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Deceptive Police Interrogation Practices: How Far is too Far?

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DECEPTIVE POLICE INTERROGATION PRACTICES: HOW FAR IS TOO FAR?

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I. INTRODUCTION: FOCUSING ON VOLUNTARINESS TO LIMIT THE USE OF DECEPTION

Virtually all interrogations — or at least virtually all successful interrogations — involve some deception.[1] As the United States Supreme Court has placed few limits on the use of deception, the variety of deceptive techniques is limited chiefly by the ingenuity of the interrogator. Interrogators still rely on the classic "Mutt and Jeff," or "good cop, bad cop," routine. Interrogators tell suspects that nonexistent eyewitnesses have identified them, or that still at-large accomplices have given statements against them. Interrogators have been known to put an unsophisticated suspect's hand on a fancy, new photocopy machine and tell him that the "Truth Machine" will know if he is lying. Occasionally, an interrogator will create a piece of evidence, such as a lab report purporting to link the suspect's bodily fluids to the victim. Perhaps most often, interrogators lie to create a rapport with a suspect. Interrogators who feel utter revulsion toward suspects accused of horrible crimes sometimes speak in a kindly, solicitous tone, professing to feel sympathy and compassion for the suspect and to feel that the victim, even if a child, should share the blame. At the very least, the successful interrogator deceives the suspect by allowing the suspect to believe that it somehow will be in the suspect's best interest to undertake the almost always self-defeating course of confessing.

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1. As referred to by commentators seeking to limit the use of deceptive interrogation techniques, deception is defined broadly to include everything from express misstatements about the existence of evidence, to the use of false expressions of sympathy for a suspect in order to establish a better rapport.

Because most deception is employed only after the suspect executes a valid waiver of *Miranda*[2] rights, *Miranda* offers suspects little protection from deceptive interrogation techniques. Thus, commentators have increasingly looked to the voluntariness requirement of the Due Process Clause as a basis for limiting these techniques. These commentators have offered a variety of rationales for the voluntariness requirement — such as equality, dignity, and trust — to justify limiting the use of deception. On close scrutiny, however, none of these rationales provides a sound basis for prohibiting or drastically limiting the use of deception during interrogation. Presumably in recognition of the fact that these rationales have somewhat limited resonance with the Court, with legislators, and with the public at large, some commentators have now focused on the reliability rationale for the voluntariness requirement. A confession is unreliable when the person who gives it actually had nothing to do with the crime to which he purports to confess.

Commentators have sought to show that deception causes many false confessions and, thus, the wrongful convictions of many innocent persons.[3] Their efforts have captured the attention not only of the academic community, but also of the popular press.[4] Television, newspapers, and magazines have reported on individual cases in which defendants were convicted after giving purportedly false confessions,[5] and on the academic studies calling for limits on the use of deception during interrogation.[6] Scholars of law and psychology have made sug-

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. As discussed in this literature, a false confession does not include a statement making even a partial admission to actual wrongdoing. A false confession consists only of an admission to wrongdoing by an entirely innocent person.

4. *See* Alan W. Scheflin, Book Review, 38 SANTA CLARA L. REV. 1293, 1297 (1998) (reviewing CRIMINAL DETECTION AND THE PSYCHOLOGY OF CRIME (David W. Canter & Laurence J. Alison, eds., 1997)) (finding that the "field of false confessions is currently a 'hot' topic").

5. *See* James R. Peterson, *True Confession?*, PLAYBOY, July 1, 1999, at 45, *available at* 1999 WL 7387978 (collecting cases of allegedly false confessions); *ABC News: 20/20* (ABC television broadcast, June 18, 1999), *available at* 1999 WL 6790763 (reporting on the confession of twelve-year-old Anthony Harris to murdering his five-year-old neighbor, and the confession of fifteen-year-old Michael Crowe to murdering his younger sister); *CBS News: 48 Hours* (CBS television broadcast, Apr. 13, 2000), *available at* 2000 WL 8422806 (reporting on two teenagers who confessed to murdering four girls in Austin) [hereinafter *48 Hours*]; *60 Minutes* (CBS television broadcast, June 30, 1996) (reporting on the case of Richard LaPointe's allegedly false confession to murder).

