**Fordham Urban Law Journal**

Volume 33 | Number 3 Article 3

2006

# A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques

Miriam S. Gohara
*Criminal Justice Project, NAACP Legal Defense and Education Fund, Inc.*

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**Cover Page Footnote**
This article is dedicated to the memory of Prof. Welsh White who painstakingly reviewed several drafts and was immeasurably generous with his expertise and feedback. I also owe and enormous debt of gratitude to Tanya Coke for her review and edits and to Dan Korobkin for substantial research assistance. Many thanks also to Maria Pulzetti and Jessica Zertuche for additional research assistance.

# A LIE FOR A LIE: FALSE CONFESSIONS AND THE CASE FOR RECONSIDERING THE LEGALITY OF DECEPTIVE INTERROGATION TECHNIQUES

*Miriam S. Gohara**

> "History amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence."[1]
>
> "The principle that a State may not knowingly use false evidence . . . to obtain a tainted conviction [is] implicit in any concept of ordered liberty."[2]

## I. INTRODUCTION

The December 2002 exoneration of five young men who were convicted of the infamous 1989 attack on a jogger in Central Park highlighted the ease with which standard interrogation techniques can produce false confessions that lead to wrongful convictions.[3]

When the jogger was attacked in 1989, the public was convinced that the five Harlem youths, who repeatedly incriminated themselves and each other, were guilty beyond doubt. Meanwhile, the actual attacker committed

* Assistant Director, Criminal Justice Project, NAACP Legal Defense and Educational Fund, Inc.; B.A., Columbia 1994; J.D., Harvard 1997. This article is dedicated to the memory of Prof. Welsh White who painstakingly reviewed several drafts and was immeasurably generous with his expertise and feedback. I also owe an enormous debt of gratitude to Tanya Coke for her review and edits and to Dan Korobkin for substantial research assistance. Many thanks also to Maria Pulzetti and Jessica Zertuche for additional research assistance.

1. Haynes v. Washington, 373 U.S. 503, 519 (1963).

2. Napue v. Illinois, 360 U.S. 264, 269 (1959).

3. *See, e.g.*, Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. For a more detailed discussion of the jogger case, see Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 894-900 (2004); N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1346-60 (2004).

three more rapes and a rape and murder before he was caught.[4] In 2002, when the case unraveled after the actual perpetrator confessed to attacking the victim by himself, the public scratched its collective head while trying to understand why not only one, but several, of the boys had apparently falsely confessed to their involvement in the brutal attack on the jogger.

A significant part of the answer may be attributable to the court-approved interrogation techniques that police have been using for decades in station houses across the country. Principal among these is the routine deception of suspects about a range of issues which influence a suspect's willingness to make an incriminating statement. In the Central Park jogger case, family members of the five exonerated youths have alleged that the police tricked the boys into believing that they were simply giving statements as witnesses, not as suspects, and that once they provided taped interviews, they would be allowed to go home.[5] In addition, the interrogation tactic of leading each boy to believe that others had already confessed and implicated the others was particularly effective.[6] For example, Kharey Wise, one of the exonerated five youths, said he initially told police he knew nothing about the jogger. But when police told him that his friends had said that he was at the scene, "he started making up facts 'just to give them what they wanted to hear.'"[7] Wise said that the police told him he would be able to go home after giving his statement, but instead they took him to jail. In his words, "'I fell for it.'"[8] Other deceptive tactics were also employed. One detective even admitted to falsely telling one of the suspects that his fingerprints would be found on the jogger's shorts.[9]

The case of Martin Tankleff presents another high profile example of the pitfalls of police trickery on youthful and other vulnerable suspects. Tankleff was seventeen years old when his parents were discovered stabbed to death in their Long Island home.[10] Tankleff, who had been asleep in the house at the time his parents were killed, immediately became

4. *See* Jim Dwyer, *Amid Focus on Youths in Jogger Case, a Rapist's Attacks Continued*, N.Y. TIMES, Dec. 4, 2002, at B1.

5. *See House of Cards: Experts Say Interrogation Techniques Can Encourage False Confessions* (ABC News broadcast Sept. 26, 2002).

6. *See id.*

7. *Id.*

8. *Id.*

9. *See* Drizin & Leo, *supra* note 3, at 897 & n.20 (citing THOMAS MCKENNA, MANHATTAN NORTH HOMICIDE 11 (1991) (authored by Detective Thomas McKenna, who investigated the Jogger case)).

10. Bruce Lambert, *Long Jailed In Killings, Son Tells of Ordeal*; *Fighting Conviction in Parents' Murder with Focus on New Evidence*, N.Y. TIMES, Dec. 5, 2004, at A43 [hereinafter Lambert, *Long Jailed in Killings, Son Tells of Ordeal]*.

the prime suspect.[11] During the interrogation, the lead detective, by his own admission, told Tankleff untruthfully that his father had awakened at the hospital and identified him as the attacker.[12] Tankleff told the police that his father had never lied to him and that if he identified him as the attacker, maybe he had "blacked out" and in fact killed his parents.[13] The police agreed with Tankleff that he had probably committed the crime but blocked the memory. Tankleff then provided a possible narrative of the crime but was unable to provide any details of the crime apart from information detectives had presented during his interrogation.[14] The detective penned a confession based on this narrative which Tankleff refused to sign and immediately disavowed.[15] The statement contained details of the crime which were irreconcilable with the physical evidence.[16] Nevertheless, the statement was admitted at Tankleff's trial and became the centerpiece of the case against him. Though he remains incarcerated for the crime, post-conviction investigation has revealed strong evidence pointing to his father's business partner, Jerry Steuerman, as the likely culprit.[17] The police never investigated Steuerman, despite the fact that he had a motive to murder the victims—he owed them hundreds of thousands of dollars and had been arguing with them about this shortly before they died—and despite the fact that he staged his own suicide shortly after the Tankleff murders.[18] Police explained their failure to investigate Steuerman

11. *Id.* at A48.

12. *Id.* The detective also misrepresented a number of other facts during Tankleff's interrogation. He told Tankleff that his hair was found in his mother's hands and that a test proved that he had used his shower after his parents' murder, and speculated that he had done so in order to wash off their blood. *See* Bruce Lambert, *Awaiting Next Word in 17-Year-Old Murder Case*, N.Y. TIMES, Jan. 3, 2006, at B1.

13. *See* John Springer, *New Evidence Gives Hope to Long Island Man Convicted of Killing Parents* (Court T.V. broadcast July 20, 2004).

14. S*ee* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 458 (1998) [hereinafter Leo & Ofshe, *The Consequences of False Confessions]; see also* Lambert, *Long Jailed In Killings, Son Tells of Ordeal supra* note 10, at A48.

15. Lambert, *Long Jailed In Killings, Son Tells of Ordeal, supra* note 10, at A48.

16. For example, even though the bodies showed signs of a struggle, no blood or tissue were found under Tankleff's fingernails and his own body exhibited no bruises or scratches. The murder weapons identified in the statement, a knife and a barbell, were found in the home without a trace of blood. *Id.*; *see also* Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 458.

17. Lambert, *Long Jailed in Killings, Son Tells of Ordeal, supra* note 10, at 48; Bruce Lambert, *Youth Says Father Admitted to '88 Long Island Murders*, N.Y. TIMES, Nov. 14, 2005, at B6 (reporting that Joseph Creedon, an alleged accomplice of Steuerman's, implicated himself and Steuerman in the Tankleff murder).

18. Lambert, *Long Jailed in Killings, Son Tells of Ordeal, supra* note 10, at 48.

by saying that they "were confident they had solved the case with [Martin] Tankleff's arrest."[19] Several witnesses have since come forward and admitted that associates of Mr. Steuerman recruited them to attack the Tankleffs.[20] Martin Tankleff's motion for a new trial was denied by the trial court in Suffolk County, New York.[21]

Courts have repeatedly held that police are free to mislead suspects about everything from the existence of physical evidence against them, to the results of polygraphs, to the statements of alleged cohorts incriminating them in the crime. The bedrock cases sanctioning police deception, however, pre-date the advent of DNA testing and the many exonerations that followed from DNA test results.[22] As the Central Park Jogger and Tankleff cases demonstrate, interrogation practices in which police misrepresent evidence against suspects can and do lead to false confessions and wrongful convictions. Examination of actual wrongful convictions and additional empirical data demonstrating the correlation between deceptive interrogation practices and false confessions provide a basis for reconsidering the line of cases that allow police to use trickery to obtain confessions. Such reconsideration is particularly critical because at the time those cases were decided, it was assumed that deceptive interrogations would not lead to false confessions.

This article reviews the law on deceptive interrogation practices, discusses empirical evidence of the role police deception plays in eliciting false confessions and argues that the law should circumscribe interrogation techniques that rely on misrepresentation to induce suspects into incriminating themselves.[23] This article also asserts that there are good policy reasons, in addition to the increasing exposure of wrongful convictions, which should encourage courts and legislators to proscribe the use of deception by law enforcement in a criminal justice system expressly designed to elicit the truth about a crime.[24]

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19. *Id.*

20. *See id.*; Springer, *supra* note 13.

21. Bruce Lambert, *Verdict Upheld in 1998 Killings of L.I. Couple*, N.Y. TIMES, Mar. 18, 2006, at B1.

22. For a more detailed description of the advent of wrongful conviction research, and the impact of DNA on the study of false confessions specifically, see Drizin & Leo, *supra* note 3; *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005) ("The rate of exonerations has increased sharply over the fifteen year period of this study, from an average of twelve a year [through the early 1990s] to an average of forty-two a year since 2000.").

23. *See also* Welsh S. White, *Miranda's Failure To Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1246-47 (2001) [hereinafter White, *Miranda's Failur*e] (arguing police deception may induce false confessions).

24. *See* Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213 (1942);

Numerous articles have described the phenomenon of false confessions and some have examined the factors which cause people to implicate themselves in crimes they did not commit.[25] Little has been written to date, however, about the specific impact on the reliability of confessions of standard interrogation techniques including trickery and deception of suspects. Moreover, despite increasing numbers of wrongful convictions that have resulted from demonstrably false confessions, criminal justice reforms aimed at protecting the innocent have missed the opportunity to reconsider laws which allow police to trick suspects about a wide variety of subjects, including the strength and availability of incriminating evidence, in order to induce a confession.[26] This article provides data and policy arguments in favor of adopting reforms of standard interrogation tactics in which police mislead suspects about evidence and other factors which suspects weigh heavily before deciding whether to incriminate themselves. The article also proposes novel, specific reforms limiting the use of standard interrogation techniques and recommends challenges to confessions begotten from interrogations employing trickery.

Part II reviews the case law affirming the use of deceptive law enforcement interrogations. In pre-*Miranda* cases, the Supreme Court recognized that in some circumstances, trickery during interrogations was coercive and rendered confessions inadmissible.[27] In post-*Miranda* cases, however, the Court has applied a "totality of the circumstances" test and indicated that, so long as the police comply with *Miranda*, statements obtained through deceptive interrogation practices will almost invariably be admissible.[28] So as the law stands today, trickery which does not deprive a suspect of his *Miranda* rights, does not by itself invalidate a confession. Part III describes and then critiques deceptive police techniques recommended in leading law enforcement training manuals. After describing these techniques, Part III examines empirical data bearing on whether these techniques are likely to produce reliable statements. Part IV argues that in light of the growing body of empirical evidence demonstrating that law enforcement trickery plays a significant role in false confessions, defense lawyers should challenge confessions made after interrogations involving police trickery, courts should circumscribe

Mooney v. Holohan, 294 U.S. 103 (1935); see also Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 384 (2004) (noting that executive privilege claims that shield evidence from disclosure to the grand jury or at trial may not be expansively construed because "they are in derogation of the search for truth") (internal citation omitted).

25. *See infra* section III.B.

26. *See infra* section IV.A

[27] *See infra* notes 31-41.

[28] *See infra* notes 42-73.

interrogation techniques which employ lies to induce a suspect to confess, and legislatures should regulate or proscribe those deceptive interrogation techniques—such as false evidence ploys—which have proven most likely to elicit false confessions.[29]

## II. REVIEW OF UNITED STATES SUPREME COURT AND LOWER COURT CASES CONSIDERING THE LEGALITY OF DECEPTIVE LAW ENFORCEMENT INTERROGATION TECHNIQUES

Prior to its 1966 decision in *Miranda v. Arizona*,[30] the Supreme Court, applying a due process voluntariness test, recognized, in several cases, that the police use of deceptive interrogation tactics played a significant role in producing involuntary confessions.[31] In *Leyra v. Denno*,[32] Leyra asked the police to allow him to see a physician because he was suffering from sinus problems.[33] The police brought in a psychiatrist who posed as a general physician. The Supreme Court held that the "subtle and suggestive" questioning by the psychiatrist amounted to a continued interrogation of the

29. False evidence ploys and other overt forms of deception are certainly not the only type of deceptive interrogation practices. As psychologist Saul Kassin has written, the "minimization" technique prescribed by leading interrogation manuals, allows police to refrain from explicitly promising a suspect lenience in exchange for a confession—a practice which would render the confession inadmissible in court—but still allows the interrogator to *suggest* implicitly that the confession will ameliorate the consequences of the suspect's having incriminated himself. *See* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 222 (2005) [hereinafter Kassin, *Does Innocence Put Innocents at Risk?*] ("[I]t is now clear that . . . [minimization] circumvents the exclusion of promise-elicited leniency 'under the radar.'"); *see also infra* notes 92-111 and accompanying text (discussing the minimization technique in more detail).

30. 384 U.S. 436 (1966).

31. Under the "due process voluntariness test," courts evaluated the admissibility of a suspect's statement by determining under the totality of the circumstances whether the statement was voluntary, i.e., "the product of a rational intellect and a free will." Blackburn v. Alabama, 361 U.S. 199, 208 (1960). *See* White, *Miranda's Failure*, *supra* note 23, at 1215-17 (discussing the "minimal safeguards" against pernicious interrogation tactics that *Miranda*'s core protections have actually afforded suspects); *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005) (tracing the history of confession law before and after *Miranda* and advocating for a departure from *Miranda*'s focus on subjective "voluntariness" under the Fifth Amendment's due process clause and instead adopting an "objective penalties test" under the self-incrimination clause, which would render inadmissible confessions compelled by the use of certain defined "objective penalties"); *id*. at 540 ("This test would hold any confession inadmissible when it has been obtained by imposing an objective penalty [defined within the article based on a review of relevant law] on the suspect under interrogation to provoke speech or punish silence.").

32. 347 U.S. 556 (1954).

33. *Id*. at 559.

suspect without his knowledge.[34] This deception and other circumstances of the interrogation rendered Leyra's confession involuntary.[35] Similarly, in *Spano v. New York*,[36] the Court considered a case in which the suspect regarded one of the interrogating officers to be a friend. The Court held that the officer's false statements, which suggested that the suspect's actions might cost the officer his job, were a key factor in rendering the confession involuntary.[37]

Even where the defendant fell short of establishing that the police actually lied to him, in the pre-*Miranda* era, the Court was willing to consider the coercive effect of deceptive interrogation techniques. For example, in *Lynumn v. Illinois*,[38] the Court held that police threats to remove a suspect's children and the government aid she received to support them, overbore her will and coerced her confession, because she was not familiar enough with the legal system to know whether the police actually had the authority to carry out their threats.[39]

In an oft-quoted phrase from *Miranda*, the Supreme Court acknowledged the potentially coercive effect of obtaining confessions through police trickery and intimidation: "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery."[40] The Court indicated that the deceptive tactics recommended by standard interrogation manuals fostered the coercive environment of police interrogation.[41]

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[34] *Id.*at 561.

