lengthy interrogations that occurred over seven days); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 153-56 (1944) (involving 36 hours of continuous questioning). The Court has called various police methods unfair, *see, e.g.*, Lisbena v. California, 314 U.S. 219-236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence . . . ."); outrageous, illegal, *see* Spano v. New York, 360 U.S. 315, 320 (1959) (confessions are excluded as involuntary because of "the deep-rooted feeling that the police must obey the law while enforcing the law"); or contrary to fundamental values, *see* Rochin v. California, 342 U.S. 165, 173 (1952) ("Coerced confessions offend the community's sense of fair play and decency.").

statements about which police behavior will not be tolerated in a fair system, often still reflect, at bottom, a concern with reliability.[54]

III. PROPOSED REASONS, BEYOND RELIABILITY, FOR LIMITING DECEPTION

Some of the proposed limits on deceptive interrogation are based on rationales for the voluntariness requirement other than reliability. To evaluate the worth of the proposed limits, it is necessary to consider the asserted rationales.

A. *Equality Between Suspect and Interrogator: "Fox-Hunter" Rationale*

The "fox-hunter," "fair chance," or "sporting theory" rationale for limiting police deception during interrogation provides that deception gives the interrogator so much of an advantage that the suspect has no real chance to avoid confessing.[55] The argument is that the suspect is entitled to some assistance in resisting the powerfully persuasive appeals of the interrogator to confess. The notion of creating some parity between the suspect and his interrogator was evident in *Miranda*'s treatment of suspects as victims.[56] References to the sporting theory

54. In his seminal 1963 article on the Court's involuntary confession cases, Professor Yale Kamisar described the cases as decided based on two reliability standards. The first standard considered whether the confession of the particular defendant, given that defendant's individual characteristics, might be unreliable. The second standard considers whether the police tactic might make some innocent defendant confess, even if there was no concern about the reliability of the instant confession. *See* Yale Kamisar, *What Is an Involuntary Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 755 (1963). A tactic that would never cause an innocent person to confess falsely will rarely be deemed by the Court so outrageous as to be constitutionally barred.

55. Under this theory:

> The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law*: leave to run a certain length of way, for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as *unfair* as convicting him of burglary on a hen-roost, in five minutes' time, in a court of conscience.

JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 29 (1993) [hereinafter GRANO, CONFESSIONS] (citing J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk. 9, pt. 4, ch. 3 at 238-39 (1827)). "Bentham sarcastically observed that this concern about the accused's likelihood of success at trial can be rational only under a sporting code that has amusement rather than justice at its end." *Id*; *see also* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1234 n.22 (1988).

56. *See* Miranda v. Arizona, 384 U.S. 436, 442 (1966) (acknowledging historically unjust methods for interrogating suspects); Joseph D. Grano, *Criminal Procedure: Moving From the Accused as Victim to the Accused as Responsible Party*, 19 HARV. J.L. & PUB. POL'Y 711, 713 (1996) ("*Miranda* . . . expressed concern about the inequality between sophisticated and unsophisticated defendants . . . .") [hereinafter Grano, *Criminal Procedure*]; *see also* Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731, 733-34 (1981) (stating that defendant, because of reliable confession, has no chance of acquittal is "wholly desirable").

are even more pronounced, however, in the work of commentators critical of police interrogation.[57]

The sporting view or fox-hunter rationale for limiting deception should be rejected. It is not in society's interest to give the suspect and the officer an equal chance to prevail in an interrogation. Society is not indifferent as to who wins the hunt.[58] There is no reason, constitutional or otherwise, that guilty defendants deserve an opportunity to avoid prosecution or conviction.[59] Interrogation is not a game in which a suspect matches wits with the police. Law enforcement should be encouraged to build the strongest possible case against a defendant, and one of law enforcement's goals is to solve a crime by obtaining a confession from the wrongdoer. Moreover, other types of evidence are not excluded or limited simply because they make conviction more likely. For example, DNA, fingerprint, and videotape evidence can be even more damning than a confession. Yet no one suggests that by collecting such evidence and introducing it at trial the police create some unfair inequality between the police and the defendant. Nor do we suggest that such powerful evidence makes a trial futile for the defendant because it creates such a strong case for the prosecution. The community benefits when a case is strong, and when a guilty defendant either pleads guilty or is convicted by being found guilty beyond a reasonable doubt.

B. *Equality Among Suspects: The Equal Protection Rationale*

The "equal protection" rationale for limiting interrogation addresses the purported problem that some criminals are smarter, more sophisticated, or more able to resist the pleas of interrogators to confess than are other criminals. Stated in a favorable light, the equal protection rationale means only that all suspects should be equally aware

57. Professor George Dix, one of the leading proponents of the sporting view of interrogation, has concluded that "[a] major objective of the law of confessions . . . should be regarded as assuring that a person who confesses does so with as complete an understanding of his tactical position as possible." George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1 WASH. U. L.Q. 275, 330-31 (1975); *see also* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) ("[E]ffective measures to right the imbalance created by the 'inherently coercive' atmosphere might be no less than tantamount to the abolition of the institution.").

58. *See* Gerald Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1443 (1985).

59. *See* GRANO, CONFESSIONS, *supra* note 55, at 32 ("What earned the fair chance argument Bentham's derisive fox-hunter's label was its suggestion that, as an end in itself, even guilty defendants should have a fair chance for acquittal."); George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 812 (1995) ("Nothing — not even the tired cliche that the United States has an accusatorial and not an inquisitorial system of justice — will make [the fox-hunter] argument work once it is exposed as a call to give guilty suspects a better chance at acquittal." (reviewing GRANO, *supra*)).

of their rights.[60] But when this rationale is viewed more expansively, it means that foolish, ignorant, and unsophisticated suspects must be given the same chance as experienced, knowledgeable suspects to resist interrogation.[61]

Proponents of the equal protection rationale have stated that it is "unseemly for government officials systematically to seek out and take advantage of the psychological vulnerabilities of a citizen."[62] Such a view may have some validity when applied to truly mentally impaired individuals. But if psychological vulnerabilities are meant to include anything that makes a person more likely to confess — from a moderately low I.Q. to a docile personality — than the propriety of interrogating almost any suspect is doubtful. Although the Due Process Clause may require some additional protections for particularly young or impaired suspects, it surely does not protect the foolish and unsophisticated criminal from himself. In fact, society benefits because some suspects confess.[63]

Because *Miranda* guarantees that all suspects are aware of their rights, there is no need to further equalize suspects' ability or inclination to invoke those rights and prevent interrogations. There is no doubt that a foolish or unsophisticated suspect is far more likely to confess than is a strong, smart, sophisticated suspect. But this logical occurrence should not be troubling. The foolish suspect is also more likely to consent to a search, to leave fingerprints and other clues at the crime scene, to be slow or noisy, or to speak loosely to new acquaintances who may be undercover officers. The community is pleased when any of these things happen because the criminal is more likely to be caught. Therefore, we should not be troubled when the suspect's folly leads him to confess when questioned.

---

60. *See* Caplan, *supra* note 58, at 1456 ("Suspects who do not know their rights, or do not assert them, as a consequence of some handicap — poverty, lack of education, emotional instability — should not, it is felt, fare worse than more accomplished suspects who know and have the capacity to assert their rights.").

61. *See* R. Kent Greenawalt, *Silence as A Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41 (1981) (noting that deceptive interrogation tactics "work unevenly by undermining the inexperienced and ignorant [while] having little effect on the hardened criminal."); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 872 (1981) (stating under the pre-*Miranda* voluntariness test, the "vulnerable were more likely to be on the losing end of a successful police interrogation" (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980))).

62. Schulhofer, *supra* note 61, at 872.

63. Thomas, *supra* note 59, at 812 (noting that calls for equal treatment in the interrogation room "is like saying that because the police do not solve white-collar crimes as often as crimes of violence, the State should release from custody some of the robbers and muggers").

C. *Trust Rationale*

Some commentators have urged limits on deceptive interrogation techniques in order to "facilitate trust relationships between suspects and government [interrogators]."[64] In fact, one commentator has argued that the primary purpose of interrogation is not to solve crimes, but rather to establish the interrogator's integrity and to elicit the suspect's trust.[65] Interrogation is not, however, a civics lesson for criminal suspects.[66] Interrogation is a critical information-gathering tool in law enforcement's arsenal for solving crimes and protecting the public. Arguments based on the trust rationale ignore the chief purpose of interrogation and the practical realities of law enforcement. Moreover, the trust rationale would require a ban on all undercover investigation. The basis of the trust rationale is that harm occurs when the suspect learns that the police lied to him during interrogation. Yet the suspect in an undercover operation will be similarly harmed by learning that an undercover agent's very identity was a lie.

There is no real support for the claim that suspects would be more likely to confess to an officer whom they trusted.[67] In addition, suspects do not expect complete honesty from law enforcement personnel. Complete honesty would require an officer to inform a suspect that it is most certainly not in the suspect's best interest to confess and that the suspect would be best served by invoking his rights to silence and counsel.[68]

---

64. Paris, *Trust*, *supra* note 9, at 6, 62 (1995) (noting that the lack of rules restricting lies creates an atmosphere in which the government is expected to lie and manipulate); *see also* Young, *supra* note 9, at 457-61; Greenawalt, *supra* note 61, at 41 (interrogation about "garden variety crimes, such as petty theft and income tax evasion, [results in] an unhealthy atmosphere of resentment and distrust").

65. Paris, *Lying*, *supra* note 47, at 825 (asserting that an important police objective of interrogation is to "provide important opportunities for police to distribute information to suspects (and more indirectly, the public) about such things as integrity, honest dialogue, and trustworthiness"); Paris, *Trust*, *supra* note 9, at 65 (asserting that "we might sensibly conclude that facilitating trust between individuals and their governments . . . is an important goal to which the truth-seeking function sometimes must submit.").

66. *See, e.g.*, Paris, *Trust*, *supra* note 9, at 6 ("[W]e should want to make interrogation a particularly meaningful encounter for the suspect — one in which the values of trust and trustworthiness are taught by the interrogator's own example — regardless of whether a confession ensues . . . ."); *see also* Greenawalt, *supra* note 61, at 70 ("[W]hat is proper behavior between government and residents will closely resemble what is proper behavior in analogous relationships among private individuals . . . .").

67. Young, *supra* note 9, at 455-68.

68. Professor Paris contends that suspects who are lied to and then convicted will remember the lie when they are released, be resentful about it, and be less likely to act as upstanding citizens. *See* Paris, *Lying*, *supra* note 47, at 830-31. Yet suspects who are not lied to may very well not confess, not be convicted, and will suffer no incarceration or other penalty for their wrong-doing. This unpunished, at-large criminal is certainly no more likely to be an upstanding citizen because he was not lied to by the police. Although he may have feelings of trust for the honest officers, he is just as likely to feel contempt towards them for their inability to apprehend and prosecute him for his wrong-doing.