6. *See, e.g.*, Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1 (reporting on Leo and Ofshe's study); Thomas H. Maugh II, *Glendale Case Raises Issue of Reliability of Confessions*, L.A. TIMES, Apr. 2, 1998, at A1 (same); Mary McCarty & Tom Beyerlein, *Coming Back to Life After Hell*, DAYTON DAILY NEWS, July 4, 1985, at 1A, *available at* 1995 WL 8952484 (reporting on man released from death row and referring to the Bedau & Radelet study); Clarence Page, *When a Death Sentence is Dead Wrong*, CINCINNATI POST, July 11, 1996, at 19A, *available at* 1996 WL 10557685 (reporting on four men freed from prison and the report by Bedau and Radelet); Peterson, *supra* note 5, at 45 (reporting on Leo and Ofshe study of sixty false con-

gestions for curtailing deceptive interrogation techniques.[7] While some commentators have concluded that few limits on deception techniques are necessary,[8] and a few have advocated prohibiting any interrogation techniques involving deception,[9] still others have proposed limits between these two extremes.[10]

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fessions); *48 Hours*, *supra* note 5 (reporting that Dr. Ofshe has analyzed sixty cases of police-induced false confessions).

7. *See* Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alschuler*, 74 DENV. U. L. REV. 1123, 1131 (1997) ("In the law reviews and psychological journals, one can read a veritable stream of new ideas for restricting — or even eliminating — police interrogation.") [hereinafter Cassell, *Balanced Approaches*].

8. *See, e.g.*, Fred E. Inbau, *Police Interrogation — A Practical Necessity*, 52 J. CRIM. L. & CRIMINOLOGY 16, 20 (1961) ("Although both 'fair' and 'unfair' interrogation practices are permissible, nothing shall be done or said to the subject that will be apt to make an innocent person confess.") [hereinafter Inbau, *Police Interrogation*]; Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 777 (1997) (taking a fairly expansive view on the use of deception by asserting that deceptive practices should be permitted once there has been a judicial determination of probable cause); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 690 (1986) (reviewing FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986)) (concluding that "tactics that are likely to induce a false confession" are unacceptable) [hereinafter Grano, *Selling the Idea*].

9. *See* Margaret Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9, 44 (1996) (advocating the prohibition of any lies during questioning) [hereinafter Paris, *Trust*]; Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1612 (1988) (advocating a per se rule against police trickery during interrogation); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 477 (1996) (urging a complete ban on police lying in order to maintain trust relationships between citizens and the police); Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729 (1994).

Some commentators have sought to limit not only deceptive interrogation, but also any interrogation of suspects in the absence of counsel. *See* Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT xvii (1932) (proposing a bar on all interrogation by the police); Donald A. Dripps, *Foreword: Against Police Interrogation — And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 726 (1988) (arguing for a bar on all confessions obtained during custodial interrogation); Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1842 (1987) (urging that interrogation be permitted only in the presence of counsel); Young, *supra* at 473-76 (arguing that confessions are seldom necessary, especially if obtained by deception).

10. The most detailed intermediate proposal comes from Professor Welsh White. He argues "that interrogation methods likely to lead to untrustworthy confessions should be prohibited." Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111 (1997) [hereinafter White, *False Confessions*]. He advocates substantial limits on deception by proposing, first, that the police be prohibited from falsely leading a suspect "into believing that forensic evidence establishes his guilt," *id.* at 149, and, second, that courts closely scrutinize tactics that mislead the suspect "as to the strength of the evidence against him (or the likelihood of his guilt)," *id.* *See also id.* at 142-43 (suggesting that courts should restrict interrogation of "vulnerable suspects" such as juveniles and mentally impaired persons). This two-part proposal is far more limited than his 1979 proposal, in which he contended that "the device of seeking to elicit incriminating information through the assumption of a non-adversarial role should be

In order to evaluate these calls for either bans or significant limits on the use of deceptive interrogation techniques, I begin by briefly summarizing the history of the voluntariness requirement to identify its primary policy of preventing unreliable confessions. Next, I critique the rationales for the voluntariness requirement, other than reliability, that have been offered as a basis for limiting deceptive interrogation. After concluding that none of these other rationales offers an appropriate basis for the limits, I examine the reliability rationale for the voluntariness requirement, and I find that it does provide the appropriate basis for setting appropriate limits on deceptive interrogation techniques. I then consider the evidence that reliability has been implicated by the purportedly widespread problem with police-induced false confessions. Finding that the evidence of such false confessions consists entirely of anecdotal accounts, I conclude that the existing evidence falls well short of establishing the significant problem that

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barred." Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PENN. L. REV. 581, 617 (1979) [hereinafter White, *Police Trickery*].

