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You Can't Handle the Truth: A Primer on False Confessions

Craig J. Trocino*

I. INTRODUCTION

> In matters of truth and justice, there is no difference between large and small problems, for issues concerning the treatment of people are all the same.
>
> –Albert Einstein

It often comes as a surprise to the general public that one of the leading causes of wrongful convictions is false confessions.[1] After all, it seems to defy logic that a person would confess to a crime, especially a rape or a murder, that he did not commit. It is difficult to believe that someone could be so fooled, cajoled or coerced into falsely admitting to a crime that carries a life sentence or even the death penalty. The first reaction is that this must be wrong. The next reaction is that if false confessions do exist, they must surely be rare and only made by children

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1 *The Causes of Wrongful* Conviction, THE INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction. As of the writing of this article there have been 325 DNA exonerations (last visited Jan. 29, 2016). Of the 325 wrongful convictions, 27 percent were caused by false confessions. *Id.*

or the mentally disabled.[2] But false confessions do, indeed, exist for a myriad of reasons and are not limited to children or the mentally disabled. Otherwise normal adults succumb to pressures and give false confessions. False confessions are a known fact and a serious problem in the criminal justice system.[3]

This article will introduce the reader to false confessions and their impact on the criminal justice system. False confessions impact the life of the individual who by means of psychological tactics widely employed by police and investigators, has a confession extracted from him for a crime he did not commit. Police have long used the so-called Reid[4] technique in the process of extracting confessions. False confessions pose various problems for the criminal justice system. They, quite obviously, lead to the conviction of innocence people. They also negatively impact justice for the crime victim and the public because if a false confession is extracted from an innocent individual, that means that the real perpetrator remains free to commit more crime and injure others.[5] They also short-circuit the investigatory process because once a confession is obtained, investigations generally cease, and all focus of the prosecution is geared toward the confession.[6]

Although the precise rate of false confessions is difficult to determine, recent history has left a wake of devastated lives wrought by false confessions.[7] What is definitively known about false confessions is that of the 325 DNA exonerations since 1989, twenty-seven percent were caused by false confessions.[8] Furthermore, the research and literature over the last two decades have concluded that false confessions in America "occur with alarming frequency."[9] "Social psychologists, criminologists, sociologists, legal scholars, and independent writers have

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2 *See generally* Steve A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 968–74 (hereinafter Drizin & Leo); Laurel LaMontagne, Comment, *Children Under Pressure: The Problem of Juvenile False Confessions and Potential Solutions*, 41 W. ST. U. L. REV. 29, 32 (2013–14).

3 Drizin & Leo, supra note 3, at 920.

4 *See* Saul M. Kassin, *On the Psychology of Confessions, Does* Innocence *Put* Innocents *at Risk*?, 60 AM. PSYCHOLOGIST, 215, 216 (2005).

5 *See, e.g.*, James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1689–91 (2013).

6 See Richard J. Ofshe & Richard J. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984 (1997).

7 *See* Kassin, *supra* note 5, at 215.

8 THE INNOCENCE PROJECT, *supra* note 2.

9 Drizin & Leo, *supra* note 3, at 920. *See also,* GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATION AND CONFESSION 205-212 (2003); Richard A. Leo & Richard J. Ofshe, The Consequences of Gals Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations, 88 J. CRIM. L. & CRIMINOLOGY 429, 444–49 (1998).

documented so many examples of interrogation-induced false confessions in recent years that there is no longer any dispute about their occurrence."[10] Even though the general public remains largely unaware of the crisis of false confessions, the mountain of documented cases of false confessions is "likely to represent only the tip of a much larger iceberg."[11] Nonetheless, there are high profile cases of false confession that illustrate their disastrous outcomes; from the infamous Central Park Five[12] to Henry Lee McCollum,[13] to the recently exonerated Fairbanks Four.[14]

False confessions have imprisoned innocent people only to allow the true perpetrator to remain at large and commit more crime. Indeed, had the police apprehended the real perpetrator of the Central Park Jogger rape, Matias Reyes, instead of extracting false confession from five young boys,[15] Reyes would not have been free to commit several other rapes and a murder. On June 14, 1989, after the five young boys were arrested for the Central Park Jogger rape, Reyes, "raped a pregnant woman in her apartment after locking her three small children in another room, where they could hear their mother screaming for her life."[16] "She died [from her stab wounds] three hours later."[17] Thus, the fallout from false confessions is not measured only in the context of the persons wrongfully convicted. Rather, it must be measured by the damage to society and the credibility of the criminal justice system.