35. *Id.*

36. 360 U.S. 315 (1959).

37. *Id.* at 323.

38. 372 U.S. 528 (1963).

39. *Id.* at 534; *see also* Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (holding that the suspect's right to counsel had been violated where the interrogating officers obtained the suspect's incriminating statement by tricking him into believing that his alleged accomplice had incriminated him, and noting that counsel is particularly critical when "the police carry out a process of interrogations that lends itself to eliciting incriminating statements").

40. Miranda v. Arizona, 384 U.S. 436, 461 (1966). Shortly after *Miranda* was decided, critics cited concerns that the procedures it requires actually obscure, rather than elucidate, the truth in criminal trials. *Cf. Withrow v. Williams*, 507 U.S. 680, 707-708 (1993) (O'Connor, J., dissenting in part); *Miranda*, 384 U.S. at 542 (White, J., dissenting) (objecting that the Court's holding in *Miranda* "establish[ed] a new . . . barrier to the ascertainment of truth by the judicial process"); *see also* Godsey, *supra*, note 31, at 508-09 (describing contemporaneous criticisms of *Miranda*).

41. *Miranda*, 384 U.S. at 457.

### A. Trickery in the Post-*Miranda* era

Following *Miranda*, which established that a suspect's custodial statements cannot be used against him unless police apprise the suspect of his rights to remain silent and to counsel, the Supreme Court precedent concerning interrogation trickery changed direction almost immediately. Three years after *Miranda*, in *Frazier v. Cupp*,[42] the Court undermined the suggestion that confessions obtained through trickery may be coercive. *Frazier* held that the voluntariness of a confession induced by police trickery must be evaluated under a "totality of the circumstances" test.[43] In *Frazier*, police used two forms of trickery to extract a statement from the suspect. First, they told Frazier that another man whom Frazier and the victim had been seen with on the night of the crime had confessed to involvement in the crime.[44] The investigating detective also suggested, sympathetically, that Frazier had started a fight with the victim because the victim made homosexual advances toward him.[45] The Court held that Frazier's confession was voluntary, and cited only the officers' false statements regarding the co-defendant's confession as trickery.[46] It did not consider the feigned sympathy about the homosexual advance as such.[47] *Frazier* established that police deception itself would not be enough, on its own, to render a confession involuntary. Rather, according to *Frazier*, police deception is one factor among many that a court should consider in evaluating the voluntariness of a suspect's incriminating statements.[48]

The evolution to a "totality of the circumstances" test suggests that once

42. 394 U.S. 731 (1969).

43. *Id.* at 739.

44. *Id.* at 737.

45. *Id.* at 738.

46. *Id.* at 739.

47. *Id.*

48. *Id.* A couple of additional Supreme Court cases have addressed police trickery directly. In *Moran v. Burbine*, 475 U.S. 412, 432-34 (1986), the Court held that police deception of an attorney, whom a suspect's family had contacted to represent him, did not render the suspect's three instances of waiver of his *Miranda* rights and subsequent confession involuntary. The attorney had attempted to contact the suspect by calling the police station. *Id.* at 417. Police told the attorney that the suspect would be questioned the following day, and never notified the suspect that the attorney had tried to contact him. *Id.* The suspect then waived his rights and gave the incriminating statements. *Id.*

In a 1984 decision, New York v. Quarles, 467 U.S. 649 (1984), the Court held that a statement police obtained without Mirandizing a suspect, and the gun to which the statement led the authorities, were admissible pursuant to the "public safety" exception to *Miranda*. *Id.* at 655-56. In dissent, Justice Marshall, joined by Justices Brennan and Stevens, asserted that in order to avert a potential public emergency, police may "of course" resort to coercion and trickery to reveal life-saving information, but that the Fifth Amendment prohibited the admissibility of such statements at trial. *Id.* at 686 (Marshall, J., dissenting).

the Court established the *Miranda* safeguards, it was willing to allow police leeway to use interrogation tactics which had previously been considered coercive.[49] This result is evinced by the scores of federal decisions recognizing exceptions to *Miranda*'s admonition that deceptive interrogation tactics may compromise a confession's voluntariness, especially in cases where *Miranda* warnings have been administered.[50]

In 2004, the Court established that when interrogation tactics deprive a suspect of an adequate understanding of her *Miranda* rights, they render the resulting incriminating statements involuntary. *Missouri v. Seibert*[51] involved the interrogation of Patrice Seibert for an arson which resulted in the death of a teenager.[52] The officer who interrogated her had been instructed to refrain from giving Seibert *Miranda* warnings.[53] At the police station, the officer left Seibert alone in the interrogation room for twenty minutes and then interrogated her for thirty to forty minutes, all without Mirandizing her.[54] After Seibert admitted that she intended for the teenager to die in the fire, the officer gave her a twenty-minute coffee and cigarette break.[55] The officer returned, turned on a tape recorder and gave Seibert the *Miranda* warning.[56] She signed a waiver of rights, and the officer resumed the interrogation, starting by confronting Seibert with her pre-*Miranda* admissions.[57] Seibert, who was later charged with first-degree murder, sought to exclude both her pre-warning and post-warning statements.[58] At the suppression hearing, the officer who interrogated Seibert testified that he made a "conscious decision" not to Mirandize her at the outset. He acknowledged that he acted pursuant to an interrogation

49. *See Frazier*, 394 U.S. at 739.

50. *See* White, *Miranda's Failure*, *supra* note 23, at 1220

> Two factors have contributed to the infrequency with which lower courts find due process violations in post-[*Miranda*] waiver confession cases. First, lower courts conflate the test for determining a valid Miranda waiver with the test for determining a voluntary confession because the tests are so similar. Both tests require the court to assess the 'totality of [the] circumstances' to determine whether the suspect's action was voluntary. . . Second, the Supreme Court's limited application of the voluntariness test during the post-*Miranda* era has probably increased lower courts' natural inclination to disfavor involuntary confession claims.

*Id.*

51. 542 U.S. 600 (2004).

52. *Id.* at 604-05.

53. *Id.* at 604.

54. *Id.* at 604-05.

55. *Id.* at 605.

56. *Id.*

57. *Id.*

58. *Id.*

technique whereby officers are instructed to withhold the warnings, question the suspects, then give the warnings, repeat the questions, and use the suspects' pre-warning statements against them.[59] He further acknowledged that Seibert's post-*Miranda* statement was repetitive of her pre-warning statements.[60] She was convicted of second-degree murder.[61] On direct appeal, the Missouri Supreme Court reversed Seibert's conviction on the grounds that her post-*Miranda* statements were the product of her "invalid first statement" and should have been suppressed at trial.[62] The United States Supreme Court affirmed and held that the *Miranda* warnings administered to Seibert were delivered "mid-interrogation" and were therefore ineffective in protecting her Fifth Amendment rights.[63] In reaching this conclusion, the Court gave great weight to the fact that the officer's questioning of Seibert was "systematic, exhaustive, and managed with psychological skill."[64] This coupled with the facts that: the first and second interrogations were conducted by the same officer; both interrogations took place in the same station house; a mere fifteen to twenty minutes lapsed between the two interrogations; and the officer repeatedly made reference to the first interrogation during the second, rendered it "reasonable to regard the two sessions as part of a continuum," and thereby nullified the effect of the *Miranda* warning delivered between Seibert's two statements.[65]

Although *Seibert* lays groundwork for some limits on deliberately deceptive interrogation tactics,[66] the case fell short of establishing clearly

59. *Id.* at 609-10. The court noted:

> An officer of [the Rolla, Missouri] police department testified [at Seibert's suppression hearing] that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked . . . Consistently with the officer's testimony, the Police Law Institute, for example, instructs that 'officers may conduct a two-stage interrogation . . . At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court.'

*Id.* (quoting POLICE LAW INST., IL. POLICE LAW MANUAL 83 (Jan. 2001-Dec. 2003) (emphasis in original) ).

60. *Id.* at 606.

61. *Id.*

62. *Id.* (citing Missouri v. Seibert, 93 S.W.3d 700, 701 (2002)).

63. *Id.* at 617.

64. *See id.* at 616.

65. *See id.* at 616-17.

66. Note that *Seibert* reinforces the post-*Miranda* trend that an interrogation practice which undermines *Miranda* will likely render a confession involuntary, but that once

discernible standards for assessing when trickery renders a confession involuntary. Moreover, *Seibert* only directly applies to cases involving the deliberate withholding of *Miranda* warnings. It makes no explicit statement about the use of other sorts of deception, in some instances blatant untruths, used to trick suspects into confessing in cases where they have been Mirandized legitimately. In other words, the Court refrained from seizing the occasion to affirm the principles established in its *Leyra*, *Spano*, and the other pre-*Miranda* cases which recognized that under some circumstances deliberately lying to a suspect during interrogation *per se* nullified statements obtained therefrom.[67]

The federal courts of appeals have applied and expanded on the Supreme Court's tolerance of deceptive police practices to induce confessions. Several circuit court decisions have held confessions to be voluntary where police have misrepresented the existence of physical evidence linking the suspect to the crime;[68] where they have fabricated statements of

*Miranda* is invoked, police are granted wide berth in employing deceptive interrogation techniques. In fact, Justice Kennedy concurred in the judgment on a narrower ground: that there must be a finding that the police *intentionally* employed a tactic designed to undermine *Miranda* warnings before a statement should be considered involuntary. *Id.* at 621-22 (Kennedy, J., concurring).

67. *See supra* notes 27-34 and accompanying text.

68. *See* United States v. Byram, 145 F.3d 405, 408 (1st Cir. 1998)

> [T]rickery is not automatically coercion. Indeed, the police commonly engage in such ruses as suggesting to a suspect that a confederate has just confessed or that police have or will secure physical evidence against the suspect. While the line between ruse and coercion is sometimes blurred, confessions procured by deceits have been held voluntary in a number of situations.

*Id.*; Ledbetter v. Edwards, 35 F.3d 1062, 1070-71 (6th Cir. 1994) (holding that under the totality of the circumstances, use of phony evidence including picture of fingerprint misrepresented as being from crime scene, telling suspect he had been identified in photo array, and creating a staged scene where a police officer acting as the victim "identified" the suspect through glass in the police station did not render the confession involuntary, and noting that it was obtained by "means of legitimate law-enforcement methods that withstand constitutional scrutiny"); *see also* Lucero v. Kerby, 133 F.3d 1299, 1311 (10th Cir. 1998) (finding confessions voluntary where police falsely informed the defendant that his fingerprints had been found at the victim's home; "misrepresentations, without more, do not render an otherwise voluntary confession involuntary"); United States v. Welch, No. 93-4043, 1994 U.S. App Lexis 26574, at *6 (6th Cir. Sept. 19, 1994) (finding that an officer's telling the defendant that "new DNA test[ing]" had shown that her daughter had not died of Sudden Infant Death Syndrome and that strong circumstantial evidence linked the defendant to the girls' deaths did not render her confession involuntary); Green v. Scully, 850 F.2d 894, 903-04 (2d Cir. 1988) (finding that confession was voluntary despite police "'chicanery'" of falsely telling the defendant that his fingerprints matched prints taken off blood in the victims' apartment); Sotelo v. Ind. State Prison, 850 F.2d 1244, 1251-52 (7th Cir. 1988) (finding confession voluntary where police, *inter alia*, falsely told the suspect that the results of a polygraph indicated that he was lying about his innocence, which along with other tactics induced his confession).

accomplices implicating the suspect being questioned;[69] where they have made false promises of leniency;[70] where they have misrepresented the intention to prosecute or the seriousness of the charges against the suspect;[71] where police have falsely promised the suspect psychiatric help

69. *See* United States v. Velasquez, 885 F.2d 1076, 1088-89 (3d Cir. 1989) (deciding that a confession was voluntary although detectives falsely informed the suspect that her alleged accomplice had been released after making statements against her and these false statements made the government's evidence look much stronger than it actually was); United States v. Petary, 857 F.2d 458, 461 (8th Cir. 1988) (citing *Frazier v. Cupp* and holding that under the totality of the circumstances, interrogating a suspect for six to seven hours who had not slept for twenty-four hours, had consumed beer but no food, and telling him that his alleged accomplice was talking to agents was not coercive); United States v. Castaneda-Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984) (finding the confessions of husband and wife co-defendants voluntary after police falsely told the husband the wife had confessed, he confessed, and then they returned to the wife with the husband's statements and she also confessed); *see also* Schmidt v. Hewitt, 573 F.2d 794, 801 (3d Cir. 1978) (remanding to the trial court for a hearing on voluntariness after officers falsely told the suspect his accomplices had confessed and interrogated him for five days without allowing him to see his mother); *cf.* Nelson v. Fulcomer, 911 F.2d 928, 940-41 (3d Cir. 1990) (remanding for further fact finding where, after invoking his Fifth Amendment right to remain silent, the suspect was confronted with his alleged accomplice, the two had a conversation in which the accomplice said he admitted to the crime, and the suspect made inculpatory remarks; the court noted that if the police had falsely told the suspect that the accomplice had confessed before placing them in the room together, such tactic would be prohibited as a ploy likely to induce a confession, pursuant to *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980), but that if the accomplice was simply placed in the room without more, the confession would not meet the test of being reasonably likely to elicit an incriminating response).

70. *See* United States v. Flemmi, 225 F.3d 78, 91 & n.5 (1st Cir. 2000) (finding that a confession was voluntary when given in response to a promise of immunity from an FBI agent without authority to grant immunity) ("The mere fact that an unfulfilled promise was made in exchange for a person's statement does not constitute coercion . . . . Of course trickery can sink to the level of coercion, but this is a relatively rare phenomenon."); United States v. Rojas-Martinez, 968 F.2d 415, 418 (5th Cir. 1992) (finding implicit promises to let suspects return to Mexico insufficient to render confessions involuntary); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990) ("[I]t is well settled that police may use small deceptions while interrogating witnesses . . . [and] police are free to solicit confessions by offering to reduce the charges against the defendant."); *cf.* United States v. Powe, 591 F.2d 833, 836 (D.C. Cir. 1978) ("[I]t is firmly established that self-incriminating statements induced by promises or offers of leniency shall be regarded as involuntary and shall not be admitted into evidence for any purpose.").