Professor Albert Alschuler has made suggestions similar to those of Professor White. He acknowledges that "[i]n some circumstances, [the police] should be allowed to express false sympathy for the suspect, blame the victim, play on the suspect's religious feelings, reveal incriminating evidence that in fact exists, confront the suspect with inconsistent statements, and more." Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 973 (1997) [hereinafter Alschuler, *Constraint*]; *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2669 (1996) (proposing that police interrogation be replaced with questioning by a neutral magistrate). But he insists that, in addition to barring threats or promises, courts "should forbid falsifying incriminating evidence and misrepresenting the strength of the evidence against a suspect." Alschuler, *Constraint*, *supra* at 974.

Professors Richard Leo and Richard Ofshe, the authors of a widely-cited article on false confessions, suggest a different approach. They do not advocate direct limits on the use of interrogation techniques involving deception. Instead, they first suggest that interrogations be videotaped. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1120 (1997) ("To further improve interrogation practices and the truth-finding function of the criminal justice system, mandatory taping of interrogations should be adopted.") [hereinafter Ofshe & Leo, *Decision to Confess Falsely*]. They then suggest that judges evaluate the reliability of a confession before admitting it as evidence at trial. *See id.* at 1118. They would have judges determine reliability by considering whether the defendant's "post-confession narrative" and the other evidence in the case corroborate the confession. Such evaluations are objectionable, however, because they would intrude on the traditional role of the factfinder. Judges do not evaluate other types of evidence — such as witness identifications — to determine whether the evidence is corroborated by other evidence. There is no reason to impose a corroboration requirement on statement evidence. *See* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction From False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 526 (1999) (criticizing the corroboration requirement) [hereinafter Cassell, *Guilty and "Innocent"*]. Even if the use of deception were shown to create a false confession problem, the proposed pre-trial evaluation of all confessions would not be the appropriate means of remedying the problem. *See* Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2025-26 (1998) (criticizing Leo's reliability requirement as both unworkable and insufficiently protective) [hereinafter White, *Involuntary Confession*].

has been alleged to exist.[11] On the other hand, greatly limiting deception would impose significant costs on society in terms of reduced numbers of true confessions and reduced convictions of guilty persons.

There is absolutely no question that the conviction of an innocent person because of a false confession is an enormous failing of the criminal justice system. But it does matter whether such occurrences are rare tragedies or a widespread epidemic. Statistically sound studies, based on a random sample of confessions to determine how many are false, can and should be done. At this point, however, given the absence of empirical support, the calls for fundamentally changing the way crime is investigated in this country are not justified.

II. DEFINING VOLUNTARINESS

A. *The Multi-Factor Totality of the Circumstances Test*

The common law originally placed no limits on the methods used to obtain confessions.[12] During the 1700s and 1800s, however, judges in both Great Britain and the United States became increasingly concerned about the reliability of statements obtained by physically abusive means and began to ask whether confessions were voluntarily given.[13] For example, in its 1884 *Hopt v. Utah* decision, the U.S. Supreme Court suggested that abusive interrogation tactics might rebut "the presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement."[14]

Nevertheless, law enforcement personnel continued to employ the "third degree" during interrogation. In 1936, however, with *Brown v. Mississippi*,[15] the Court turned to the Due Process Clause of the Fourteenth Amendment as the basis for examining the voluntariness of confessions in dozens of state cases.[16] The Court held that police use of violence was "revolting to the sense of justice,"[17] stating that "[t]he

11. Thus far, there has been "advocacy research," but not objective "academic research," on the issue of how frequently false confessions occur. *See generally* Victor L. Streib, *Academic Research and Advocacy Research*, 36 CLEV. ST. L. REV. 253 (1988).

12. 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.2(a), at 442 (2d ed. 1999).

13. *See id.* § 6.2, at 440 ("[A] confession forced from the mind by the flattery of hope, or by the torture of fear" would be excluded because it "comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it." (quoting The King v. Warickshall, 168 Eng. Rep. 234, 234-35 (K.B. 1783))).

14. 110 U.S. 574, 585 (1884).

15. 297 U.S. 278, 285-87 (1936).

16. *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2203 ("Due Process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown v. Mississippi* . . . .").

