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The Hunting Of Man: Lies, Damn Lies, And Police Interrogations

Miller W. Shealy Jr.

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MILLER W. SHEALY, JR.*

ABSTRACT

The job of the police is to stop crime by stopping criminals. It is a real life, deadly cat-and-mouse game where the hunter and the hunted spar for advantage and success. To accomplish its goals, law enforcement can draw from a vast array of technologies, stratagems, and devices. One of the primary weapons in the law enforcement arsenal is deceit. Criminals, like most prey, are lured into clever traps set by police. The police create circumstances and situations that are designed to prompt the criminal suspect into revealing incriminating information. This is obvious in the use of confidential informants, undercover police officers, and other common police tactics. Suspects are "tricked" by police into revealing themselves. A controversial aspect of this kind of police "trickery" occurs in the interrogation context. What may police tell suspects to "trick" or prompt them into

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confessing? Can a police officer misrepresent the strength of the case against the suspect? Can an officer lie about the nature of incriminating evidence? Can an interrogating officer disguise his or her identity during the interrogation and pose as a family friend, priest, or someone friendly to the accused? This article will examine current police practices in the context of recent Supreme Court cases and social science findings. I will argue that certain deceptive techniques are appropriate in the interrogation context. If appropriately utilized, "trickery" of a certain type does not unreasonably increase the risk of false confessions and is an appropriate tactic in the hunting of criminals.

I. INTRODUCTION

> *Hunting has been a defining characteristic of human behavior for over two million years.*
>
> – Sean Hemingway[1]

Ernest Hemingway is one of this country's finest writers. His writing captures the human condition in a way that is both gritty and romantic at the same time, and that is very hard to do. The phrase, "the hunting of man," in the title above, is his. Hemingway was not only a great writer, but an avid outdoorsman as well. His writing on hunting, fishing, war, love, conquest, defeat, and human struggle has few equals. He captured what it means to hunt other men in a famous phrase that most certainly applies to soldiers in battle, but is equally applicable to a lot of routine police investigation:

> Certainly there is no hunting like the hunting of man and those who have hunted armed men long enough and liked it, never really care for anything else thereafter. You will meet them doing various things with resolve, but their interest rarely holds because after the other thing ordinary life is flat as the taste of wine when the taste buds have been burned off your tongue. Wine, when your tongue has been burned clean with lye and water, feels like puddle water in your mouth, while mustard feels like axle-grease, and you can smell crisp, fried bacon, but when you taste it, there is only a

1. SEAN HEMINGWAY, HEMINGWAY ON HUNTING, at xxii (Sean Hemingway ed., 2001). Sean Hemingway is the grandson of Ernest Hemingway.

feeling of crinkly lard.[2]

The second part of the title is taken from another American writer who was equally gritty in his own way: Mark Twain. Twain said, "There are three kinds of lies: Lies, damn lies, and statistics."[3] The replacement of "statistics" with "police interrogation" makes my point. In the Twain quotation "statistics" is the worst kind of lie, but not really. Statistics, when properly prepared and presented, constitute some of the best evidence. So it is with police interrogations. Interrogations produce some of the best and most reliable evidence: confessions. However, like statistics, they must be carefully developed and properly used. The process of interrogation, like gathering data for statistics, is very technique sensitive. We know that both constitute good evidence, but only when done correctly.

The criminal process is most aptly captured by the hunting metaphor. Hunting metaphors are obvious from the case law and the scholarly commentary. Perhaps the most famous of all the hunting metaphors is the one from *Johnson v. United States*,[4] referring to law enforcement as being "engaged in the often competitive enterprise of ferreting out crime."[5] This phrase has become famous and a standard mantra to describe the hunting of criminals.[6] In fact, as of this writing, there are no less than fifty-five United States Supreme Court cases that use this phrase to reference police investigation.[7] Police in our adversarial system hunt criminals. They do this by gathering data,

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2. Ernest Hemingway, *On the Blue Water: A Gulf Stream Letter,* ESQUIRE MAG., Apr. 1936, *reprinted in* HEMINGWAY ON FISHING 125 (Nick Lyon ed., 2000).

3. AUTOBIOGRAPHY OF MARK TWAIN, VOL. I, at 228 (Harriet E. Smith et al. eds., 2010). (attributing this quote to the British Prime Minister Benjamin Disraeli); *but see The Meaning and Origin of the Expression: "There are three kinds of lies: Lies, damned lies, and statistics,"* THE PHRASE FINDER, http://www.phrases.org.uk/meanings/lies-damned-lies-and-statistics.html (last visited Sept. 15, 2013) (noting that Disraeli biographers have not uncovered the quotation in any of Disraeli's speeches or writings).

4. 333 U.S. 10 (1948).

5. 333 U.S. 10, 14 (1948).

6. *Johnson*, 333 U.S. at 14; Maryland v. King, 133 S. Ct. 1958, 1970 (2013); Herring v. United States, 555 U.S. 135, 158 (2009) (Breyer, J., dissenting); Groh v. Ramirez, 540 U.S. 551, 575 (2004); Arizona v. Evans, 514 U.S. 1, 15 (1995); Horton v. California, 496 U.S. 128, 144 (1990); United States v. Montoya de Hernandez, 473 U.S. 531, 552 (1985); United States v. Leon, 468 U.S. 897, 914 (1984); Illinois v. Gates, 462 U.S. 213, 240, (1983).

7. *See* cases cited *supra* note 7 (this was revealed by a simple Westlaw search using the phrase "competitive enterprise of ferreting out crime.").

evidence, on persons suspected of breaking the law. An important—crucial—form of evidence is incriminating statements. One scholar puts the point even more bluntly:

> Every criminal procedure student learns on the first day of class that [criminal investigation] represents a zero-sum game: a constant struggle between the individual privacy of citizens and the needs of law enforcement. The job of the courts is to mediate that struggle, to be referees in the "game" of cat-and-mouse between the police officer and the criminal. . . . Judges frequently refer to criminal investigations as a competitive enterprise, in which the job of the courts is to maintain the status quo between both sides. The Supreme Court has repeatedly stated that the purpose of the Fourth Amendment is to act as a safeguard against the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."[8]

A substantial debate has opened up in the law over police interrogation techniques and whether and to what extent certain interrogation techniques lead to "false confessions" and, therefore, false convictions. On the one side is the [in?] famous "Reid Technique" named after John E. Reid who substantially developed it.[9] Broadly, but not entirely, in line with Reid is the Supreme Court and the vast majority of state and federal courts.[10] On the other side are the disciples of the Innocence Project[11] and scholars like Richard A. Leo.[12]

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8. Ric Simmons, *Ending the Zero-Sum Game: How to Increase the Productivity of the Fourth Amendment*, HARV. J.L. & PUB. POL'Y 549, 550 (2012). *But see, e.g.,* Nicholas A. Snow, *A Never Ending Game of Cat and Mouse*, REASON.COM (Apr. 16, 2013, 7:00 AM), http://reason.com/archives/2013/04/16/a-never-ending-game-of-cat-and-mouse (last visited Sept. 15, 2013) (noting that he hunting metaphor and never ending game of cat-and-mouse is even more apparent in the context of drug prosecutions); *see also* PETER ANDREAS, SMUGGLER NATION: HOW ILLICIT TRADE MADE AMERICA (2013).

9. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY, & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS, at xi-xv, 339-77 (5th ed. 2013); John E. Reid & Associates, Inc., https://www.reid.com (last visited Sept. 21, 2013).

10. *See* sources cited *infra* note 18. *See also* Bobby v. Dixon, 132 S. Ct. 26, 30 (2011). *See generally* Frazier v. Cupp, 394 U.S. 731 (1968).

11. INNOCENCE PROJECT, http://www.innocenceproject.org/ (last visited Sept. 15, 2013).

12. RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE (2008); GEORGE C. THOMAS, III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND (2012); POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

This debate has captured the attention of the elite national media. In December 2013, *The New Yorker* published a major article, which featured, in substantial part, an interview with Joseph Buckley, the president of John E. Reid & Associates.[13] Unfortunately, the piece is not very informative. It explains very little about the real law of interrogations and takes a completely uncritical stance toward the so called "social science" of false confessions.[14] This is unfortunate, as I will contend that the "social scientists"[15] are not very scientific in a great deal of false confessions research, and many courts have agreed. Much is at stake here. However, the essence of the dispute is whether or not, and to what extent, a police interrogator may use deceptive techniques to goad, prompt, or trick suspects into confessing or otherwise incriminating themselves.

I will argue that in the hunt for criminal suspects, it is appropriate to use deception to get some suspects to confess. However, not all deception is appropriate. Lying to persons suspected of crime in order to trick or prompt them into confessing is neither *per se* unconstitutional nor unethical. Furthermore, current legal rules on the admissibility of confessions are adequate to limit the risk of false confessions if applied diligently and in good faith. It is not necessary to overhaul our adversarial system to deal with the risk of false confessions. We have the tools to deal with this problem, though they may not be as thoroughly exploited, as they should be. I would also note that this article addresses routine domestic criminal cases and investigations. Matters concerning national security or international terrorism are not my concern here. Rules governing the investigation and interrogation of terrorists or those engaged in foreign espionage or acts of war are not the subject matter of this article. For the purposes of this article, I consider those to be separate issues. Lastly, it is not my goal to defend the Reid Technique as such. That would be an ambitious goal and well beyond the scope of this paper. The Reid Technique involves far more than cleverly misleading suspects in order to prompt them into confessing. The Reid Technique is a full-blown philosophy of interrogation and purports to cover a broad range of interrogation stratagems.

This article will unfold in stages:

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13. Douglas Starr, *The Interview: Do Police Techniques Produce False Confessions?*, THE NEW YORKER, Dec. 9, 2013, at 42-49.

14. *Id*. at 44-45.

15. *Id*. at 45.

First, I will set the problem of deception in the police interrogation context against the background of routine deceptive law enforcement practices that have been acknowledged and upheld by the United States Supreme Court.[16]

Second, confessions are necessary to convict in many cases and certain forms of deceit are appropriate in obtaining them.[17] Despite what the public is daily bombarded with in television, cinema, and popular fiction,[18] pure forensic science cannot solve most crimes.[19]

Third, I will set forth the manner in which confessions may be challenged in the trial court. I will survey the law on when a confession is admissible and who has the burden of proof regarding its admissibility. This is significant because it seems to me that much of the literature on this subject has lost sight of this. We have the legal tools to address police misconduct during interrogations. We must use the tools at hand with greater vigor.

Fourth, I will address some of the social science and related research on both sides of the "false confession" debate.

Lastly, I will propose my own solution to the problem of so-called "false confessions."

II. POLICE DECEPTION

The Supreme Court has routinely and consistently upheld the use of deceptive police practices in the investigation of criminal suspects. It is absolutely clear that law enforcement personnel may engage in fraud and even lie in the pursuit of legitimate enforcement objectives.

> The function of law enforcement is the prevention of crime and the apprehension of criminals. . . . . Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police

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16. Hereafter, any reference to the "Supreme Court" refers to the Supreme Court of the United States.

17. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS at xi-xv, 339-377 (5th ed. 2013); WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.1(a) (3d ed., 2012); Culombe v. Connecticut, 367 U.S. 568, 571 (1961) (Opinion of Frankfurter, J.); Haynes v. Washington, 373 U.S. 503, 515 (1963); Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973*);* Illinois v. Lidster, 540 U.S. 419, 425 (2004).

18. Arun Rath, *Is the 'CSI Effect' Influencing Courtrooms?*, NPR (Sept. 15, 2013, 9:30pm), http://www.npr.org/2011/02/06/133497696/is-the-csi-effect-influencing-courtrooms; *The "CSI Effect*," THE ECONOMIST, Apr. 24 2010, *available at* http://www.economist.com/node/15949089.

19. *See* sources cited *supra* note 10.

officer.[20]

This rule has been often applied in cases where undercover law enforcement activity is necessary to uncover criminal activity. This is particularly so in cases involving violent crime, narcotics investigation, and organized criminal activity.[21]

> Indeed, it has long been acknowledged by the decisions of this Court, see *Grimm v. United States*, 156 U.S. 604, 610 (1895) and *Andrews v. United States*, 162 U.S. 420, 423 (1896),[5] that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents.[22]
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> . . .
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> Former Chief Justice Hughes commented as follows upon the use of official deception in combating criminal activity: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." *Sorrells v. United States*, 287 U.S. 435, 441-442 (1932).[23]

This line of cases was recently reaffirmed by the Supreme Court in *Jacobson v. United States*.[24] In *Jacobson*, *Lopez*,[25] and *Hampton v. United States*,[26] the Court addressed the issue of entrapment. However, entrapment only occurs when the government's deception is such as to actually "implant" the crime in the defendant's mind and "induce" the defendant to do something he was not already predisposed to do.[27] The mere fact that the criminal suspect is given ample opportunity or even

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20. Sherman v. United States, 356 U.S. 369, 372 (1958); United States v. Russell, 411 U.S. 423, 434 (1973).