According to the trust rationale, breaches of trust ultimately deter confessions because the resentful "suspect or defendant today may be the witness tomorrow."[69] There is no evidence, however, that witnesses have refused to talk to the police because the police are not always truthful in talking to suspects. Witnesses have many reasons not to cooperate with the police. For example, witnesses may be unwilling to make court appearances for fear that a defendant will retaliate. In addition, most people are already aware, if only from television, that the police lie during interrogation. There has been no showing that citizens have responded to this police ingenuity by declining to report crimes, assist in investigations, or testify as witnesses. Even if it were true that breaches of trust deterred confessions in the long-run, the police may legitimately feel that "a bird in the hand is worth two in the bush." When the police suspect a person of a particular, already-committed crime, it is not worth forgoing deception, on the off-chance that the suspect might be a useful witness to some other person's future crime.

D. *Dignity Rationale*

In advocating limits on police interrogation, some commentators refer to a concern for the individual's "dignity."[70] According to these commentators, "pressuring a suspect to answer questions is unduly cruel, violating the idea of the basic dignity of all individuals,"[71] and "[i]nterrogation tactics that are calculated to make the suspect feel that he is not a decent or honorable person unless he confesses constitute direct assaults upon [his] dignity."[72] The dignity concern would appear to invalidate most interrogation. Both commentators for[73] and against[74] substantial limits on interrogation refer to a need to respect individual dignity. Nevertheless, acknowledgement of this need does not translate easily into rules that distinguish acceptable and unacceptable interrogation practices.

---

69. Young, *supra* note 9, at 458.

70. *See, e.g.*, Greenawalt, *supra* note 61, at 40-41 (arguing that deceiving suspects does not accord with dignity and autonomy).

71. Paris, *Trust*, *supra* note 9, at 48 n.153; *see also* Rosenberg & Rosenberg, *supra* note 9, at 76-77 (asserting that *Miranda* "reflects the ages-old tension between preservation of human dignity and solution of crimes."); Thomas S. Schrock et al., *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 42 n.174 (1978) (citing *Miranda*'s assumption that the constitutional basis of the privilege is the "respect a government . . . must accord to the dignity and integrity of its citizens").

72. White, *Police Trickery*, *supra* note 10, at 628 (stating that "criminal suspects have a right to be treated in a manner that reflects a concern of their dignity as human beings").

73. *See, e.g.*, *id.* at 627-28; Greenawalt, *supra* note 61, at 51 (suggesting that police interrogation be replaced with questioning by a magistrate).

74. *See* GRANO, CONFESSIONS, *supra* note 55, at 22 ("[N]otions of human dignity provide limits on what government may do to solve crime.").

E. *Morality Rationale*

Some commentators have asserted moral limits on interrogation techniques.[75] In particular, a number of these commentators[76] have taken cues from the work of moral philosopher Sissela Bok. Bok has examined the justifications for lying throughout the whole range of human interactions.[77] She details the harms that lying can cause, but concludes that lying is morally justified when there is no alternative, or when the lie results in greater benefits than costs.[78] Thus, Bok finds that lying to one's "enemies" is justified. She does not specifically deal with the matter of interrogation, but she does allow that criminals could be considered "enemies."[79]

Reliance on morality as a basis for limiting deceptive interrogation practices requires two assumptions: 1) that lying and deception are clearly an evil within the everyday relationships of citizens; and, 2) that expectations about everyday relationships should also apply during the questioning of criminal suspects. Both of these assumptions should be questioned. First, even apart from police questioning, in the normal course of affairs among citizens, deception cannot be painted as an unmitigated evil. In fact, deceptions large and small are an ac-

---

75. *See, e.g.*, Greenawalt, *supra* note 61, at 17 (concluding that the right to silence is "morally justified"). *But see* State v. McKnight, 243 A.2d 240, 250-51 (N.J. 1968) ("It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process. This must be so if Government is to succeed in its primary mission to protect the first right of the individual to live free from criminal attack.").

76. *See* Paris, *Lying*, *supra* note 47, at 819; Slobogin, *supra* note 8, at 777 (confirming that his article principally relies on Sissela Bok's philosophical work); Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 833 (1997) ("I interpret Bok's approval of deception as further removed from authorizing the deceptive investigative practices considered by Professor Slobogin than he does."); Alschuler, *Constraint*, *supra* note 10, at 974 n.85 (citing Bok to assert that lying "raises deontological concerns that should at least cast the burden of justification on the defenders of deceptive interrogation").

77. *See* SISSELA BOK, LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE (1978) (discussing whether there are such things as justifiable lies and the circumstances in which they would occur).

78. *See id.* at 97, 114-29 (advising an evaluation of the alternatives, consequences, and effects of lying).

79. *See id.* at 141-53; Commentators have reached widely divergent conclusions on whether Bok's theories permit the regular use of deception during interrogation. The different views arise because of disagreement over when a criminal suspect should be deemed an enemy within Bok's theory. *Compare* Paris, *Lying*, *supra* note 47, 817, 819-20 (relying on Bok to find virtually all deception prohibited), *with* Slobogin, *supra* note 8, at 806 (relying on Bok to find that suspects are "enemies" and can be lied to once they are held pursuant to a probable cause determination). Professor Mosteller suggests "the most appropriate reading of [Bok's] work is that the declared-enemies category applies only to a small subset of criminal defendants . . . and not to the typical investigation of past individual criminal conduct." Mosteller, *supra* note 76, at 834. Professor Alschuler suggests that the concerns raised by reference to Bok's theories "should at least cast the burden of justification on the defenders of deceptive interrogation." Alschuler, *Constraint*, *supra* note 10, at 974 n.85.

cepted part of life — from enthusiastic sales pitches to polite greetings and comments.[80]

Second, the rules and expectations governing discourse between citizens does not necessarily apply to police questioning of criminal suspects. Given society's interest in catching criminals, lying during interrogation can be justified as an appropriate means toward achieving this important social end. Thus, conduct by the police towards a criminal suspect cannot be judged by reference to what is morally worthy during interactions between family members, friends, neighbors, and acquaintances.

F. *Pragmatic Concerns*

In contrast to principled criteria for limiting deceptive interrogation practices, commentators have also advanced pragmatic reasons offered for limiting deception during interrogation. The chief pragmatic reason is the slippery slope argument that permitting lying during interrogation leads to widespread police lying in other contexts, including warrants, affidavits, and sworn testimony.[81] Some officers, like some civilian witnesses, do lie under oath. But we assume that ordinary people — such as witnesses, jurors, and even defendants — understand the significance of the oath. Similarly, police officers know, and should be expected to know, what is appropriate and lawful during the many different duties they perform — undercover agent, beat officer, interrogator, affiant, and witness.[82]

---

80. William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1910 (1993) [hereinafter Stuntz, *Lawyers*].

> In moral terms, the most reasonable explanation for this behavior is that people make distinctions, based on the relative harmfulness of telling the truth versus dissembling, on whether the false statement is defensive or offensive, or on whether the motivation is selfish or altruistic. Whether the conduct is wrong, and if so how much, depends on context.

Id.

81. *See, e.g.*, Leo & Skolnick, *supra* note 32, at 9 ("When police are permitted to lie in the interrogation context, why should they refrain from lying to judges when applying for warrants, from violating internal police organization rules against lying, or from lying in the courtroom?"); Paris, *Lying*, *supra* note 47, at 829 ("[L]ying in the interrogation context may lead to police perjury under oath."); Young, *supra* note 9, at 463 (asserting that lying during interrogation will teach officers to become accomplished liars, and suggesting that officers may lie to obtain an adrenaline rush).

82. Commentators raising these evidentiary concerns have not addressed the matter of either undercover investigations or the use of ruses during searches. The dangers alleged to arise from deceptive interrogation would seem just as likely, if not more likely, to arise from the deceptions used during undercover operations or as ruses to search. If officers can be relied on to understand the line between undercover operations and sworn testimony, they are equally able to distinguish between interrogation and sworn testimony.

There is one pragmatic concern that has caused a court to exclude a confession because of the use of a deceptive interrogation technique. In the 1989 case of *Florida v. Cayward*, 552 So. 2d 971 (1989), the state court held that there is a distinct difference between acceptable verbal deception and fabrication of scientific documentation, which has the potential to reach the courtroom. *Cayward* specifically held that the police should not have created a

G. *Criticism of the Non-reliability Rationales for Limiting Interrogation Techniques*

Many of the rationales offered for limiting deceptive interrogation techniques, if taken to their logical extreme, would bar not only deceptive interrogation techniques, but other investigative methods as well. Commentators have failed to explain adequately why deception must be barred or substantially limited during interrogation, while the deception used in other areas — such as undercover investigations, wiretaps, ruses, and informants — may continue.[83] A bar on deception during all stages of investigation would make it very difficult to solve some crimes.[84]

Some commentators suggesting limits on interrogation techniques appear most concerned with whether a technique is effective in eliciting confessions. Yet effectiveness is an inappropriate basis for limiting interrogation. The voluntariness requirement does not bar effective interrogation, or even reflect a general hostility to the concept of police interrogation.[85] "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are in-

---

false lab report purporting to connect semen found on the five-year-old rape and murder victim to the nineteen-year-old suspect. *Id.* Relying on *Frazier v. Cupp*, 394 U.S. 731 (1969), the court acknowledged that verbal deception does not render a confession involuntary. The court, however, distinguished deception by false documents. 552 So. 2d at 975. The court concluded that there was an unacceptably high risk that such false evidence used during interrogation would somehow be included in the file and later considered true evidence at trial. *Id.* at 975 (suggesting that the heavy caseload of courts may allow manufactured documents to be used as substantive evidence against the defendant). Although this is a danger that should be addressed by appropriate police and prosecution procedures, the *Cayward* court's wholesale bar on documentary deception is overbroad.

83. *See* Grano, *Selling the Idea*, *supra* note 8, at 679 (acknowledging that wiretaps and informants are no more respectful of a suspect's dignity than police interrogations).

84. *See* Slobogin, *supra* note 8, at 778 ("Undercover work is by definition deceptive. It normally involves outright lies.").