17. *Brown*, 297 U.S. at 286.

rack and torture chamber may not be substituted for the witness stand."[18] In *Brown* and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable.[19] Due process required interrogation procedures that would yield voluntary, and therefore reliable, statements. Courts used a "totality of the circumstances" analysis to determine whether "the interrogation was . . . unreasonable or shocking, or if the accused clearly did not have an opportunity to make a rational or intelligent choice."[20]

The totality of the circumstances test required courts to consider: the conduct and actions of the officers; the physical surroundings of the interrogation; and the characteristics and status of the defendant, including both physical and mental condition.[21] Some types of police conduct were deemed so coercive that no examination of the particular susceptibilities of the suspect was even necessary.[22] Most notably, physical violence and threats, whether implicit[23] or explicit, could not be directed against any suspect.[24] Physical mistreatment,[25] such as extended periods of interrogation without intervals for sleep, also provided grounds for finding involuntariness.[26]

The Court's pre-*Miranda* cases regularly looked to the characteristics of the particular defendant in deciding whether a confession should be deemed involuntary.[27] When the suspect was a juvenile, mentally ill, retarded, or intoxicated, courts required the police to lessen the intensity and duration of the interrogation or reduce the amount of deception. In other cases, however, the courts provided lit-

18. *Id.* at 285-86.

19. *See, e.g.*, Ward v. Texas, 316 U.S. 547 (1942) (defendant threatened with mob violence); Chambers v. Florida, 309 U.S. 227 (1940) (defendant interrogated for five days with no contact with anyone except the police); White v. Texas, 309 U.S. 631 (1940) (defendant taken into the woods on six nights for interrogation).

20. New York v. Quarles, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring and dissenting).

21. *See* LAFAVE ET AL., *supra* note 12, § 6.2(c), at 448.

22. *See* Stein v. New York, 346 U.S. 156, 182 (1953) (stating that, when the police conduct is outrageous, "there is no need to weigh or measure its effects on the will of the individual victim").

23. *See* Malinski v. New York, 324 U.S. 401 (1945) (defendant was kept naked for three hours, then left in his socks and underwear with a blanket for several more hours).

24. *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967); Haynes v. Washington, 373 U.S. 503 (1963) (slapping); Brown v. Mississippi, 297 U.S. 278 (1936) (whipping).

25. *See, e.g.*, Brooks v. Florida, 389 U.S. 413 (1961) (deprivation of food or water).

26. *See* Reck v. Pate, 367 U.S. 433 (1961); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (thirty-six hours of interrogation).

27. *See, e.g.*, Haley v. Ohio, 322 U.S. 596, 599 (1948) (stating, in a case in which a fifteen-year-old African-American defendant was arrested for murder and questioned from midnight to 5:00 a.m. by relays of officers, "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.").

tle guidance to police regarding which social, emotional, or mental characteristics were relevant in determining how to interrogate a particular suspect.[28]

Even though reliability was surely uppermost in the Court's mind when it decided *Brown v. Mississippi*, the Court gave mixed and confusing signals in subsequent cases about the precise rationale for the voluntariness requirement.[29] For example, in *Jackson v. Denno*,[30] the Court referred to a "complex of values" requiring the exclusion of involuntary confessions. Reliability was just one of these values. Yet, notwithstanding the Court's assertions that there are rationales other than reliability for the voluntariness requirement, reliability still appears to be the single most important factor considered by the Court in deciding whether a confession is voluntary.[31]

B. *Courts Place Few Limits on the Use of Deception During an Interrogation*

Interrogation typically requires at least some deception — from professing unfelt sympathy for the suspect, to exaggerating the strength of the evidence against the suspect, to falsely alleging that a witness has identified the suspect.[32] In the pre-*Miranda* voluntariness

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28. In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court found that police misconduct was an absolute prerequisite to a finding of involuntariness. Thus, the vulnerabilities of a particular defendant could never alone establish involuntariness.

29. *See* White, *False Confessions*, *supra* note 10, at 112-13 (discussing Rogers v. Richmond, 365 U.S. 534 (1961)). In *Rogers*, the Court said that the issue was not reliability but "whether the behavior of the State's law enforcement officials was such as to overbear [defendant's] will to resist and bring about confessions not freely self-determined — a question to be answered with complete disregard of whether or not [defendant] in fact spoke the truth." *Rogers*, 365 U.S. at 542, 544.

30. 378 U.S. 368 (1964).

31. *See* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 20-21 (1980) (during the 1960s, "in 99 cases out of 100," a confession's voluntariness would be determined on the basis of whether the "interrogation methods employed . . . create[d] a substantial risk that a person subjected to them will falsely confess — whether or not this particular defendant did." (emphasis omitted)); White, *False Confessions*, *supra* note 10, at 113 ("[I]t still appeared that the probable trustworthiness of a confession would be an important factor in determining its admissibility under the due process voluntariness test.").