71. *See* United States v. Haynes, No. 00-4675, 2001 WL 1459702 at *8 (4th Cir. Nov. 19, 2001) (finding a confession voluntary where police staged a room to give the impression that a "massive investigation" of the defendant for a triple homicide was ongoing, though the defendant had been arrested on charges of cocaine distribution); *see also Byram*, 145 F.3d at 408 (holding that the suspect's statements were voluntary where police gave him false assurances that he would not be prosecuted); United States v. Matthews, 942 F.2d 779, 782 (10th Cir. 1991) (finding the suspect's statements voluntary where he was led to believe that if he cooperated, no charges would be brought against him); Miller v. Fenton, 796 F.2d 598, 609-10 (3d Cir. 1986) (finding the confession voluntary although police lied about the victim's status, though she was dead, the officer represented at the beginning of the

in exchange for a statement;[72] and where they have misled the suspect about the strength of the evidence against him.[73]

### B. Impermissible Trickery

A few courts have circumscribed deceptive interrogation practices that they have considered extreme in some way.[74] Some have also suggested that any interrogation practices likely to result in false confessions are impermissible.[75] For example, at least two state courts have made a distinction between verbal misrepresentations and fabricated tangible evidence and have held that the boundaries of deceptive interrogation techniques must be drawn at the latter. In *State v. Cayward*,[76] a Florida appeals court held that the fabrication of scientific reports implicating a suspect and the presentation thereof to the suspect during his interrogation rendered his confession invalid. The court cited several policy justifications for its holding:

> In addition to our spontaneous distaste for the conduct we have reviewed in this matter, we have practical concerns regarding use of false reports beyond the inducement of a confession. Unlike oral misrepresentations, manufactured documents have the potential of indefinite life and the

interview that she was alive and told the suspect "you are not a criminal"); *cf.* Hart v. Attorney Gen. of Fl., 323 F.3d 884, 894-95 (11th Cir. 2003) (holding that the suspect's confession was involuntary given the totality of the circumstances surrounding the interrogation where a police officer whom the suspect "trusted" told him that the "cons" of having an attorney present were that the attorney would tell him not to answer the officer's questions; on the grounds that such misleading information rendered the suspect's waiver of his Miranda rights involuntary).

72. *See Green*, 850 F.2d at 903 (holding that confession was uncoerced where detectives, *inter alia*, promised to obtain psychiatric help for suspect); *Miller*, 796 F.2d at 610 (same); Jarrell v. Balkcom, 735 F.2d 1242, 1250 (11th Cir. 1984) (rejecting petitioner's argument that his confession was involuntary because police officer said that as far as he knew petitioner/suspect would receive medical help for his mental condition); *cf.* United States v. Raymer, 876 F.2d 383, 386-87 (5th Cir. 1989) ("Police exploitation of the mental condition of a suspect, using 'subtle forms of psychological persuasion,' could render a confession involuntary," but did not in the instant case) (internal citation omitted).

73. *See, e.g.*, Holland v. McGinnis, 963 F.2d 1044, 1050-51 (7th Cir. 1992) (finding the defendant's first confession, which followed kicking, beating, punching, and pulling hair by police involuntary, but finding second confession, which took place in another police station under questioning by different officers six hours later, voluntary, even though the second group of officers falsely represented that a witness had seen the suspect at the crime scene).

74. *See* State v. Thacker, No. W2002-01119-CCA-R3-DD, 2003 Tenn. Crim. App. LEXIS 1133, at *83 (Tenn Crim. App. Dec. 18, 2003) (quoting State v. Stephenson, 878 S.W.2d 530, 544 (Tenn. 1994)); *cf.* Lara v. State, 25 P.3d 507, 510 (Wyo. 2001).

75. *See, e.g.*, Commonwealth v. Baity, 237 A.2d 172, 177 (Pa. 1968) ("[A] trick which has no tendency to produce a false confession is a permissible weapon in the interrogator's arsenal.") (citing Commonwealth v. Spardute, 122 A.161, 164 (Pa. 1923)).

76. 552 So. 2d 971, 974-75 (Fla. Dist. Ct. App. 1989).

> facial appearance of authenticity. A report falsified for interrogation purposes might well be retained and filed in police paperwork. Such reports have the potential of finding their way into the courtroom.[77]

The Superior Court of New Jersey cited *Cayward* extensively in *State v. Patton*.[78] In *Patton*, the defendant challenged his confession in part on the grounds that it was induced after police fabricated an audiotape of an eyewitness who claimed to have seen the defendant perpetrate the crime.[79] The New Jersey trial court admitted the tape, which also contained a "roadmap" of the prosecution's theory of the crime and hearsay evidence of prior bad acts by the defendant. The appeals court ordered a new trial and held that the fabricated evidence "set in motion a confluence of events that tainted not only the interrogation process but the trial itself."[80] The court went on to note that the "totality of the circumstances" test is "not without limits" and held Patton's confession *per se* involuntary as a result of the fabricated evidence.[81] The court even went as far as equating the use of fabricated evidence with physical coercion during interrogation.[82]

Few federal courts have circumscribed the use of specific deceptive interrogation techniques, and only in rare cases have federal courts deemed deceptive interrogation practices coercive. The federal courts generally apply a "totality of the circumstances" test, which is discussed in more detail, *infra*, in determining whether a confession is voluntary.[83] In applying the "totality" test, courts have considered all the circumstances surrounding a confession and have stopped short of issuing *per se* bars on particular deceptive tactics.

Deception, false assurances, and misrepresentations of the availability of independent incriminating evidence by themselves are generally insufficient to establish involuntariness under the federal courts' application of the "totality" test.[84] Rather, federal courts' central inquiry

77. *See also id.* (listing concerns that opening the door for fabricated evidence may lead to the fabrication of warrants and other court documents and that sanctioning such fabrication by law enforcement would damage the rapport police have established with the general public).

78. 826 A.2d 783 (N.J. Super. Ct. App. Div. 2003).

79. *Id.* at 789.

80. *Id.* at 800.

81. *Id.* at 802.

82. *Id.* at 805.

83. *See, e.g.*, United States v. Bell, 367 F.3d 452, 461 (5th Cir. 2004); United States v. Crawford, 372 F.3d 1048, 1060 (9th Cir. 2004), *cert. denied*, 543 U.S. 1057 (2005).

84. *See, e.g.*, *Bell*, 367 F.3d at 461-62 (holding that interrogators' false statements that the suspect would go to jail if he lied to them and that police had physical evidence connecting the suspect to a rape did not render his confession involuntary because in this case, the deception had not overcome the suspect's will); *Crawford*, 372 F.3d at 1060

into the impact of a particular interrogation tactic on voluntariness is whether the allegedly coercive tactic overcame the suspect's free will and rational decision-making.[85]

Despite the general paucity of federal caselaw circumscribing deceptive interrogation techniques, there are a few noteworthy federal decisions sanctioning the use of particular tactics. The Seventh Circuit, for example, held, in the context of a Fourth Amendment consent-to-search claim, that "[a]lthough the law permits the police to pressure and cajole, conceal material facts, and actively mislead, it draws the line at outright fraud, as where police extract a confession in exchange for a false promise to set the defendant free."[86] In so holding, the court drew explicit parallels between law enforcement deception in executing a search and in extracting a confession.[87] The Ninth Circuit held that when detectives coerced a suspect into confessing by falsely telling him that his statement could not be used against him, the resultant statement was involuntary.[88]

Interrogations employing false or fabricated evidence where interrogators have misled suspects to believe that police possessed inculpatory evidence, including physical evidence or accomplices' confessions have generally been held to be voluntary.[89] At least one

(internal citations omitted) ("Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises."); Monroe v. Coplan, No. Civ. 02-069B, 2002 WL 31689343 at *5 (D.N.H. Nov. 22, 2002). ("Misrepresentation to a defendant of the strength of the government's case is not *per se* coercive, although it is a factor to be considered in the 'totality of the circumstances' surrounding a confession.").

85. *See Bell*, 372 F.3d at 462; United States v. Haswood, 350 F.3d 1024, 1029 (9th Cir. 2003)"; Pollard v. Galaza, 290 F.3d 1030, 1033-34 (9th Cir. 2002) (determining that a confession was voluntary in light of the "surrounding circumstances and the combined effect of the entire course of the officer's conduct upon the defendant" and holding that "misrepresentations made by law enforcement . . . while reprehensible, does [sic] not necessarily constitute coercive conduct"); *see also* Colorado v. Connelly, 479 U.S. 157, 165 (1986).

86. Hadley v. Williams, 368 F.3d 747, 749 (7th Cir. 2004) (internal citations omitted) (holding that the defendant's mother's consent to enter and search her home to arrest her son, after police misrepresentation that they had a warrant for his arrest, was obtained fraudulently, and that the search was therefore a Fourth Amendment violation); *cf.* United States v. Rucker, 348 F. Supp. 2d 981, 1003 (S.D. Ind. 2004) (applying the "totality" test to determine the voluntariness of a suspect's consent to search, and finding that law enforcement deceit about prior entry into the suspect's apartment did not overcome voluntariness in the absence of threats or promises).

87. *Hadley*, 368 F.3d at 749.

88. Henry v. Kernan, 197 F.3d 1021, 1027 (9th Cir. 1999) ("[T]he slippery and illegal tactics of the detectives overcame Henry's will and . . . he continued his confession only as a result of their deception.").

89. *See* United States v. Lux, 905 F.2d 1379, 1382 (10th Cir. 1990) (upholding as voluntary a confession made after police falsely told the suspect that her co-defendant had

federal court, however, has held that a confession obtained after police presented fabricated evidence, like that employed in *Cayward*, was involuntary.[90]

*Cayward* and its progeny represent an admirable effort by courts to set some limits on the use of deliberate deception to induce suspects to confess.[91] The policies underlying these holdings, and reasons that other

implicated her in the murder); *Coplan*, 2002 WL 31689343 at *7 (concluding that a confession was voluntary when it was obtained by an undercover officer posing as a witness to the crime who blackmailed the suspect by promising not to report him to authorities in exchange for $2,000 payment from the suspect); Dallio v. Spitzer, 170 F. Supp. 2d 327, 340 (E.D.N.Y. 2001) ), *aff'd*, 343 F.3d 553 (2d Cir. 2003) (denying habeas relief and finding that the confession was voluntary because the officer did not lie to the suspect, but merely asked what would happen if he were to tell the suspect that his fingerprints were found in blood at the murder scene); U.S. *ex rel.* Brandon v. LaVallee, 391 F. Supp. 1150, 1152 (S.D.N.Y. 1974) (same). *But see* Quartararo v. Mantello, 715 F. Supp. 449, 460-61 (E.D.N.Y. 1989), *aff'd*, 888 F.2d 126 (2d Cir. 1989) (finding involuntary the confession of a fifteen-year-old boy whom police had questioned for four hours without counsel or family members present and falsely reported that his alleged accomplice had confessed to the homicide and "buried" the suspect).

90. Robinson v. Smith, 451 F. Supp. 1278, 1291-92 (W.D.N.Y. 1978) (finding that the police told the suspect that his accomplice had accused him of shooting the victim, had presented the suspect with a typed, fabricated confession "signed" by the accomplice, and had misled the suspect that the only way he could avoid "having a rope put around his neck" was by acknowledging his role and clearing himself of the shooting, though the crime was a felony murder and charges would be brought against both accomplices regardless of who did the shooting).

91. *Cf.* State v. Farley, 452 S.E.2d 50, 60 n.13 (W.Va. 1994) (citing State v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989), with approval and opining that if the police in the instant case had fabricated a false polygraph report, the defendant's confession would have been inadmissible); State v. Kelekolio, 849 P.2d 58, 73 (Haw. 1993). The court in *Kelekolio* drew a distinction between deliberate falsehoods that are "intrinsic" to the facts of the offense and falsehoods which are "extrinsic" to those facts and held that the intrinsic deception will be considered among the totality of the circumstances while the extrinsic deception, which is more likely to produce a false confession, will be *per se* inadmissible. *Id.* According to the court, examples of intrinsic falsehoods include: misrepresentations regarding the existence of incriminating evidence, a claim that a murder victim is still alive, discovery of a non-existent witness; examples of extrinsic falsehoods include: assurances of divine salvation upon confession, promises of mental health treatment in exchange for a confession, promises of favorable treatment in exchange for a confession, misrepresentations of legal principles. *Id. See also* United States v. Swint, 15 F.3d 286, 290 (3d Cir. 1994) (holding that the government overreached, rendering a confession involuntary, by misleading the defendant about the implications of his statements); Woods v. Clusen, 794 F.2d 293, 297 (7th Cir. 1986) (holding that under the totality of the circumstances the police overreached when they falsely reported to a juvenile suspect that his fingerprints had been found on the victim's wallet, showed him gruesome photos of the crime scene, forced him to wear jail garb, and subjected him to intimidating statements); Singletary v. Fischer, 365 F. Supp. 2d 328, 337-38 (E.D.N.Y. 2005) (finding defense counsel ineffective for failing to challenge the validity of a confession obtained after police tricked a mentally retarded defendant by promising him leniency and drug treatment if he would make incriminating statements implicating himself in his niece's murder); United

courts should follow and extend them, are further discussed in Part IV. The cases limiting the use of certain deceptive interrogation techniques may lay the foundation for some of the reforms proposed in Part IV. In fact, the leading interrogation manual, described in the next section, cites *Cayward* and admonishes officers not to fabricate evidence. Nevertheless, as the law currently stands, a defendant seeking to suppress his confession on the sole grounds that the police induced it by tricking him faces bleak prospects of succeeding in court.

## III. DECEPTIVE INTERROGATION TECHNIQUES AND THE ROLE THEY PLAY IN ELICITING FALSE CONFESSIONS

### A. Review of Interrogation Manuals Prescribing Tricking and Deceiving Suspects[92]

The interrogation method most widely publicized and probably most widely used is known as the Reid Technique, which was introduced in the interrogation manual *Criminal Interrogation and Confessions* ("*Inabu Manual*")[93] and was commercialized by John E. Reid and Associates,

States v. Knowles, 2 F. Supp. 2d 1135, 1137 (E.D. Wis. 1998) (holding that a "pattern of deceptions" amounted to coercion during interrogation); *Quartararo*, 715 F. Supp. at 460 (E.D.N.Y. 1989) (invalidating a confession given after the interrogating officer untruthfully told the defendant, that a co-defendant had confessed and offered the defendant leniency to confess as well); Robinson v. Smith, 451 F. Supp. 1278, 1292 (W.D.N.Y. 1978); Pyles v. State, 947 S.W.2d 754, 756-57 (Ark. 1997) (excluding a confession based on an officer's "false promise" that he would help the defendant if he incriminated himself); Mason v. Texas, 116 S.W.3d 248, 260 (Tex. App. 2003) (listing the factors which render confessions induced by a promise involuntary and inadmissible). *But see, e.g.*, U.S. *ex rel.* Lathan v. Deegan, 450 F.2d 181, 185 (2d Cir. 1971) (upholding a confession where a detective posed as an Army officer who wanted to help the defendant); Whittington v. State, 809 A.2d 721, 741 (Md. Ct. Spec. App. 2002) (upholding a confession where the police used fake gunpowder to make the suspect believe that a test had shown that she had gunpowder on her hand); People v. Henry, 132 A.D.2d 673, 675 (N.Y. App. Div. 1987) (upholding a confession elicited after the defendant was confronted with a fabricated polygraph test indicating that he had lied to police).

92. This article's review of interrogation manuals concentrates on the leading interrogation manual, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (Jones & Bartlett Pubs. 2004) (1962) [hereinafter INBAU MANUAL], and presents a sampling of three other noteworthy and influential interrogation manuals as well. This is by no means a comprehensive review of all interrogation manuals to which American law enforcement agencies may have referred historically or today.