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10 Drizin & Leo, *supra* note 3, at 921.

11 *Id*. *See also*, Richard A. Leo & Richard J. Ofshe, *The Social Psychology of Police Interrogations: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 191 (1997).

12 Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 482 (2006). *See also People v.* Wise, 61 A.D.3d 900 (2009).

13 Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina*, SLATE (Sep. 3, 2014, 5:37 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.html. *See also* State v. McCollum, 433 S.E.2d 144 (N.C. 1993); McCollum v. North Carolina, 512 U.S. 1254, 1254-55 (1994) (Blackmon, J., dissenting); Callins v. Collins, 510 U.S. 1141, 1143 (1994).

14 Josh Saul, *The Fairbanks Four's Brutal Fight for Freedom*, NEWSWEEK (January 12, 2016, 5:39 AM), http://www.newsweek.com/2016/01/22/alaska-fairbanks-four-and-how-murder-convictions-end-414201.html.

15 Khory Wise was sixteen, Yousef Salem and Antron McCray were fifteen and Raymond Santana and Kevin Richardson were fourteen at the time of the so called confessions. People v. Wise, 752 N.Y.S.2d 837, 843 (Sup. Ct. 2002).

16 James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1689–90 (2013).

17 *Id*. at 1690.

II. THE INHERENT AND DANGEROUS POWER IN AUTHORITY

It is not wisdom but Authority that makes a law.

–Thomas Hobbes[18]

Those in authority are perfectly placed to take advantage of the powerless on many levels. While not all power devolves into authoritarianism, there is a long historical context for those in power to extract confessions. On American soil, one can start with the Salem Witch Trials dating back to 1692 in which numerous women, under torture, confessed to being witches and possessing supernatural magical and evil powers.[19] Regardless of the specific motivation for extracting a confession, the interrogations that lead to confessions are usually administered by the powerful against the powerless. Justice Black addressed this very fact in *Chambers v. Florida*, where he stated,

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.[20]

It is also telling that Justice Black chose to reference a 1931 report from the National Commission of Law Observance and Enforcement in a footnote to the above quotation. In that footnote Justice Black quoted the report thusly, "[t]hat the third degree is especially used against the poor and uninfluential is asserted by several writers, and confirmed by official informants and judicial decisions." [21] Such abuses have been recognized

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[18] *See* George Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 982 (1981).

[19] *See* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 4 (2010).

[20] Chambers v. Florida, 309 U.S. 227, 237-38 (1940).

[21] *Id.* at 238 n.11 (quoting IV NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON PROSECUTION 159 (1931)).

by the legal community since at least the 1930's, yet it still comes as shock to, and is viewed with disbelief by, the majority of people today.

From the 1800's through the mid-1930's, American police routinely used the "third degree" and other physical and psychological torment to extract confessions from suspects.[22] Eventually, as a result of a report from the National Commission of Law Observance and Enforcement and cases from the Supreme Court of the United States, interrogation techniques transformed from the physical to the psychological.[23] Although these new techniques are not physically brutal they are psychologically aggressive: "As psychological methods of interrogation have evolved over the years, they have become increasingly sophisticated, relying more on subtle forms of manipulation, deception and coercion."[24] The techniques of coercion have evolved from the rack and the thumbscrew to psychological manipulation and coercion that leaves no visible scars. Psychological coercion also uses euphemistic and antiseptic language to downplay the coercive nature of the interrogation.[25] Thus, it has long been known that coercive interrogation tactics are used on the least-powerful among us but in the seventy five years since *Chambers*, nothing has changed the powerful's desire to use more and more sophisticated methods of coercion against the "weak, friend-less and powerless."[26]

III. THE POWER OF CONFESSIONS

> Who are you going to believe, me or your lying eyes?
>
> –Groucho Marx

Groucho Marx may have sardonically edited his famous line had he known the way in which false confessions are used and perceived in court. Confessions are desired because they are very powerful evidence of guilt.[27] Having a confession makes a successful prosecution easier and punishment more severe. [28] Not only does the confession sway

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22 Drizin & Leo, *supra* note 3, at 908–09.