32. The seminal work on the various types of deception that the police employ during interrogation is contained in the police manual, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986).

In Professor Leo's "typology of interrogatory deception," he catalogues the most frequently used interrogation techniques. *See* Richard A. Leo & Jerome H. Skolnick, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 5-7 (1992). He included: (1) presenting interrogations as noncustodial interviews not subject to *Miranda*; (2) giving the *Miranda* warnings in a way calculated to downplay their importance; (3) misrepresenting the nature or seriousness of the offense; (4) assuming roles to make manipulative appeals to conscience; (5) misrepresenting the moral seriousness of the offense; (6) using vague and indefinite promises; (7) misrepresenting police identity; and (8) fabricating evidence. Professor Leo's description of deceptive tactics is quite similar to that of the *Miranda* Court.

cases, the Court characterized the use of deception during interrogation as just one of the many factors it considered in evaluating the totality of the circumstances surrounding the confession. For example, in *Spano v. New York*,[33] an officer, who was also a close friend of the defendant, told the defendant that he would get in a lot of trouble if the defendant did not confess. The Court found that the use of the defendant's childhood friend, who feigned legal and family difficulties to get the defendant to confess, was unconstitutional. Although the Court held that the defendant's statement was involuntary, the use of deception was not a dispositive factor.[34] In addition to the exploitation of the friendship, the Court's holding relied on the defendant's limited education, his emotional instability, his great fatigue, the pressure used by the interrogating officers over many hours, his requests for an attorney, and his requests to remain silent.[35]

Although the *Miranda* Court appeared to take a negative view of deceptive interrogation techniques, the Court imposed few limits on their use. By detailed reference to police training manuals, the Court took note of widely used techniques, such as "good cop, bad cop" routines and false lineup identification techniques, and observed that the techniques created or increased the disadvantage most suspects had in matching wits with their interrogators.[36] Instead of forbidding such techniques, however, the Court protected suspects by requiring that police inform suspects of their rights to remain silent and to be provided with an attorney before commencing custodial interrogation.[37] *Miranda* was the high-water mark of the Court's negative view of interrogation in general and deceptive interrogation in particular.[38] Since

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See Miranda v. Arizona, 384 U.S. 436, 449-55 (1966) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (1962) (cataloguing various psychological interrogation techniques)); *see also* White, *Police Trickery*, *supra* note 10, at 602-28 (describing various types of deception used by police during interrogation).

33. 360 U.S. 315 (1959).

34. The Court stated that it deserved mentioning, in the totality of the circumstances inquiry, that one of the officers who questioned the defendant was a childhood friend, who falsely represented to the defendant that he would be in trouble if the defendant did not confess. *Id.* at 323.

35. *See id.* at 321-23 (noting that the cumulation of these factors amounted to "official pressure" that overwhelmed the defendant's will).

36. *See Miranda*, 384 U.S. at 448-58 (listing various types of police deception and observing that they could take a "heavy toll on individual liberty").

37. *Miranda* does limit the use of deception in obtaining a waiver of rights or in responding to requests to invoke the rights. Once the police obtain a valid waiver, however, and absent any express invocations of the right to silence or counsel, *Miranda* leaves the police free to use almost any deceptive tactic.

38. When the Court recently reaffirmed the *Miranda* procedures, in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), the Court did not reaffirm the *Miranda* Court's arguably negative view of confessions. Where the *Miranda* decision is full of great passion and rhetoric, much of it aimed at the most common interrogation procedures, the *Dickerson* opinion is

then, the Court's decisions have reflected a far more positive attitude toward police interrogation and the role of confessions in the criminal justice system.

The Court has directly considered the propriety of deception only once. In *Frazier v. Cupp*,[39] the police misrepresented the strength of their case against the defendant. They falsely told the defendant that his cousin, who had been with him on the night of the crime, had confessed.[40] The Court considered the fact of this deception relevant to, but not dispositive of, the voluntariness issue. The Court has repeatedly declined the opportunity to place any specific limits on the use of deception during interrogation.[41]

In 1986, while considering lies made to an attorney, the Court, in *Moran v. Burbine*, did acknowledge that some police deception might be so "egregious" that it could rise to the "level of a due process violation."[42] Yet the Court neither provided examples of such unacceptable police conduct, nor suggested that the police needed to be particularly careful about using deception during interrogation. Instead, the *Moran* Court emphasized that society has a "legitimate and substantial interest in securing admissions of guilt,"[43] and that " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted."[44] Similarly, in *Illinois v. Perkins*,[45] the Court

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spare and subdued. Looking primarily to the principle of stare decisis to reaffirm *Miranda*, Chief Justice Rehnquist includes no criticism of specific police techniques.