21. *See* sources cited *supra* note 21. *See also* Sorrells v. United States, 53 U.S. 435 (1932); Lewis v. United States, 385 U.S. 322 (1966).

22. *Lewis*, 385 U.S. at 209. *See also* Lopez v. United States, 373 U.S. 427, 465 (1963).

23. *Lewis*, 385 U.S. at 209 n. 5.

24. 503 U.S. 540, 548 (1991). *See also* sources cited *supra* note 19.

25. 373 U.S. 427 (1963).

26. 425 U.S. 484 (1976).

27. *Jacobson*, 503 U.S. at 547-550; *Hampton*, 424 U.S. at 486-8; Lopez, 373 U.S. at 434-7.

encouragement to commit the crime is insufficient to support entrapment.[28] Short of such misconduct by the police, deception is not problematic. In addition, whether or not entrapment exists is ultimately a question for the jury.[29]

A second and very important line of cases concerns the "false friends" doctrine.[30] In this line of cases the Supreme Court considered police deception in falsely befriending potential criminal suspects with the goal of gaining their trust in order to betray them. This line of cases holds that when law enforcement employs the "false friend" technique it violates neither the Fourth, Fifth, nor Sixth Amendments.[31]

The *Hoffa* case involved the infamous President of the International Brotherhood of Teamsters, Jimmy Hoffa.[32] A government informant who was close to Hoffa, but unknown by Hoffa to be an informant, repeatedly reported Hoffa's conversations and comments to a federal agent.[33] While there was some dispute between the government and the Petitioner, Hoffa, as to how to state the issue before the Court, the Court seemed to accept the Petitioner's statement of the issue.

> Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.[34]

The Court found that Hoffa's constitutional rights were not violated. In so doing, the Court relied on and elaborated upon its previous decision in *Lopez*:[35]

> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. Indeed, the Court unanimously rejected that very contention less than four years ago in *Lopez v.*

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28. *See* sources cited *supra* notes 21-23 and 28.
29. *Jacobson*, 503 U.S. at 542.
30. Hoffa v. United States, 385 U.S. 293 (1966).
31. *Id.*
32. *Id.* at 296.
33. *Id.*
34. *Id.* at 295.
35. *Id.* at 302-3.

> *United States,* 373 U.S. 427 (1963). In that case the petitioner had been convicted of attempted bribery of an internal revenue agent named Davis. The Court was divided with regard to the admissibility in evidence of a surreptitious electronic recording of an incriminating conversation Lopez had had in his private office with Davis. But there was no dissent from the view that testimony about the conversation by Davis himself was clearly admissible.[36]

Interestingly, the majority of the Court in *Hoffa* went further and cited with approval the dissenting opinion in *Lopez*:

> In the words of the dissenting opinion in *Lopez*, "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. It is the kind of risk we necessarily assume whenever we speak."[37]

The Court next considered Hoffa's claim that his Fifth Amendment rights were violated. It concluded, citing to the case of Aaron Burr, that there was no Fifth Amendment violation:

> But since at least as long ago as 1807, when Chief Justice Marshall first gave attention to the matter in the trial of Aaron Burr, all have agreed that a necessary element of compulsory self-incrimination is some kind of ***compulsion***.[38]

The Court's holding regarding "compulsion" is significant. Without some kind of compulsion in the interrogation context, there is no constitutional error.[39] The Court specifically noted that "the petitioner's incriminating statements were [not] the product of any sort of coercion, legal or factual."[40] We will return to this point later. The Court also rejected the Sixth Amendment claims, but for reasons that are not closely related to the main thesis of this article.[41]

The Court then took up *United States v. White*.[42] *White* was different from *Hoffa* in that *White* was decided after the Court's seminal case of *Katz v. United States*.[43] Because *Katz* altered the basic

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36. *Id.*
37. *Id.* at 303 (quoting *Lopez*, 373 U.S. 427 (1963) (Goldberg, J., dissenting)).
38. *Id.* at 303-4 (emphasis added).
39. *Id.*
40. *Id.*
41. *Id.* at 304-11.
42. 401 U.S. 745 (1971).
43. 389 U.S. 347 (1967).

test for a Fourth Amendment "search," the Court was called upon to re-analyze the "false friends" doctrine in light of its *Katz* decision.[44] The Court affirmed its prior rulings in *Hoffa* and *Lopez*.[45] The slight difference in *White* was that the suspect's conversations were not only overheard and encouraged by a "false friend," they were recorded as well.

> If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez v. United States*, 373 U.S. 427 (1963). Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are un-persuaded that he would distinguish between probably informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound.[46]

Perhaps *White* seems obvious or even innocuous to the modern reader because police surveillance of this sort has become so accepted and even expected.[47] However, the issue of using undercover police or

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44. *White*, 401 U.S. at 747-49 (discussing the holding in *Katz* at length, where the Court adopted a two prong test to determine whether a "search" had occurred. The test basically asks whether the suspect has exhibited a subjective expectation of privacy in the place searched, and, second, whether that expectation is reasonable, that is, one that society is willing to respect. The Court emphasized that Katz abandoned the trespass text, which had been used in the past).

45. *Id*. at 747-54.

46. *Id*. at 752-53.

47. Michael Powell, *On Reed-Thin Evidence, A Very Wide Net of Police Surveillance*, N.Y. TIMES (Sept. 9, 2013), http://www.nytimes.com/2013/09/10/nyregion/on-reed-thin-evidence-a-very-wide-net-of-police-surveillance.html; Jim Dwyer, *Police Infiltrate Protests, Video Tapes Show*, N.Y. TIMES (Sept. 22, 2013), http://www.nytimes.com/2005/12/22/nyregion/22police.html?_r=0&pagewanted=print;

police informants in this manner was very controversial at the time and the stakes were thought to be high. In order to fully appreciate the impact of the Court's ruling permitting this kind of police deception, one only needs to read from Justice William O. Douglas's dissent. It is worth quoting at length:

> Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse-a First Amendment value-may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. Free discourse liberates the spirit, though it may produce only froth. The individual must keep some facts concerning his thoughts within a small zone of people. At the same time he must be free to pour out his woes or inspirations or dreams to others. He remains the sole judge as to what must be said and what must remain unspoken. This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth. The philosophy of the value of privacy reflected in the Fourth Amendment's ban on "unreasonable searches and seizures" has been forcefully stated by a former Attorney General of the United States:
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> > "Privacy is the basis of individuality. To be alone and be let alone, to be with chosen company, to say what you think, or don't think, but to say what you will, is to be yourself. Solitude is imperative, even in a high-rise apartment. Personality develops from within. To reflect is to know yourself. Character is formed through years of self-examination. Without this opportunity, character will be formed largely by uncontrolled external social stimulations. Americans are excessively homogenized already. Few conversations would be what they are if the speakers thought others were listening. Silly, secret, thoughtless and thoughtful statements would all be affected. The sheer numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious

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MATT APUZZO & ADAM GOLDMAN, ENEMIES WITHIN: INSIDE THE NYPD'S SECRET SPYING UNIT AND BIN LADEN'S FINAL PLOT AGAINST AMERICA (Touchstone 2013). *See generally* UNDERCOVER-POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE (Cyrille Fignaut & Gary T. Marx eds., 1995).

> little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good. Invasions of privacy demean the individual. Can a society be better than the people composing it? When a government degrades its citizens, or permits them to degrade each other, however beneficent the specific purpose, it limits opportunities for individual fulfillment and national accomplishment. If America permits fear and its failure to make basic social reforms to excuse police use of secret electronic surveillance, the price will be dear indeed. The practice is incompatible with a free society." R. Clark, Crime in America 287 (1970).
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> Now that the discredited decisions in *On Lee*[48] and *Lopez* are resuscitated and revived, must everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.[49]

Justice Douglas was, as ever, eloquent. However, his dissent has not been revived by the Court and with each passing term his articulate contrarian viewpoint slips ever further into the past.

In the very recent case of *Kentucky v. King*,[50] the Court held that police could create an exigency in the Fourth Amendment search context. The Court has long held that exigent circumstances provide a basis for entering premises and searching them without a warrant.[51] The basic idea is that where full probable cause exists and police need to act quickly to prevent the destruction of evidence,[52] to protect life and limb,[53] or to catch a fleeing suspect,[54] the police may act without a

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48. On Lee v. United States, 343 U.S. 747 (1952).

49. *Id*. at 762-65 (Douglas, J., dissenting)

50. 131 S. Ct. 1849 (2011).

51. Michigan v. Fisher, 558 U.S. 45 (2009); Brigham City v. Stuart, 547 U.S. 398 (2006); Mincey v. Arizona, 437 U.S. 385 (1978); Warden v. Hayden, 387 U.S. 294 (1967).

52. *King*, 131 S. Ct. 1849.

53. *See* sources cited *supra* note 52.

54. *See* sources cited *supra* note 52.

warrant and enter premises to resolve the exigency.[55] However, the issue in *King* was whether, when acting on the particular exigent circumstance to prevent the destruction of evidence, the creation of the exigency by the police would operate to void the exigency. The Court held, *contra* many lower courts, that it was irrelevant whether the police had created the exigency. As long as the police do not otherwise violate the Fourth Amendment – and creating the exigency is not a *per se* violation – it does not matter how the exigency arose.[56] The potential in this context for the police to use deception to avoid the warrant requirement is obvious. In *King*, the police believed marijuana was inside an apartment.[57] They knocked on the door and loudly announced themselves as police, though they did not demand entrance.[58] The officer then heard suspicious noises inside that sounded like people scurrying around to dispose of the drugs.[59] The police then entered.[60] Thus, if police can prompt or trick suspects into thinking they are going to enter premises and find them with contraband or evidence of a crime, and the suspects behave in such a manner as to give police probable cause that they are destroying the evidence or contraband, the police may enter without a warrant. It is certainly conceivable that police can and will use this ruling to trick suspects into engaging in actions that will give police a basis to enter premises that they could otherwise not enter.

In *Illinois v. Perkins*,[61] an undercover government agent was placed in the cell with Perkins. At the time, Perkins was incarcerated on charges totally unrelated to the agent's investigation. During the course of conversation, Perkins made comments that incriminated him. Perkins later claimed that the statements should not have been admitted as Perkins had not been read his *Miranda*[62] rights.[63] However, the Court held that the statements were admissible.[64] The Court upheld the

55. *See* sources cited *supra* note 52.
56. *King*, 131 S. Ct. at 1857-61.
57. *Id.* at 1854-5.
58. *Id.*
59. *Id.*
60. *Id.*
61. 496 U.S. 292 (1990).
62. 384 U.S. 436 (1966).
63. *Perkins*, 496 U.S. at 294 (noting that the Sixth Amendment was not applicable as Perkins was not indicated or formally charged with the crimes that were under investigation).
64. *Id.*

agents' conduct as a valid form of "strategic deception."