23 *See* Brown v. Mississippi, 297 U.S. 278 (1936); *see also* Ashcraft v. Tennessee, 322 U.S. 143 (1944); *see also* IV NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON PROSECUTION (1931).

24 Drizin & Leo, *supra* note 3, p. 910.

25 See *infra* notes 73–75.

26 *Chambers*, 309 U.S. at 238.

27 *See* Drizin & Leo supra note 2, at 923; *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV 1051, 1084 (2010).

28 *Id.* at 922.

jurors, it sways prosecutors, defense lawyers, investigators, forensic scientists, judges and the general public.

For instance, in the case of the Central Park Five, the fact that five young boys ages fourteen to sixteen "confessed" caused the majority of the public to know and believe they were guilty without any corroborating or additional evidence. During that tumultuous time in New York, Donald Trump, less than two weeks after the incident and before hearing the first piece of evidence, declared the boys guilty and advocated that they be executed.[29] Trump took out a full page ad in the New York Times and called for reinstating the death penalty in New York based on the Central Park Jogger attack.[30] Trump stated the boys "should be forced to suffer . . . .I am not looking to psychoanalyze them or understand them, I am looking to punish them."[31] Even after Matias Reyes confessed to the crime, DNA established that Reyes was the sole rapist, and the boys were exonerated, Trump, without the burden of any evidence other than coerced confessions, declared the five guilty because "[t]hese young men do not exactly have the pasts of angels."[32]

Confessions are also especially powerful to jurors. So powerful in fact, that a false confession can lead to a conviction even in the face of DNA evidence excluding the false confessor from the crime.[33] Travis Hayes was seventeen years old when he was convicted of a convenience store robbery with a number of witnesses present.[34] His interrogation lasted from 11:00 pm to 5:00 am the next morning.[35] Hayes offered few if any details, implicated his codefendant, Ryan Mathews, and admitted to being the getaway driver.[36] Before trial, DNA testing was done on a mask worn by the perpetrator. The DNA from the mask excluded both Hayes and Mathews. But on the strength of a false confession both were nonetheless convicted.[37]

Not only do false confessions unduly sway lay people, the general public and jurors, but they also infect the professionals working in the criminal justice system clouding the views of judges, prosecutors, police

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29 N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1350–51 (2004).

30 *Id.*

31 *Id*.

32 Ryan Sit, et al., *EXCLUSIVE Donald Trump Slams NYC for $40 M Central Park Five Deal While Convicted Rapist Maintains His Guilt*, N.Y. DAILY NEWS (June 21, 2014), http://www.nydailynews.com/new-york/nyc-crime/central-park-dad-40m-settlement-article-1.1837710.

33 Garrett, *supra* note 29.

34 *Id*.

35 *Id*

36 *Id.*

37 *Id*.

and even defense lawyers. Most people, even those intimately involved in the criminal justice system still will not consider the notion that a confession could be false. Police often close a case as solved once a confession is obtained and forgo all other avenues of investigation even if the confession is wholly inconsistent with or contradictory to the evidence collected.[38]

With regard to prosecutors, a confession leads to more severe and more numerous charges, and make prosecutors less likely to engage in plea negotiations.[39] Likewise, defense lawyers are prone to succumb to a notion of hopelessness when facing a client who confessed and thereby pressure the client to plea.[40] Given that the American criminal court system is largely one of pleas and not trials,[41] false confessions have a significant impact on innocent individuals as they move through the system. The innocent person who falsely confessed is very likely to be confronted with prosecutors who charge more severely and defense lawyers who do not believe the protestations of innocence and thereby pressure to enter a guilty plea to a crime they did not commit.[42]

If the innocent person who falsely confessed proceeds to exercise his constitutional right to trial, the false confession will also color the judge's view of the case. A confession makes it more difficult to obtain pretrial release by bail or other means.[43] Additionally, trial judges rarely suppress confessions, and if the person is convicted at trial, he will be sentenced more severely than without the confession.[44] Even Supreme Court Justices can be swayed by false confessions.