85. A few commentators have freely acknowledged their distaste for much or all police interrogation. *See, e.g.*, BORCHARD, *supra* note 9, xvii (urging a rule "prohibiting the use in evidence of all confessions made to the police"); Martin H. Belsky, *Living with* Miranda: *A Reply to Professor Grano*, 43 DRAKE L. REV. 127, 141 (1994) (analogizing intimidating interrogation to child abuse, spouse abuse, or rape); Driver, *supra* note 57, at 60-61 (1968) (arguing that abolition of police interrogation may be necessary to eliminate coercion); Rosenberg & Rosenberg, *supra* note 9, at 91, 113 ("We have a philosophical predilection" for the position "that confessions be considered of no evidentiary value."); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY 21, 46 (1961) (asserting that police interrogation is "irreconcilable" with the self-incrimination privilege).

A number of commentators have proposed that magistrates, not the police, question suspects. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 908 (1995); Dripps, *supra* note 9; Paul G. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

herently desirable."[86] Presumably in recognition of the importance of confessions, some commentators urging limits have wisely shifted away from arguments rooted largely in the effectiveness of interrogation techniques, and focused more on the reliability concern.[87]

IV. BASING LIMITS ON DECEPTION DURING INTERROGATION ON RELIABILITY CONCERNS

A. *Commentator Recognition of Reliability as the Limiting Principle*

Despite the wide variety of rationales proffered for the voluntariness requirement, scholars have increasingly emphasized the reliability rationale.[88] Under the reliability rationale, a court must ask whether the procedure used to obtain a confession creates an unreasonable risk that an innocent person would falsely confess.[89]

According to many of these scholars, empirical evidence shows that deceptive interrogation practices cause a significant number of false confessions.[90] Because the reliability rationale focuses on protecting innocent suspects, it offers a more palatable — and appropriate — reason for limiting interrogation.[91] The increased scholarly empha-

86. United States v. Washington, 431 U.S. 181, 187-88 (1977). Professor Grano has been the most thoughtful commentator on the inherent value of confessions. *See, e.g.*, Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061 (1992); Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).

87. *Compare, e.g.*, White, *Police Trickery*, *supra* note 10, at 613-23 (1979) (focusing on a concern that guilty suspects would make an irrational or poor choice about the desirability of confessing), *with* White, *False Confessions*, *supra* note 10, at 105 (emphasizing the risk of false confessions and the reliability rationale for the voluntariness requirement).

88. *See, e.g.*, Alschuler, *supra* note 10, at 975 (including reliability as the chief reason for advocating limits on the use of deception); White, *False Confessions*, *supra* note 10, at 138-42 (discussing the constitutional basis and the formulation of procedural safeguards); Young, *supra* note 9, 461 (including reliability as one basis for a broad argument against lying).

89. There are obvious parallels between the increased focus on reliability by critics of police interrogation and the growing "innocence movement" by opponents of the death penalty. *See, e.g.*, Sara Rimer, *Support For a Moratorium On Executions Gets Stronger*, N.Y. TIMES, October 31, 2000, at A18.

90. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) [hereinafter Leo & Ofshe, *Consequences*]; White, *False Confessions*, supra note 10, at 110 (arguing that "the empirical evidence shows that standard interrogation techniques are likely to lead to untrustworthy confessions in a significant number of cases").

91. *See* Mosteller, *supra* note 76, at 837 ("[C]hanges in the law that increase procedural protections are practical possibilities if they have a greater probability of protecting the innocent. This point dovetails with the reality of popular societal reaction and contemporary press coverage: not surprisingly, it will be abuses of authority involving innocent people that will likely provoke restrictions on investigative deception, and restrictions that are more likely to prevent abuses affecting the innocent are, relatively speaking, more politically viable.").

sis on false confessions has gained greater public support than the more abstract arguments against deception. Professors Leo and Ofshe, in particular, have been able to present their research and arguments extensively in the popular press.[92]

B. *The False Confession Costs of Deceptive Interrogation Practices*

1. *Claims of Significant Numbers of False Confessions*

A number of commentators who have urged limitations on interrogation techniques have made alarming assertions that the false confession problem is widespread.[93] In recent years, Professors Leo and Ofshe have claimed that "[p]olice-induced false confessions are a serious problem for the American criminal justice system" because "confessions by the innocent still occur regularly."[94] They assert that "police-induced false confessions occur often and are highly likely to lead to the wrongful arrest, prosecution, conviction, and/or incarceration of the innocent."[95] They further claim that contemporary psychological methods are "apt to cause an innocent person to confess,"[96] and that "[w]hen police interrogate suspects whose guilt is a mere possibility rather than a reasonable likelihood, they run a significant risk of

92. *See, e.g.*, Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REPORT, November 9, 1988; Robin Topping, *False Confessions, Do the innocent sometimes admit to crimes?*, NEWSDAY, August 27, 1997, at A34; *see also Rivera Live* (NBC television broadcast, April 30, 1997) *available at* 1997 WL 4603535 (explaining that the police use deception during interrogation).

93. *See, e.g.*, MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 85 (1991) (false confessions "are commonplace"); *see also* EDWARD D. RADIN, THE INNOCENTS 8-9 (1964) (suggesting that five percent of convictions are miscarriages of justice in which an innocent person is imprisoned); Alschuler, *Constraint*, *supra* note 10, at 974 ("Especially when suspects are retarded or easily suggestible and when deception is coupled with intimations that leniency will follow confession, this misrepresentation is *likely* to generate false confessions." (emphasis added)); Michael L. Perlin, *"I'll Give You Shelter from the Storm": Privilege, Confidentiality, and Confessions of Crime*, 29 LOY. L.A. L. REV. 1699, 1700 (1996) (relying on Bedau, Radelet, and Huff to conclude that as "many as 740 erroneous convictions each year may be due to false confessions"); Thomas N. Thomas, Book Review, 36 JURIMETRICS J. 343, 344-46, 349 (1996) (reviewing LAWRENCE WRIGHTSMAN & SAUL KASSIN, CONFESSIONS IN THE COURTROOM (1993) and asserting, without citation support, that "many confessions are false" and that both spontaneous and police-induced false confessions are "common," and reviewing GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992) and asserting that Gudjonsson reveals that "the interrogation process . . . can easily evoke false confessions").

94. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

95. Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. L. REV. 1135, 1139 (1997) [hereinafter *Missing the Forest*].

96. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

eliciting a false confession."[97] Finally, Professors Leo and Ofshe reach the sweeping conclusion that "many investigators have recognized" that "the problems caused by police-induced false confessions are significant [and] recurrent."[98]

Professors Leo and Ofshe have found that "[i]t is well established that psychologically-induced false confessions occur frequently enough to warrant the concern of criminal justice officials, legislators and the general public."[99] In comments outside of their written work, they have portrayed the false confession problem even more alarmingly, asserting that false confessions happen "all the time."[100]

Professors Leo and Ofshe are not alone in suggesting that the false confession problem is widespread. For example, Professor White has stated that false confessions are obtained in a "significant" number of cases,[101] and that police interrogation "often yields false confessions."[102] He concludes that the empirical data "indicates that confessions induced by standard interrogation methods are frequently un-

97. *Id.* at 986.

98. Leo & Ofshe, *Consequences*, *supra* note 90, at 430.

99. Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 561 (1998).

100. *See* Maugh II, *supra* note 6, at A1; *Dateline* (NBC television broadcast, Dec. 23, 1997) ("Innocent people confess all the time.... We know it happens all the time."); *Defense Expert Says Boy Forced to Confess*, CLEVELAND PLAIN DEALER, Jan. 29, 1999, at 5-B (quoting Dr. Ofshe as testifying that "people often confess to crimes they didn't commit because of police tactics"). Professor Ofshe is reported to have claimed that as many as 60% of people might falsely confess to a crime when interrogated. *See* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 729 (1997) (citing CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" 97 (Donald S. Connery ed., 1996) (describing Professor Ofshe's comments at a 1995 public forum in Hartford, Connecticut titled "Convicting the Innocent").

101. White, *False Confessions*, *supra* note 10, at 108 ("Over the past two decades, a significant number of suspects have claimed that standard interrogation techniques have led them to give false confessions."); *id.* at 110 ("[S]tandard interrogation techniques [are] likely to lead to untrustworthy confessions in a significant number of cases."). *But see* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 488 (1996) (referring to the "esoteric problem of false confessions induced by noncoercive police questioning") [hereinafter Cassell, *Social Costs*].

102. Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1209 n.4 (1980) ("Those who have sought to limit police interrogation believe that interrogation, often carried out in secret, involves coercion, and often yields false confessions."). Yet he also concedes that "[t]here are only a small number of documented cases in which standard interrogation methods have led to indisputably false confessions." White, *False Confessions*, *supra* note 10, at 131.

trustworthy,"[103] and that "standard interrogation methods precipitate a significant number of false confessions."[104]

These repeated and widely-reported assertions that "contemporary psychological methods" are "apt" to cause an innocent suspect to confess are verifiable and should be verified.[105] Yet, thus far, no one has undertaken the research necessary to prove the claims.[106]

2. *Empirical Data on False Confessions Is Limited*

These alarming claims that false confessions are widespread do not hold up under scrutiny. Although there are reports — in both the academic and popular press — about individual instances of purportedly false confessions, there is no sound empirical proof that such instances are widespread.[107] Thus far, the reports have failed to rebut the intuitive view[108] that the number of persons incarcerated because of police-induced false confessions is quite small.

The existing research is almost entirely anecdotal and focuses on the causes, not the scope, of the problem. Sweeping references to significant, substantial, and widespread instances of false confessions are supported by reference to perhaps a few dozen indisputably false confessions. To justify the claim that the false confession problem is widespread, the new research will need to be based on a statistically significant, randomly-drawn sample of persons who gave confessions during interrogation. To determine whether there is a substantial concern that any of the confessors may actually be innocent, researchers would

---

103. White, *False Confessions*, *supra* note 10, at 131. Yet he also concludes that it is "impossible to estimate" the "number of false confessions," White, *Involuntary Confession*, *supra* note 10, at 2039, and that "there are only a small number of documented cases in which standard interrogation methods have led to indisputably false confessions." White, *False Confessions*, *supra* note 10, at 131.

104. White, *Involuntary Confession*, *supra* note 10, at 2042; *see also* White, *False Confessions*, *supra* note 10, at 108 ("Over the past two decades, a significant number of suspects have claimed that standard interrogation techniques have led them to give false confessions.").

105. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

106. *See id.* at 1135 (acknowledging that there has been no research "to quantify the number and frequency of false confessions or the rate at which they lead to miscarriages of justice").

107. *See* Cassell, *Balanced Approaches*, *supra* note 7, at 1125-26 (stating that "the empirical linchpin" for the proposals of Ofshe, Leo, and Alschuler "is simply missing"). Despite the spirited, on-going debate about police interrogation and confessions, there are surprisingly few studies of confession evidence. *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM ix (1993) ("[I]n contrast to the massive numbers of eyewitness studies, the topic of confession evidence has been almost completely ignored by psychologists and other social scientists.").