93. *See id.* The first edition, published in 1962, was repeatedly cited and implicitly criticized in *Miranda v. Arizona*, 384 U.S. 436, 449-54 (1966). Professor Yale Kamisar also subjected the first edition to a stinging critique. *See* Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963), *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 1 (1980). Second and Third

Inc.[94] The distinctive features of the Reid Technique are: (1) a sharp distinction between an interview and an interrogation;[95] (2) the accusatory nature of the interrogation;[96] (3) the premise that a suspect will not easily confess because to do so is against his interests;[97] (4) and a psychologically sophisticated array of methods and procedures by which an interrogator can nevertheless elicit a confession.[98]

The Reid technique is founded on the premise that a suspect will not confess unless he is led to believe that doing so is in his own best interest. Reid prescribes a nine-step approach for law enforcement officers to employ in order to convince suspects that confessing is in their self-interest. [99] Pursuant to Reid's technique, convincing a suspect that incriminating himself will inure to his benefit requires both persuading the suspect that the benefits of confession are relatively high (e.g. internal peace, more lenient punishment, end of interrogation) and that the costs of confession are relatively low (e.g. futility of continued denial, possibility that the crime was morally justified).[100]

Throughout its description of interrogation tactics, the *Inabu Manual*

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Editions were issued in 1967 and 1986, respectively. Most modern references are to the Third Edition, and presumably most law enforcement agencies rely primarily upon that text. A Fourth Edition, however, was released in 2004, and references herein, except when otherwise specified, are to the Fourth Edition.

94. *See* John E. Reid & Associates, Inc., http://www.reid.com (last visited February 3, 2006).

95. INBAU MANUAL, *supra* note 92, at 5.

96. *Id.* at 213.

97. *Id.* at 419.

98. *Id.* at 209-398.

99. *Id.* at 419 ("Ordinary people do not act against self-interest without at least a temporary perception of a positive gain in doing so."); *see also id.* at 212-16 (summarizing techniques).

100. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 62 (1992) ("According to the [Reid] model, a suspect confesses (i.e. tells the truth) when the perceived consequences of a confession are more desirable than the anxiety generated by the deception (i.e. denial)."); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 913 (2004)

> Drawing on more than fifty years of theoretical and empirical research on rational choice approaches to decision-making, both in social psychology and microeconomics, the Decision-Making Model [of Confession] . . . focuses on how the interrogator's efforts at persuasion influence a suspect's perception and analysis of his immediate situation, the options available to him, and the likely consequences of each possible course of action. According to this model, the interrogator's goal is to persuade the suspect that the act of admission is in his self-interest and therefore the most rational course of action, just as the act of continued denial is against his self-interest and therefore the least rational course of action.

*Id.*

makes it clear that employing trickery and deceit is essential to an interrogator's strategy for eliciting a confession. The use of false evidence ploys, in particular, are cited as helpful in convincing the suspect that his refusal to confess would be fruitless because overwhelming independent incriminating evidence is more than sufficient to obtain a conviction.[101] In Step 1, the interrogator is advised to accuse the suspect with great confidence.[102] The *Inabu Manual* notes that the accusation will have a greater impact if the interrogator is accompanied by a thick case file as well as visual props such as video tapes, a fingerprint card, shell casings, and plastic evidence bags.[103] The interrogator need not refer specifically to these items; the visual reference will often be enough.[104] In Step 2, the *Inabu Manual* draws a distinction between the "emotional" and the "non-emotional" suspect: the emotional suspect will respond positively to themes that empathize with the suspect's discomfort and minimize his moral culpability for the criminal act, whereas the non-emotional suspect will respond positively to a rational presentation of his circumstances and his possible courses of action.[105] Thus, the non-emotional suspect will be more likely to respond favorably to the techniques used to disarm the emotional suspect—expressions of empathy and minimizations of moral culpability—after it is made clear to him that his denials are futile and that

101. See Brian C. Jayne & Joseph P. Buckley III, *Criminal Interrogation Techniques on Trial*, SECURITY MGMT., Oct. 1992, at 64, in which the authors advise interrogators "[f]alsely [to] tell the suspect about possible evidence implicating him or her in the commission of the crime."); *see also* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 77 (1993)

> The interrogator could thus pretend to have strong circumstantial evidence (e.g., the suspect's fingerprints at the scene of the crime), have a policeman pose as an eyewitness and identify the suspect in a rigged line-up, or even—through elaborate staging devices—try to persuade the suspect that he or she has already been implicated by an accomplice or co-suspect.

Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 146 (1997) [hereinafter White, *False Confessions*] ("When the interrogator tells the suspect that there is convincing evidence of his guilt, the suspect may feel that maintaining his innocence will be futile.").

102. INBAU MANUAL, *supra* note 92, at 218-19.

103. *Id.* at 217 (noting that "in fact, the file may contain nothing but blank sheets of paper"); *see also id.* at 219 (suggesting that during the initial confrontation the interrogator "finger through the case folder to create the impression that it contains material of an incriminating nature about the suspect"). Inbau is careful to advise the interrogator against "prepar[ing] false incriminating documents that appear to have been generated through an official source" such as the FBI or a crime lab. *Id.* at 217 n.2 (citing State v. Cayward, 552 So.2d 971 (Fla. Dist. Ct. App. 1989)) and stating that the *Cayward* decision was based on the risk that "such falsified documents may find their way into the court system"). This footnote is new for the Fourth Edition.

104. *Id.* at 217.

105. *Id.* at 209-10.

the police need not rely on his confession in light of independent incriminating evidence.[106] In Step 3, the interrogator may continue to use the false evidence ploy in order to quickly reject persistent denials by the suspect.[107] The *Inabu Manual* recommends additional deceptive ploys such as "playing one [suspect] against the other" by leading one to believe the other has confessed, even when no such thing has taken place.[108] For example, the *Inabu Manual* describes a scenario whereby a police department secretary pretends to be typing up a suspect's confession while the other suspect watches.[109] The officer then delivers the "confession" to the suspect who allegedly confessed and spends a few moments with him, leading the other to believe that his alleged cohort is signing his own statement.[110] All of this is a ruse. The officer then interrogates the suspect who did not "confess" and leads him to believe, without revealing the content of his cohort's statement, that his accomplice implicated both of them in the offense.[111]

The authors of the *Inabu Manual* assert strongly, particularly in the Fourth Edition, that their techniques do not elicit false confessions. They support this in two ways. First, they instruct the interrogator on how to differentiate the truth-telling, innocent suspect from the lying, guilty suspect.[112] Thus, the deceptive interrogation techniques will be used only

106. *Id.* at 290-91.

107. *Id.* at 306-07.

108. *Id.* at 2932-93.

109. *Id.* at 294-95.

110. *Id.* at 295.

111. *Id.* The manual offers several additional suggestions for using "bluffs" to pit suspects against one another. *See id.* at 295-98.

112. *See id.* at 107-08 (listing "Indications of Truthfulness" and "Indications of Deception"); *id.* at 121-53 (describing "Behavior Symptom Analysis"); *id.* at 213 (claiming that a guilty person will permit the interrogator to cut off his denials, whereas an innocent person will continue to deny the accusation even when the interrogator attempts to cut him off); *id.* at 213-14 (claiming that a guilty person will fall back on economic, religious, or moral reasons to explain why he could not have committed the crime of which he is accused, whereas an innocent person will continue to insist upon his factual innocence and not fall back on such objections); *id.* at 222-23 (describing the "Behavioral Pause," in which immediately following an initial confrontation with the interrogator the guilty person will avoid eye contact, shift uncomfortably, cross his legs, lean back in his chair, and ask questions to stall for time, whereas the innocent person will become angry, lean forward in his chair, look the interrogator in the eye, and vehemently deny the accusation); *id.* at 314 (claiming that "[b]y far, the easiest denials to identify during an interrogation are those emanating from an innocent suspect"). *But see id.* at 155 ("Although behavior symptoms can be helpful in differentiating truth from deception, they are not to be considered determinative of the issue."); *id.* at 155-71 (noting behavior common to truthful and lying suspects and warning of factors that can lead to misinterpretation of behavior symptoms); *id.* at 226 (warning that there are "exceptions" to the general rule that a guilty person will react to accusations "in a passive, evasive, and insincere manner" whereas an innocent person

on suspects whom the interrogator has determined are guilty. Second, they insist that if a completely innocent person were subjected to the Reid Technique, it would not produce a false confession.[113]

Particularly noteworthy are the authors' defenses of trickery, deception, and the use of false evidence.[114] As described *infra*, the *Inabu Manual* discourages the use of false evidence in some instances.[115] As a legal matter, the *Inabu Manual* notes that a confession could be excluded from evidence if it appears to be a result of threats or promises.[116] And as a tactical matter, it warns that the use of false evidence may backfire if the suspect realizes he is being deceived and becomes irreversibly uncooperative.[117] But the authors of the *Inabu Manual* steadfastly maintain that the tactics they recommend cannot cause an innocent person to confess.[118] Instead, they suggest that deceptive tactics, if employed properly, can actually assist law enforcement in determining whether the suspect is in fact guilty.[119] The *Inabu Manual* further recommends the use of a bait question—for instance, "Is there any reason why we would find

will react "in a sincere, aggressive, and perhaps even hostile manner").

113. *Id.* at 212 ("It must be remembered that none of the [Nine] steps is apt to make an innocent person confess and that all the steps are legally as well as morally justifiable."); *id.* at 290 ("[A]n innocent suspect . . . is not apt to confess to a crime merely because the investigator expresses high confidence in his guilt . . . .").

114. *See id.* at 236, 291, 323, 427-29.

115. *See infra* note 193 and accompanying text.

116. *Id.* at 236 (warning that if the interrogator tells the suspect that "the case against him is iron clad," then the only issue to resolve is the length of sentence the suspect will receive, leading the interrogator to imply that a confession will result in leniency). The authors indicate that the best way to get around this legal obstacle is to tell a suspect that the evidence against him is so strong that his confession isn't necessary, but that he is being offered an opportunity to tell his side of the story. *Id.* at 291. This is legally distinct, the *Inbau Manual*, insists, from telling suspects that the evidence is so strong they are certain to be convicted and a confession is the best way to get a lighter sentence. *Id.* at 290.

117. *Id.* at 323 ("While it is perfectly legal to verbally lie about evidence connecting a suspect to a crime, it is a risky technique to employ. . . . A miscalculation . . . may cause the technique to backfire and fortify a guilty suspect's resistance."); *id.* at 429 ("Introducing fictitious evidence during an interrogation presents a risk that the guilty suspect may detect the investigator's bluff, resulting in a significant loss of credibility and sincerity. For this reason, we recommend that this tactic be used as a last resort effort.").

118. *Id.* at 290 ("[A]n innocent suspect . . . is not apt to confess to a crime merely because the investigator expresses high confidence in his guilt."); *id.* at 429 ("It is our clear position that merely introducing fictitious evidence during an interrogation would not cause an innocent person to confess."). The authors largely base their conclusions on the notion that it is not "natural" for people to confess to crimes they did not commit. *See id*. at 428 ("The important question to answer is whether it is human nature to accept responsibility for something we did not do in the face of contrary evidence."); *id.* at 429 ("Under this circumstance, the natural human reaction would be one of anger and mistrust toward the investigator.").

119. *See id.* at 284.

your fingerprints at the scene of the crime?"[120] If the suspect adamantly denies it, then the interrogator is advised not to bring up the false evidence again.[121] "However, if the suspect's behavioral response indicates a lack of confidence or uncertainty as to whether the evidence might exist, during the interrogation the investigator can present that same evidence in a more definitive matter."[122] The *Inabu Manual* suggests that interrogators tread cautiously in this area. This admonition, however, is clearly motivated by the authors' concerns about the legal admissibility of a resulting confession and the risk that false evidence ploys could backfire and fail to produce any confession at all than from any perceived danger that the techniques might result in a false confession.[123]

Although the *Inabu Manual* (and its Reid & Associates commercialized counterpart) is the most widely used,[124] there are several other noteworthy police interrogation resources. [125] O'Hara & O'Hara's *Fundamentals of Criminal Investigation* ("*O'Hara & O'Hara Manual*")[126] is a 900-page manual that devotes several chapters to interrogation. The authors recommend a panoply of interrogation techniques, including the use of a false evidence ploy to produce a confession. Making reference to the "average person[s'] . . . mystical notions of the power of scientific crime detection," the *O'Hara & O'Hara Manual* suggests that such persons "will accept practically any claims that science may make."[127] The *O'Hara & O'Hara Manual* further advises that a detective may "mix pseudoscience in his statements."[128] It offers specific examples:

> In a homicide, the interrogator can refer to hair found at the scene of the

120. *Id.* at 194 (emphasis omitted). Note that the *Inbau Manual* recommends the use of a question during a non-accusatory interview. "During an interrogation, however, the investigator often must express more confidence that the evidence, in fact, does exist or will shortly become available." *Id.* at 284.

121. *Id.*

122. *Id.*

123. The authors recommend some specific limitations on the use of the technique. False evidence ploys should not be used when the suspect claims not to remember what happened, and when the suspect is youthful or mentally impaired. *Id.* at 429. *See also id.* at 160-71 (describing "factors that may lead to misinterpretation of behavior symptoms"); *id.* at 290 (instructing interrogators not to "attempt to convince a suspect who claims not to recall whether he committed the crime, that he must have committed it").

124. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221, 222 (1997); White, *False Confessions*, *supra* note 101, at 118.

125. All three manuals discussed herein are listed in WRIGHTSMAN & KASSIN, *supra* note 101, at 65.

126. CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (7th ed. 2003) [hereinafter O'HARA & O'HARA MANUAL].

127. *Id.* at 149.

128. *Id.* at 149-50.

> crime, which can be shown, under the microscope, to be the suspect's hair. For added realism, the suspect can be invited to look into the microscope. In a document case, such as a forgery or a threatening letters case, a comparison of handwriting can be represented as being conclusive."[129]

The *O'Hara & O'Hara Manual* goes on to depict a scenario prescribing the use of false fingerprint evidence during an interrogation.

> Fingerprints are the most effective form of evidence. The layman believes that they can be left on any object. The investigator should select some object which was known to have been touched and should face the suspect with the object. It does bear fingerprints and the fingerprints have been photographed. The interrogator can show at a discreet distance a small photograph of a latent fingerprint. The imaginative investigator can create his own dramatic effects such as having the interrogation interrupted by the delivery of a message to the effect that the fingerprints on the weapon have been identified, or that the handwriting has been positively compared.[130]

Although the *O'Hara & O'Hara Manual* acknowledges that deceptive interrogation techniques, at their extreme, can lead to false confessions, it leaves interrogators only with the tautological advice that "Trickery and deception may be used if it is not of such a nature as to make an innocent person confess."[131] In fact, the *O'Hara & O'Hara Manual* refers interrogators to the *Inabu Manual*, which provides a similarly conclusory "rule of thumb."[132] The interrogator is to ask himself, "Is what I am about to do, or say, apt to make an innocent person confess?"[133] If the answer is no, then the interrogator may proceed with his deceptive tactic.[134] Like the *Inabu Manual*, the O'Hara & O'Hara Manual juxtaposes a strong endorsement of police trickery with a skeptical attitude toward the risk of false confessions.[135]

Another interrogation manual is Macdonald & Michaud's *The Confession* ("*Macdonald & Michaud Manual*").[136] In contrast to the *Inabu*

129. *Id.* at 150.