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[38] Ofshe and Leo, *supra* note 7, at 984.

[39] Paul G. Cassell & Bret Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 905–13 (1996).

[40] Ofshe & Leo, *supra* note 7. This can also be seen in the deplorable representation of Brendan Dassey by his appointed lawyer, Len Kachinsky, in the Netflix docuseries *Making a Murder*. Not only did counsel immediately believe the false confession of his seventeen year-old mentally disabled client, he sent his own investigator in to extract a further confession and called the police to further falsely inculpate his client.

[41] Dr. Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea-Bargaining*, 2 TEX. A& M L. REV. 385, 389 (2015). Indeed, Justice Kennedy noted that "criminal justice today is for the most part a system of pleas, not a system of trials." Lafler v. Cooper,132 S. Ct. 1376, 1388 (2012).

[42] Thirty one of the 325 DNA exonerations pleaded guilty to a crime they did not commit. *When the Innocent Plead Guilty*, THE INNOCENCE PROJECT (Jan. 26, 2009), http://www.innocenceproject.org/news-events-exonerations/when-the-innocent-plead-guilty.

[43] Drizin & Leo, *supra* note 3, at 922.

[44] *Id.* at 923. The reason for more harsh penalties is that "judges are conditioned to punish defendants for claiming innocence (the logical extension of not accepting the prosecutor's plea bargain and sparing the state the expense of a jury trial) and for failing to express remorse and apologize for his wrongdoings" (citing Daniel Givelber, *The Adversary System and Historical Accuracy: Can We Do Better? in* WRONGLY

In 1984, Henry Lee McCollum was convicted of the rape and murder of an eleven year old girl in North Carolina.[45] His conviction was secured solely through a confession.[46] Mr. McCollum was mentally disabled, had an IQ between 60 and 69 and a mental age of a nine-year-old.[47] He was convicted on the basis of that "confession" and sentenced to death.[48] In 1994, Justice Blackmun proclaimed that he viewed the death penalty unconstitutional in all respects in his dissent in *Callins v. Collins*.[49] In that dissenting opinion Justice Blackmun famously wrote "I shall no longer tinker with the machinery of death."[50] Justice Scalia, in his concurrence in *Callins*, derided Justice Blackmun's newly found enlightenment on the death penalty and specifically referenced Mr. McCollum's case. Appearing certain of McCollum's guilt, Justice Scalia stated that death by lethal injection is preferable to the way the victim died in the McCollum case. He went on to state lethal injection,

looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional—for example, the case of the 11–year–old girl raped by four men and then killed by stuffing her panties down her throat. See *McCollum v. North Carolina*, cert. pending, No. 93–7200. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.[51]

Justice Scalia was so persuaded by the confession of a man with the intellectual functioning of a nine-year old as to present Mr. McCollum as unassailably guilty and a poster child for the death penalty. However, on September 2, 2014, Henry Lee McCollum and his half-brother Leon Brown were exonerated by DNA in the rape and murder of the eleven-

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CONVICTED: PERSPECTIVES ON FAILED JUSTICE 264–65 (Saundra O. Westervelt & John A. Humphrey eds. 2001)).

45 State v. McCollum, 433 S.E.2d 144, 164 (N.C. 1993).

46 North Carolina v. McCollum, No. 83CRS15506-07, 2014 WL 4345428, at *1 (N.C. Super. Sept. 2, 2014).

47 *McCollum v. N. Carolina*, 512 U.S. 1254, 1255 (1994) (Blackmun, J. dissenting from denial of cert.)