108. *See* White, *False Confessions*, *supra* note 10, at 108 ("The idea that a suspect, who is neither insane nor the victim of physical coercion, will confess to a crime he did not commit seems counterintuitive.").

need to examine all available evidence, starting with the court records. It appears that no one has attempted such statistically sound research on false confessions.

a. Most Research Is on the Causes and Types, Not the Number, of False Confessions. Based on the assertions of a widespread false confession problem, one would expect to see hundreds, if not thousands, of false confession cases documented. Yet no such evidence exists. Instead, research on false confessions falls into two categories. First, there are articles referring to collections of several, or at most several dozen, case histories of allegedly wrongful convictions because of false confessions.[109] Second, there are studies, generally by psychologists, not lawyers, on the causes of false confessions.

To justify substantial limits on the ability of the police to solve crimes by interrogating suspects, two questions must be answered: 1) why do some suspects falsely confess; and 2) how many false confessions are actually given. The first question, why a person would falsely confess, must be answered to determine whether limiting certain police conduct would even have the effect of preventing false confessors from confessing. For example, if most false confessors are like the defendant in *Colorado v. Connelly*,[110] who confessed independently of police action, then there is no point in limiting police conduct. Even if the research should establish that police conduct can cause false confessions, we cannot decide whether to limit that conduct without answering the second question on how often the conduct causes false confessions. Although there is a fair bit of research on the first question — why a person might falsely confess[111] — there is absolutely none that adequately answers the second question — how often this phenomenon takes place. Advocates of limits on interrogation tactics fail to make the critical distinction between research on why anyone might falsely confess and how often suspects actually make false confessions.

---

109. Professors Leo and Ofshe present twenty-nine cases, involving mostly homicides, from 1973 to 1996. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 429, 435, 478. (The authors present sixty disputed confession cases, but only twenty-nine of the defendants were convicted or pled guilty). During that time, the police interrogated many thousands of suspects for homicide. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions — and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 506 n.36 (surveying 80% of the 460,000 persons arrested for murder and manslaughter according to the FBI reports) [hereinafter Cassell, *Protecting the Innocent*]; *see also* "Felony Sentences in the United States 1996," BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 175045 (reporting that there were 11,766 murder cases in the United States in 1996).

110. 479 U.S. 157 (1986).

111. *See, e.g.*, Gail Johnson, 6 B.U. Pub. Int. L.J. 719 at 726, 729 (explaining that "[m]odern psychology has come a long way towards a more complex and sophisticated understanding of the interplay of factors to leading to false confessions," but deeming "unanswerable" how many people would falsely confess during interrogation).

At best, the existing research has shown: 1) that certain interrogation techniques are more likely than other techniques to result in false confession; and 2) that certain types of people — such as juveniles and the mentally impaired — appear somewhat more likely than the average suspect to give a false confession. The research has not demonstrated, however, how often the techniques in question result in false confessions, nor what number of suspects in these more vulnerable groups give false confessions. The fact that persons in these vulnerable groups appear to be over-represented in the few false confession cases that have been collected and examined does not demonstrate that persons in these groups give false confessions at a substantial rate. The existing research is interesting, but it provides no basis for imposing limits on the current practice of using deception during interrogation.

Commentators asserting that there is a widespread, significant problem with false confessions have relied primarily on three scholarly works: 1) the 1987 Bedau-Radelet study of 350 purportedly erroneous convictions in potentially capital cases since 1900;[112] 2) the 1998 Leo-Ofshe study of sixty post-*Miranda* cases involving purportedly false confessions; and, 3) Dr. Gisli Gudjonsson's 1992 book on the causes and types of false confessions.[113] These works suggest only why an innocent person might falsely confess,[114] not how many people actually do falsely confess.

---

112. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); WRIGHTSMAN & KASSIN, *supra* note 107, at 84 (lamenting that Bedau and Radelet's review "has not received the attention it deserves" and uncritically describing all 350 examples in the study as involving an "innocent person"); *see also* Leo & Ofshe, *Consequences*, *supra* note 90, at 433 n.9 (relying on Bedau and Radelet).

113. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992). *See, e.g.*, Alschuler, *Constraint*, *supra* note 10, at 972-73 (citing Gudjonsson); Thomas, *supra* note 93, at 350 (citing only Bedau and Radelet as support for the assertion that police-induced false confessions are "common").

Many commentators also refer to the much earlier work of Edward Borchard, which presents sixty-five cases of purportedly wrongful convictions of innocent persons. *See* BORCHARD, *supra* note 9; *see, e.g.*, Leo & Ofshe, *Consequences*, *supra* note 90, at 433 n.7. Borchard acknowledged that only a very few of these sixty-five cases involved false confessions. He found that the causes or alleged error were "in the main, mistaken identification, circumstantial evidence (from which erroneous inferences are drawn), or perjury, or some combination of these factors." BORCHARD, *supra*, at viii.

Commentators also refer to two other books: JEROME FRANK AND BARBARA FRANK, NOT GUILTY (1957) (reviewing cases of convictions of allegedly innocent persons), and RADIN, *supra* note 93. Other more recent works cited with some regularity are: 1) Professor Saul M. Kassin's and Professor Lawrence S. Wrightsman's writings on the causes of false confessions, *see, e.g.*, Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221 (1997); Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67-94 (Saul M. Kassin & Lawrence S. Wrightsman, eds., 1985); and 2) Professor Ronald Huff's 1986 opinion survey about false confessions, *see* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 2 CRIME & DELINQ. 518 (1986).

114. Professors Leo and Ofshe have identified three types of false confessors in cases where the police allegedly induced a false confession. *See* Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 998-1000. The first type, the stress-compliant false confessor,

The widely-cited study by Professors Bedau and Radelet does not examine any randomly drawn sample of cases. Instead, Professors Bedau and Radelet collected 350 cases from the many thousands decided in this century when the defendant received or could have received a capital sentence. Although they concluded that the confession was false in forty-nine of these cases, they acknowledge that few, if any, of these forty-nine allegedly false confessions were caused by police deception. As they explain, some of the confessions were "the result of mental illness;" one defendant confessed "as a joke;" and another claimed to have confessed "to impress his girlfriend."[115] In selecting and describing just forty-nine cases of allegedly false confessions from the thousands of capital or potentially capital cases decided in this century, Professors Bedau and Radelet provide no support for the claim that false confessions are widespread. Their research is of particularly limited use in evaluating interrogation techniques used now, because they included so many cases from the earlier part of the century, when both discrimination against minority suspects and the use of physical abuse against all suspects were far more common.[116]

In their 1998 study of false confessions, Professors Leo and Ofshe presented a collection of sixty cases, selected from the many hundreds of thousands of confession cases decided after *Miranda*, in which they believed the confessions were false. As they acknowledge, those sixty cases "do not constitute a statistically adequate sample of false confession cases."[117] Thus, their study focused not on the number of false

---

"makes this choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation." *Id.* at 997. Within the context of the legal doctrine about voluntariness, the "stress-compliant" false confessor just seems like another way of saying that the physical and psychological pressures are so great that an innocent person would confess. The existing law, under the totality of the circumstances test for voluntariness, would almost surely bar any such pressures that would make an innocent person confess.

The second type, the coerced-compliant false confessor, confesses "[i]n response to classically coercive interrogation techniques such as threats of harm and/or promises of leniency . . . ." *Id.* at 998. The third type, the persuaded false confessor, confesses after becoming convinced that it is more likely than not that he committed the crime, despite possessing no memory of having done so. *Id.* at 999 ("A non-coerced persuaded false confession is elicited when an investigator relies on routine influence techniques of interrogation, whereas a coerced-persuaded false confession is elicited when threats, promises, or other legally coercive interrogation techniques are added to this mix.").

Professor White categorizes false confessions similarly but uses only two categories. The "coerced-compliant" confession occurs when "a suspect knows he is confessing falsely but confesses in order to obtain some goal or 'escape from a stressful or an intolerable situation' . . . ." White, *False Confessions*, *supra* note 10, at 109 (quoting GUDJONSSON, *supra* note 113, at 228). "Coerced-internalized" confessions occur when a "suspect comes to believe in his own guilt." *Id.*

115. *See* Bedau & Radelet, *supra* note 112, at 63.

116. Fewer than ten percent of the 350 cases involved defendants convicted after 1977, when the Supreme Court upheld the revised death penalty.

117. Leo & Ofshe, *Consequences*, *supra* note 90, at 435.

confession cases, but only on whether there were any shared characteristics in the very small number of false confession cases that were presented.

Dr. Gudjonsson's book, the leading work on false confessions,[118] is based on cases outside of this country.[119] The book contains illustrative case histories of false confessions, but no random sample of confession cases. Dr. Gudjonsson focuses on perhaps a few dozen cases of purportedly false confessions.[120] He offers interesting case studies of a number of individual cases, but no data on the total number of false confession cases.

Thus far, the studies on false confessions fail to prove, or even strongly to suggest, that a significant number of persons have been wrongly convicted because of false confessions obtained by police using deceptive interrogation techniques.[121] The commentators have not

---

118. *See* Scheflin, *supra* note 4, at 1296 ("The leading text on false confessions is Gudjonsson's 1992 book, *The Psychology of Interrogations, Confessions and Testimony*.").

119. Dr. Gudjonsson conducted his research in Great Britain. His book is not necessarily helpful in understanding the interrogation process in this country because the process in Great Britain is somewhat different. On the one hand, the British have no analogue to *Miranda* and no right to remain silent; on the other hand, the British police are more constrained in their use of deception. *See* GUDJONSSON, *supra* note 113, at 278; *see also* James R. Agar II, The Admissibility of False Confessions Expert Testimony, Department of Army Pamphlet 27-50-321 (August 1999) (discussing the Police and Criminal Evidence Act of 1984, sections 76 and 78, which states that deception may render a confession unreliable).

120. *See* Kassin & Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, *supra* note 113, at 67-94. Both authors are psychology professors.

121. The one study that concludes that there are a large number of wrongful convictions of innocent persons, and at least suggests that some portion of these many cases might be due to false confessions, is utterly flawed. *See* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 2 CRIME & DELINQ. 518 (1986). In 1986, Professors Huff, Rattner, and Sagarin asserted that a "conservative estimate" of the number of wrongful convictions of innocent persons each year was 6,000. They arrived at this number without assembling a random sample or examining any case files. Instead, they obtained a figure for the frequency of wrongful convictions by surveying the opinions of 177 persons involved in the criminal justice system, from sheriffs to judges to public defenders. It is hardly clear why all of these people were deemed to know a figure that most other researchers assert is either elusive or unknowable.