130. *Id.*

131. *Id.* at 177; *see also id.* at 147.

132. *Id.* at 147 (citing Fred E. Inbau, *Legally Permissible Criminal Interrogation Tactics and Techniques*, 4 J. POLICE SCI. & ADMIN. 249 (1976)).

133. *Id.*

134. *Id.*

135. Like the *Inbau Manual*, the *O'Hara & O'Hara Manual* also relies on the belief that interrogators can more or less determine whether a suspect is truthful or lying by examining his body language and physiological symptoms. *Id.* at 152-53.

136. JOHN M. MACDONALD & DAVID L. MICHAUD, THE CONFESSION: INTERROGATION AND CRIMINAL PROFILES FOR POLICE OFFICERS (1987) [hereinafter MACDONALD & MICHAUD

*Manual* and the *O'Hara & O'Hara Manual*, the *Macdonald & Michaud Manual* strongly advises against outright trickery—not out of a concern that such tactics may induce false confessions, but out of a concern that the technique may backfire if the suspect learns of the deception. [137] The *Macdonald & Michaud Manual*, however, stops short of discouraging detectives from *implying* that substantial false evidence exists: "A large case folder on the desk suggests that the investigation has revealed much information, yet the folder may contain records on another case."[138] Aside from its general disapproval of explicit deception, the *Macdonald & Michaud Manual* corresponds with the *Inabu Manual* and the *O'Hara & O'Hara Manual* on two important points: first, the *Macdonald & Michaud Manual* shares a skepticism about false confessions;[139] and second, all three manuals rely on a confidence that police officers can detect, during an interview, whether the suspect is guilty or innocent.[140]

Another interrogation manual is *The Gentle Art of Interviewing and Interrogation* by Royal & Schutt ("*Royal & Schutt Manual*").[141] This volume is far less comprehensive than the other manuals discussed.[142] Its approach to the use of deceptive interrogation tactics is ambivalent. The

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MANUAL].

137. *Id.* at 23.

> Do not make any false statements. Do not tell him his fingerprints were found at the scene if they were not found at the scene. Do not tell him he was identified by an eyewitness if he was not identified by an eyewitness. If he catches you in a false statement, he will not longer trust you, he will assume that you do not have sufficient evidence to prove his guilt, and his self-confidence will go up.

*Id.*; *see also id.* at 46 ("Reminders: No threats, no promises, no false statements.").

138. *Id.* at 19.

139. *Id.* at 7 (explaining that false confessions are brought about by a "wish for publicity and notoriety," warning that some people "who make false confessions . . . later commit murder," and stating that "[o]ther reasons for false confessions are to obtain a bed for the night in freezing weather, or to obtain transport to a distant city where the crime occurred").

140. *Id.* at 36-38, 40-43 (listing "clues to deception"). Tellingly, many of the authors' "clues to decpetion" are inconsistent or self-contradictory. "Brief answers" and "excessively detailed answers" both indicate that a suspect is lying. *Id.* at 36. In addition, "politeness," "irritability," and "short-lived anger" are all sure signs of deception. *Id.* at 38. The suspect who avoids eye contact, as well as the suspect who engages in "prolonged eye contact," is lying. *Id.* at 41. At times the authors' claims are simply bizarre. For example, if you can see white under the suspect's iris, then "the detective has touched on an area that is troubling to the subject." *Id.*

141. ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE (1976) [hereinafter ROYAL & SCHUTT MANUAL].

142. For instance, there is a section devoted to "Interviewing Women," in which the reader is warned that "[a]ny attempt on the part of the interviewer to inhibit the flow of subjective content, especially if strong emotions or feelings are involved, will usually result in an almost immediate breakdown of rapport." *Id.* at 111.

*Royal & Schutt Manual* never discusses the use of false evidence ploys expressly, though they suggest that bluffing may be permissible: "In some cases, the use of deception, such as staged events or bluffs, may be acceptable. There can be no justification, however, for deliberate lies or false promises."[143] The *Royal & Schutt Manual* is murky as to where to draw the line between "the use of deception . . . or bluffs" and "deliberate lies." The *Royal & Schutt Manual* warns interrogators, "Never bluff if there is the least chance that the suspect will detect the bluff."[144] Without expressly advocating that interrogators use a false evidence ploy, the *Royal & Schutt Manual* notes that "[a] suspect is usually more convinced by specific illustrations and physical evidence than he is by alleged statements of his guilt or by circumstantial evidence."[145] Thus, the authors provide the reader with the information he needs to use a false evidence ploy against a suspect, without expressly advocating the use of this tactic. Later in the book, the authors write: "Bluffs or staged situations are sometimes used, but dependence on them should be avoided."[146] The *Royal & Schutt Manual* does not, however, elaborate on the reasons for this advice, nor does it ever address the risk that bluffing about the existence of evidence may lead to false confessions.

### B. Critiques of Leading Interrogation Techniques Which Explain Why Suspects May Confess Falsely When Confronted With False Evidence and Other Deception

A number of critiques of the leading interrogation techniques prescribed by Reid, Inbau and others have described the reasons that the use of deception and trickery during interrogations leads to false confessions. Most of these critiques describe the kinds of cost/benefit analyses suspects undertake before deciding to incriminate themselves, regardless of guilt or innocence. The critiques and related theories help illustrate the impact trickery and deception, particularly an exaggeration or misrepresentation of the existence or quantum of independent incriminating evidence, have on even innocent suspects.

#### *i. Rational Choice: A Theory of False Confession*

Critics of the Reid Technique employ what they call a "rational choice"

143. *Id.* at 68.
144. *Id.* at 121.
145. *Id.*
146. *Id.* at 146.

model to explain how false confessions can occur.[147] The model is consistent with Reid & Inbau's theory that a rational person will do what he *perceives* to be in his best interest.[148] Although most suspects enter an interrogation room believing that it is against their best interest to confess, the object of the Reid Technique is to *convince* suspects that confession is in their best interest.[149] Underlying the rational choice model is a definition of "best interest" that weighs the costs against the benefits of a potential course of action.[150] To this end, the Reid Technique requires interrogators to convince suspects that the benefits of confession will be relatively high (e.g. lenient sentencing, end of stressful interrogation, release from custody) and that the costs of his confession will be relatively low (e.g. he will be convicted anyway because there is enough other evidence to prove the case against him).[151]

From the law enforcement perspective, if the police were initially correct in their determination that the suspect is guilty, then their manipulation of what the suspect perceives as his best interest will produce a just outcome. Under the rational choice model, however, the suspect's actual guilt or innocence has little bearing on whether he confesses; rather, he will confess *whenever* the costs of confession as he perceives them are outweighed by the benefits of confession, regardless of his culpability.[152]

It is with respect to the perceived costs of confession that false evidence ploys are particularly salient. When a suspect is confronted with seemingly incontrovertible evidence of his guilt, he is likely to conclude that he is certain to be convicted even though he is innocent.[153] The suspect may believe that he has been framed somehow, that there was a mistake in the

147. *See generally* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*] (theorizing that an innocent person could confess when convinced that confession is the most rational course of action, given his circumstances and options as he perceives them); *see also* GUDJONSSON, *supra* note 100, at 64-65; Drizin & Leo, *supra* note 3, at 913.

148. *See* Jayne & Buckley, *supra* note 101, at 11 ("A psychologically healthy suspect will not engage in behavior that will jeopardize [his] self-interests.").

149. Drizin & Leo, *supra* note 3, at 913 ("According to this model, the interrogator's goal is to persuade the suspect that the act of admission is in his self-interest."); *see also supra* notes 93-100 and accompanying text.

150. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147150, at 985 (stating that the interrogator's objective is to convince the suspect that the "marginal benefits of confessing outweigh the marginal costs").

151. *See id.* at 990.

152. *See* Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 221; White, *False Confessions*, *supra* note 101, at 119, 133.

153. *See* Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 146; *see also* White, *Miranda's Failure*, *supra* note 23, at 1242-43.

analysis of the evidence, or that he is just very unlucky in that all the evidence points to him, an innocent person.[154] Regardless of what the suspect believes the source of the error to be, he is likely to believe that any reasonable jury, viewing the evidence, will be convinced of his guilt beyond a reasonable doubt.[155] When faced with overwhelming evidence against him, the innocent suspect may rationally conclude that the costs of his confession are relatively low because he is likely to be convicted regardless of whether he confesses.[156] Weighing against these lowered costs of confession are its relatively high benefits; the suspect may be spared a harsh penalty in the long term,[157] and in the short term the stress of an interrogation may be ameliorated or truncated.[158] In other words, a suspect's cost-benefit calculation changes when independent incriminating evidence is added to the equation. Whereas confessing to a crime for which the police have little independent evidence (regardless of whether one committed the offense) would ordinarily carry extraordinary costs and no benefits, the presence (or apparition) of overwhelming evidence flips the cost-benefit calculation such that one has some reason to confess and may

154. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147, at 1009 ("For an innocent suspect who naively trusts the police and believes that they would not lie, the cumulative effect of an endless stream of false evidence can be devastating.").

155. *See id.* at 1013 ("The fact that the suspect's denials of the evidence has failed to convince the investigator of the his [sic] innocence is intended to serve as a demonstration. The implication is that he will also be unable to convince a prosecutor, a judge, or a jury of his innocence. The investigator strives to create the impression that because his opinion is based on hard facts, all other equally reasonable and informed persons will reach the same conclusion."); *see also* Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 222 (showing that in fact mock jury studies have demonstrated that confessions are more potent than eyewitness evidence and other forms of human evidence and that juries do not fully discount confessions even when they are supposed to legally).

156. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147, at 985-86 ("Police elicit the decision to confess from the guilty by leading them to believe that the evidence against them is overwhelming, that their fate is certain (whether or not they confess), and that there are advantages that follow if they confess.").

157. *See* Drizin & Leo, *supra* note 3, at 916-17.

158. *See* White, *False Confessions*, *supra* note 101, at 146. The prospect of being released from custody after hours of interrogation is enough to induce some suspects to confess. *See* Welsh S. White, *Confessions Induced By Broken Government Promises*, 43 DUKE L.J. 947, 982-83 (1994) (discussing the case of Leo Bruce, who confessed to killing several people at a Thai Buddhist temple near Phoenix after an FBI agent falsely told Bruce that police had evidence establishing that he was at the temple the night of the murders; even after he repeatedly denied involvement in the murders, he was interrogated for several more hours until he finally confessed; Bruce was never brought to trial, because evidence discovered after he confessed established that his confession was false); *see also* White, *Confessions in Capital Cases*, 2003 U. ILL. L. REV. 979, 1020-21 (reporting that Bruce confessed after he was questioned for thirteen hours; when asked why he would confess to capital crimes, he replied, "I just wanted it to end right there. I wanted to sleep. I was exhausted.").

believe that he has little reason to remain silent.

According to the rational choice model, then, two components of the Reid Technique converge to create an arguably significant risk of false confession. First is the authors' unjustified confidence in the interrogator's ability to discern the guilt or innocence of the suspect based on the suspect's behavior, body language, and other armchair psychology.[159] Second is the interrogator's liberal use of trickery, deceit, and fictitious evidence to convince the presumed guilty suspect that he is certain to be convicted.[160] If the interrogator truly were able to know with any certainty whether the suspect was guilty or innocent, then the false evidence ploys might be justified as a means of rendering criminal interrogations and investigations more efficient. At the same time, if the interrogator did not use false evidence to manipulate the suspect's perceived self-interest, then the interrogator's occasional error in prejudging the guilt of the suspect would be unlikely to result in false confessions. The combination, however, of these two errors—an observational error that occurs when the officers erroneously presume guilt and an ethical error when officers deliberately mislead suspects—can lead a suspect to confess even when he knows he is actually innocent.[161]

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159. *See* GUDJONSSON, *supra* note 100, at 48; Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 222

> Research has consistently shown that people are poor intuitive judges of truth and deception. In fact, even so-called experts who make such judgments for a living—police interrogators; judges; psychiatrists; and polygraphers for the Central Intelligence Agency, the Federal Bureau of Investigations, and the military—are highly prone to error.

(internal citations omitted); s*ee also* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 188-89 (2003); Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 219-20

> It is possible that police who commit themselves to [measuring their success by their ability to extract a confession] are, at times, not merely blinded by their initial beliefs [that the suspect is guilty] but motivated to reinforce them . . . [A] warehouse of psychology research suggests that once people form an impression, they unwittingly seek, interpret, and create behavioral data that verify it.

Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 34 LAW & HUM. BEHAV. 499, 500-01 (1999); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of Literature and Issues*, 5 PSYCHOL. SCI. PUB. INT. 35, 40 (2004) [hereinafter Kassin & Gudjonson, *The Psychology of Confessions*] (discussing psychological tests which showed that people who have undergone training in judging the accuracy of confessions are actually "significantly less accurate than those who did not [undergo the training] . . . though they were more confident in their judgments [of guilt or innocence]"); Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 L. & HUM. BEHAV. 469, 470 (2002).

160. GUDJONSSON, *supra* note 100, at 48.

161. Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 124, at 220. In fact,

*ii. Observational Study of Police Interrogation Methods*

The question of how often police use trickery in interrogation is hard to answer. In 1996, Professor Richard Leo published a quantitative study, *Inside the Interrogation Room*, which—based on his personal observation of police interrogations in a major urban police department—examined the details of police interrogation techniques.[162] This is not a study of false confessions, so Leo did not explore the likelihood that any one of these techniques would cause the suspect to confess to a crime that he did not commit. Rather, the study yielded data on which interrogation techniques were prevalent, whether they were successful at eliciting confessions, and what kind of suspects were most susceptible to each kind of interrogation technique.[163]

Leo observed that it was routine for detectives to begin an interrogation by confronting the suspect with evidence of his guilt and then suggesting that it was in his best interest to confess.[164] In fact, this technique was utilized in approximately ninety percent of the interrogations Leo observed.[165] In eighty-five percent of the interrogations Leo observed, the police confronted the suspect with actual (not fictitious) evidence of his guilt.[166] In thirty percent of the interrogations, the police used false evidence to try to convince the suspect to confess.[167] Leo's study concluded that the use of evidence against the suspect was a highly effective method of eliciting self-incriminating information.[168] Moreover, it turned out that the presentation of false evidence was slightly more effective than the use of actual evidence.[169] Detectives were successful in eliciting self-incriminating information from suspects in seventy-eight percent of the cases where suspects were told of actual evidence, and in eighty-three percent of the cases where the police lied to suspects about the

psychological studies show that innocence may actually render a suspect *more* likely to submit to interrogation, waive his rights, and confess to a crime that he erroneously believes the objective evidence will disprove, even in the face of false evidence ploys. *Id.* at 224.

162. *See generally* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996).

163. *Id.* at 268 ("This Article takes the reader inside the interrogation room to understand the characteristics, context, and outcome of contemporary police interrogation practices in America. It is the only study to do so in more than twenty-five years, and the first ever to do so in any sustained, explicit, or comprehensive manner.").

164. *Id.* at 279.

165. *Id.*

166. *Id.* at 277 tbl.5.

167. *Id.*

168. *See id.* at 293.