> *Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. As we recognized in *Miranda:* "[C]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." 384 U.S., at 478. 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. Cf. *Oregon v. Mathiason,* 429 U.S. 492, 495–496, (1977) *(per curiam)*; *Moran v. Burbine,* 475 U.S. 412, 106 S. Ct. 1135, 89 L.Ed.2d 410 (1986) (where police fail to inform suspect of attorney's efforts to reach him, neither *Miranda* nor the Fifth Amendment requires suppression of pre-arraignment confession after voluntary waiver). *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. . . . The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self–Incrimination Clause. We held in *Hoffa v. United States,* 385 U.S. 293 (1966), that placing an undercover agent near a suspect in order to gather incriminating information was permissible under the Fifth Amendment. In *Hoffa,* while petitioner Hoffa was on trial, he met often with one Partin, who, unbeknownst to Hoffa, was cooperating with law enforcement officials. Partin reported to officials that Hoffa had divulged his attempts to bribe jury members. We approved using Hoffa's statements at his subsequent trial for jury tampering, on the rationale that "no claim ha[d] been or could [have been] made that [Hoffa's] incriminating statements were the product of any sort of coercion, legal or factual." *Id.,* at 304. In addition, we found that the fact that Partin had fooled Hoffa into thinking that Partin was a sympathetic colleague did not affect the voluntariness of the statements. *Ibid.* Cf. *Oregon v. Mathiason, supra,* 429 U.S., at 495–496 (officer's falsely telling suspect that suspect's fingerprints had been found at crime scene did not render interview "custodial" under *Miranda*); *Frazier v. Cupp,* 394 U.S. 731, 739 (1969); *Procunier v. Atchley,* 400 U.S. 446, 453–454 (1971). The only difference between this case and *Hoffa* is that the suspect here was incarcerated, but detention, whether or not for the crime in question, does not warrant a presumption that the use

> of an undercover agent to speak with an incarcerated suspect makes any confession thus obtained involuntary.[65]

In the Sixth Amendment context, as opposed to the Fifth Amendment context of *Perkins*, it is still permissible to place informants or undercover officers in cells with inmates pending trial. However, such undercover officers or informants may only passively listen to the inmate. They may not encourage in or take part in conversation. In the Sixth Amendment context, it is strictly forbidden to initiate contact with a criminal suspect if their Sixth Amendment rights have attached.[66]

Lastly, two cases are of great importance on the issue of police deception in the course of interrogation: *Frazier v. Cupp*[67] and *Bobby v. Dixon*.[68]

In *Frazier*, Justice Thurgood Marshall wrote the opinion of the Court in which both Chief Justice Earl Warren and Justice William O. Douglas joined in the result. Frazier appears to have been a marine who was charged with murder along with his cousin, Rawls.[69] There are two important aspects to this case, which are highly relevant for this article. First, during the course of the interrogation Frazier "was reluctant to talk, but after the officer sympathetically suggested that the victim had started a fight by making homosexual advances, [Frazier] began to spill out his story."[70] Second, the police lied to Frazier about the nature and strength of the evidence against him. They indicated that Rawls had implicated him.[71] Nevertheless, the Court found that this did not amount to coercion under the "totality of the circumstances."[72]

In *Dixon*, a 2011 case, the Court reaffirmed that merely misrepresenting the strength of the state's case to the suspect is insufficient to render a confession inadmissible.[73]

> [T]he Sixth Circuit held that police violated the Fifth Amendment

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65. *Id.* at 297-99.

66. Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); Maine v. Moulton, 474 U.S. 159 (1985); Kuhlmann v. Wilson, 477 U.S. 436 (1986).

67. 394 U.S. 731 (1969).

68. 132 S. Ct. 26 (2011) (per curiam).

69. *Frazier*, 394 U.S. at 733, 737-38.

70. *Id.*

71. *Id.* at 739.

72. *Id.*

73. *Dixon*, 132 S. Ct. at 29-30.

> by urging Dixon to "cut a deal" before his accomplice Hoffner did so. The Sixth Circuit cited no precedent of this Court—or any court—holding that this common police tactic is unconstitutional. Cf., *e.g.,* [*Oregon v. Elstad,* 470 U.S. 298, 317 (1985)] ("[T]he Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily"). Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so . . . .[74]

Interestingly, *Dixon* is a *per curiam* opinion. It appears that not a single member of the Court objected to this language. It clearly harkens back to *Frazier* and the long line of precedent set forth above. Regarding the lower courts, both state and federal,[75] *Frazier* and *Dixon*

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74. *Id*. In *State v. Parker*, 671 S.E.2d 619, 630 (S.C. Ct. App. 2008) (summarizing the rule: Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all . . . . Thus, it can almost always be said that the interrogation caused the confession . . . It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect . . . These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary).

See also State v. Von Dohlen, 471 S.E.2d 689, 695 (S.C. 1996) (quoting Miller v. Fenton, 796 F.2d 598, 604-5 (3d Cir. 1986)).

75. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.2(c) (3d ed., 2012) (citing and summarizing many precedents).

Similarly, lower courts have held confessions admissible when they were prompted by such misrepresentations as that the murder victim was still alive, or had died of natural causes, that the police only sought defendant's statement as a witness, that nonexistent witnesses have been found, that the murder weapon had been uncovered, that defendant's prints were found at the crime scene, that an accomplice had confessed and implicated the defendant, that defendant's relatives had implicated him, that DNA evidence linked defendant to the crime, that the crime was captured by a video camera, that other physical evidence implicated the defendant, or that the results of defendant's polygraph exam showed that he had lied. So too, it is not objectionable that the police failed to reveal to the defendant prior to questioning any exculpatory evidence then at hand. (Clearly there is nothing improper with confronting the suspect with the actual evidence against him, though if that evidence was illegally come by then defendant's statement in response is likely to be treated as the inadmissible "fruit of the poisonous tree.") Courts are much less likely to tolerate misrepresentations of law. Thus, confessions have been held involuntary when obtained in response to a false police representation that the jury would never hear defendant's side of the story unless defendant gave it to the police now, that the confession could not be used against the defendant at trial, that the confession would be kept confidential or the defendant granted immunity, that the results of defendant's prior polygraph test showing he lied would be admissible against him in court, or that the previously obtained confession of

are very sound law.[76] The use of deception and trickery in obtaining a confession, without more, does not render the confession coerced and, therefore, involuntary under the Constitution.[77] As an additional

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an accomplice could be so used. Moreover, a distinction must be made between the kind of trickery discussed earlier, involving facts of which a defendant has firsthand knowledge, and trickery by "a lie unrelated to the government's evidence of his guilt, that had consequences to others," as the latter instance is more likely to induce an innocent person to give a confession.

Accord Annual Review, *Custodial Interrogations*, 41 Geo. L.J. Ann. Rev. Crim. Proc., 187, 212-3 (2012) (citing many cases).

76. C. T. Dreschsler, Annotation, *Admissibility of Confession as Affected by Its Inducement Through Artifice, Deception, Trickery, or Fraud,* 99 A.L.R. 2d 772 (2013). One widely used text on modern criminal procedure puts it this way:

A leading interrogation manual, authored by Inbau, Reid, and Buckley, argues the merits of deceptive interrogation techniques in leading to confessions. The techniques they recommend include:

showing fake sympathy for the suspect by acting like his friend (e.g., by falsely telling a rape suspect that the officer himself had once "roughed it up" with a girl in an attempt to have intercourse with her);

reducing the suspect's feelings of guilt through lies (e.g., by telling a person suspected of killing his wife that he was not as "lucky" as the officer, who at one time was just about to "pound" his wife when the doorbell rang);

exaggerating the crime in an effort to get the suspect to negotiate, or in hopes of obtaining a denial which will indirectly inculpate the suspect (e.g., accusing the suspect of stealing $40,000 when only $20,000 is involved, or accusing the suspect of murder where the victim, while shot, survived the incident); and

playing one codefendant against another (e.g., leading one to believe the other has confessed when no confession has occurred).

INBAU, REID & BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS 98-132 (3d ed. 1986) [This is an earlier edition of the book referenced in note 74]. ***Tactics such as these are routinely permitted by the courts in applying the voluntariness test***. *See e.g.,* Frazier v. Cupp, 394 U.S. 731 (1969) (holding use of "false friend" and "game is up" techniques, although relevant to the due process inquiry, were not sufficient to render the confession involuntary); Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986) (holding use of "false friend" technique, together with a ruse that the victim had not died when in fact she had, does not render confession involuntary). *See also* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996) (providing citations to lower court cases refusing to exclude confessions obtained after the suspect was exposed to lies about matters such as the strength of the case, fabricated evidence, suggestions that the suspect was not at fault, and lies about the identity of the interrogator).

STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE: CASES AND COMMENTARY 663-4 (9th ed. 2010) (emphasis added).

77. Dreschsler, *supra* note 77; *e.g.*, Laurie Magid, *Deceptive Police interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1197-1209 (2001) (defending the same proposition) ("A compelling argument has not yet been made that drastic limits on the use of deceptive interrogation techniques are either required or advisable.

note, ethical challenges to police deception in the interrogation context have consistently been brushed aside for many of the same reasons that have led to its general acceptance under the constitution.[78]

III. THE IMPORTANCE OF CONFESSIONS

While the topic is still somewhat debatable,[79] I think there is little doubt that confessions in particular, and incriminating statements in general,[80] play a huge role in investigating and successfully prosecuting

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. . . In advocating limits on deceptive techniques, however, some commentators have overstated the false confession problem and minimized the costs of limiting interrogation."). *Id*. at 1209. (dealing with other arguments that from time to time have been raised against the use of trickery in interrogation: "fox-hunter" rationale, equality among suspects, trust rationale, dignity rationale, morality rationale, and various pragmatic concerns). *Id*. at 1179-1186. (I have not explored such arguments because these lines of argument have been largely discredited for the reason Magid offers and, thus, have disappeared from serious literature on this subject). *See also* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1905 (1993) ("Deception and advantage taking are . . . at the core of criminal investigation . . . ."); MICHAEL SKERKER, AN ETHICS OF INTERROGATION 90-114, 207-213 (2010); FRED E. INBAU ET AL., CRIMINAL INTERROGATIONAL AND CONFESSIONS 339-377 (5th ed. 2013); *Critics Corner: Trickery and Deceit; Subterfuge; Additional Cases*, John E. Reid & Associates, Inc. (collecting cases) (Sept. 22, 2013, 11:30 AM), https://www.reid.com/educational_info/trickery.html; *New Decisions,* John E. Reid & Associates, Inc., (collecting cases) (Sept. 22, 2013, 11:30 AM), https://www.reid.com/educational_info/r_ccorner.html; *Critics Corner: Lying About Evidence: Pretending to Have Evidence Against Accused, Generally – Confession Held Admissible,* John E. Reid & Associates, Inc. (collecting cases) (Sept. 22, 2013, 11:30 AM), https://www.reid.com/educational_info/lyingaboutevidence.html.

78. *See* sources cited *supra* note 78.

79. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.1(a) (3d ed., 2012) (some might wonder how could it possibly be "debatable" that confessions and other incriminating statements are so important in criminal investigations? Isn't this obvious after all? However, from time to time, there has been more than a bit of hedging on the issue of whether confessions are really that important).

80. For the purposes of this article, the distinction between confessions and incriminating statements is not significant. However, for my purposes the distinction is one of degree. A confession is a complete admission of all the material facts by the accused or something very near to it, e.g.:

"I always hated him. I saw him out alone, so I snuck up behind him and hit him in the back of the head with a tire iron I got out of the trunk of my car. He never saw me coming. He hit the ground, and I kept hitting him with the tire iron–over and over and over. He never had a chance. I wanted him dead and good riddance!"

An incriminating statement is something the accused says, but it falls short of a full or complete admission. It makes the accused look bad. It is relevant in that it tends to prove one or more of the elements of the crime, but standing alone it is insufficient to

crime. This largely constitutes the positive case for police deception in interrogation, and it is important to my main thesis: I contend that opponents of some very effective police interrogation techniques forget how important it is to persuade the suspect to answer basic questions about their involvement in the crime.

One of the most eloquent statements by the Supreme Court on the necessity of confessions came in *Culombe v. Connecticut*:[81]

> The critical elements of the problem may be quickly isolated in light of what has already been said. Its first pole is the recognition that "Questioning suspects is indispensable in law enforcement." As the Supreme Court of New Jersey put it recently: "the public interest requires that interrogation, and that at a police station, not completely be forbidden, so long as it is conducted fairly, reasonably, within proper limits and with full regard to the rights of those being questioned." But if it is once admitted that questioning of suspects is permissible, whatever reasonable means are needed to make the questioning effective must also be conceded to the police. Often prolongation of the interrogation period will be essential, so that a suspect's story can be checked and, if it proves untrue, he can be confronted with the lie; if true, released without charge. Often the place of questioning will have to be a police interrogation room, both because it is important to assure the proper atmosphere of privacy and non-distraction if questioning is to be made productive, and because, where a suspect is questioned but not taken into custody, he—and in some cases his associates—may take prompt warning and flee the

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establish guilt, e.g.:

"Yes, I was the last person to see him that night. We had an awful argument. I was furious with him, but I stormed out. I never saw him again. I'm glad he's dead!"

The difference between these two statements is obvious. The first is a complete admission to murder or perhaps a homicide in the first degree. The second is relevant in that it puts the suspect at the scene and gives him a motive, thus, it is relevant on the issue of guilt. However, if strictly true, the suspect is entirely innocent. On an additional note, some might consider the statements made by a defendant during the course of a formal plea of guilty in a courtroom to be "confessions" as well. However, I do not address guilty pleas. Pleas of guilty are beyond the scope of his article. Statements by a defendant at guilty pleas simply are not part of "police interrogation" in any meaningful sense. At a guilty plea a defendant is typically represented by counsel (or has the right to be represented), the plea is made before the court (a judge), and the entire proceeding is typically transcribed by a court reporter.