The survey was both framed and interpreted in a highly misleading manner. Respondents were asked to estimate the number of wrongful convictions. They were given only the following choices as possible answers: Never, Less than 1%, 1-5%, 6-10%. Because just one case of wrongful conviction would have to exclude the answer "never," not surprisingly, few respondents gave that answer. Also hardly surprising was the fact that the overwhelming majority of the respondents chose the next lowest category offered as a choice, "Less than 1%." Of course, the category of all estimates "Less than 1%" but greater than zero is quite broad. It includes estimates as high as 1 out of 101 as well as estimates of 1 in 1000, 1 in 10,000, 1 in 100,000, and, in fact, every barely perceptible estimate as long as it is higher than zero. Thus, the construction of the survey question should have allowed the researchers to reach almost no conclusion about the estimates by the respondents. Yet the researchers decided to simply take the mid-point of their very broad range and settled on an estimate of one-half of 1% or 1 in 200. They then multiplied this quite high rate of error by an enormous figure representing the number of convictions in this country each year for serious crimes. Thus, they were able to arrive at an alarmingly large number — 6,000 — of purportedly

produced credible evidence that there is a serious problem that should be addressed by substantially limiting police efforts to obtain confessions.[122]

b. Inclusion of Cases Without Convictions. The existing studies are also weakened by the inclusion of persons who gave false confessions but who were never brought to trial and convicted. For example, in the Leo-Ofshe collection of sixty cases involving false confessions, only 29 of the cases involved a person who was actually convicted after making a false confession.[123] In the remaining cases, the criminal justice system successfully identified the unreliability of the confessions at some point before conviction. Instances in which the system worked as it is supposed to — by weeding out false confessions before an erroneous conviction — do not provide a sound basis for drastically limiting police efforts to obtain confessions from all suspects, many of whom are guilty of serious offenses.[124] Thus, researchers should focus on those instances of allegedly false confessions in which the defendant has exhausted his appeals.

c. Inappropriate Sources to Establish Innocence. To verify a wrongful conviction, it is necessary to determine whether a convicted person is, in fact, innocent. Actual innocence is a certainty in only a small fraction of the cases that researchers have used to illustrate the

---

wrongful convictions. This number, however, is based on a completely speculative assumption that the respondents were reporting estimates of 1 in 200, rather than much lower estimates.

This sleight of hand with statistics tells us very little about how many wrongful convictions actually occurred, or even much about what the 177 respondents believe. In conducting surveys about matters that may be quite rare, survey questions must be carefully crafted to allow for answers that reveal the true rarity of the matter being studied.

122. Even while asserting that there is a significant false confession problem, some commentators have acknowledged that there are, in fact, few documented cases. *See, e.g.*, White, *Involuntary Confession*, *supra* note 10, at 2043 (recognizing that "a court might conclude that the empirical data" on the false confession problem is "tentative and fragmentary"). Professors Leo and Ofshe, tacitly acknowledging that their list of cases falls well short of establishing that false confessions happen regularly, assert that "it is reasonable to assume that the reported cases represent only the proverbial tip of the false confession iceberg." Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1139. No such assumption is reasonable. The actual frequency of false confessions should be established by studying a random sample of confession cases and not by speculation based largely on isolated cases reported in the media.

123. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 473.

124. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 536. ("If a person who has made a false confession is not convicted — because the police do not arrest, the prosecutor does not indict, or the jury does not convict — then the screens in the system have at least worked to prevent the ultimate miscarriage of justice, the conviction of an innocent person."); *see also* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 408 (1987) ("A misidentified defendant who goes to trial undoubtedly runs a terrible risk of being convicted in error, but it does not take blind faith in trials by jury to believe that the risk is considerably smaller than it is for a guilty defendant and that this highly imperfect filter reduces the number of erroneous convictions considerably.").

problem of wrongful convictions in general and false confessions in particular. Innocence is most clearly and easily established by the criminal justice system itself, when it overturns convictions on grounds of innocence. Actual innocence is unequivocally established, for example, when a court overturns a confessor's conviction because DNA evidence establishes that the defendant did not commit the crime. There are few cases, however, involving judicial determinations of wrongful convictions in cases of purportedly false confessions. In fact, many of the persons whom scholars have labeled as innocent are still in prison because no judge has agreed with the researchers' and defendant's claims of innocence.

The methodology used to establish the innocence of convicted persons raises significant concerns. Because there are so few judicial determinations of actual innocence, researchers have looked for other evidence demonstrating innocence. They have made some claims of innocence based, at least in part, on questionable information such as newspaper assertions and the defendant's own claims of innocence.[125]

The reliance on questionable sources to establish innocence is apparent, for example, in the Bedau-Radelet study of 350 cases of purportedly wrongful convictions. Professors Bedau and Radelet assert that, in these cases, the defendant was subsequently "found to be innocent" of the capital or potentially capital crime for which he was convicted.[126] The phrase "found to be innocent" would seem to suggest that there was a judicial or other official determination of innocence. In fact, for some of the cases, the finding of innocence is a conclusion reached by Professors Bedau and Radelet. Many of the defendants deemed innocent by them actually served their sentences or remain imprisoned because the courts made no such finding of innocence. Professors Bedau and Radelet do make several concessions. First, they admit that the evidence convincing them of innocence in some cases "may not convince others."[127] Second, they admit that their decision to include "a few borderline cases may look to other investigators to be not only debatable but even incorrect."[128] Third, they concede that "the cases form a continuum, from those where the evidence for innocence is conclusive to those where the evidence is slight."[129]

---

125. *See* Cassell, *Guilty and "Innocent", supra* note 10, at 578-79 (criticizing Leo and Ofshe's use of seemingly questionable sources); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 122 (1988).

126. Bedau & Radelet, *supra* note 112, at 24; *see also id.* at 38 (asserting that the defendants had been "proved to be innocent").

127. *Id.* at 47.

128. *Id.*

129. *Id.* at 47-48. They also concede that "[i]n none of these cases, however, can we point to the implication of another person or to the confession of the true killer, much less to any official action admitting the execution of an innocent person." *Id. at* 74.

In addition to these admitted defects, a significant problem with the Bedau-Radelet study is that it appears to give greater weight to potentially unreliable post-conviction statements than to the decisions of juries and trial judges that were upheld by appellate judges.[130] The method of establishing innocence used by Professors Leo and Ofshe is questionable. To determine whether a confession is probably false and the defendant probably innocent, they examined the defendant's own post-admission narrative and looked for evidence corroborating the confession. This method of determining innocence is can be "highly subjective."[131] Despite these limitations, other researchers have incorrectly claimed that the Bedau-Radelet studies present "known" instances of wrongful convictions of false confessors.[132]

C. *The Value of Deception During Interrogation*

Deceptive interrogation techniques have value. Deception is needed to obtain some confessions, confessions are needed to obtain some convictions, and those convictions provide great value to society — specifically to existing victims, future potential victims, and innocent persons who might have been wrongly charged absent a confession by the true perpetrator.[133]

---

130. *See* Markman & Cassell, *supra* note 125, at 126.

131. James R. Agar II, The Admissibility of False Confessions Expert Testimony, Department of Army Pamphlet 27-50-321 (August 1999); Cassell, *Protecting the Innocent*, *supra* note 109, at 505 ("[I]n a significant number of their cases, the 'innocent' defendants were in all likelihood guilty."). Moreover, for some cases Professors Leo and Ofshe refer chiefly to media accounts as the source of evidence of innocence. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 449. Media accounts are not necessarily a reliable source for definitively establishing innocence. The press bias may be to find an innocent person wrongly convicted, since it is not news that a guilty person is in prison.

132. *See* Alschuler, *Constraint*, *supra* note 10, at 973 n.78 ("For an indication of the frequency of known false confessions (no more than the tip of the iceberg)," see the works of Professors White, Bedau and Radelet, Leo and Ofshe). Professor Alschuler, like others, has accepted the studies by Professors Leo and Ofshe, and Professors Bedau and Radelet, without questioning what evidence there is of innocence. Professor Alschuler refers to these studies as concerning cases of "known" innocence, even though the researchers themselves concede that in many of their cases, the innocence is, at best, possible or probable, and there has been no judicial acknowledgement of the purportedly "known" innocence of the defendant. *See also* Gregory W. O'Reilly, *Comment on Ingraham's "Moral Duty" To Talk and the Right to Silence*, 87 J. CRIM. L. & CRIMINOLOGY 521, 539 (1997) (relying on Bedau and Radelet after asserting that "the innocent are convicted").

133. *See* Stuntz, *Lawyers*, *supra* note 80, at 1905 ("Deception and advantage taking are . . . at the core of criminal investigation . . . .").

1. *Deception Is Needed to Obtain Some Confessions*

In some instances, the police must use deception to obtain a confession from a suspect.[134] Relatively few suspects enter the interrogation room and promptly offer a full and truthful confession of their wrongdoing. Confessions usually occur only after some form of deception by the officer, from hiding the officer's true feelings about the suspect or the nature of the crime to exaggerating the strength of the evidence. Officers use deception because experience has taught them that it works.[135] Effective interrogations necessarily depend upon a single but significant lie — the "Big Lie." The Big Lie is that it is somehow in the suspect's best interest to confess. In reality, making an uncounseled confession to an officer is rarely in a suspect's best interest.[136] If an interrogator were truly honest, he would inform the suspect that it is generally not in the suspect's best interest to make any

134. Professor Inbau, author of the leading police manual, has explained that "[i]n dealing with criminal offenders, and consequently also with criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens." Inbau, *Police Interrogation*, *supra* note 8, at 19. Inbau observes that conversation between officer and suspect during interrogation does not proceed as it would between two citizens in everyday life. *Id.* Interrogation is part of criminal investigation, not everyday life. There is no reason to require interrogation during an investigation to be any more genteel than a search and seizure during an investigation. For example, a person who seems to have lost an item does not upend a friend's house and search for it even if he has some suspicion that the friend accidentally or intentionally obtained the item. Yet the police, based on probable cause, may conduct a probing search of a home that will be fairly unpleasant for the homeowner.

135. In his observational study of almost 200 interrogations, Professor Leo found that it was commonplace for the police to confront the suspect with false evidence. He found that in 30% of the interrogations, the police confronted the suspect with false evidence of his guilt. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 623 (1996).

Most commentators do not dispute the point that deception is necessary to obtain some confessions. *See, e.g.*, White, *False Confessions*, *supra* note 10, at 111 (stating that "interrogation is indispensable to law enforcement"). *But see* Paris, *Lying*, *supra* note 47, at 825 ("It is far from clear that the amount of information derived from interrogations would be significantly reduced if police were required to tell the truth."). In fact, the arguments against deception are based on the notion that deception is too effective, and that a confession is far more likely to be obtained when the interrogating officer uses some deception than when the officer is entirely truthful. Thus, some of the arguments against deception reflect a view that the police should simply get along with fewer confessions.

136. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 213 (Ballantine Books 1993) ("The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation. It is a fiction propped up against the greater weight of logic itself . . . ."); H. RICHARD UVILLER, TEMPERED ZEAL 210 (1988) (" 'Anybody who stops and thinks about it has to know that he's hurting himself by admitting to a crime . . . .' " (quoting a police officer)); Stuntz, *Lawyers*, *supra* note 80, at 1926 ("If suspects fully comprehended the nature and scope of their legal rights and the likely consequences of relinquishing them, there would be very few police station confessions.").

statement at all.[137] Such a completely honest interrogator would find confessions awfully scarce.

2. *Confessions Are Needed to Obtain Many Convictions*

a. Convictions Lost Because of the Absence of a Confession. Some cases can be successfully prosecuted only with a confession from the defendant. The state has an extremely high burden of proof. Without a statement from the defendant, the physical evidence and testimony from witnesses are sometimes insufficient to obtain a conviction.[138] In other cases, there is little physical evidence, the defendant conceals his face, or there are no witnesses. Some of the most heinous crimes, such as child abuse, may involve no physical evidence and no witnesses, other than the child who may be incompetent to testify due to age. Obviously, the more clever and sophisticated the criminal is, the less likely he is to carelessly leave behind physical evidence or witnesses. Confessions will sometimes offer the only hope of convicting the guilty.[139]

b. Value of a Confession Even If Not Essential to Conviction. A confession may be extremely valuable in a case, even if not essential to a conviction. First, resolution of a case because of a confession allows the police to use their valuable and limited resources to investigate other crimes. Second, confessions greatly reduce the risk that police

---

137. In the overwhelming number of cases it is contrary to a suspect's self-interest to confess because a confession will increase the chance that the suspect will be convicted and a penalty will be imposed. But Justice Scalia has pointed out that the suspect may, in fact, achieve some rehabilitative benefit by confessing, rather than continuing to conceal, his wrong-doing. *See* Minnick v. Mississippi, 498 U.S. 146, 166-67 (1990) (Scalia, J., dissenting) (" '[A]dmissio[n] of guilt . . . , if not coerced, [is] inherently desirable,' . . . because it advances the goals of both 'justice and rehabilitation.' " (quoting United States v. Washington, 431 U.S. 181, 187 (1977) and Michigan v. Tucker, 417 U.S. 433, 488 n.23 (1974))). Given that the nation's prisons serve more punitive than rehabilitative goals, and that rehabilitation can also occur in a private setting outside of incarceration, confessing will usually impose greater costs than benefits on the defendant.

138. *See* Columbe v. Connecticut, 367 U.S. 568, 571 (1961):

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains — if police investigation is not to be balked before it has fairly begun — but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

See also Inbau, *Police Interrogation*, *supra* note 8, at 147 ("Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.").

139. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 905-15 (1999) (surveying fifty-nine prosecutors and finding that 61% of confessions were deemed necessary to obtain a conviction; also finding that defendants who confessed were convicted in 78.9% of cases, while those questioned unsuccessfully were convicted in 49.3% of cases).

suspicion will fall on an innocent person. If there is no confession from the true wrongdoer, there is a risk that an innocent person could be investigated, arrested, or even falsely convicted and incarcerated.[140] Third, the existence of a confession may permit the prosecution to obtain a suitable plea agreement. A confession may so strengthen the prosecution's case that a plea bargain to an inappropriate lesser offense can be avoided. Guilty pleas free the courts to move quickly to resolve other cases, spare trauma to the victim, and avoid the financial drain on judicial and prosecutorial resources that would be consumed by a trial.

3. *Value of Convictions Obtained Because of Confessions*

Before considering the proposals to limit substantially various interrogation techniques, it is necessary to consider the obvious benefits of resolving a criminal investigation with a conviction. First, the greatest value to society is the incapacitation of the criminal. During the time that the offender is incarcerated, he is unable to commit new crimes and victimize others. Many criminals commit far more crimes than the few for which they are arrested. Leaving a criminal at large imposes substantial risks on society. Second, if a criminal is not apprehended and convicted, the victim continues to suffer even after recovering from the direct physical and financial injuries caused by the criminal. The victim's emotional recovery is less certain and takes far longer if the victim knows that the criminal remains at large. Both the victim's anxiety about suffering additional harm and the victim's unaddressed desire for justice are significant costs incurred when the absence of a confession means that the perpetrator cannot be convicted.[141]

Finally, if the offender is not convicted, there is no opportunity for rehabilitation. A conviction allows the court not only to incarcerate — and thereby incapacitate — the offender, but also to attempt to rehabilitate the offender with a wide variety of programs, including probationary and parole supervision, boot camp, drug and alcohol treatment, educational opportunities, parenting programs, and counseling. Such supervision benefits the offender who may then be able to lead a rewarding life as a productive citizen. Society benefits, of course, when the offender is rehabilitated and, thus, is no longer a threat to the physical, emotional, and financial well-being of innocent persons.

---

140. *See* Cassell, *Protecting the Innocent*, *supra* note 109, 537-38 (1998); Stuntz, *Lawyers*, *supra* note 80, at 1931 ("[M]aking government investigation easier improves the welfare of innocent defendants.").

141. *See, e.g.*, Tatjana Hornle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175, 182 (1999) ("[A]n important function of the [criminal] sentence lies in its message to the victim."). *See generally* DOUGLAS BELOOF, VICTIMS IN CRIMINAL PROCEDURE 7-33 (1998).

D. *Weighing the Costs and Benefits of Deception During Interrogation*

Major policy changes, such as greatly limiting interrogation, should be implemented only after the costs and benefits of making a change have been adequately considered, properly weighed, and balanced against each other.

1. *The False Confession Cost from Permitting Deception: Numbers Do Matter*

In assessing the cost of deceptive interrogation practices, in terms of wrongful convictions resulting from false confessions, numbers do matter. Laws that could affect nearly everyone in the country should not be based on a few compelling, even disturbing, anecdotes.[142] The number of false confessors must be compared to the number of true confessors, and the number of false confessions we could avoid must be compared to the number of true confessions we would lose. Yet, commentators advocating substantial limits on interrogation techniques have relied for support on anecdotal evidence of the false confession problem. The presentation of anecdotal evidence on false confessions may be sufficient to establish a need for additional, and more scientific, study of the matter, but anecdotal reports alone do not provide the evidence which is needed to properly weigh the costs and benefits of deception.

a. Problems with Basing Policy on Anecdotal Evidence. Anecdotes do have value. The recitation of anecdotes, which evoke an emotional response, can be persuasive evidence that a problem exists. "[A]necdotes can crystallize and mobilize public opinion on even the most dull and arcane subject. Unlike statistics, anecdotes offer simplicity and transparency. Little specialized knowledge is necessary to become outraged by a bad anecdote or self-congratulatory about a good one."[143] For some issues, the narrative in anecdotes "puts a human face on a particular problem, brings new voices to the table, makes plain unexamined assumptions and implicit bias, and can enhance the probability of a real solution by transforming the terms of discourse."[144] But anecdotes alone cannot provide the basis for major

142. There is often criticism of laws with broad application that were hastily enacted after a single heinous crime. *See, e.g.*, *60 Minutes* (CBS television broadcast, August 20, 2000) (Professor Franklin Zimring concluded that California's three strikes legislation "was passed in the heat of passion" after the kidnapping and murder of twelve-year-old Polly Klass by a defendant with a long criminal record).

143. David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800-01 (1998).

144. *Id.* at 807-08.

policy or legal changes.[145] The anecdotes, which capture the attention of academics, the press, the public, or legislators, must be shown to be representative of a much larger group of such cases.

Anecdotes standing alone, however, provide no evidence on the frequency of the problem they illustrate. That is why "anecdotal evidence is heavily discounted in most fields."[146] The persuasive power of an anecdote, especially a well-told anecdote, can obscure the limited role of anecdotes in proving that a problem is widespread, or in analyzing the problem.[147] Although "[s]cientists and medical researchers reject anecdotal evidence for precisely these reasons . . . [t]he rest of the population is less cautious."[148] Lawyers, unlike scientists, often embrace anecdotal evidence.[149] In relying on anecdotes, commentators have established neither the frequency of false confessions nor that false confessors in the anecdotal reports are typical of the many defendants who give confessions.[150]

Professors Leo and Ofshe have asserted that "the important question is not whether false confessions are pervasive or isolated," but why they occur and how they can be prevented.[151] In fact, the question of whether false confessions are pervasive or isolated most certainly is an important question. When the preventive measures suggested

---

145. *See id.* at 807 ("[T]he adverse consequences of generalizing from an unrepresentative anecdote can be severe. Unfortunately, as the underlying subject matter becomes more complex and the trade-offs become tougher, the temptation to use anecdotal evidence becomes overwhelming.").

146. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992) ("Because we easily remember captivating little stories, when called on to estimate how frequent various legal events and outcomes are, we mistakenly associate the ease of anecdote recall with the numerousness of the type of case.").

147. Harlon Dalton, *Storytelling on Its Own Terms*, *in* LAW'S STORIES 57 (Peter Brooks & Paul Gewirtz eds. 1996) ("When a story is well told, I park my analytic faculties at the door."); Hyman, *supra* note 143, at 808-09 ("Critics respond that the narrative format precludes consideration of the critical issues of frequency and typicality, raises difficult issues of professional discourse, and may even represent the rejection of rationality.").

148. Hyman, *supra* note 143, at 801.

149. *See* Hyman, *supra* note 143, at 801-02 ("Independent of the recent boom in narrative scholarship, lawyers are by training and inclination enthusiastic about anecdotal evidence."); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989) (arguing that lawyers are more comfortable with words than numbers, with stories than statistical studies).

150. In fact, the available evidence is that the defendants in the anecdotes are not typical of the great number of defendants who are subjected to interrogation and who give confessions. The false confessors in the anecdotes appear to include a much larger percentage of juveniles and mentally impaired persons than is typical of criminal defendants in general. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 584; *see also* Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997) ("The significance of a story of oppression depends on its representativeness . . . [T]o evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social science rather than of narrative.").

151. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1140.

would impose substantial costs on society, in terms of lost true confessions, it is vitally important to know just how many false confessions will be avoided by the measures sought.