169. *See id.*

existence of incriminating evidence.[170]

Leo's study also demonstrated that suspects from lower socio-economic backgrounds or with prior felony convictions were more vulnerable to these techniques than others.[171]

In addition to Leo's empirical report on prevalent interrogation techniques, several significant psychological studies on confessions have produced results which help explain the false evidence ploys' coercive effect.[172]

### *iii. Psychological Analysis of Interrogation Techniques: Maximization and Minimization*

Psychology professor Saul Kassin described the Reid Technique as essentially boiling down to two interrogation methods used frequently, and sometimes in combination, by the police.[173] The first is *minimization*: the interrogator takes a sympathetic approach, telling the suspect that what he did was understandable, justifiable, and will not produce significant adverse consequences.[174] This generally works well with emotional or "remorseful" suspects who are easily lulled into a false sense of security by the awareness that someone else empathizes with their plight.[175]

The second interrogation method Professor Kassin identifies is *maximization*: the interrogator aggressively confronts the suspect with the magnitude of his situation, hoping to convince him that he is in serious trouble and likely to be punished severely.[176] This generally works with "non-emotional" suspects who are able to logically evaluate the costs and benefits of their situation and comprehend that their best option is confession.[177] The evidence bluff is an overt form of maximization:[178]

> The interrogator would thus pretend to have strong circumstantial evidence (e.g., the suspect's fingerprints at the scene of the crime), have a

170. *Id.*

171. *See id.* at 295. The use of false evidence in the interrogation room was particularly effective with suspects from lower economic class backgrounds: eighty-eight percent of those suspects provided self-incriminating information. *Id.* Suspects with prior felony records were even more vulnerable: ninety-six percent of those suspects provided self-incriminating information when confronted with false evidence against them. *Id.*

172. *See infra* notes 173-193 and accompanying text.

173. Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 223-24.

174. *Id.* at 223.

175. *See* GUDJONSSON, *supra* note 100, at 38.

176. Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 223.

177. *See* GUDJONSSON, *supra* note 100, at 38; *see also* INBAU MANUAL, *supra* note 92, at 210, 290 (discussing interrogation techniques for emotional and non-emotional offenders).

178. *See* Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 223.

> policeman pose as an eyewitness and identify the suspect in a rigged line-up, or even—through elaborate staging devices—try to persuade the suspect that he or she has already been implicated by an accomplice or co-suspect.[179]

According to Kassin, interrogators recognize that non-emotional suspects are likely to respond "logically" to their perceived circumstances. The non-emotional suspect, confronted with overwhelming evidence against him, is expected to make the only rational decision available to him: confessing to the crime.[180]

As discussed above, suspects confronted with what appears to be overwhelming evidence against them may confess falsely merely because they perceive the benefits of confessing outweigh its costs.[181] Confessions are more likely to occur when the fictitious evidence is presented as strong, perhaps overwhelming.[182] Suspects tend to believe that "scientific" evidence—such as DNA, fingerprints, and even lie detector tests[183]—are generally accepted by juries as infallible proof of guilt:

> Evidence ploys that are based on well known technical or modern scientific procedures are likely to be more influential because the mere mention of a special technology—whether it is well-known or new—carries the prestige and incomprehensibility of modern science. Both the guilty and the innocent have a harder time explaining away evidence that is allegedly derived from scientific technologies.[184]

Suspects generally view witness evidence—such as eyewitness statements, line-up or photo array identifications, and statements from co-defendants and jailhouse snitches[185]—to be significantly less threatening.[186] Additionally, suspects are more intimidated when the interrogator provides specific details of the damaging evidence rather than general assertions that strong evidence exists.[187] Psychologically, the evidence has a greater impact on the suspect when it is presented visually, either in a plastic bag, a thick manila case folder, or as a printed report from

179. WRIGHTSMAN & KASSIN, *supra* note 101, at 77.

180. For a comprehensive description of the various types of false confessions, *see id.*, at 225-26; *see also* GUDJONSSON, *supra* note 100, at 226-28.

181. *See supra* notes 147-158 and accompanying text.

182. *See* Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 225; Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147, at 1013.

183. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147, at 1023-38.

184. *Id.* at 1023.

185. *See id.* at 1015-22.

186. White, *Miranda's Failure*, *supra* note 23, at 1243.

187. *Id.*

the laboratory.[188]

Because interrogators are well aware that "maximization" is most effective when presented visually, with specificity, and in "scientific" form, they are likely to shape their false evidence ploys to fit these criteria. When police use *real* evidence as an interrogation tactic, of course, they are limited to whatever form of evidence they actually possess—statements from an eyewitness, for example. But when the police are permitted to invent the evidence for the purposes of bluffing the suspect into a confession, they are at liberty to create an illusion of the existence of evidence most likely to impress the suspect.[189] Sometimes this means employing more "science fiction" than actual science. For example, Ofshe and Leo have reported interrogators' presentation of imaginary technology such as a test purporting to lift fingerprints from a corpse, or a method purported to prove scientifically whether a particular suspect fired the murder weapon. [190]

Finally, most scholars agree that false evidence ploys are more likely to be successful when the suspect being interrogated is especially vulnerable to manipulation. Kassin suggests that vulnerability factors include "youth, interpersonal trust, naiveté, suggestibility, lack of intelligence, stress, fatigue, alcohol, or drug use."[191] Gudjonsson has conducted extensive studies on suggestibility, the details of which are beyond the scope of this article.[192] Even the *Inabu Manual* acknowledges that certain classes of

188. *See id.*

189. *See* Ofshe & Leo, *The Decision to Confess Falsely supra* note 147, at 1015-50. Ofshe & Leo provide testimonials from suspects and excerpts from dozens of interrogation transcripts, impressively demonstrating that law enforcement officials really do use the interview techniques described in the literature. *Id.* For a quantitative analysis based on observation of police interrogations, see generally Leo, *Inside the Interrogation Room*, *supra* note 162. For items in the popular media confirming police use of deceptive tactics in their attempts to elicit confessions, see *Disclosure: Inside the Interrogation Room* (CBC News television broadcast Jan. 28, 2003), *available at* http://www.cbc.ca/disclosure/archives/030128_confess/murder.html (reporting false confessions in a murder case and criticizing the Reid Technique); *Fresh Air* (National Public Radio broadcast Feb. 25, 2005) (interview with former NYPD Detective Bill Clark) (originally broadcast Nov. 1, 1995), *available at* http://www.npr.org/templates/rundowns/rundown.php?prgId=13&prgDate=02-25-2005 (stating that detectives regularly lie to suspects about the evidence against them in order to elicit a confession).

190. *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 147, at 1026 (reporting San Diego detectives' "use" of a non-existent technology, the "Cobalt Blue" test, that can lift fingerprints from a corpse); *id.* at 1033 (reporting investigators' invention of the "Neutron Proton Negligence Intelligence Test" to convince a suspect that there was scientific proof he had fired the murder weapon).

191. *Id.* at 227.

192. *See* GUDJONSSON, *supra* note 100, at 131-64.

suspects, such as juveniles and the mentally impaired, are not always suited for complex interrogation techniques.[193]

### C. Inbau's Defense

The *Inabu Manual* devotes an entire chapter—completely new in the Fourth Edition—to responding to the "critics of police interrogation."[194] In this chapter, the *Inabu Manual* responds to claims that standard interrogation practices produce false confessions. The authors emphasize that the Reid Technique does not instruct interrogators to make any threats or promises involving "real consequences":

> As a general guideline, areas that are considered impermissible as topics of threats or promises during an interrogation address *real consequences*. Real consequences affect the suspect's physical or emotional health, personal freedom (arrest, jail, or prison), or financial status (losing a job or paying large fines). It should be emphasized that merely discussing real consequences during an interrogation does not constitute coercion. It is only when the investigator uses real consequences as leverage to induce a confession through the use of threats or promises that coercion may be claimed. Our long-standing position has been that interrogation incentives that are apt to cause an innocent person to confess are improper.[195]

Instead of making explicit threats and promises, the *Inabu Manual* recommends that interrogators merely make ambiguous statements that *could* be interpreted by a suspect as a threat or promise. For instance, the *Inabu Manual* insists that there is a difference between a detective who explicitly promises the suspect that he will talk to the judge and make sure he is put on probation and a detective who merely suggests that he will include in his report information from a confession that could reflect favorably on the suspect.[196] Moreover, the *Inabu Manual* insists that the "self-preservation instincts" of an innocent suspect will withstand the standard interrogation techniques prescribed in the manual.[197] It also maintains that false confessions result only from interrogations in which "improper inducements, such as threats and promises, or deprivation of

193. INBAU MANUAL, *supra* note 92, at 429; *see also* Singletary v. Fischer, 365 F. Supp. 2d 328, 337 (E.D.N.Y. 2005) (citing Inbau's Fourth Edition as warning against the use of techniques "designed to persuade" suspects "who are unintelligent, uneducated, and come from a low cultural background").

194. INBAU MANUAL, *supra* note 92, at 411-47; *see also id.* at 412 ("Even critics of police interrogation agree that most confessions are true.").

195. *Id.* at 418.

196. *Id.* at 420.

197. *Id.* at 447.

biological needs were used."[198]

Critics such as Kassin doubt that suspects distinguish clearly between explicit threats and promises and more ambiguous language with underlying threats and promises.[199] The *Inabu Manual* nevertheless insists—without the benefit of empirical corroborating evidence—that even if the guilty suspect does not make such a distinction, the difference is enough to prevent the innocent from falsely confessing:

> An innocent suspect who is told that it is important to explain the reason behind committing the crime will predictably reject the investigator's entire premise and explain that he had no involvement in the crime whatsoever. A guilty suspect who hears exactly this same message may start to entertain possible benefits as to why it might be important to tell the truth.[200]

In other words, according to the leading interrogation manual, an implied threat or promise will have the same effect as an explicit threat or promise when police are dealing with guilty suspects. Innocent suspects, however, will not respond to implied threats or promises.

The argument posited by the *Inabu Manual* fails entirely to address the risks attending the false evidence ploy. The false evidence ploy is a type of implied threat: if the suspect does not confess, then he will be convicted with independent incriminating evidence without the opportunity to enter any mitigating statement into the record. False evidence, when seemingly irrefutable, is therefore unlikely to have a greater influence on guilty persons than on innocent persons. An innocent person and a guilty person alike are likely to see the "evidence" for what it appears to be—a threat of dire consequences awaiting them regardless of whether they confess. In fact, by any rational calculation, a confession may ameliorate the otherwise inevitable and unhappy consequences awaiting the suspect, whether he is guilty or innocent.

The *Inabu Manual* attempts to take up this challenge again later in the chapter.[201] The authors insist that the use of false evidence *alone* would never cause an innocent person to confess.[202] Instead, they insist that false

198. *Id.*

199. *See* Kassin, *The Psychology of Confession Evidence*, *supra* note 124, at 223-24; Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 235 (1991) [hereinafter Kassin & McNall, *Police Interrogations and Confessions*]; *see also* INBAU MANUAL, *supra* note 92, at 420.

200. INBAU MANUAL, *supra* note 92, at 421-22.

201. *See id.* at 427-29.

202. *Id.* at 428. "Would a suspect, innocent of a homicide, bury his head in his hands and confess because he was told that the murder weapon was found during a search of his home?

evidence would only cause a false confession when coupled with the interrogator's use of a "threat of inevitable consequences" or a promise of leniency.[203] The Reid Technique's admonishment against threats is considered sufficient protection against false confessions even if the interrogation involves false evidence ploys and other forms of trickery.[204]

The *Inabu Manual* defense is founded on the notion that a suspect will make a carefully considered rational analysis of the options he is presented with and will only confess if he knows he is guilty and knows he stands to lose more if he continues to deceive police. This premise fails to take into account facts that the empirical laboratory studies discussed in the ensuing section and that real-life false confession cases have borne out[205]: that some suspects—juveniles, the mentally impaired[206]—are incapable of making such finely calibrated decisions; that a skilled interrogator's persistence and intimidation of a suspect may overbear the will even of mature, mentally intact suspects; and that some suspects simply decide that even if they confess falsely the objective evidence will later corroborate their claims of innocence.[207]

Some of the seminal empirical studies on false confessions help to establish these points.

### D. Empirical Studies Establishing That Confronting Suspects With False Evidence And Other Deceptive Interrogation Practices Induces Suspects to Confess Falsely

Scholars have performed a number of empirical studies of false confessions. The studies discussed in this article fall into two general categories. First, psychology experiments conducted in a laboratory; second non-observational statistical analyses of confessions later shown to be false.

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Of course not!" *Id.*

203. *Id.* at 429.

204. *Id.*

205. *See* Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 126 (1996); *see also Leo & Ofshe*, *The Consequences of False Confessions*, *supra* note 14, at 490-92 (detailing the case of Juan Rivera, a mentally handicapped twenty-year old, who signed two police-written confessions admitting he raped and murdered a young girl, and whose conviction was later overturned).

206. *See* Singletary v. Fischer, 365 F. Supp. 2d 328, 337 (E.D.N.Y. 2005).

207. *See* Kassin & Gudjonsson, *The Psychology of Confessions*, *supra* note 159, at 56.

*i. Laboratory Experiment*

Saul Kassin established an experiment to test the hypothesis that "presentation of false evidence can lead individuals . . . to confess to an act they did not commit."[208] Each subject in the experiment was asked to take a typing test on a computer, with half the tests conducted at a fast pace and half at a slow pace.[209] All subjects were specifically warned not to hit the "ALT" key because this would cause the computer to crash and data to be lost.[210] Although none of the subjects actually hit the "ALT" key, a computer crash was simulated and the subjects were accused of doing so.[211] Initially, each subject confidently denied the accusation.[212] But then, in half the scenarios, another subject in the room (actually a plant, working with Professor Kassin) claimed to have witnessed the subject hit the "ALT" key as he had been expressly instructed not to do.[213] The experiment then measured the subjects' response to this presentation of "false evidence."

The experiment sought to measure three different kinds of responses: compliance, internalization, and confabulation.[214] Compliance was detected if the subject agreed to sign a statement admitting to having hit the "ALT" key, thereby crashing the program and destroying data.[215] Internalization was detected if the subject, when asked later by another plant what had happened, reported that she had hit the wrong key and caused the computer to crash (rather than, for instance, "They *said* I hit the wrong key").[216] Confabulation was detected if the subject was actually able to recall and describe *how* and *when* she hit the wrong key, despite having never done so.[217]

The experiment produced the following remarkable results:[218]

| | NO WITNESS | | WITNESS | |
|---|---|---|---|---|
| FORM OF INFLUENCE | *Slow Pace* | *Fast Pace* | *Slow Pace* | *Fast Pace* |

208. Kassin & Kiechel, *supra* note 205, at 126.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* (emphasis added).
217. *Id.* at 126-27.
218. *See id.* at 127 tbl.1.

| | | | | |
|---|---|---|---|---|
| *Compliance* | 35% | 65% | 89% | 100% |
| *Internalization* | 0 | 12% | 44% | 65% |
| *Confabulation* | 0 | 0 | 6% | 35% |

As the results demonstrate, the subjects were much more likely to confess when confronted with false evidence against them, though they were less likely to do so when the pace of the typing test was slow, presumably leaving them with more certainty as to which keys they actually hit.[219]

*ii. False Confession Studies: Empirical Data on the Role of Police Trickery In Actual Wrongful Convictions.*

The landmark empirical study of "miscarriages of justice," in which the innocent were convicted, is arguably Bedau & Radelet's 1987 study published in the *Stanford Law Review* ("Bedau & Radelet Study").[220] Although a full analysis of the Bedau & Radelet Study is beyond the scope of this article, their study provided much-needed statistical support for the claim that wrongful conviction of the innocent is a real and ongoing phenomenon.[221] Identifying 350 potentially capital cases of the twentieth century in which a miscarriage of justice had occurred, Bedau & Radelet concluded that the wrongful conviction was caused by a police-induced false confession in fourteen percent of the cases.[222] The Bedau-Radelet Study, though groundbreaking, does not provide a breakdown of the false confessions showing what kind of interrogation techniques were employed to induce the suspect to confess. Therefore, although it is certainly significant in demonstrating the frequency of false confessions, it is of limited use in an analysis focused on police use of false evidence ploys.