81. 367 U.S. 568 (1961) (Opinion of Frankfurter, J.).

premises.[82]

One of the most well-known interrogation manuals in use by many law enforcement, military, and government agencies in the United States puts the matter this way:

> There is a gross misconception, generated and perpetuated by fiction writers, movies, and TV, that when criminal investigators carefully examine a crime scene they will almost always find a clue that will lead them to the offender; furthermore, once the criminal is located, he or she will readily confess or otherwise reveal guilt, as by attempting to escape. This, however, is pure fiction. As a matter of fact, the art and science of criminal investigation have not developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary legal proof of guilt. In criminal investigations, even the most efficient type, there are many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as of others who may possess significant information. In most instances these interrogations, particularly of the suspect, must be conducted under conditions of privacy and for a reasonable period of time. They also frequently required the use of psychological tactics and techniques that could well be classified as "unethical," if evaluated in terms of ordinary, everyday social behavior . . . There are times, too, when a police interrogation may result not only in the apprehension and conviction of the guilty, but also in the release of the innocent from well-warranted suspicion.[83]

One view of the situation regarding "forensic evidence" is that genuine forensic evidence is collected in less than 10% of all cases. Of all such evidence collected, approximately half is subjected to scientific analysis.[84] While more recent studies show that the use of

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82. *Id*. at 570-71; *See also* Ralph v. Peppersack, 335 F.2d 128, 137 n. 16 (4th Cir. 1961).

83. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS at xi-xii (5th ed. 2013). *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.1(a) (3d ed., 2012).

84. F. Horvath & R. Messig, *The Criminal Investigation Process and the Role of Forensic Evidence: A Review of Empirical Findings*, 41 J. FORENSIC SCI. 963 (Nov. 1996).

forensic techniques are on the increase, it still appears that forensic evidence alone does not resolve the clear majority of crimes.[85]

In *Schneckloth v. Bustamonte*,[86] a seminal case dealing with consent in the Fourth Amendment context, the Court, following *Culombe*, has continued to acknowledge the necessity of allowing law enforcement to question suspects.

> At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See *Culombe v. Connecticut*, [367 U.S. 568, 578-580 (1961)]. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes v. Washington*, 373 U.S. 503, 515, (1963).[87]

In *Illinois v. Lidster*,[88] the Court emphasized the role of routine police interrogation in the broadest possible sense. Police are expected to question potential witnesses and suspects. Police questioning is vital—even questioning of obviously innocent persons—to the successful investigation and prosecution of criminal activity.

> Further, the law ordinarily permits police to seek the voluntary cooperation of members of the public in the investigation of a crime. "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." *Florida v. Royer,* 460 U.S. 491, 497, (1983). See also ALI, Model Code of Pre–Arraignment Procedure § 110.1(1) (1975) ("[L]aw enforcement officer may ... request any person to furnish information or otherwise cooperate in the investigation or prevention of crime"). That, in part, is because voluntary requests

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85. Sarah-Anne Bradbury & Andy Feist, *The Use of Forensic Science in Violent Crime Investigations: A Review of the Research Literature 2005,* HOME OFFICE UNITED KINGDOM, 8-12 (Sept. 22, 2013, 11:30 AM), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/115849/hoor4305.pdf; Joseph Peterson, Ira Sommers, Deborah Baskin, & Donald Johnson, *The Role and Impact of Forensic Evidence in the Criminal Justice Process Revised Final Report 6-10-10*, NATIONAL INST. OF JUST. 122-130 (Sept. 22, 2013, 11:30 AM), https://www.ncjrs.gov/pdffiles1/nij/grants/231977.pdf.

86. 412 U.S. 218, 225 (1973).

87. *Id.*

88. 540 U.S. 419, 425 (2004).

> play a vital role in police investigatory work. See, *e.g., Haynes v. Washington,* 373 U.S. 503, 515 (1963) ("[I]nterrogation of witnesses ... is undoubtedly an essential tool in effective law enforcement"); U.S. Dept. of Justice, Eyewitness Evidence: A Guide for Law Enforcement 14–15 (Oct. 1999) (instructing law enforcement to gather information from witnesses near the scene).[89]

Thus, the Court makes it clear that a kind of ordinary, routine, old-fashioned police work is still necessary and appropriate to the investigation of crime.[90]

One of the most powerful indicators that police interrogations are necessary to criminal investigation and the protection of the public is when one of the foremost critics of police interrogation practices eloquently admits it. Professor Richard A. Leo puts it this way:

> Police interrogation and confession taking is enormously important for society. It is, of course, often necessary in investigating and solving crime, especially felony crime. Some crimes, such as conspiracy and extortion, or even rape and child abuse, frequently can be conclusively solved only by a confession since there may be no other evidence of guilt. Other serious crimes, such as murder, are more commonly solved by confessions than by any other type of evidence [citations omitted]. Done properly, police interrogation can thus be an unmitigated social benefit. It can allow authorities to capture, prosecute, and convict wrongdoers and deter crime. These are enormously important outcomes.[91]

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89. *Id*.

90. *Id*.

91. RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE, 2-3 (2008). *See e.g*., Katherine Sheridan, Note, *Excluding Coerced Witness Testimony to Protect a Criminal Defendant's Right to Due Process of Law and Adequately Deter Police Misconduct*, 38 FORDHAM URB. L.J. 1221, 1223-24 (2011); Michael J. Aiello, Note, *United States v. Barone: Evaluating Police Re-Interrogation After Mosley – Courts Must Consider the Suspect's State of Mind*, 2 WIDENER J. PUB. L. 707, 714 (I993); Gregory E. Spitzer, Supreme Court Review, *Fifth Amendment – Validity of Waiver: A Suspect Need Not Know the Subjects of Interrogation*, 78 CRIM. L. & CRIMINOLOGY 828, 851-52 (1988); Scott A. McCreight, Comment, *Colorado v. Connelly: Due Process Challenges To Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207, 223 (1987). (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

One of the most recent works dealing with the problem of improper police interrogations and "false confessions" is an anthology entitled, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, edited by G. Daniel Lassiter and Christian A. Meissner. It represents some of the latest scholarship on the topic as of this writing. Interestingly, it does not go so far as to bar police interrogation or even require an attorney actually be present.[92] Much more will be said of this work later. For now, it is only significant to note that the method of interrogation is all that is seriously in dispute. Two other prominent scholars, whose work strongly challenges some police techniques in interrogation, nevertheless admitted: "confessions play a vital role in law enforcement and crime control."[93]

Police interrogation is here to stay. It is an absolutely necessary tool for criminal investigation. The only question that remains is what techniques police may use to persuade suspects to talk with them about their role in the crime.

IV. THE ADMISSIBILITY OF CONFESSIONS

So far, this article has unfolded in a way that logically leads to this point. We began with a discussion of police deception in general with an emphasis on deception in the interrogation context. I then pointed out that there is abundant authority for the proposition that confessions secured by means of police interrogation are absolutely essential in routine law enforcement investigation. In this context, I hope to have demonstrated that courts at the state and federal level

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absent a confession by the true perpetrator. In some instances, the police must use deception to obtain a confession from a suspect. 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). Laurie Magrid, *Deceptive Police Interrogation Practices: How Far is Too Far?,* 99 MICH. L. REV. 1168, 1197-98 (2001). *See also* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1905 (1993) ("Deception and advantage taking are . . . at the core of criminal investigation . . . "); MICHAEL SKERKER, AN ETHICS OF INTERROGATION, 90-114, 207-213 (2010).

92. POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 225-29 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

93. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 36 (2004).

have overwhelmingly approved of certain deceptive tactics by police in order to secure confessions and other incriminating statements.

Before addressing some of the social science and recent research on confessions and police interrogations, it is necessary to address in some detail the law concerning the admissibility of confessions and custodial statements in general. It is my contention that a lot of the professional literature in this area has overlooked this aspect of confessions and police interrogation law. As such, spurious conclusions have been reached based on an inadequate appreciation of the current state of the law.

To briefly preview, current confessions law requires a three-step analysis of any custodial statement made by an accused to law enforcement, which is later sought to be admitted as evidence in a criminal trial.[94] First, the standard analysis must be made under applicable rules of evidence. While this level of analysis is not a concern for purposes of this article, such statements are usually admissible because they are relevant (e.g., FRE 401-2) and because they are admissions by a party opponent (e.g., FRE 801(d)(2)). The next two levels of analysis are very important for our purposes. Second, the statements must be "voluntary," that is, "voluntarily" made, under the Due Process Clause of the Fifth or Fourteenth Amendment.[95] This is often referred to as the due process voluntariness test.[96] Third, and last, the statements in question must pass muster under *Miranda v. Arizona*[97] and its progeny. The change wrought by *Miranda* is that the Self Incrimination Clause of the Fifth Amendment is applicable in the pre-trial investigation phase of the criminal process.[98] If a statement passes all three hurdles, it may be considered by the trier of fact on the issue of guilt or innocence. The precise details of this process are crucial, because it is my contention that the law as it stands is more than adequate to deal with overbearing police

94. *See* Jackson v. Denno, 378 U.S. 368 (1964); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 10.5(a)-(c), 10.6(a) (3d ed., 2012); Annual Review, *Custodial Interrogations,* 41 GEO. L.J. ANN. REV. CRIM. PROC., 187, 213-14 (2012) (including cases cited therein); R.E.H., Annotation, *Presumption and Burden of Proof as to Voluntariness of Nonjudicial Confession*, 76 A.L.R. 641 (2013).

95. *See* sources cited supra note 95. *See also* Hopt v. Utah, 110 U.S. 574 (1884); Bram v. United States, 168 U.S. 532 (1897); Brown v. Mississippi, 297 U.S. 278 (1936); Culombe v. Connecticut, 367 U.S. 568 (1961) (Opinion of Frankfurter, J.).

96. *See* sources cited *supra* note 96.

97. 384 U.S. 436 (1966).

98. *Id*.

conduct in the interrogations context. Existing law provides us with ample tools to determine what kind of police conduct is likely to produce a false confession and what kind of police conduct will simply persuade the guilty to give up their secrets.

Our modern law, constitutional and otherwise, governing the admissibility of confessions has its origins in the common law. Under the early common law, confessions were admissible at trial without any restrictions whatsoever, so that even an incriminating statement, which had been obtained by torture, was not excluded. But some time prior to the middle of the eighteenth century, English trial judges began placing restrictions on the admissibility of confessions. A formal rule of exclusion appears to have been first stated in 1783 in the case of *The King v. Warickshall*, wherein it was asserted:

> A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, 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; and therefore it is rejected.[99]

The *Warickshall* rule, as later followed in England and the United States, was designed to protect a defendant from an erroneous conviction based upon a false confession. . . . Sometimes, as in *Warickshall*, the question was put in terms of whether the defendant's confession had been induced by a promise of benefit or threat of harm, while on other occasions the inquiry was more directly put in terms of whether the circumstances under which the defendant had spoken impaired the reliability of the confession. But it became more common for the courts simply to ask whether the confession had been made "voluntarily." Generally, the approach under the common law rule was to identify certain inducements, which made a confession unreliable. These included actual or threatened physical harm, a promise not to prosecute, a promise to provide lenient treatment upon conviction, and deceptive practices so extreme that they might have produced a false confession. The latter did not include such practices as using a fellow prisoner as an undercover agent or misleading the defendant as to the

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99. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.2(a) (3d ed., 2012) (citing King v. Warickshall, 168 Eng. Rep. 234, L. Leach Cr. Cases 263 (K.B.1783)).

strength of the case against him.[100] The *Warickshall* case is still representative of the central theme of the jurisprudence in this area. When it comes to police misconduct, the focus is still on two central points: (1) promises by the police to persuade the suspect to speak or threats designed to coerce the suspect into doing so, and (2) tactics that constitute the "third degree."[101] If a court finds either, suppression of the confession/statement is generally required.[102] This is the essence of what makes a confession involuntary under the due process standard.[103] More specifically, promises or threats which go to the nature of the charge or possible sentence (murder vs. manslaughter, first degree vs. second degree, probation, life imprisonment, death penalty, parole, etc.), the terms and conditions of confinement (solitary, general population with other dangerous offenders, sent to a faraway facility, etc.), and whether bond/bail shall be granted and, if so, under what conditions generally constitute promises or threats that will render a confession inadmissible.[104] So called "third degree" tactics, which include any number of things including beatings; deprivation of sleep, food, and water; lengthy interrogations; and sometimes extreme deceit designed to trick one into giving up one's constitutional right not to speak, have been found to vitiate a confession.[105] "Third degree"

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100. *Id*. *See generally* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY, 1–25 (1980); WILLIAM RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS, ch. 25 (2d ed. 1980); OTIS H. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 31–62 (1973); Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Joseph D. Grano, CONFESSIONS, TRUTH, AND THE LAW (1996); Wilfred J. Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35 (1962); H. Frank Way, Jr., *The Supreme Court and State Coerced Confessions*, 12 J. PUB. L. 53 (1963); Welsh S. White, *What Is an Involuntary Confession Now?,* 50 RUTGERS L. REV. 2001 (1998); *Developments*, 79 HARV. L. REV. 938, 961–82 (1966).