Although the use of deception is not a risk-free procedure, the magnitude of the risk must be considered before new limits are imposed. There is no doubt that the conviction of an innocent person because of a false confession is a great miscarriage of justice and a matter of enormous concern. The research presented to date does not establish that false confessions occur with such frequency that drastic measures are warranted. Commentators have highlighted only a few dozen false confession cases out of the pool of thousands, if not millions, of cases in this century in which a person made a confession and was convicted.[152]

b. Statistically Valid Research on False Confessions Could Be Conducted. Commentators urging limits on interrogation techniques seem reluctant to conduct the kind of research necessary to justify these limits. For example, while presenting the false confession problem as significant, Professors Leo and Ofshe assert "that it is presently not possible to quantify the number and frequency of false confessions or the rate at which they lead to miscarriage of justice . . . ."[153] Although they correctly concede that such research has not been conducted, their assertion that such research is "impossible" is not sound.[154]

They assert that there "are at least three reasons why at present it is not possible to devise an empirical study to measure, quantify or estimate with any reasonable degree of certainty the incidence of police-induced false confessions or the number of wrongful convictions they cause."[155] They explain, first, that "American police typically do not record interrogations in their entirety."[156] This fact does not present an insurmountable barrier to researching the frequency of false confessions. Currently, two states and many other individual municipalities videotape confessions.[157] Moreover, a researcher could arrange to ob-

152. *See* Cassell, *supra* note 7, at 1127 ("Even looking solely to the last ten years [1987 to 1997], police officers around the country interrogated approximately 23 million suspects for index crimes." (citing FBI statistics on the number of arrests and assuming approximately 80% of arrestees are questioned)).

153. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1135.

154. Other commentators have also asserted that it is "impossible" to measure how often false confessions occur. WRIGHTSMAN & KASSIN, *supra* note 107, at 85. ("It is impossible to determine or even estimate the frequency with which people confess to crimes that they did not actually commit.").

155. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1136.

156. *Id.* at 1136.

157. *See* Stephan v. State, 711 P.2d 1156, 1157-58 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); *see also* William Geller, Police Videotaping of Suspect Interrogations and Confessions (Report to the National Institute of Justice, 1992) (reporting that thousands of police departments use videotaping at least some of the time).

serve a large sample of interrogations.[158] These observed cases could then be tracked to determine if there is evidence that the confession was false and it resulted in a wrongful conviction.

The second objection to researching the frequency of false confessions is that "because no criminal justice agency keeps records or collects statistics on the number or frequency of interrogations in America, no one knows how often suspects are interrogated or how often they confess, whether truthfully or falsely."[159] Even assuming that no such total number of confessions for the nation is readily available, the absence of such a number does not impede the research. Random samples could be observed in several representative areas such as large urban, suburban, and rural police departments.[160]

The third reason offered for the absence of research on the frequency of false confessions is that "many cases of false confession are likely to go unreported and therefore unacknowledged and unnoticed" because "most confessors will be arrested, charged, prosecuted and/or convicted."[161] The fact of conviction is certainly strong evidence that the confession was not false. But if there is other evidence that, despite the conviction, the confession was false, it is the admittedly difficult job of the researcher to find that evidence.[162]

---

158. In fact, Professor Leo has already relied on this approach by observing a sample, although not an entirely random one, of 182 cases in one jurisdiction. Professor Cassell undertook a similar observational study. He, or his research colleague, observed 173 cases in Salt Lake City. *See* Cassell, *Social Costs*, *supra* note 101.

159. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1137.

160. In two studies that did not specifically look for false confessions, but that did examine samples of confession cases, the researchers did not report that any of the confessions were false. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 529 (discussing Professor Leo's study of 182 interrogations in the San Francisco Bay area, and Professor Cassell's study of 173 interrogations in Salt Lake City).

A random sample survey of the actual number of confessions could be made an even more manageable project if only murder cases were examined. Limiting the research to murder cases makes sense because most of the anecdotal evidence on false confessions involves homicide cases. *See* Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1140.

161. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1137.

162. Professors Bedau and Radelet seem unwilling to acknowledge that better, more comprehensive research could be conducted and is necessary to support their argument about wrongful convictions. They claim that if their existing study "fails to convince the reader of the fallibility of human judgment then nothing will." Bedau & Radelet, *supra* note 112, at 24 (quoting G. SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 262 (1950)). Of course, no one doubted, even before their study, that some wrongful convictions do occur. The key question, and the one on which Professors Bedau and Radelet shed little light, is not whether they occur but how often they occur.

Professors Bedau and Radelet argue that they have already undertaken "a sustained and systematic attempt to identify as many cases as possible" of wrongful convictions. *Id.* at 27. There is no doubt that quite a bit work went into their study. Yet the glaring flaw in their research is that they did not conduct any kind of random survey. They chose their 350 cases from the entire body of cases decided this century throughout the country. A far more useful study would concentrate on a much smaller time frame and geographic area and attempt to identify the total number of wrongful convictions in that time and place. This would allow researchers to have some reasonable estimate of the percentage of wrongful convictions.

2. *The Cost of Limiting Deception*

The argument for broad limits on the use of deception should be evaluated only after considering the costs of imposing such limits. If such limits were imposed, true confessions would be lost either because officers complying with the restrictive limits would fail to elicit a confession, or because a confession would be suppressed if officers questioned a suspect in violation of the limits. Although the precise cost from losing true confessions cannot be specified, there is no doubt that it would be substantial. Given that there is no proof of an unacceptably high rate or number of false confessions, there is no basis for imposing on society the large cost of lost true confessions in order to avoid the much smaller cost of false confessions.

The loss of true confessions, which translates into lost convictions, imposes substantial costs on both existing and potential victims. Unconvicted criminals have the opportunity to commit additional crimes. In fact, a criminal who evades punishment for one crime is even more likely to commit additional crimes because he avoided being rehabilitated and did not experience any deterrence effect from conviction, sentencing, and incarceration. Moreover, in addition to the existing and future victims of crime, other innocent persons suffer from the loss of confessions and convictions when they are wrongly charged for crimes to which the actual wrongdoer has not confessed.[163]

There would be great costs imposed on the criminal justice system if improper deception were defined to include anything that tends "to decrease the suspect's perception of the consequences of confessing."[164] That is precisely what an interrogator must do if he expects to obtain a confession. A suspect who fully comprehends the consequence of confessing will generally not give a full and truthful confession to an officer. If suspects were allowed fully to protect their self-

---

Thus far, Professors Leo and Ofshe, too, have demonstrated little interest in undertaking research on the actual number of false confessions. They have asserted that "it is far more important to study the conditions under which [false confessions] occur, the characteristics of such cases and why they led to deprivations of liberty and miscarriages of justice than it is to attempt to quantify" the number of false confessions. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1139. They assert that it may not be "worth the effort and expense" to quantify the rate of false confessions because "there appears to be widespread agreement that false confessions and miscarriages of justice occur sufficiently often to warrant the concern of legal scholars, jurists, and legislators." *Id.*

163. *See* Cassell, *Protecting the Innocent*, *supra* note 109, at 498 ("[T]ruthful confessions protect the innocent by helping the criminal justice system separate a guilty suspect from the possibly innocent ones, while the failure to obtain a truthful confession creates a risk of mistake."); Stuntz, *Lawyers*, *supra* note 80, at 1907 ("[G]uilty criminal defendants would benefit substantially if the law were to prohibit deceptive tactics, while innocents would probably be harmed by the impairment of the government's ability to sort cases.").

164. Grano, *Selling the Idea*, *supra* note 8, at 669 (citing FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986)). See also *supra* note 9 for commentators who have urged a very broad definition of deception.

interest during interrogation, then much of what successful interrogators practice, "from insincere politeness to overt trickery, would have to be disallowed."[165] As few suspects spontaneously give full and truthful confessions, many confessions, and thus many convictions, would be lost if all deception were prohibited.

3. *The Value of Deception Outweighs Its Costs*

As shown above, no one has made a credible case that there is truly a substantial number of cases in which persons have been wrongly convicted based on false confessions induced by deceptive interrogation techniques. On the other hand, the substantial value of deception in obtaining confessions is based on long experience.[166] Given the limited proof of the false confession problem, there is little question that the benefit of deception outweighs its costs. Nevertheless, some commentators urge drastic limits on interrogation.

There are at least three possible explanations why some commentators urge drastic limits on deceptive interrogation techniques on the basis of such limited evidence of false confessions. First, some commentators may believe that the few cases they discovered are somehow only the tip of the iceberg. Second, and more likely, these commentators may believe that even a very small number of cases of false confessions is too high a price to pay for the continued use of deception. In reaching this conclusion, these commentators either fail to appreciate or substantially undervalue the costs that would be imposed on society by drastically limiting deception. Third, the commentators who focus on the few documented cases of innocent persons convicted because of police-induced false confessions may also be interested in reducing the far greater number of confessions obtained from guilty persons. The absence of a confession will sometimes mean that there will be no conviction or that the case will be so much weaker that the guilty defendant will be offered a plea bargain and allowed to serve less time. There is a range of reasons why some commentators may prefer to have even guilty persons either not be convicted or serve less time. For example, they may believe that criminal penalties are generally too harsh, that prisons are overcrowded and violent, or that many

165. Grano, *Selling the Idea*, *supra* note 8, at 670. Academic critics of deception tend to ignore or downplay the enormous value in permitting deception during interrogation. *See* Grano, *Criminal Procedure*, *supra* note 56, at 714 ("When commentators make reference to crime control, they usually use such narrow terms as 'the police interest' or 'law enforcement goals.' Unlike the discussion of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat. It is the police rather than the criminals who are treated as aliens." (emphasis omitted) (quoting Caplan, *supra* note 58, at 1425 n.47 (1985))).

166. That is why defendants routinely and strenuously object, in motions to suppress and at trial, to the use of deception during interrogation.

guilty defendants turned to crime as a consequence of an underprivileged upbringing, drug or alcohol use, or after difficult life experiences. But placing limits on the use of deception, and thus reducing the number of convictions of guilty persons, is not the appropriate means of addressing these other valid concerns about how best to treat persons who are convicted of a crime.

4. *No Reason to Single Out Deception Out from Other Causes of Wrongful Conviction*

The existing research has documented only a very small number of convictions caused by false confessions from police deception. Even if additional studies were to show more such cases, the very broad limitations on interrogation would still not necessarily be warranted. Interrogation, like many other investigative tools in the criminal justice process, has the potential to result in some number of erroneous convictions. The argument has not been persuasively made, however, that interrogation should be singled out from other practices that also have the potential to cause erroneous convictions.