48 McCollum v. North Carolina, 512 U.S. 1254 (1994).

49 Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J. dissenting from denial of cert.)

50 *Id.* at 1145.

51 *Id.* at 1142–43 (1994) (Scalia, J. concurring).

year-old girl.[52] Mr. McCollum served thirty years on death row for a crime he did not commit.[53] Mr. McCollum and Mr. Brown were convicted entirely on the false confession.[54] "No physical evidence — either at the time of their arrests or at any time since — linked Mr. McCollum or Mr. Brown to the scene or the commission of this crime."[55] DNA not only eviscerated the State's theory that Mr. McCollum was guilty, but the DNA "along with other circumstantial evidence, show[s] a strong likelihood that the serial rapist and murderer, Mr. Artis, alone, raped and murdered [the victim]."[56]

Thus, not only can lay people and jurors be swayed by the power of false confessions, a Justice on the highest court in America can be so convinced of guilt based solely on a false confession as to stake the existence of the death penalty on that confession and misperception of guilt, even where there was "no physical evidence" connecting Mr. McCollum "to the scene or the commission of this crime."[57] False confessions have a wide-ranging impact. They impact everyone from the general public, to jurors, prosecutors, defense lawyers, trial judges and even appellate judges.

III. DECEPTION DETECTION AND SUBJECTIVE TRUTHS

> You can't handle the Truth.
>
> –Colonel Nathan R. Jessup, A Few Good Men

Given the power of confessions it would seem that there would be safeguards in place to help prevent circumstances from allowing authorities to extract false confessions from innocent individuals. In reality some of the techniques that exist in order to extract confessions tend to cause the innocent to confess.[58] For decades, police and other interrogators have used the Reid technique.[59] This comes from the procedure devised by Fred E. Inbau, John E. Reid, Joseph P. Buckley

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52 North Carolina v. McCollum, No. 83CRS15506-07, 2014 WL 4345428, at *1 (N.C. Super. Sept. 2, 2014).

53 *Id*. *See also* Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina*, SLATE (Sept. 3, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.html.

54 *Id.*

55 *Id.*

56 *Id*. at *3.

57 *Id.* at *1.

58 Kessin, *supra* note 8, at 216.

59 Garrett, *supra* note 3, at 1066.

and Brian C. Jayne (hereinafter Inbau et al.)[60] The training manual is routinely used in police interrogation training.[61] Its main claim is that the Reid technique can train interrogators to detect deception.[62]

Even though Inbau, et al., claim their technique imbues the user with special skill to be able to detect when someone is being deceptive, the scientific data fails to support this.[63] Indeed, untrained interrogators are no better than chance and the trained interrogators are only slightly better than chance at detecting deception.[64] In addition to failing to significantly increase the ability to detect deception, the Reid technique has the effect of over-inflating the interrogator's perception of his ability.[65] In other words, a Reid trained interrogator is not much better than chance at detecting deception but, dangerously, he becomes convinced that he is based solely on the training. This is dangerous because when and innocent subject is telling the truth about being innocent, but the interrogator believes based on his "training" that the person is lying, the tone of the interrogations take a much more aggressive confrontational turn and last significantly longer and more intense.[66] This is the psychological equivalent from moving from browbeating to the rack or thumbscrew.

As mentioned above, the basic tenant of the Reid technique is "deception detection." Among other topics in the manual, there is a section regarding the analysis of behavioral and linguistics cues that an interrogator should know in order to discern between truth and deception.[67] Inbau, et al., claim to have conducted their own empirical studies finding an eighty-three percent success rate in identifying deception.[68] However, this result "substantially exceeds human lie detection performance in any of the world's laboratories."[69] Nonetheless, the Reid proponents argue in the face of contrary scientific data that their own empirical data are superior.[70]

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60 FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATIONS AND CONFESSIONS (5th Ed. 2013).

61 Kassin, *supra* note 8, at 216.

62 *Id.*

63 *Id.*

64 *Id.* at 217.