101. *See* sources cited *supra* note 95.

102. *See* sources cited *supra* note 95.

103. *See* sources cited *supra* note 95.

104. *See* sources cited *supra* note 101.

105. WAYNE R. LAFAVE ET AL., *supra* note 76 ("[T]he Court has condemned such practices as whipping or slapping the suspect, depriving him of food or water or sleep, keeping him in a naked state or in a small cell, holding a gun to his head or threatening him with mob violence. As the Court noted in *Stein v. New York*, 346 U.S. 156 (1953), when such outrageous conduct is present 'there is no need to weigh or measure its effects on the will of the individual victim.'"); b*ut* see Arizona v. Fulminante, 499 U.S. 279 (1991) (seeming unconcerned about the "effects" on the victim, rather it focused on the conduct of law enforcement) (nevertheless, most lower courts have continued to follow *Stein* and require some connection between such force and its effects on a suspect. Even where force was actually applied by the police, lower courts have held

techniques can also be found in circumstances where the police threaten third parties, such as the suspect's wife, children, etc.[106] In making this determination, which is highly fact specific as to whether "third degree" tactics were used or whether a promise or threat was made to induce the confession, the court must look to the "totality of the circumstances." Aside from "third degree" tactics, which for obvious reasons are deeply problematic, the following are of particular importance in assessing the "totality of the circumstances":

> Another very important consideration is whether the defendant was subjected to extended periods of incommunicado interrogation. Of particular significance in this regard is whether the suspect was subjected to lengthy and uninterrupted interrogation, whether he was kept in confinement an extended period of time even though subjected only to intermittent questioning, whether he was moved from place to place and questioned by different persons so as to be disoriented, whether he was questioned in solitary confinement or at some isolated place away from the jail, whether he was held incommunicado up until the time of the confession (especially if family, friends or counsel were turned away), and whether—if the suspect is a foreign national—there was a violation of his right under treaty to have consular officials notified of his detention. Under the more extreme of these circumstances, such as where there have been a couple of weeks of uninterrupted detention or virtual nonstop interrogation for 36 hours, the situation is "inherently coercive" and suppression of the confession is mandated. But when the circumstances are somewhat less extreme, as where the detention has only been a few days or the questioning lasted only a few hours, exclusion of the confession has typically occurred only

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that intervening factors may require an examination of the circumstance of the individual case to determine whether it was that force (and the threat of new force) that operated to overbear the will of the defendant); *see* United States v. Jenkins, 938 F.2d 934, 939 (9th Cir. 1991) ("it appears most likely that *Stein's* per se approach is limited to those confessions made substantially concurrently with physical violence." A line must be drawn "between those confessions properly considered to have been made concurrently with violence, in which a conclusive presumption that one's will is overborne is appropriate, and those sufficiently attenuated from such misconduct to justify application of the more lenient totality of the circumstances test."); *Id*. (finding relevant such factors as the passage in time, change in custodial status, and affirmative police steps to remove the threat).

106. Lynumn v. Illinois, 372 U.S. 528 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

> when it was also shown that the defendant was especially susceptible to coercion. In the case of Bram v. United States, [168 U.S. 532, 542-3 (1897)] the Court declared that a confession "obtained by any direct or implied promises, however slight," is not voluntary. Read literally, this passage suggests a standard holding automatically involuntary any confession that was a "but for" product of a promise that might benefit the defendant. That position has long been challenged, however, and in Arizona v. Fulminante, [499 U.S. 279, 285 (1991)] the Supreme Court noted that such a reading of the Bram passage "under current precedent does not state the standard for determining the voluntariness of a confession." The role of the promise must be evaluated in light of the totality of the circumstances and the promise must have been "sufficiently compelling to overbear the suspect's will in light of … [those] circumstances." [United States v. Leon Guerrero, 847 F.2d 1363, 1367(1988)][107]

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107. LaFave, *supra* note 73 (emphasis added). *See also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE: CASES AND COMMENTARY, NINTH EDITION, 661-66 (2010) (the Court has made it clear that the test for "voluntariness" is whether the police conduct at issue was sufficient to overbear the will of the accused). Florida v. Powell, 595 U.S. 50, 52 (2010); Dickerson v. United States, 430 U.S. 428, 434 (2000); Minnesota v. Murphy, 465 U.S. 420, 431 (1984); Fare v. Michael C., 442 U.S. 707, 728 (1979); Beckwith v. United States, 425 U.S. 341, 347-48 (1976); Michigan v. Mosley, 423 U.S. 96, 115 (1975); Miranda v. Arizona, 384 U.S. 436, 469 (1966); Haynes v. Washington, 373 U.S. 503, 513-14 (1966); Jackson v. Denno, 378 U.S. 376, 390-91 (1964); Rogers v. Richmond, 365 U.S. 534, 544 (1961); Culombe v. Connecticut, 367 U.S. 574, 576, 602 (1961) (Opinion of Frankfurter, J.) (excellent discussion of the common law background of the voluntariness test); Spano v. New York, 360 U.S. 315, 323 (1959) (excellent survey of voluntariness cases by Chief Justice Warren).

To determine if a defendant's statements were voluntary, a court must ask whether, under the totality of the circumstances, law enforcement officials obtained the evidence by ***overbearing the will of the accused***. This inquiry centers upon: (1) the conduct of law enforcement officials in creating the pressure, and (2) the suspect's capacity to resist that pressure.

Annual Review, *Custodial Interrogations*, 41 GEO. L. J. ANN. REV. CRIM. PROC., 187, 208-9 (2012) (emphasis added). As noted previously, in resolving these two factors the court looks to the "totality of the circumstances." *Id*. at 210-13. In trying to be even more precise about voluntariness, at least two scholars have suggested the following:

[Joseph D.] Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979), argues that an involuntary confession is "any confession produced by interrogation pressures that a person of reasonable firmness, with some of the defendant's characteristics, would not resist." Others have argued that a confession is involuntary only where police tactics are such as would force an innocent person to confess. This is a reflection of the premise of some scholars that "the Constitution

The prosecution has the burden of establishing the voluntariness of the confession/custodial statement by a preponderance of the evidence.[108]

Probable cause is also relevant in the custodial interrogation context. If a suspect is in custody unlawfully, that is, the suspect is under full custodial arrest but there is insufficient probable cause to support the arrest, the confession made under such circumstances will almost always be suppressed.[109] This is true even in the absence of other circumstances surrounding the confession, including the fact that the suspect freely and voluntarily waived his *Miranda* rights.[110] Unlawful custody/arrest is a near impossible hurdle for the prosecution to overcome. It renders the confession involuntary under due process.[111] The common law also provided one important additional protection to those who confessed to crimes. The rule is still followed in many jurisdictions. The common law required proof of the *corpus delicti* of the crime *aliunde* the confession. This rule is important, as we shall see later, because it is powerful protection against the possibility that someone might be convicted solely on the basis of a false confession.

> In general, extrajudicial statements or admissions or confessions of an accused must be corroborated, in order to be admissible and to support a conviction. The purpose of the requirement that a confession be corroborated is to obviate the danger of conviction on the basis of a confession or admission where no crime has, in fact, been committed. . . . The corroboration must be established by evidence independent of the confession or admission. [The problem] to avoid [is] the danger of convicting a defendant solely out of his or her own mouth of a crime that never occurred or a

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seeks to protect the innocent." [Akhil Reid] Amar, The CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES, 154 (1997). This would mean that threats of harm, and physical violence would be prohibited, but tactics that could be used to trick a person to confess (e.g., false expressions of sympathy, or understating the significance of the crime) would be permitted.

STEPHEN A. SALTZBURG AND DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE: CASES AND COMMENTARY, NINTH EDITION, 661 (2010). *See generally* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW (1993).

108. *See* sources cited *supra* note 91.

109. Maryland v. Shatzer, 130 S. Ct. 1213 (2009); Kaupp v. Texas, 538 U.S. 626 (2003) (per curiam) (*Miranda* warnings insufficient to break the taint of illegal arrest); Hayes v. Florida, 470 U.S. 811 (1985); Dunaway v. New York, 442 U.S. 200 (1979); Davis v. Mississippi, 394 U.S. 721 (1969); Brown v. Mississippi, 297 U.S. 278 (1936).

110. *See* sources cited *supra* note 110.

111. *See* sources cited *supra* note 110.

crime committed by someone else . . .[112]

Therefore, under the common law, even if a confession is clearly voluntary, it is insufficient without corroborating evidence to support a conviction.

However, as noted above, police conduct, including misrepresentations and trickery, which does not rise to this level – "third degree" or a "promise" or a "threat" – has not been held to invalidate a confession.

In addition to being voluntary under the due process test, a confession/custodial statement must pass muster under *Miranda v. Arizona*.[113] I do not intend to explain *Miranda* in any detail. It is not necessary to do so here. *Miranda* requires that suspects be given their *Miranda* rights[114] when they are in "custody" and subject to "interrogation" or its functional equivalent.[115] Police must obtain a "waiver" before beginning an interrogation. The waiver must not only be voluntary as discussed above, but knowing and intelligent as well.[116] *Miranda* requires an actual waiver of rights; due process voluntariness is not enough.[117] After a waiver is secured, questioning may proceed. If there is no waiver, questioning is not permitted. If the suspect is

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112. 23 C.J.S. *Criminal Law* §§ 1288-89 (2013). *Accord* 29 Am. Jur. 2d *Evidence* §§ 1395-96 (2013).

113. 384 U.S. 436 (1966).

114. The so-called "*Miranda* rights" have never been given precise form by the Court. This comes as a surprise to many people. The Court has actually never required any particular verbiage be used, only that the basic rights be expressed clearly. Florida v. Powell, 130 S. Ct. 1195, 1204-5 (2010); Duckworth v. Eagan, 492 U.S. 195, 203-4 (1989); California v. Prysock, 453 U.S. 355, 359-60 (1981). Annual Review, *Custodial Interrogations*, 41 GEO. L.J. ANN. REV. CRIM. PROC., 187 (2012) (Suspects must be warned of their rights to remain silent, that any statements can be used against them at trial, that they have a right to the presence of an attorney at questioning, and if they cannot afford an attorney one will be appointed for them for free. This is the essence of *Miranda*).

115. *See* sources cited *supra* note 114. *See also* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) ("custody"); Stansbury v. California, 511 U.S. 318 (1994) (per curiam); Pennsylvania v. Muniz, 496 U.S. 582 (1990) ("interrogation"); Berkemer v. McCarty, 468 U.S. 420 (1984) ("custody"); California v. Beheler, 463 U.S. 1121 (1983) ("custody"); Rhode Island v. Innis, 446 U.S. 291 (1980) ("interrogation"); Annual Review, *Custodial Interrogations*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 187, 188-196 (2012).

116. *See* sources cited *supra* note 111; Berghuis v. Thompkins, 130 S. Ct. 2250 (2010). *See also* Colorado v. Connelly, 479 U.S. 157, 169-70 (1986) (making it clear that the standard for a waiver of *Miranda* rights is the same as the due process voluntariness standard discussed at length above).

117. *See* sources cited *supra* note 115.

questioned in the absence of a waiver of Miranda rights, the statement may not be used in the prosecution's case-in-chief.[118]

The procedures set forth in *Jackson v. Denno*[119] are required before the jury hears a custodial statement. Upon motion by defense counsel, a hearing is held before the court in the absence of the jury to determine whether the voluntariness due process standard was met and that the requirements of *Miranda* were followed.[120] The prosecution has the burden of proof before the court, by a preponderance of the evidence, to establish voluntariness and a knowing and intelligent waiver of *Miranda* rights.[121] If the court finds the confession voluntary and that *Miranda* was properly waived, the confession then goes to the jury, that is, it may be considered by the trier of fact to determine guilt or innocence.[122] Juveniles are generally subject to the same rules as adults concerning due process voluntariness and the waiver of their *Miranda* rights.[123] The *Miranda* warnings need not be videotaped or in writing, and the oral testimony of an officer that the accused received the warnings and waived them freely and voluntarily is sufficient.[124] While some courts have allowed expert testimony on the issue of voluntariness, at best this is a contested issue. It appears that most courts have not looked with favor on expert testimony in this context.[125]

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118. *See* sources cited *supra* note 115. *But* see Oregon v. Haas, 420 U.S. 714, 723-4 (1975); Harris v. New York, 401 U.S. 222, 226 (1971) (statements made in violation of *Miranda* may still be used for impeachment purposes.. Also, the police may make derivative use of a statement taken merely in violation of *Miranda*). United States v. Patane, 542 U.S. 630 (2004) (if a statement is truly involuntary under due process, the best view seems to be that it cannot be used for impeachment and any evidence seized derivatively may also be suppressed). WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 9.5(a) (3d ed., 2012) (a statement can be totally voluntary, and yet be in technical violation of Miranda. However, the reverse is hard to contemplate. Mere *Miranda* violations to not warrant the same severe response as do due process voluntariness violations).