False confessions appear to be one of the least common reasons for an erroneous conviction. In fact, there is virtually universal agreement that misidentifications by victims and eyewitnesses cause far more erroneous convictions than do false confessions.[167] Yet there are few limits on the ability of eyewitnesses to testify against a defendant. Procedures such as showups, lineups, and photo arrays all sometimes result in misidentifications and erroneous convictions. Although these procedures cannot be so suggestive as to make a identifications unreliable,[168] the procedures that are permitted still result in some misidentifications. These procedures are permitted, however, because they are

167. Misidentification by witnesses was recognized as the "major source" of false convictions in Borchard's classic work. BORCHARD, *supra* note 9, at xiii; *see also* EDWARD CONNORS ET AL., NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 24 (1996) (stating that eyewitness misidentification is the main reason for false convictions); Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 642 (1999) ("The major reasons [for false convictions], in order of importance, are inaccurate identifications, official misconduct, and ineffective defense counsel."); *id.* at 656 ("Erroneous identification evidence remains the single leading cause of false convictions."); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1347 (noting studies showing that eyewitness misidentification is the primary source of false convictions); Gross, *supra* note 124, at 396 ("[A]s far as anyone can tell, eyewitness misidentification is by far the most frequent cause of erroneous convictions.").

168. *See* Manson v. Brathwaite, 432 U.S. 98, 111-12 (1976) ("[T]he Court's concern with the problem of eyewitness identification" was the "driving force" behind *United States v. Wade*, 388 U.S. 218 (1967)), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967)); *see also* Neil v. Biggers, 409 U.S. 188, 198 (1973) (stating that courts must determine if an identification procedure is so suggestive that it raises "a very substantial likelihood of irreparable misidentification").

recognized as necessary if crimes are to be solved, and wrongdoers prosecuted.

V. THE LIMITING PRINCIPLES BEYOND RELIABILITY ARE NARROW

Although reliability is the primary basis for setting limits on interrogation, there are additional reasons for setting some limits. But these additional reasons are few. Some of the additional reasons offered by commentators simply collapse down to the reliability rationale. For example, much of the objection to inappropriate "police methods" is best understood as an objection to methods with an unacceptably high risk of causing a false confession.[169] There may, however, be a small number of interrogation techniques that would violate due process without implicating reliability concerns. Professor Grano suggested one such situation with a hypothetical concerning the use of a police officer who impersonates a chaplain to obtain a confession in the interrogation room.[170] Arguably, such a deception should be barred because it intrudes on society's fundamental value in religion.[171]

The Court has suggested that a "shock the conscience" standard may be useful for determining when police deception during interrogation goes too far. The Court applied the shock the conscience standard when it considered police deception not towards a suspect, but towards the attorney for the suspect who was interrogated. In 1986, in *Moran v. Burbine*, the Court heard a claim that the police violated due process: 1) by failing to inform the defendant that an attorney, retained by his sister, was trying to contact him; and, 2) by falsely telling the attorney that the suspect would not be questioned that day. The Court rejected the claim, finding that "egregious . . . police deception might rise to a level of a due process violation,"[172] but that the conduct in *Moran* "falls short of the kind of misbehavior that so shocks sensibilities of civilized society as to" violate due process.[173]

Under a shock the conscience standard, techniques cannot be considered shocking simply because they are successful in convincing suspects to give truthful confessions. The shock the conscience standard bars only those few techniques that, even though they do not involve

169. *See* Laurie Magid, *Questioning the Question-Proof Inmate*, 58 OHIO ST. L.J. 883, 909-12 (1997).

170. *See* GRANO, CONFESSIONS, *supra* note 55, at 109; Grano, *Selling the Idea*, *supra* note 8, at 681. The hypothetical of an officer impersonating a priest was originally offered by Professor Kamisar to show that some police methods must be barred even if the resulting confession would be reliable. *See* Kamisar, *supra* note 54, at 747.

171. Moreover, even if the particular jurisdiction does not provide a priest-penitent privilege, the suspect may believe that such a privilege exists.

172. Moran v. Burbine, 475 U.S. 412, 432 (1986).

173. *Id.* at 433-34.

the physical coercion clearly forbidden under the voluntariness test, and even though they do not implicate the concerns of the reliability rationale, nevertheless violate "canons fundamental to the 'traditions and conscience of our people.' "[174] Although the hypothetical involving the imposter chaplain is not the only technique that shocks the conscience by violating a fundamental value, it is one of only a small group.[175]

VI. CONCLUSION: ADDITIONAL LIMITS ON DECEPTION ARE UNWARRANTED

Interrogation techniques have changed little in the years since the *Miranda* Court itemized them, cast a disapproving look, but concluded that they were permissible as long as a valid waiver of rights was obtained. The *Dickerson* Court affirmed the balance struck in *Miranda*, in which rights, warnings, and waivers protect suspects. But *Miranda* left (and *Dickerson* continues to leave) interrogators with a wide berth for obtaining truthful confessions. A compelling argument has not yet been made that drastic limits on the use of deceptive interrogation techniques are either required or advisable. The non-reliability rationales for such limits — such as equality, trust, and dignity — largely reflect the inappropriate view that certain interrogation techniques should be barred because they are too effective in obtaining confessions. In fact, there is nothing wrong with obtaining a truthful confession of wrongdoing from a guilty person.

Reliability, however, is an appropriate concern. Interrogation techniques must be limited when they endanger reliability by creating a likelihood of producing a false confession. In advocating limits on deceptive techniques, however, some commentators have overstated the false confession problem and minimized the costs of limiting interrogation. The alarming claims of a widespread false confession problem have not yet been demonstrated with a statistically valid sample of confession cases. Thus far, the evidence of the false confession problem consists only of anecdotal reports. On the other hand, broad limits on deception could result in the loss of many thousands of confessions by guilty persons. Because there is insufficient proof of the scope of the false confession problem, the reliability rationale does not provide a basis, at least yet, for barring or greatly limiting deception during interrogation.

174. *Moran*, 475 U.S. at 432 (quoting Rochin v. California, 342 U.S. 165, 169 (1952)).

175. If barring an officer from impersonating a chaplain is appropriate, should an officer also be barred from impersonating a physician? Beyond clearly fundamental values such as religion, it is far less clear which interests are so important outside of the interrogation room that they should not be impinged on by interrogation techniques.

Moreover, even if researchers provide additional empirical proof on the false confession problem, alternatives to drastic prohibitions on interrogation techniques should be considered. For example, there is widespread agreement among commentators that interrogations should be videotaped. At least some of the concerns raised about false confessions could be addressed by the use of videotaping, rather than by strictly limiting interrogation techniques.[176]

There is no question that deceptive interrogation techniques can contribute to the unpleasantness that suspects, both guilty and innocent, endure during interrogation. Nevertheless, once there is probable cause to suspect a person of a crime, some level of discomfort is considered acceptable because of society's interest in investigating and solving crimes. Deceptive but nonthreatening interrogation will generally be no more unpleasant than the other intrusions deemed reasonable after a showing of probable cause — such as having one's home thoroughly searched pursuant to a warrant, or being placed in a detention facility during post-arrest processing.[177] The probable cause standard provides an appropriate threshold of protection from both the pressures of custodial interrogation and the unpleasantness of deceptive interrogation techniques.

There is a growing view that reliability is the appropriate focus of the debate over the use of deceptive interrogation techniques. There should also be a greater acknowledgement that, before these techniques are drastically limited, there must be statistically sound, empirical research to determine if there truly is a widespread problem with police-induced false confessions. In the meantime, we should let the police do their job of investigating crime, but we should also be alert to the possibility of that tragic case in which an innocent person has been wrongly convicted because of a police-induced false confession.

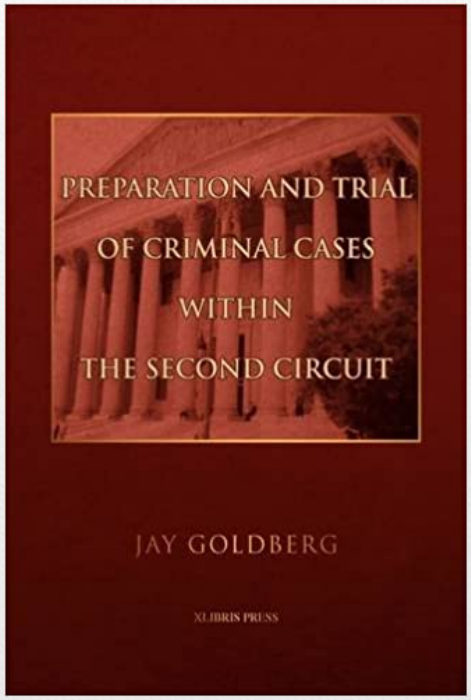
---

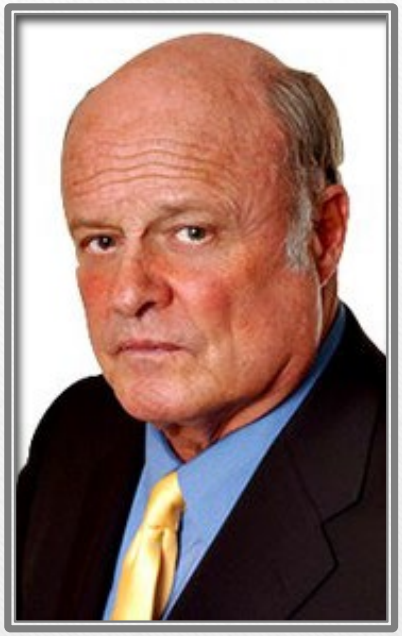
176. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 494 ("The risk of harm caused by false confessions could be greatly reduced if police were required to video- or audio-record the entirety of their interrogations."). For additional support of videotaping, see Cassell, *Social Costs*, *supra* note 101, at 486-97; KAMISAR, *supra* note 31, at 132-36; Yale Kamisar, *Foreword:* Brewer v. Williams — *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 236-43 (1977). Even when there is no videotape, defendants may be able to raise the false confession concern with the use of expert psychological witnesses. At this time, however, the false confession research is not sufficiently developed for witnesses on false confessions to qualify as experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). "[A]dmissions of expert testimony based on this new theory is premature" largely because "the empirical base that supports the theory has too many unanswered questions . . . ." *See* James R. Agar, II, The Admissibility of False Confession Expert Testimony, 1999 Aug. Army Law 26, 42 (1999) (explaining that two federal appellate courts have admitted such evidence while the thirteen state courts that have ruled are divided on the issue). Scientific advances in DNA and other areas, however, do provide an additional measure of protection against wrongful convictions.

177. *See* Caplan, *supra* note 58, at 1468 (comparing due process to the Fourth Amendment which was understood as forbidding only "unreasonable" invasions of privacy).

Questions?

Please contact Jay Goldberg





Jay Goldberg

www.jaygoldberg.com

remagoldberg10@gmail.com

T: 917.838.8984