65 *Id.* at 216.

66 *See Id.* at 219.

67 *See* INBAU, et al., *supra* note 60, at 70–84.

68 Kassin *supra* note 8, at 216.

69 *Id.*

70 INBAU, et al., *supra* note 60, at 66–67.

All of the other research indicates that people fare no better than chance at detecting deception.[71] Additionally, even those trained and those with relevant experience such as judges, customs inspectors and polygraph examiners perform only slightly better than chance.[72] The research also indicates a troubling by-product of the training in deception detection. "Across studies, investigators and trained participants, relative to naïve controls, exhibited a proclivity to judge targets as deceptive."[73] In other words, if one is told their training imbues them with the power to detect deception, everything that does not fit within the narrow confines of the narrative that the person being interrogated is guilty must therefore be a lie. This pathology proves the old adage that if one is a hammer, the entire world looks like a nail.

Beyond the above problems, Reid trained interrogators are taught to use antiseptic and euphemistic language in describing interrogations. In the Reid Technique, a distinction is made between an interview and an interrogation.[74] An interview, which precedes an interrogation is "non-accusatory" and designed to establish rapport.[75] An interrogation on the other hand is accusatory.[76] The semantic difference cannot be overstated in context of its use or training. Clearly, "interview" connotes agreement and casual conversation whereas "interrogation" conjures up images of intense questioning and even enhanced interrogations or coercive techniques. Inbau, et al. caution their trainees about the use of each individual word, stating

While testifying in court, the investigator inevitably describes this conversation with the defendant as an "interview." This is so even if it lasted four hours and clearly involved repeated accusations of guilt. Conversely, a rookie police officer may be overheard telling a fellow officer about a traffic stop he made the night before: "yeah this guy initially claimed he didn't know he was speeding but after a little 'interrogation' he came up with an excuse for going over the limit – I got him to confess.[77]

Obviously, the training is to downplay the confrontational and accusatory nature of an "interrogation" in order to make the "confession" seem more voluntary and therefore more damaging to the accused. The

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71 Kassin *supra* note 8, at 217. *See* Bella M. DePaulo et al., *Deceiving and Detecting Deceit*, *in* THE SELF AND SOCIAL LIFE, 323–70 (Barry R. Schenker ed., 1985); *see also* Miron Zuckerman et al., *Verbal and Nonverbal Communication of Deception*, *in* 14 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 1 (Leonard Berkowitz ed., 1981).

72 Kassin *supra* note 8, at 217.

73 *Id.*

74 INBAU, et al., *supra* note 60, at 3–4.

75 *Id.*

76 *Id.* at 5.

77 *Id.* at 3.

entire tone of the training anecdote above verges of the Orwellian. The "investigator" not interrogator is instructed to describe the "interrogation" as merely a conversation. Then in this "conversation" they use the psychological tactics from the training to extract a confession from the suspect; even it if takes four hours of intense questioning and accusations of guilt.[78] Yet when they testify in court before a jury the entire process is described nonchalantly as a consensual conversation that occurred during an interview.

This desire to get to a confession can and has led to a diminishment of the truth-seeking function of criminal courts because it diminishes actual investigatory work.[79] This is starkly evident in the case of the Central Park Five where the police focused solely on getting the young boys to confess while actual investigation would have caught Matias Reyes, the real perpetrator. Put another way, the entire scenario of Reid taught interrogations is dedicated to vindicating the police assumption of guilt and winning by getting a confession all while downplaying and minimizing the inherently coercive nature of the process in court.