119. *See* sources cited *supra* note 95.

120. *See* sources cited *supra* note 95.

121. *See* sources cited *supra* note 95.

122. *See* sources cited *supra* note 95.

123. Fare v. Michael C., 442 U.S. 707 (1979) (holding that voluntariness and waiver standards for juveniles and adults are the same, but age is an important factor court must consider); *See also* J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011) (holding in determining "custody" for Miranda purposes, a court must consider age of suspect).

124. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 6.8(c) (3d ed., 2012).

125. Solomon M. Fulero, *Tales From the Front: Expert Testimony on the*

It should be noted that the mere fact that a suspect is suffering from some serious mental disease or defect, without more, is not a basis for excluding a confession.[126] Due process and the Self Incrimination Clause, as well as the Bill of Rights generally, require some kind of police or governmental misconduct or overreaching.[127] The purpose of due process, the privilege against self-incrimination, and the Bill of Rights in general is to protect one from governmental misconduct, not one's own misfortune, condition, or the conduct of non-state actors, that is, private parties.[128] In other words, "a state actor is a necessary element to [find a confession involuntary under] this test."[129]

Lastly, some jurisdictions enforce the procedure outlined above in slightly different ways. Some background is required. When the

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Psychology of Interrogations and Confessions Revisited, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 211-224 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (mixed results and few published cases permitting this kind of testimony); I. Bruce Frumkin, *Evaluations of Competency to Waive Miranda Rights and Coerced or False Confessions: Common Pitfalls in Expert Testimony*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS 202-6 (G. Daniel Lassiter & Christian A. Meissner eds., 2010) (disallowing expert testimony in most cases regarding competency to waive *Miranda*); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 367-78 (5th ed. 2013); *New Decisions,* John E. Reid & Associates, Inc. (collecting cases), https://www.reid.com/educational_info/r_ccorner.html (last visited Sept. 22, 2013); 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 (2003); Saul M. Kassin and Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 58-9 (2004) (arguing for the use of expert testimony). *Id*. at 59 (stating that "psychologists have testified in hundreds of criminal trials that generated no written opinions."). *Id*. (noting "yet, in other cases they have been excluded on various grounds."). *Id*. (citing no case where an expert was allowed to testify as to the veracity of a confession). *See also* Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward*, RESEARCH COUNCIL OF THE NATIONAL ACADEMY (discussing problems in forensic science lately) (There have been serious issues raised about the validity of the science behind some "forensic science" in recent years. If either the prosecution or the defense offers expert testimony on this issue, it must be based on solid science) (Sept. 27, 2013, 10:00 PM), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf.

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

127. *Id*.

128. *Id*.

129. Annual Review, *Custodial Interrogations*, 41 GEO. L.J. ANN. REV. CRIM. PROC., 187, 209 (2012). *See also Connelly*, 479 U.S. at 170.

Supreme Court decided *Jackson v. Denno*,[130] there were three methods governing the admissibility of confessions: the orthodox rule, the Massachusetts rule, and the New York rule.[131] In those states following the orthodox rule, the judge determined the issue of voluntariness. The jury did not make a separate determination of that issue. The jury could hear evidence regarding police methods in acquiring the confession to determine the weight to be given to the confession, that is, its credibility. However, the jury in no circumstances was asked to pass on its voluntariness separate and apart from the judge's finding.[132] Under the Massachusetts rule, the finding of voluntariness is bifurcated. First, the trial judge ruled on the issue of voluntariness. If the court found the confession involuntary, the confession was suppressed and that was the end of the matter. However, if the judge found the confession voluntary, it was then submitted to the jury and they were charged to make an independent determination of voluntariness before considering the confession as evidence of guilt. The jury was permitted to hear extensive evidence on the voluntariness of the confession, that is, the "totality of the circumstances" surrounding the taking of the confession as referenced above.[133] Under the New York rule, the determination of the voluntariness of the confession was primarily left up to the jury. The judge's role under the New York rule was limited to excluding the confession only if there were "no circumstances" under which the confession could be voluntary.[134] The jury was then charged on the voluntariness standard and told to consider the confession only if it found the confession to be voluntary.[135] In *Jackson v. Denno*, the Supreme Court found the New York rule to be unconstitutional by a vote of 5-4. The essence of the Court's holding in *Jackson* was succinctly summarized by the Court in the later case of *Lego v. Twomey*.[136] In *Lego*, the Court held:

> We concluded that the New York procedure was constitutionally defective because at no point along the way did a criminal defendant receive a clear-cut determination that the confession

130. 378 U.S. 368 (1964).

131. Wayne R. LaFave, et al., CRIMINAL PROCEDURE, 2 Crim. Proc. § 10.5(a) (3d ed., 2012).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. 404 U.S. 477, 483 (1972).

> used against him was in fact voluntary. The trial judge was not entitled to exclude a confession merely because he himself would have found it involuntary, and, while we recognized that the jury was empowered to perform that function, we doubted it could do so reliably. Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts.[137]

Also noted in *Lego*, the Court in *Jackson* "cast no doubt upon the orthodox and Massachusetts procedures."[138]

It is important to note that the Massachusetts rule and the orthodox rule survive today in various incarnations in many state jurisdictions: "The dozen or so states which had theretofore used the New York procedure were thus free to adopt either of the others. The orthodox rule is now followed in the federal courts and in most states, while a substantial minority uses the Massachusetts rule."[139] A practical example of the Massachusetts rule is superbly evidenced in *State v. Parker*.[140] There the Court noted that after the judge determines voluntariness by a preponderance of the evidence, the jury must be instructed that before it may consider the confession on the issue of guilt or innocence, it must first find the confession voluntary beyond a reasonable doubt.[141] The jury is entitled to hear all relevant evidence of the confession's voluntariness.[142]

This, then, is the procedure governing the admissibility of confessions. This is the current state of the law. It is tedious and thorough. However, it is often not followed with the necessary meticulousness, and this is the problem. I will return later with a

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137. *Id*.

138. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, 2 Crim. Proc. § 10.5(a) (3d ed., 2012) (citing Lego v. Twomey, 404 U.S. 477, 481 n. 3 (1972)).

139. *Id*. *See also* E. H. Schlopler, Annotation, *Comment Note: Constitutional Aspects of Procedure for Determining Voluntariness of Pretrial Confession*, 1 A.L.R. 3d 1251 (2013); William G. Phelps, Annotation, *Duty of Court, in Federal Criminal Prosecution, to Conduct Inquiry Into Voluntariness of Accused's Statement—Modern Cases*, 132 A.L.R. Fed. 415 (2010).

140. 671 S.E.2d 619, 622, 627-30 (S.C. Ct. App. 2008).

141. *Id*. at 622.

142. *Id*. *See also* LaFave, et al., *supra* note 128.

recommendation on how to fix this, but first it is necessary to leave the law, strictly speaking, and address the social science of interrogation.

V. SOCIAL SCIENCE RESEARCH

Earlier in this article, I paraphrased and tweaked Mark Twain's famous quote: I said that the three kinds of lies are lies, damn lies, and police interrogations.[143] We have discussed that at length. However, it is now time to note the original quote again: "There are three kinds of lies: lies, damn lies, and statistics."[144] In Mark Twain's time, there was no such thing as social science research, at least, not anything that would be seriously recognized as such in the modern sense. However, "statistics," or better yet a certain statistical frame of mind, is surely what Mark Twain was thinking about when he said this. It is the mindset of many who oppose certain police interrogation techniques. As *The New Yorker* has recently informed us with respect to certain interrogation techniques, "Here, too, social scientists find reason for concern."[145] It is fair to inquire into the reliability of police methods. That is an inquiry we should never stop making. However, it is also fair to inquire into the reliability of the methods of those who oppose the police and the great weight of legal precedent on this matter. Thus far, they have failed to make a real impact on courts, as I have shown above.[146] Are the courts at fault for missing something? Perhaps, in looking more closely at the data, that is, "statistics," as well as the so-called "research," the courts have realized that the common law struck the right balance all along.

There is a substantial literature on this subject. Not all of it is of equal value. Currently, the most valuable and concise statement of the issues, law, and "science" surrounding this subject matter can be found in four works: (1) POLICE INTERROGATION AND AMERICAN JUSTICE, by Richard A. Leo; (2) POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, eds. G. Daniel Lassiter and Christian A.

143. *See* Twain *supra* note 4.

144. *Id*. It turns out there is a substantial literature on the misuse of statistical data and the like. *See* JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS (2001); JOEL BEST, MORE DAMNED LIES AND STATISTICS: HOW NUMBERS CONFUSE PUBLIC ISSUES (2004); JOEL BEST, STAT-SPOTTING: A FIELD GUIDE TO IDENTIFYING DUBIOUS DATA (2008); DARRELL HUFF, HOW TO LIE WITH STATISTICS (1993). Mark Twain would be proud. He was right!

145. *See* Starr, *supra* note 14, at 45.

146. *See* LaFave et al., *supra* note 125.

Meissner; (3) CRIMINAL INTERROGATION AND CONFESSIONS 5TH ED., by Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne, and (4) an excellent summary of the social scientific research is presented in *The Psychology of Confessions: A Review of the Literature and Issues* by Saul M. Kassin and Gisli H. Gudjonsson.[147]

The studies in question vary greatly in their methods and mode of analysis. For my purposes, I break them down as follows: DNA and physical evidence based studies, self reporting studies based on interviews of suspects and police investigators about their conduct during alleged interrogations, observational studies where an alleged independent expert/observer actually observed interviews, and lastly, controlled "lab" studies where individuals—often college students—are engaged in mock scenarios that supposedly allow us to draw conclusions about the behavior of real police and suspects in an actual interrogation.[148] DNA and physical evidence based studies usually

147. RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE (2008); POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013). *See also* THE INNOCENCE PROJECT, http://www.innocenceproject.org (last visited Feb. 3, 2014); John E. Reid & Associates, Inc., http://www.reid.com (last visited Sept. 21, 2013). As noted above, the literature is voluminous. However, there is some additional important literature. *See* Gisli H. Gudjonsson, *False Confessions and Correcting Injustices*, 46 NEW ENG. L. REV. 689 (2012); Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012); Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.S. DAVIS L. REV. 1407 (2011); Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox*, 85 CHI.-KENT L. REV. 179 (2010); Saul M. Kassin, et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010); Saul M. Kassin, *Inside Interrogation: Why Innocent People Confess*, 32 AM. J. TRIAL ADVOC. 525 (2009); Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551 (2007); Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579 (2007); George C. Thomas, III, *"Truth Machines" and Confession Law in the Year 2046*, 5 OHIO ST. J. CRIM. L. 215 (2007); Dale E. Ives, *Preventing False Confessions: Is Oickle Up to the Task?*, 44 SAN DIEGO L. REV. 477 (2007); Saul M. Kassin and Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33 (2004); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?,* 99 MICH. L. REV. 1168 (2001); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 89 J. CRIM. L. & CRIMINOLOGY 1465 (1999); Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

148. These types of studies are all addressed in the literature. *See* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and*

involve a situation where a suspect who confessed was later shown to be innocent because physical evidence or DNA analysis proved that the suspect simply could not have committed the crime.[149] Self-reporting studies are either done in person (by an interviewer) or in writing (on computer or via mail). Participants in the studies are asked a series of questions about why they confessed or, if the person is a police officer, what they believe about the interrogation process. Inferences are then drawn from these interviews by social scientists.[150] Observational studies should be obvious enough. Suspects and interviewers are observed by independent observers who analyze the situations they are watching.[151] Lastly, the controlled mock scenarios are the most interesting. Some are cleverly, but questionably, designed. Usually, but not always, college students are involved. They are engaged in clever mock scenarios from which it is thought data can be extrapolated that has relevance for the real world of police interrogations. Students/participants are placed in scenarios where they are engaged in some activity and are told to lie about it, or are accused of wrong doing when they did nothing wrong. Attempts are then made to get them to falsely confess.[152]

At the outset, there are a few points worthy of special note. It is absolutely clear that false confessions are a reality. We really do know that some innocent people admit to things they did not do, and some

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Issues, 5 PSYCHOL. SCI. PUB. INT. 33, 38-56 (2004); POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012) (various essays of this anthology address all four of the studies as I have broken them down); RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE, 195-236 (2008); Saul M. Kassin, et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3-28 (2010).