Since Bedau & Radelet, two studies have examined the phenomenon of

219. *Id.*

220. *See generally* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); s*ee also* Drizin & Leo, *supra* note 3, at 902 (describing Bedau & Radelet's article as a "watershed study"); Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 432 n.9 ("The leading contemporary research in this tradition is Bedau and Radelet's landmark study of miscarriages of justice.").

221. White, *Miranda's Failure*, *supra* note 23, at 1227; *see also* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, *supra* note 22, at 527 ("The rate of exonerations increased sharply over the fifteen year period of this study, from an average of twelve a year from 1989 through 1994, to an average of forty-two a year since 2000.").

222. Bedau & Radelet, *supra* note 220, at 57-58. Perjury by prosecution witnesses and mistaken eye-witness identification were more likely to cause the miscarriage of justice, but false confessions ranked third. *Id.* at 56.

false confessions more closely. In 1998, Leo & Ofshe published a study examining sixty cases of police-induced false confessions,[223] and in 2004, Drizin & Leo expanded on Leo & Ofshe's study by examining 125 cases.[224] Both studies provided detailed analyses of what happened to the suspects after they falsely confessed.[225] The Drizin & Leo study further reported the age of suspects who falsely confessed[226] as well as information, when available, about how long the suspects' interrogation lasted before they falsely confessed.[227] Although the data usefully examines the danger that false confession will lead to conviction as well as the special vulnerability of youthful suspects and suspects whose interrogations have lasted many hours, it provides little quantitative insight into the psychological techniques, such as false evidence ploys, utilized by police interrogators.

In fact, in the *Inabu Manual*, the response to the empirical work on false confessions and interrogation techniques[228] begins by addressing the "anecdotal accounts of presumably false confessions."[229] The *Inabu Manual* cites the Ofshe & Leo study[230] and criticizes its failure to prove statistical significance or causation:

> Anecdotal reports of false confessions have emotional appeal to the uninformed audience. However, they offer no insight as to the actual frequency or cause of false confessions. As such, they offer no scientific basis for drawing any conclusions as to false confessions, other than that some suspects historically have falsely confessed.[231]

The authors of the *Inabu Manual* then respond to Kassin's laboratory experiments, which they deride as being too far removed from real life to have any significance: "The fundamental problem with laboratory studies is the inability to generalize those findings to the field situation."[232] Finally, the *Inabu Manual* dismisses the importance of Leo's *Inside the Interrogation Room*[233] by noting that even though the police in that study

223. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14.

224. Drizin & Leo, *supra* note 3.

225. *See id.* at 949-63; Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 472-91.

226. *See* Drizin & Leo, *supra* note 3, at 944-45.

227. *See id.*, at 948-49.

228. INBAU MANUAL, *supra* note 92, at 441-46.

229. *Id.* at 442 (citing Kassin & McNall, *Police Interrogations and Confessions*, *supra* note 199).

230. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14.

231. INBAU MANUAL, *supra* note 92, at 443.

232. *Id.* at 445.

233. Leo, *Inside the Interrogation Room*, *supra* note 162.

employed some coercive techniques, Leo reported no instances of false confession.[234]

Although Drizin & Leo's 2004 study, which is the most comprehensive analysis to date of the impact of false confessions on convictions later proven wrongful by DNA testing, does not assess the role of trickery and other deceptive law enforcement tactics in producing false confessions, other reviews of actual false confession cases have shown that trickery is a coercive factor leading the suspect to falsely incriminate himself. For example, Ofshe & Leo have examined the likelihood that various types of deceptive interrogation techniques will induce a suspect to falsely confess.[235] They have concluded that the psychological interrogation tactics advocated in police training manuals straightforwardly cause suspects to confess to crimes they did not commit.[236] In addition, Professor Welsh White studied the role of false confessions in capital cases and concluded that misrepresenting the presence or strength of forensic evidence sometimes produces false confessions.[237] Accordingly, he recommended that legislatures and courts proscribe police from misrepresenting the nature of forensic evidence against capital suspects.[238]

The empirical studies described in the preceding paragraphs illuminate the phenomena that took place in the Central Park Jogger case: the coercive effect of deceptive interrogation techniques and the unreliability of the confessions they induce. Moreover, these studies show that Martin Tankleff and the young men exonerated of the Central Park Jogger attack are assuredly only two case examples of many in which police misrepresentation has induced an innocent person to confess.[239]

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234. INBAU MANUAL, *supra* note 92, at 446.

235. *See* Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L. POL. & SOC'Y 189, 202 (1997); *see also* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 440 (citing psychological interrogation methods and poor interrogation training as causes of false confessions).

236. *Id.* at 492.

237. *See* White, *Confessions in Capital Cases*, *supra* note 158, at 1018.

238. *Id.* at 1018-19.

239. *See id.* at 1016-18 (describing the case of David Vasquez who was wrongfully convicted of murder in Virginia after police falsely told him that his fingerprints had been found at the crime scene); Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 221 (describing the case of Michael Crow, who at the age of fourteen falsely confessed to murdering his sister after police told him the following untrue "facts": that his hair was found in her fist, that her blood had been found in his bedroom, that the crime was an inside job because all doors to the house were found locked, and that Crow had failed a lie detector test); Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 462-63 (describing the case of Gary Gauger who gave a false "hypothetical confession" to killing his parents and was later exonerated); *see also Coerced Confessions—Why Innocent People*

## IV. PROPOSED REFORMS: CHALLENGING DECEPTIVE INTERROGATION TECHNIQUES AS A MEANS OF REDUCING FALSE CONFESSIONS & WRONGFUL CONVICTIONS

In this part, I propose that courts and legislatures reconsider the wide latitude afforded interrogation techniques based on misrepresentations of evidence. My reasons for this proposal are: first, as discussed in the previous section, empirical studies and real-life wrongful conviction cases have demonstrated that false evidence ploys are likely to produce false confessions; second, as discussed, *infra*, in a criminal justice system whose purported goal is divining the truth, it is bad public policy to permit law enforcement officers to try to ascertain the truth by lying to suspects.

### A. Truth-Seeking Function of American Criminal Justice System

Countless court cases, articles and books have set forth the goals of the American criminal justice system, and in particular, our adversarial system of justice. One central tenet of the system is that it is designed not to achieve a prosecution at all costs, but rather to unearth the truth about the culpability of a defendant.[240] If "truth-seeking" is at the heart of our adversarial system of justice, then the question arises whether the official

*Admit to Murder*, (ABC News television broadcast Mar. 17, 2002) (stating that Gauger confessed after police told him that they had independent evidence linking him to the crime and that he must have "blacked out" and done it unknowingly); Kassin & Gudjonsson, *The Psychology of Confessions*, *supra* note 159, at 56; Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 463-64 (describing the case of Edgar Garrett, who falsely confessed to murdering his daughter after police convinced him he did so).

240. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 17 (1990) (citing the "internal function of [a criminal trial's] truth-finding" in arguing for liberal discovery rules in criminal cases); *see id.* at 18 ("Procedural rules ought be designed to maximize the chance that the outcome of the trial will be a verdict that is based on what truly occurred."); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 51-52 (1998) (describing the prosecutor's "dual role as an advocate for the government and as an administrator of justice"); *see also* Strickler v. Greene, 527 U.S. 263, 281 (1999) (recognizing the "special role played by the American prosecutor in the search for truth in criminal trials); Nix v. Whiteside, 475 U.S. 157, 166 (1980); Bennett L. Gershman, *Misuse of Scientific Evidence By Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 18 (2003) ("If a prosecutor uses the evidence responsibly, the verdict is trusted and the public's confidence in the adjudicative process is enhanced."); Gershman, *supra*, at 19 ("The prosecutor's role as a 'minister of justice' includes preeminently a duty to seek the truth."); *Dan Conley in Profile*, 39 THE PROSECUTOR 16, *available at* http://www.ndaa-apri.org/ndaa/profile/dan_conley_jan_feb_2005.html (quoting Boston district attorney Dan Conley as saying, "Our job (as prosecutors) is not simply to make arrests and preserve convictions at all costs. Our job is to seek the truth and achieve justice . . . There is nothing more critical to the integrity of the criminal justice system than to look at the evidence, no matter when it comes, and follow the facts and the law.").

use of deception and falsehood should play any role in developing the prosecution's case.[241]

First, as recognized in *Cayward* and *Patton*, courts' acceptance and thus sanction of the use of trickery during interrogations creates a risk that trickery will bleed into other parts of criminal prosecutions. This is a significant risk even despite deeply rooted and recently affirmed precedent requiring honesty and fair-dealing in criminal prosecutions.[242] The *Cayward* case may represent the outer fringe of the use of false evidence in interrogations, but the principles enunciated therein are by no means limited to cases in which forged documents are presented to the suspect. The Florida appeals court which decided *Cayward* cited at least three major concerns which prompted it to draw the line of police trickery at the fabrication of documents: 1) that the manufacturing of documents offends "our traditional notions of due process;"[243] 2) that false reports might be preserved indefinitely and may inadvertently be introduced into the court record;[244] and 3) that approval of the concoction of evidence reports would create a slippery slope which might lead to the fabrication of other official documents such as warrants, orders, lab reports, and judgments.[245]

None of these concerns are limited to the forgery of documents. In fact there is no principled distinction between a fake document and an officer's oral report to a suspect that he has failed a polygraph examination, which is a commonly used technique for eliciting confessions.[246] Both sorts of official misrepresentation offend traditional notions of due process. Forgery and oral misrepresentation differ from one another only in degree rather that in kind. False reports may be preserved indefinitely and

241. Even some of *Miranda*'s harshest critics base their criticism on the decision's purported thwarting of the truth-seeking function of the criminal justice system by protecting the guilty from the consequences of their truthful confessions. *See, e.g.*, Paul G. Cassell, *A Tribute to Joe Grano: He Kept the Flame Alive*, 46 WAYNE L. REV. 1215, 1216 (2000); *see also* Withrow v. Williams, 507 U.S. 680, 707 (1993) (O'Connor, J., dissenting in part).

242. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 701-03, 705 (2004); Kyles v. Whitley, 514 U.S. 419, 432-38, 441 (1995) (discussing prosecutorial misconduct); Brady v. Maryland, 373 U.S. 83, 88 (1963) (requiring prosecutors to turn over to the defense any exculpatory information in its possession); Napue v. Illinois, 360 U.S. 264, 269-72 (1959) (prohibiting prosecutors from knowingly using perjured evidence).

243. State v. Cayward, 552 So. 2d 971, 974 (Fla. Dist. Ct. App. 1989).

244. *Id.*

245. *Id.* at 975.

246. Kassin & Gudjonsson, *The Psychology of Confession Evidence*, *supra* note 159, at 57 ("It is important to note that as a historical matter, the polygraph has played a key role in the interrogation tactic of presenting false evidence. The polygraph is best known for its use as a lie-detector test, but because polygraph evidence is not admissible in most courts, police use it primarily to induce suspects to confess.").

introduced into the court record, presenting a risk when a law enforcement officer tells a suspect, for example, that he has failed a polygraph and that representation is recorded on tape or transcribed and later presented in the case record. There may be no documentation of the fact that the suspect did not in fact fail the polygraph, but there may very well remain documentation of the officer's report that he did fail.[247]

Thus, the same risk of an official lie becoming a part of the court record results from an oral misrepresentation as from a forged document. In fact, a counterargument to the court's analysis in *Cayward* is that it may be *easier* to discern whether a tangible item such as a document is forged than it is to determine in the absence of some documentation whether an oral representation was simply a misunderstanding, deliberately misleading, or an outright lie. Finally, there is no reason to believe that drawing the line at a forged evidence report will be a bulwark against the forgery of other official documents.[248] If our courts tolerate, and sanction as constitutional, law enforcement trickery as long as it is not reduced to paper, then applying the same logic as the *Cayward* court applied, there is nothing stopping police from fabricating information about any number of official transactions and events. Moreover, there is no clear basis for distinguishing deception by police when interrogating suspects, from deception by prosecutors when presenting evidence in court, a practice which courts have long held to offend the Constitution.[249] Again, there is little justification for drawing the line at false documents which have been proven no more damaging to criminal cases and to confidence in our criminal justice system than other forms of deception employed routinely by those who are sworn to protect and uphold the law.[250]

247. *See also* State v. Patton, 826 A.2d 783, 794, 798-99 (N.J. Sup. Ct. 2003) (discussing the risks in using fabricated audio-taped evidence during interrogation which, in this case, included the prosecution's use of the fabricated evidence at trial to satisfy its burden that the confession was voluntary and which prejudiced the jury by exposing it to otherwise inadmissible prior bad act hearsay evidence).

248. *Id.*

249. *See supra* note 242 and accompanying text. Relatedly, interrogating officers should apprise prosecutors when they employ false evidence ploys and other deceptive interrogation techniques to elicit incriminating statements. Prosecutors should be aware of the circumstances begetting confession evidence before deciding whether to rely on such evidence in pursuing prosecutions.

250. *See, e.g.*, Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIPIAC L. REV. 151, 190-191 (2004) (criticizing law enforcement's use of imaginary informants in drug cases and discussing other legally sanctioned forms of police trickery).

### B. Recommendations

In light of the scientific findings and actual wrongful conviction cases demonstrating that false evidence ploys and other forms of law enforcement trickery produce false confessions,[251] and in light of the fact that allowing police to lie to suspects undermines our justice system's reliance on truth to discover the truth, courts and lawmakers should outlaw the deliberate deception of suspects by police.[252] The following are a few recommendations toward this end.

First, legislators should pass statutes outlawing law enforcement misrepresentations about incriminating evidence during interrogations and limiting the use of trickery during custodial questioning generally.[253] At a minimum, these laws should prohibit police from misrepresenting the presence or strength of forensic evidence against a suspect. They should also outlaw police misrepresentations about statements of alleged accomplices or eyewitnesses incriminating the suspect. In addition, these statutes should circumscribe police from outrightly misleading a suspect about the purposes of the interrogation; for example, indicating that he is a witness instead of a suspect. Statutes should also require police to alert prosecutors to their use of deceptive interrogation techniques in any given case. This requirement will give prosecutors an opportunity to evaluate the incriminating evidence in a complete light. Prosecutors should, in turn, be required to provide notice to defense counsel that police misled the defendant about critical evidence before he confessed. Defense counsel ought to then challenge the admissibility of the confession as recommended more fully below.