The disingenuousness in the training and its presentation to juries is quite startling. The Reid technique trains its pupils in the art of propaganda to minimize the coercion inherent in interrogations. However, it has long been known and understood that custodial interrogations are coercive by nature. Indeed, the United States Supreme Court has declared that, any police interview of an individual suspected of a crime has "coercive aspects to it."[80] The Court noted that when the subject of the interrogation is in custody, there is a heightened risk "that statements obtained are not the product of the suspect's free choice."[81] As far back as the *Miranda*[82] decision, the Court was aware that custodial interrogations are fraught with "inherently compelling pressures."[83] The physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely."[84] Given just these characteristics of interrogations the Court has noted that, "custodial police interrogation, by its very nature, isolates and pressures the individual . . . ."[85] As such there is a large body of developed

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78 *Id.* at 3; 99; 107; 115; 137; 149; 155; 161; 167; 175; 181.
79 Drizin & Leo, *supra* note 3, at 922.
80 Oregon v. Mathiason, 429 U.S. 492, 495 (1977),
81 Dickerson v. United States, 530 U.S. 428, 435 (2000).
82 Miranda v. Arizona, 384 U.S. 436 (1966).
83 *Id*., at 467.
84 J.D.B. v. North Carolina, 131 S. Ct. 2194, 2401 (2011) (quoting *Miranda*, 384 U.S. at 467).
85 *Dickerson*, 530 U.S. at 435.

empirical evidence that these pressures "can induce a frighteningly high percentage of people to confess to crimes they never committed."[86]

Another significant problem with the Reid Technique is while it acknowledges that false confessions have occurred, it spends less than on half of one page of discussion on the topic 198 pages of text.[87] The manual's conclusion, without any citation to evidence or scientifically based data, is that false confessions are caused by improper interrogator conduct.[88] Blaming false confessions on the interrogator using the Reid Technique, rather than the technique itself, seems to be the last refuge of proponents of a system that is known to cause significant damage to the lives of people, the safety of communities, and the integrity of the American justice system.

Beyond the psychological tactics used, another troubling technique largely unknown by the general public in the Reid Technique, and in American interrogations as a whole, is the idea that the police are allowed to lie to the suspect in order to extract a confession.[89] Inbau et al., train their interrogators that using misrepresentations in their deception detection is permissible. They describe that it is permissible to do things,

such as falsely minimizing the victim's injuries, and/or by falsely telling the subject that gunshot residue was found on his person; that he was identified by eye witnesses; that surveillance video implicated him; that his blood was found on the victim; that his DNA matches the sperm recovered from the victim; that his fingerprints were found at the scene; that hair and fiber evidence places him in the victim's home or car; or, that his accomplice passed a polygraph test implicating him.[90]

In other words, the police, in detecting deception are allowed and encouraged to use deception and lies to induce a confession.[91] However, the Reid proponents do not see this as a problem. The manual explicitly states that misrepresenting evidence or minimizing the moral seriousness of the crime does not lead to false confessions.[92] However, this ignores the very real false confessions in the Central Park Five case which were

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86 Corley v. United States, 129 S. Ct. 1558, 1570 (2009) (citing Drizin & Leo, *supra* note 4).

87 Inbau, et al., *supra* note 59, at 194. The Manual actually spends more time challenging the admissibility of expert testimony on false confessions than it does on the dangers of false confessions. This appears to be an attempt to insulate the Reid Technique from critical challenge.

88 *Id.* at 195.

89 *Id.* at 193.

90 *Id.*

91 *Id.* at 194

92 Inbau, *supra* note 57, at 195.

extracted by telling the young boys lies about the other boys confessing and implicating them. None of the boys admitted to the rape but they were coerced in admitting to being an accomplice and implicated the others. [93]

While it can be argued that police deception and trickery in an interrogation can render the confession involuntary or a violation of due process, those avenues are rarely successful.[94] Trickery that misrepresents the strength of the case against the suspect is usually permitted.[95] Notwithstanding the long list of permitted lies Inbau et al. train their interrogators to engage in, some courts draw the line at creating evidence. In *State v. Cayward*, the Second District Court of Appeal in Florida held that the state violated due process when it created a false report from a DNA lab that falsely implicated the suspect.[96] Thus, while the police's ability to lie in order to gain a confession is not limitless, the bar for truthfulness for police in interrogations has been set disturbingly low.

IV. CONCLUSION

> Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.
>
> –Dr. Martin Luther King, Jr.