149. Saul M. Kassin, et. al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 3 (2010).

150. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 38-56 (2004); POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

151. *See* sources cited *supra* note 149.

152. *See* sources cited *supra* note 149. *See also* Christian A. Meissner, Melissa B. Russano & Fadia M. Narchet, *The Importance of a Laboratory Science for Improving the Diagnostic Value of Confession Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

guilty people will admit to more than they actually did.[153] Second, there is no clear theory, at least no front-runner in modern social science literature, as to why people do this. It appears there are nearly as many theories as researchers.[154] Third, and last, the rate of false confessions is unknown.[155] This later point is absolutely crucial in determining how to address the alleged false confession problem.

> However, there is perennial debate about the incidence rate of false confessions, with some scholars seeking to calculate estimates [citations omitted], and others maintaining that accurate incidence rates cannot be derived [citation omitted].[156]

In a recent work, the matter is put this way by "one of the most renowned experts on the psychology of interrogations and confessions:"[157]

> *The frequency with which false confessions occur during interrogation in different countries is unknown*. However, it is documented from anecdotal case histories and research on miscarriages of justice that false confessions do sometimes occur [citations omitted]. Kassin and Gudjonsson (2004)[[158]] commented: "*As no one knows the frequency of false confessions or has devised an adequate method of calculating precise incident*

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153. Kassin & Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 46-56 (2004); RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE, 195-236 (2008); Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 31-48 (G. Daniel Lassiter & Christian A. Meissner eds., 2012). *See also* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS, 339-377 (5th ed. 2013).

154. *See* sources cited *supra* note 149.

155. Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 31-48 (G. Daniel Lassiter & Christian A. Meissner eds., 2012); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 44 (2004).

156. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 33, 44, 48-49 (2004).

157. G. Daniel Lassiter, et. al., *Introduction: Police Interrogations and False Confessions – An Overview*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 4 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

158. *See* sources cited *supra* note 148.

> *rates, there is perennial debate over the numbers*" (p. 48).[159] The problem with high-profile cases is that they undoubtedly represent only the tip of the iceberg and focus primarily on the most serious cases, such as murder, rape, and terrorism [citation omitted]. There is evidence from *self-reported studies* conducted among *prisoners* [citation omitted], *young persons* [citation omitted], and those *with mental disorders* [citation omitted]. *Experimental studies* [citation omitted] using the *classic Alt key paradigm*[160] introduced by Kassin and Kiechel (1996) have shown that false confessions can be readily elicited by false accusations, psychological manipulation, and interrogative pressure [citation omitted].[161]

So, this is the latest from the social science front?[162] This conclusion hardly instills confidence in the social science of false confessions. Studies of the kind referenced in the immediately preceding quote were all discussed at length in the 2004 article I referenced earlier.[163] Nothing is new. It is time to take a close look at the kinds of studies relied on to justify this highly qualified and lukewarm conclusion. I mentioned them earlier. To repeat, the studies fall into four general categories: DNA and physical evidence studies, self-reporting studies, observational studies, and mock scenario studies.

These studies are ably discussed in Kassin and Gudjonsson's 2004 article, which I have already referenced.[164] First, a mock scenario type test was done to determine "investigator response bias."[165] The

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159. *See* sources cited *supra* note 148.

160. This refers to one of the mock scenarios using mostly college students that I will return to shortly. Also, the reference to "Alt key" is a reference to the "Alt" key on a typical computer key board. It is so named because the "test" involves students striking certain keys on a key board in response to certain prompts.

161. Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 36 (G. Daniel Lassiter & Christian A. Meissner eds., 2012) (emphasis added).

162. *See* sources cited *supra* note 142. *See also* Christian A. Meissner, Melissa B. Russano, & Fadia M. Narchet, *The Importance of a Laboratory Science for Improving the Diagnostic Value of Confession Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012) (not many new kinds of studies since the 2004 article, the studies seem to be basically of the same kind).

163. *See* Kassin & Gudjonsson *supra* note 157.

164. *See* sources cited *supra* note 148.

165. *See* sources cited *supra* note 148.

entire test involved a relatively small group of less than 100 people. About half were students and half were "real, experienced investigators."[166] Some were trained in the "Reid technique," though it appears this was done by assigning the Reid manual for reading and watching a few "Reid technique" videotapes.[167] There is no claim that the "Reid technique" was taught by persons approved by John E. Reid & Associates or other qualified professionals.[168] Apparently, the participants were told to watch videos of people being interrogated and asked to determine whether the person in the video was deceptive regarding the "mock crime" in question.[169] In the end, it was determined that the observers were biased "toward seeing deception" and that training in the "Reid technique" made them more biased.[170] It seems that similar tests have been done by others.[171]

Another test of the mock scenario sort set out to show that when confronted with false evidence, some participants tended "to internalize responsibility for that act, and to confabulate details consistent with that belief."[172] This is the now famous *Alt* key test, previously referenced.[173]

> In the first such study, Kassin and Kiechel (1996) tested the hypothesis that the presentation of false evidence can lead individuals who are rendered vulnerable to confess to a prohibited act they did not commit, to internalize responsibility for that act, and to confabulate details consistent with that belief. In this experiment, subjects typed letters on a keyboard in what was supposed to be a reaction time study. They were then accused of causing the experimenter's computer to crash by pressing a key they were instructed to avoid—at which point they were asked to sign a confession. All subjects were innocent, and all initially denied the charge. Two factors were independently varied. First, the subject's vulnerability was manipulated by varying the pace of the task, fast or slow. Second, the presentation of false evidence was manipulated by having a confederate tell the experimenter

166. *See* sources cited *supra* note 148.
167. *See* sources cited *supra* note 148.
168. *See* sources cited *supra* note 148.
169. *See* sources cited *supra* note 148.
170. *See* sources cited *supra* note 148.
171. *See* sources cited *supra* note 148.
172. *See* sources cited *supra* note 148.
173. *See* Gudjonsson, *supra* note 162.

> either that she did or that she did not witness the subject hit the forbidden key. Three levels of influence were assessed. To elicit compliance, the experimenter handwrote a confession and asked subjects to sign it. To measure internalization, he secretly tape-recorded whether subjects took responsibility when they later described the experience to a waiting subject, actually a second confederate (e.g., ''I hit a key I wasn't supposed to and ruined the program''). To measure confabulation, the experimenter brought subjects back into the lab and asked if they could reconstruct what happened to see if they would manufacture details (e.g., ''yes, here, I hit it with the side of my hand right after you called out the 'A' ''). Overall, 69% of all subjects signed the confession, 28% internalized guilt, and 9% confabulated details to support their false beliefs (see Table 5). More important were the effects of the independent variables. In the baseline condition, when the pace was slow and there was no witness, 35% of subjects signed the note—but not a single one exhibited internalization or confabulation. In contrast, when the pace was fast and there was allegedly a witness, all subjects signed the confession, 65% internalized guilt, and 35% concocted supportive details. Clearly, people can be induced to confess and to internalize guilt for an outcome they did not produce —and this risk is increased by the presentation of false evidence, a trick often used by police and sanctioned by the courts. Follow-up studies using this computer-crash paradigm have replicated and extended the false-evidence effect.[174]

What are we to make of such tests, this "science?" First, we should note that "[t]he interrogation room certainly presents a challenge to laboratory researchers who attempt to recreate the elements of police interrogation in a controlled environment."[175] "[I]t is impossible to precisely replicate the circumstances that a criminal suspect faces during interrogation."[176] So, how well have they been replicated here, in these two texts? I think not too well. Students and others involved in

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174. *Id*. at 54. *See also* Christian A. Meissner, Melissa B. Russano, and Fadia M. Narchet, *The Importance of a Laboratory Science for Improving the Diagnostic Value of Confession Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 118-9 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

175. *See* Meissner, *supra* note 175, at 118.

176. *Id*.

a social science professor's experiment surely know the stakes are not high for them. Nothing really bad is going to go wrong, it cannot. A real innocent person is not going to lose his/her life or liberty. A violent criminal will not go free if the participants made a wrong decision. This is a controlled experiment. Nothing during such an experiment can cause one to lose one's life or liberty for years to come. There will be no permanent social stigma based on what happens at such an event. Students in such an experiment surely know what the professor knows about such events, "[e]thical constraints likely always preclude researchers from creating situations in which participants believe they are under suspicion and are being interrogated for an actual criminal act."[177] When students show up for school in the morning, they know—barring some incredible unforeseen event—they will be going home at the end of the day. I submit that is not how suspects or police view the interrogation room. Suspects are more likely to know they will leave if they convince the police they are innocent, not if they confess to a crime.

What of the first mock scenario text I mentioned, the test concerning interrogation bias. What does it really prove? A few students read a manual and watch videos of people who they are told have committed a crime. Is this really the typical police station? Is this really like interrogation at all? These are not the kinds of data that would justify a court in abandoning well-established common law principles of law and evidence. One researcher has this to say of the mock scenario tests:

> Experimental research is particularly helpful in studying the conditions under which people make false confessions and allow the researcher to control for ground truth, but this kind of research has little ecological validity in terms of applying it to real-life individual cases.[178]

An additional point must be made regarding "investigator response bias." As was noted earlier, most of the issues raised by critics pertain to custodial interrogations. Police must have full probable cause in order to have someone in custody before an

177. *Id*.

178. Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 43 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

interrogation even begins.[179] This is a factor totally ignored by many of the social science "tests" and criticisms that police presume suspects are guilty during questioning. So, how does this work to protect the innocent and justify police suspicions toward those in custody?

> 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. The probable cause standard provides an appropriate threshold of protection from both the pressures of custodial interrogation and the unpleasantness of deceptive interrogation techniques.[180]

The so-called self-reporting studies are not better. One significant study involves self-reporting of inmates in Iceland and Northern Ireland.[181] The inmates were asked a series of questions, such as, "did you confess because of police pressure during the interview?" "Are you now pleased that you confessed?" "Do you now regret having confessed?" "Did you confess because you were frightened of the police?" "Did you feel you wanted to get it off your chest?" And, so on . . .[182] The self serving nature of all of this is simply overwhelming. One feels compelled to ask: "What did you expect them to say?" One scholar has noted:

> In many anecdotal case studies, ground truth is difficult to

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179. *See* sources cited *supra* note 110.

180. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1210 (2001). (indicating the same rationale would work for *Terry* stops). Terry v. Ohio, 392 U.S. 1 (1968). What probable cause does for the police and the accused in the arrest context, reasonable suspicion should do in the *Terry* stop context. Thus, the Fourth Amendment functions to guarantee reasonable behavior on the part of the police in the vast majority of situations where serious questioning takes place.

181. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOLOGICAL SCIENCE IN THE PUBLIC INTEREST 33, 47-8 (2004).

182. *Id*. at 47

> ascertain [citation omitted]. Similarly, in studies of false confessions among prisoners and community samples, the genuineness of the false confession is nearly impossible to corroborate.[183]

This would seem to hold for all the self-reporting studies.

Observational studies have their own unique problems. Does the observer have a bias? How much experience does the observer have in police interrogation? Do the participants to the interrogation know they are being observed?[184] While observers can reduce the likelihood of improper tactics by their presence, as long as the tactics are lawful it is hard to see what a mere observer can do. The observer could see whether a particular tactic was successful, but not whether it was fair or reliable. As noted many times above, police admit to using tricks and misrepresentation techniques during interrogation. Courts have approved it. We know what police actually do and can do in the interrogation room. That is not the debate. The debate is about whether what police actually do is fair and whether it produces reliable confessions.

Lastly, there is the DNA and physical evidence. This is somewhat obvious. DNA evidence can, at times, be retested. New physical evidence turns up which conclusively proves that the defendant simply could not be the perpetrator.[185]

> In about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.[186]

According to the Innocence Project, as of September 2013, there have

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183. Gisli H. Gudjonsson, *The Psychology of False Confessions: A Review of the Current Evidence*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 43 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

184. *Id*. at 46. *See also* Ray Bull & Stavroula Soukara, *Four Studies of What Really Happens in Police Interviews*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS, 81-96 (G. Daniel Lassiter & Christian A. Meissner eds., 2012).

185. Richard A. Leo & Steven A. Drizin, *The Three Errors: Pathways to False Confession and Wrongful Conviction*, POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2012); RICHARD A. LEO, POLICE INTERROGATIONS AND AMERICAN JUSTICE, 237-268 (2008).