In light of the ample evidence that false law enforcement claims about the availability and nature of incriminating evidence induce false

251. *See* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 491-92

> This article has documented that American police continue to elicit false confessions even though the era of third degree interrogation has passed . . . For those concerned with the proper administration of justice, the important issue is no longer whether contemporary interrogation methods cause innocent suspects to confess. Nor is it to speculate about the rate of police-induced false confession or the annual number of wrongful convictions they cause. Rather, the important question is: How can such errors be prevented?

252. *See id.* at 493 ("False confessions threaten the quality of criminal justice in America by inflicting significant and unnecessary harms on the innocent.").

253. *See* White, *Confessions in Capital Cases*, *supra* note 158, at 982-83, 992-93 (relating several reforms of interrogation techniques that the Governor's Commission on Capital Punishment recommended, including heightened judicial scrutiny of interrogation tactics that mislead the suspect as to the strength of the evidence against him or the likelihood of his guilt "in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession").

confessions and consequently wrongful convictions, legislators need not wait until a high-profile exoneration takes place in their state.[254] Rather, every state should establish Innocence Commissions to examine the prevalence of factors known to lead to wrongful convictions—including false confessions—nationwide, and to establish reforms aimed at preventing conviction of the innocent.

Recognizing, however, that events in particular cases often spur criminal justice reform, the following recommendations are aimed at defense counsel representing clients in cases in which confession evidence plays a central role. These recommendations are particularly important in cases where there is little, or weak, independent evidence corroborating the confession. The recommendations are aimed at exposing both false confessions and the factors that induce people to incriminate themselves in crimes they did not commit. As more examples of false confessions induced by false evidence ploys and other deceptive interrogation tactics come to light, legislators and their constituents will likely be more willing to advocate for reform circumscribing such techniques.[255]

Defense lawyers ought to routinely ask their clients who make custodial incriminating statements whether police made any representations that evidence linked them to the crime. If it turns out that police did make such representations and that the purported evidence did not exist, defense counsel should argue that the confession is *per se* inadmissible.[256] Even if trial courts are constrained by the precedent holding that trickery in interrogation is constitutional, the issue will be preserved for presentation on direct appeal and post-conviction where state and federal courts may reconsider the parameters of what kind of law enforcement deception warrants *per se* suppression of confessions and what deceptive techniques are constitutionally permissible.

As early as practically possible after a suspect has been arrested, defense counsel should seek discovery of any independent evidence corroborating her client's statements to police. Defense counsel should then independently assess whether the physical evidence, other witness statements, or any other reliable piece of information establishes the

254. Of the 154 DNA exonerations, at least thirty-six have involved false confessions. E-mail from Huy Dao, Case Director, The Innocence Project at Benjamin N. Cardozo School of Law (Jan. 12, 2005) (on file with author).

255. In order to respond effectively to anticipated protests by police groups that false evidence ploys and other deceptive tactics are necessary to catch the guilty and that they rarely ensnare the innocent, advocates for reform will have to carefully develop case-related examples of false confessions wrought by the tactics they seek to circumscribe. These recommendations are aimed at developing such examples.

256. *See* State v. Patton, 826 A.2d 783, 802-03 (N.J. Sup. Ct. 2003).

veracity of any part of the client's incriminating statement.[257] When in doubt, counsel should employ the services of a psychologist or other false confession expert who possesses the skills to objectively evaluate the reliability of the confession. At the same time, counsel should move for discovery of interrogation manuals and practices employed by the prosecuting law enforcement agency. Counsel should determine whether these include instructions on using false evidence ploys to induce a confession and then move to allow expert testimony at trial about the extent to which such interrogation methods undermine the reliability of confessions. The production of such manuals will both assist counsel and the retained confession expert in assessing what techniques were used in the defendant's interrogation, and provide a basis for suppression hearings, jury instructions, and other proceedings related to the reliability of the confession.

In cases in which the confession is the only evidence against the defendant, and there is no independent physical or other reliable evidence of guilt, defense counsel should move for dismissal of the case altogether. Given the revelations brought to light by DNA and other exonerations that confession evidence is often unreliable and the basis for wrongful convictions,[258] no criminal prosecution should proceed on the basis of the defendant's uncorroborated self-incriminating statement alone.[259]

In cases in which a confession is the principal evidence against the defendant and there is some credible indication that deceptive interrogation tactics were used, defense counsel should also move for full suppression hearings to cross-examine officers about the deceptive interrogation tactics employed. During such hearings, the defendant and other witnesses make a record of the falsehoods police told the suspect before he confessed, and experts testify about the coercive effects of the deceptive interrogation

257. Leo & Ofshe, *The Consequences of False Confessions*, *supra* note 14, at 495 (discussing the need . . .[t]o carefully scrutinize and evaluate a suspect's post-admission narrative against the known facts of the crime" and warning that, "In investigations in which hard evidence linking a person to a crime is missing, only the analysis of the suspect's post-admission narrative provides a basis for objectively assessing his personal knowledge of a crime.").

258. *See supra* note 254 and accompanying text (citing Innocence Project statistics on false confessions).

259. *See* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 495 ("It bears emphasizing that in none of the disputed confessions documented in this article was there any reliable evidence corroborating the defendant's confession . . . absent the uncorroborated and unreliable statement, none of these individuals would likely have been arrested, charged, convicted, incarcerated, or executed."). The *Inbau Manual* acknowledges that confessions lacking independent corroborating evidence "should be viewed suspiciously." INBAU MANUAL, *supra note* 92, at 437.

techniques on the suspect.[260] Trial courts should in turn insist on some independent evidence before admitting a confession into evidence.[261]

In addition, counsel should move for jury instructions apprising the jury that they may consider the circumstances of the confession, including whether the defendant was misled about the nature or strength of evidence linking him to the crime and accord the incriminating statements less weight if they find that they were influenced by law enforcement falsehoods. Such instructions will encourage the jury to place the confession into its proper context and give it the appropriate weight, particularly if there is little or no other evidence linking the defendant to the crime. As with the suppression motion, moving for the instruction preserves the issue for appellate and post-conviction review even if the motion is denied.

Attorneys should challenge the validity of confessions begotten by trickery on appeal as well as in post-conviction proceedings. As reviewing courts learn more about the impact of the practice and the ways in which it undermines the reliability of and confidence in the evidence used to convict, it may encourage judges to circumscribe the use of deceptive techniques. Courts hearing such challenges should establish bright-line exclusionary rules prohibiting the use of false evidence during interrogations. Such rules would automatically render inadmissible statements derived from intentionally false representations by law enforcement about such matters as the presence or strength of forensic evidence, incriminating statements by eyewitnesses or alleged accomplices, and whether the defendant was led to believe that he was being questioned merely as a witness rather than as a suspect.[262]

Civil remedies should also be pursued when exonerations come to light in cases involving deceptive interrogation practices that resulted in false

260. *See* Crawford v. Washington, 541 U.S. 36, 66-67 (2004) (discussing the circumstances of the witness's interrogation, which included "leading questions" by police officers and noting that it was "imperative" that she be cross examined in order to allow the jury to assess her statements' truth).

261. *See* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 495 (recommending that "courts insist on minimal indicia of reliability before admitting confession statements into evidence").

262. *See* State v. Patton, 826 A.2d 783, 804 (N.J. Sup. Ct. 2003). *But see* Godsey, *supra* note 31, at 536-37 (arguing that psychological interrogation techniques are "intangible" violations and should not be considered "objective penalties" warranting the suppression of a confession); *id.* at 537 ("Extending the category of penalties to include changes in mood or feelings caused by psychological pressure would create the same type of ambiguity and subjectivity that haunts the due process involuntary confession rule. Psychological pressures should, therefore, not be considered penalties. Pressures of this type are better suited for regulation under the due process clauses.").

confessions. The Fourth Circuit has recently affirmed, in a Section 1983 case, a Virginia district court's denial of qualified immunity to a police officer who is alleged to have fabricated evidence which purportedly showed that a rape and murder suspect provided police with independent evidence of the crime unknown to the public.[263] The plaintiff alleged that the officer and his colleague fed him, a mentally impaired man, relevant facts and then transcribed his answers to create his "confession."[264] The Fourth Circuit held that the district court fairly concluded that the plaintiff—the exonerated man—had alleged facts amounting to a deprivation of a constitutional right which was clearly established at the time of the plaintiff's conviction, namely the right not to be convicted pursuant to a fabricated police report of his confession.[265] The interrogation tactics in the Fourth Circuit case were not so much trickery of the suspect as much as they were misrepresentation of the circumstances of the confession, but the case opens the door for other exonerated people to sue when their convictions have been based on police chicanery during interrogations. If officers are deprived of immunity when their standard interrogation techniques deprive the innocent of liberty, then police departments may become more motivated to reevaluate interrogation tactics that most often result in false confessions.

Legislators should also pass laws circumscribing criminal prosecutions in at least the most serious of cases, rape and murder, where there is no independent, reliable evidence other than the suspect's own incriminating statements.[266] (As noted above, police should be required to disclose to prosecutors cases in which deceptive interrogation tactics result in confessions.) This proposal is not unlike the Illinois Commission's recommendation that prosecutions based solely on the uncorroborated testimony of a single eyewitness, accomplice, or jailhouse snitch, be ineligible for capital punishment.[267]

Videotaping interrogations is another widely recommended reform which, if performed correctly, not only protects the right of the accused by

263. *See* Washington v. Wilmore, 407 F.3d 274, 281-83 (4th Cir. 2005).

264. *See id.* at 277.

265. *See id.* at 283.

266. *See* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 495 (recommending that "police are trained to seek both independent evidence of a suspect's guilt and internal corroboration for every confession before making an arrest," and that "state's attorneys demand that 'I did it' statements be corroborated by the details of a suspect's post-admission narrative before undertaking a prosecution").

267. *See* FORMER ILL. GOVERNOR RYAN'S COMM'N ON CAPITAL PUNISHMENT, REPORT, RECOMMENDATION 158 (2002), *available at* http://idoc.state.il.us/ccp/ccp/reports/index.html'.

providing an objective account of the interrogation, but also insulates police from frivolous claims that a confession has been coerced.[268] In Illinois, the videotaping of interrogations is being phased into practice pursuant to legislation recommended by Governor George Ryan's commission recommending reforms designed to reduce the likelihood of wrongful conviction.[269] Videotaping is also required in a number of other jurisdictions.[270] Lawmakers in other states should also adopt the practice, especially in homicide cases.[271]

In short, it is high time to do away with the long tradition of the use of deception to trick suspects into confessing. The demonstrated correlation between police deception during interrogation and false confessions leading to wrongful convictions should inspire timely judicial and legislative reform.

## CONCLUSION

At the core of the American justice system is the reliance on actual,

268. *See* Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 225.

269. *See* Steve Mills & Maurice Possley, *Will Taping Interrogations Fix the System? Law Requires Police to Record Questioning, and Some Hope it Prevents False Confession*, THE CHI. TRIB., June 21, 2005 at A1 (reporting that as of July 2005, state law will require police across Illinois to videotape interrogations in all homicide investigations; under the new law a confession will be presumed inadmissible as evidence if the police interrogation leading up to it is not videotaped, with exceptions available if the suspect chooses not to be videotaped or if video equipment is unavailable). For a detailed report on law enforcement experiences with videotaping interrogations, see, for example, Thomas P. Sullivan, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS, A SPECIAL REPORT PRESENTED BY THE NORTHWESTERN UNIVERSITY SCHOOL OF LAW'S CENTER ON WRONGFUL CONVICTIONS (2004) (reporting on the experiences of 238 law enforcement agencies in thirty-eight states which videotape interrogations and concluding, "Recordings benefit suspects, law enforcement, prosecutors, juries, trial and reviewing court judges, and the search for truth in our justice system. The time has come for standard police practice throughout the United States to include the use of devices to record the entire interrogation of suspects in custody in all major felony investigations."). Recently, the Wisconsin Supreme Court held that police must electronically record all interrogations of juvenile suspects. *See In re* Jerrell C.J., 699 N.W.2d 110, 120-21 (Wis. 2005). The case which prompted the reform involved a fourteen-year-old boy accused of armed robbery. *Id.* at 113. Police handcuffed him to a wall and left him alone for two hours before questioning him without counsel for five hours. *Id.* at 113, 114. Eventually, he confessed to participating in the robbery. *Id.* at 114.

270. *See* Kassin, *Does Innocence Put Innocents at Risk?*, *supra* note 29, at 225 (noting that Minnesota, Alaska, Illinois, and Maine have mandatory videotaping requirements, recommending that videotaping be adopted widely, and describing the protocols most likely to produce a neutral view of the interrogation); *see also* Leo & Ofshe, *Consequences of False Confessions*, *supra* note 14, at 494.

271. *See* White, *Confessions in Capital Cases*, *supra* note 158, at 990 (citing Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 485 (1996)).

legally obtained evidence to discern the truth about a crime and to convict the guilty. In principle, the law is designed to increase confidence in the administration of justice and to insure that the guilty are convicted with legally obtained evidence and the innocent go free.

In the era preceding the advent of DNA exonerations and other conclusive proof of wrongful convictions, it was generally accepted by police and by courts that standard police interrogation practices, including the routine deception of suspects about significant matters related to their interrogation, did not induce false confessions. On the basis of this presumption, courts have consistently held that police may use lies, trickery, and various forms of deception when interrogating suspects.

In recent years, however, ever-increasing numbers of wrongful convictions have exposed the practical fallout of such deceptive interrogation practices. Wrongful convictions have provided an opportunity to closely examine the factors which cause the innocent to confess to serious crimes. As the case studies and empirical data outlined in this article demonstrate, interrogators' deception of suspects concerning critical issues such as the purpose of the interrogation and the strength or availability of incriminating physical or testimonial evidence, often leads the innocent to miscalculate the risks or costs of admitting involvement in a crime. These studies effectively counter the leading interrogation manual's insistence that standard interrogation techniques never cause the innocent to confess.

In light of the growing catalogue of cases involving demonstrably false confessions as well as empirical data correlating deceptive interrogation techniques with false confessions, courts and lawmakers should seize the opportunity to reevaluate their acceptance of deliberate law enforcement misrepresentation and to realign interrogation practices with the justice system's principled reliance on truth. Minimal safeguards include: per se exclusion of confessions made after police have misrepresented the availability or strength of physical or testimonial evidence; the establishment of innocence commissions to examine the factors, including deceptive interrogation techniques, contributing to false confessions; the enactment of laws proscribing police from misrepresenting during interrogations the nature or availability of evidence against suspects; and the enactment of laws requiring police to disclose to prosecutors, and prosecutors to disclose to defense counsel, instances in which a suspect confessed only after the police employed deceptive interrogation tactics. In addition, prosecutors should be prohibited from prosecuting cases in which the only incriminating evidence is a confession following police misrepresentation of evidence or misleading about the purpose of the interrogation. Finally, defense attorneys have an obligation to challenge

the admissibility of confessions wrought by deceptive interrogation tactics, and to provide data before trial, at trial, and on appeal of the coercive effects of deceptive police interrogation practices.

The notion that protection of the innocent is paramount to a credible criminal justice system is universally recognized. The recommendations herein—reforms designed to limit the use of deceptive interrogation techniques and challenges to confessions elicited via such techniques—will go a long way toward protecting the innocent, reducing the risks of false confessions, and shoring up the reliability of our justice system.