In the popular Netflix docuseries *Making a Murderer*, a confession is seen being extracted from a sixteen-year old with learning disabilities named Brendan Dasey. He eventually alleged the confession was false. During closing arguments in the case, the prosecutor declared that innocent people do not confess. Perhaps the prosecutor was completely ignorant of the fact that twenty-seven percent of the DNA exonerations since 1989 were caused by false confessions.[97] Perhaps he was ignorant of two decades of scientific studies establishing that people falsely

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93 People v. Wise, 752 N.Y.S. 2d 837, 843 (Sup. Ct. 2002).

94 Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L.L. REV. 105, 145 (1997).

95 *Id. See also e.g.*, Frazier v. Cupp, 394 U.S. 731 (1969)(officer's misrepresentation regarding an accomplice's statement insufficient to render confession involuntary.)

96 State v. Cayward, 552 So. 2d 971, 974 (Fla. 2d DCA 1989).

97 *The Causes of Wrongful* Conviction, INNOCENCE PROJECT, http://www.innocence project.org/causes-wrongful-conviction (last visited Feb. 3, 2016).

confess at "an alarming frequency."[98] Perhaps he was ignorant of the tactics in the Reid Technique that foster false confessions. Perhaps he was ignorant of the Supreme Court's opinion in *Corley v. United States*, which recognized that there is evidence that psychological pressures of interrogation can induce a "frighteningly high percentage" of people to falsely confess.[99] Being unaware of the above, the prosecutor perhaps believed that a sixteen-year-old, learning-disabled boy freely confessed after being politely "interviewed" by police. Or, perhaps he was aware of all or some of the foregoing and actively chose to present a statement to a jury in a murder case that is scientifically and factually wrong in order to secure a conviction. Given the data collected over the past decades, there is no question that false confessions exist.[100] The only thing missing is a concerted effort to do something about the problem.

The vast majority of the criminal justice system will not consider the likelihood that a confession is false absent being forced to by DNA. This is the case even when the confession is contrary to, or inconsistent with, other collected evidence.[101] The long standing us-versus-them mentality in the criminal justice system fosters a "win at all costs mind set". Indeed, the United States Supreme Court has recognized police are "engaged in the often competitive enterprise of ferreting out crime."[102] Once the competitive enterprise takes hold, the zeal to win overtakes the admonition to seek justice.

The American Bar Association's Criminal Justice Section Standards on the Prosecution Function state, "the duty of the prosecutor is to seek justice, not merely to convict."[103] The ABA standards continue and state,

It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."[104]

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98 Drizin & Leo, *supra* note 3, at 920. *See also*, GISLI GUDJONSSON, *supra* note 10, at 205–12; Richard A. Leo & Richard J. Ofshe, *The Consequences of Gals Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogations*, *supra* note 10, at 444–49 (1998).

99 Corley v. United States, 556 U.S. 303, 321 (2009).

100 Drizin & Leo, *supra* note 3, at 906–07 (2004).

101 Ofshe & Leo, *supra* note 7, at 984.

102 Johnson v. United States, 333 U.S. 10, 14 (1948). Although *Johnson* was a Fourth Amendment case, the concept of a competitive point of view in assessing the facts is equally applicable in the context of false confessions. In other words, the existence of false confessions and their potential occurrence in a given case must be viewed outside the "competitive enterprise of ferreting out crime."

103 ABA CRIMINAL JUSTICE STANDARD, PROSECUTION FUNCTION 3-1.2(c).

104 *Id*., 3-1.2(d).

In order to meet the goal of seeking justice and improving its administration, the notion of winning at all costs must subside. To the extent it persists then the admonition in *Chambers v. Florida* will likely persist as well. It is well time to put an end to "[t]he testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations."[105] There are measures to be taken to stem the tide of false confession in American courts and they are well documented.[106] From mandatory videotaping of all interrogations to more enlightened means of interrogation beyond the Reid Technique. The causes of false confessions and their damage are known. Now is the time to stimulate efforts for remedial action.

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[105] *See* Chambers v. Florida, 309 U.S. 227, 237 (1940).

[106] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV 1051, 1113 (2010).