186. *Understand the Causes: False Confessions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Feb. 3, 2014).

been "312 post-conviction DNA exonerations in ***United States history***."[187]

What does this mean? I shall take the Innocence Project claims at face value. First, it is a tragedy for anyone to be wrongfully convicted. However, these statistics must be put in perspective. This means, at best, we know that approximately 78 people have been wrongfully convicted where false confessions were also involved.[188] We know the confessions in these cases were false, because DNA evidence proved that the offenders in question did not commit the crimes.[189] However, what can we extrapolate from these statistics? Not much.[190] The FBI maintains the Uniform Crime Reports. These are the gold standard when it comes to criminal statistics in the United States. In 2011 (the crime statistics are not complete for 2012 as of this writing), law enforcement made a staggering 12,408,899 arrests in the United States. Of these, 1,639,883 were for property crimes and 534,704 were for violent crimes.[191] In 2011 approximately 1,598,780 people were incarcerated for crimes in federal and state institutions.[192] Keep in mind this is only for 2011, not for all of "United States history."[193] Anyone can do the mathematical extrapolations from here. Keep in mind we really do not know how many innocent people have been convicted. We only know for sure that the number is most likely infinitesimally small. Aside from hard DNA evidence, and some other forms of physical evidence, we do not have any way to calculate with certainty the number of innocents convicted throughout U.S. history.[194] We certainly do not know the current rate of conviction for innocents,[195] other than that it too is likely to be infinitesimally small. It is easy to quote Blackstone who said "better than 10 guilty persons escape, than

187. *Home page*, THE INNOCENCE PROJECT http://www.innocenceproject.org/ (last visited Feb. 3, 2014) (emphasis added).

188. *See* sources cited *supra* note 186.

189. *See* sources cited *supra* note 186.

190. Why not much? *See* Gudjonsson *supra* note 162.

191. *Crime in the United States 2011*, FBI NATIONAL INCIDENT BASED REPORTING SYSTEM, http://www.fbi.gov/about-us/cjis/ucr/nibrs/2011 (last visited Feb. 3, 2014).

192. E. Ann Carson & William J. Sabol, *Prisoners in 2011*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4559 (last visited Sept. 29 2013).

193. *See* Kassin & Gudjonsson, *supra* note 182.

194. *See* Gudjonsson *supra* note 162.

195. *See* Gudjonsson *supra* note 162.

that one innocent suffer."[196] However, we do not behave as if this were true, and we should not, we cannot.[197] Even if the Innocence Project is correct in every way, it appears our error rate is very low, though it is not, and surely never will be, zero.

What about the methodologies referenced above? As noted previously, I have divided the studies into four types: DNA and physical evidence based studies, self reporting studies based on interviews of suspects and police investigators about their conduct during alleged interrogations, observational studies where an alleged independent expert/observer actually observed interviews, and lastly, controlled "lab" studies where individuals—often college students—are engaged in mock scenarios that supposedly allow us to draw conclusions about the behavior of real police and suspects in an actual interrogation. I have addressed the first. DNA and physical evidence is truly hard science. The other three are not. While this is not the place for an in-depth discussion of social science theory and modeling, some basic problems are obvious in the false confession research. The cases analyzed by the Registry and the Innocence Project were not based on random selection, and suffer from severe problems regarding "selection bias."[198] In fairness, those who maintain the Registry and the Innocence Project are not social scientists whose main goal is to do research. They are advocacy groups who represent incarcerated defendants in and effort to achieve justice. However, as their cases do not represent a "scientific" sample, we cannot make statements about the rate of false convictions, especially those based on alleged false confessions. The interviews of prisoners and others done by some of the social scientists hardly past muster as good scientific evidence. In many cases the samples are small and limited. Inadequate sample size

196. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 352 (Clarendon Press ed. 1769).

197. *See* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY, 63-88, 171-193-212 (Cambridge 2006); Larry Laudan, *Is It Finally Time to Put 'Proof Beyond a Reasonable Doubt' Out to Pasture?* 9-24 (Univ. of Tex. Sch. of Law, Pub. Law & Legal Research Paper Series, Working Paper No. 194, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815321. Simple mathematic extrapolations will show that the error rate, at best, is far, far less than 1 in 10. It is less than 1 in 100, and less than 1 in 1000. There will always be some error rate, an error free criminal justice system is not a remote reality. In addition, there are real and substantial social costs for any system, like ours, which already falsely acquits or doesn't apprehend a great many offenders.

198. GARY KING, ROBERT O. KEOHANE, & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH, 115-149 (1994)

is in itself a major issue in reliable social science.[199] Personal interviews of prisoners, questionnaires to inmates, and tests like the Alt key do not give us a scientific picture of the problem of false confessions.

I would also note the National Registry of Exonerations.[200] The Registry is a source of information frequently used as a database by those who wish to find evidence to oppose police deception in interrogation. According to the Registry, there have been 1,304 exonerations since 1989.[201] Two major reports have been issued concerning exonerations by the Registry.[202] First, what does the Registry mean by "exoneration"?

> It means a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.[203]

Of course, "exoneration" is not the same as factual innocence.

> We do not claim to be able to determine the guilty or innocence of convicted defendants. In difficult cases, nobody can do that reliably. . . . For our purposes, the best we can do is rely on the actions of those who have the authority to determine a defendant's legal guilt.[204]

According to the Registry, why do innocent defendants confess?

> The primary reason that innocent defendants confess is that they are **coerced** into doing so – **frightened, tricked, exhausted or all three**. Sixty percent of the confessions we located were clearly **coerced**. An additional 12% of defendants denied making the

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199. *Id*. at 208-230.

200. THE NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Feb. 3, 2014).

201. *Id*.

202. *Exonerations in the United States 1989-2012*, THE NATIONAL REGISTRY OF EXONERATIONS http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited Feb. 3, 2014). *See also Exonerations in 2013*, THE NATIONAL REGISTRY OF EXONERATIONS http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf (last visited Feb. 4, 2014).

203. *See* Exonerations *supra* note 201.

204. *Id*. at 6.

> confessions that were attributed to them or denied that what they said was meant as an admission of guilt. Eleven percent of the confessions appear to have been voluntary. As the 2003 Report noted, "False confessions don't come cheap." **They usually require long, grueling interrogations, sometimes stretching over days**.[205]

Since my focus is false confessions, what percentage of the Registry's "exonerations" are attributable to false confessions? That is, in how many "exonerations" was an allegedly false confession admitted or used to obtain a conviction? The answer is 15%.[206] In calendar year 2013, it was 12%. False confession is the lowest ranking contributing

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205. *Id*. at 57-8 (emphasis added). One prominent scholar has concurred in his own analysis of the cases. That is, most of the false confessions are, in fact, "coerced" confessions. Regarding the exonerees, Professor Garrett studied, he had this to say:

> All of these exonerees waived their Miranda rights. All lacked counsel before confessing. Most were vulnerable juveniles or mentally disabled individuals. Most were subjected to long and sometimes highly coercive interrogations.

Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1058 (2010).

> Social scientists have long documented how pressure combined with repetition of a crime narrative may cause the suspect to internalize that narrative and repeat it, possibly becoming convinced of his own guilt. Only recently, however, have actual instances of such false confessions been documented. Pressures brought to bear on these exonerees ranged from threats combined with offers of leniency, to threats of physical force. Many described harrowing interrogations lasting many hours or days. Several described verbal or physical abuse.

Id. at 1064. Interestingly, regarding the Reid Technique, Professor Garrett comments as follows:

> Indeed, police have long known that suspects may admit to crimes that they did not commit for a range of reasons, including mental illness, desire for attention, desire to protect loved ones, or others. The Inbau and Reid manual cautions that "[t]he truthfulness of a confession should be questioned, however, when the suspect is unable to provide any corroboration beyond the statement, 'I did it.'" Further, police are trained not to leak facts. Police black out certain key information so that the public does not learn of it during the investigation. Thus, Inbau and Reid advise that, "When developing corroborative information, the investigator must be certain that the details were not somehow revealed to the suspect through the questioning process, news media, or the viewing of crime scene photographs." Police also know how important it is to document their efforts to keep certain facts confidential, because doing so later enhances the power of the confession in a subsequent prosecution or trial. Inbau and Reid recommend documenting in the case file the facts that are to be kept confidential "so that all investigators are aware of what information will be withheld."

Id. at 1067-68 (internal citations omitted). Thus, the Reid Technique seems to have some virtue after all.

206. *Id*. at 40.

factor according to the Registry.[207] Once again, in light of overall convictions for the same time period, and taking the statistics at face value, we are dealing with infinitesimally small numbers.[208] In addition, the fact that so many alleged false confession cases really do seem to involve coercion means that it was likely genuine coercion and not mere deception that made the difference. This is no small point given the analysis so far. I have argued that certain types of deception are permissible. However, I have steadfastly maintained that coercion in all forms under the due process voluntariness test voids confession and should continue to do so. We simply cannot equate deception and coercion. The courts do not do this, but this confusion continues to appear in discussions of Registry cases and Innocence project cases.

What do we make of all these numbers? Well, "there are three kinds of lies: lies, damn lies, and . . ." I'm sorry; I digress.

VI. CONCLUSION

The arguments against many forms of police deception in the interrogation room fail. The social science is not in a position to overturn long-standing, traditional common law rules that have prevailed in virtually every court to consider the issue, including the United States Supreme Court.

> 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. . . . But *Miranda* left [] 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. . . . 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. . . . On the other hand, broad limits on deception could result in the loss of many thousands of confessions by guilty

207. *See* Exonerations *supra* note 201.

208. *See* FBI *supra* note 192; Carson & Sabol *supra* note 193.

> 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. . . . 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.[209]

Nothing has changed, though serious issues have been raised. However, I do have four proposals that are all part of our shared common law legal tradition, though not all are universal. I believe they should be universal.

First, I suggest the adoption of the Massachusetts rule. Jurors should be more explicitly involved in assessing voluntariness. Allowing juries to review the voluntariness of confessions will give defendants another bite at the apple. The jury is our great bell-weather of justice, the "conscience of the community."[210] They will serve as an added defense against oppressive police tactics. They can only add to reliability, not detract from it.

Second, I propose that jurors be specifically instructed to find any statement made while in custody and during interrogation to have been made freely and voluntarily beyond a reasonable doubt before considering it on the issue of guilt or innocence. We need to be very explicit about this and tell the jury what to do and how to do it correctly. We should hold the prosecution to the reasonable doubt standard.

Third, the use of experts should be encouraged both before the court and the jury. However, the strict requirements of *Daubert v. Dow Chemical*[211] or *Frye v. United States*,[212] must be maintained for any expert testimony. This is especially so in light of some of the dubious science at issue in this context. So far, courts have been disinclined to allow expert testimony for good reasons. *Daubert* and *Frye* demand good reasons in order to qualify as expert testimony. Rigorously

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209. Laurie Magid, *Deceptive Police Interrogation Practices: How Far is too Far?*, 99 MICH. L. REV. 1168, 1209 (2001).

210. Jones v. United States, 527 U.S. 373, 382 (1999); Spaziano v. Florida, 468 U.S. 447, 487 (1984); United States v. Bailey, 444 U.S. 394, 435 (1980); Duncan v. Louisiana, 391 U.S. 145 (1968).

211. 509 U.S. 579 (1993).

212. 293 F. 1013 (D.C. Cir. 1923).

adhering to their requirements will make the process more reliable, not less so.

Fourth, the traditional common law principles are up to the task. The "totality of the circumstances" must be taken seriously. Detailed, thorough, and in-depth fact-finding must be made by the court in the first instance where a defendant attacks a confession. This is not new; it has always been demanded by the common law. Judges need to return, with renewed vigor and caution, to the kind of analysis they should have always been doing from the start. There is good reason to believe that many of the confession cases challenged by critics involved confessions that may be involuntary under the due process test.[213] A rigorous and searching "totality of the circumstances" test remains the best way to "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."[214]

The balance struck by current law is fair, reasonable, and constitutional. There is no error free procedure. We cannot avoid errors, but the procedures I have outlined will diminish the risk of false confessions and preserve the delicate balance struck by the common law. This is a balance that preserves defendants' rights and also recognizes the importance of police interrogation in the investigation of crime and the protection of the public from criminals.

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213. There is a concern raised by many scholars that *Miranda* actually makes it easier to introduce a bad confession. Once judges and juries hear than Miranda rights were given, they stop carefully analyzing the situation. The defendant was read his/her rights, so they knew they did not have to talk, right? Other subtle forms of coercion or deception are ignored and glossed over. Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012). I do not advocate the overruling of *Miranda*. That is an issue beyond the scope of this article. *Miranda* is still sound law, we simply cannot stop there.

214. *See* Magid *supra* note 212.