39. 394 U.S. 731 (1969).

40. *Id.* at 737. The police also falsely claimed to have sympathy for the defendant. *See id.* at 738.

41. *See, e.g.*, United States v. Velasquez, 885 F.2d 1076 (3d Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990); People v. Thompson, 785 P.2d 857 (Cal. 1990), *cert. denied*, 498 U.S. 881 (1990); State v. Register, 476 S.E.2d 153 (S.C. 1996), *cert. denied*, 519 U.S. 1129 (1997); State v. Milburn, 511 S.E.2d 828 (W. Va. 1998), *cert. denied*, 528 U.S. 832 (1999). Moreover, in several cases that the Court heard on other issues, deception had been used during interrogation, and the Court made no unfavorable comment about the deception. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 298 (1990) (holding that undercover officer posing as defendant's fellow inmate was not required to give *Miranda* warnings); Duckworth v. Eagan, 492 U.S. 195, 198, 203 (1989) (affirming conviction where police told defendant that they had no way of giving him a lawyer, but that one could be appointed for him when he went to court); Colorado v. Spring, 479 U.S. 564, 577 (1987) (holding that the police need not disclose all possible areas of questioning before an interrogation); Oregon v. Mathiason, 429 U.S. 492, 493-96 (1977) (per curiam) (finding that the police falsely told the defendant that they had found his fingerprints at the scene, but deeming the falsehood irrelevant for *Miranda* purposes); Weatherford v. Bursey, 429 U.S. 545 (1977); Michigan v. Mosley, 423 U.S. 96 (1975) (confessing suspect had been told that another person had named him as the gunman).

42. 475 U.S. 412, 432 (1986).

43. *Id.* at 427.

44. *Id.* at 426 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)). The Court has recognized that "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 426 (quoting United States v. Washington, 431 U.S. 181, 186 (1977)); *see also* McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) ("[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . .").

noted that "*Miranda* forbids coercion, not mere strategic deception. . . . Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns."[46] Thus, the "current constitutional doctrine... by and large, has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase."[47] The lower federal courts and state courts have interpreted the Supreme Court's decisions to find that almost no type of deception renders a confession per se involuntary.[48]

C. *Court's Rationales for the Voluntariness Requirement*

Although the Court has never set forth the precise rationale for the voluntariness requirement,[49] the reliability concern provides the

45. 496 U.S. 292 (1990).

46. *Id.* at 297.

47. Slobogin, *supra* note 8, at 777; *see also* Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 818 ("[C]onstitutional law permits courts little room to impose meaningful restrictions on police lying . . . .") [hereinafter Paris, *Lying*]; Paris, *Trust*, *supra* note 9, at 6 ("[A]lthough interrogation in the United States is replete with formal rules and powerful informal customs, it is remarkably unconstrained by strong rules prohibiting interrogators from obtaining confessions by lies or trickery.").

48. Slobogin, *supra* note 8, at 781 ("The message to the police is that, as far as the law is concerned, they have virtual carte blanche to engage in deceptive undercover work."); Young, *supra* note 9, at 451 ("With no absolute prohibition of police lying during interrogation, courts today are free to condone such lying.").

Courts are tolerant of lies about the existence of evidence. *See, e.g.*, Arthur v. Commonwealth, 480 S.E.2d 749, 752 (Va. Ct. App. 1997) (holding that defendant's confession was voluntary, even though the police fabricated fingerprint and DNA reports). *But see* State v. Cayward, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (holding that the police could not fabricate a lab report linking the suspect to the victim). The police may also lie about the strength of the government's case, *see id.* § 6.9(c), at 587-90 (citing cases); Holland v. McGinnis, 963 F.2d 1044, 1051-52 (7th Cir. 1992) (police told the defendant a witness saw him with the rape victim); United States v. Velasquez, 885 F.2d 1076, 1087-89 (3d Cir. 1989) (police told the defendant that her accomplice had given a statement against her); United States v. Petary, 857 F.2d 458, 460-61 (8th Cir. 1988) (police told defendant that the codefendant had confessed); Commonwealth v. Jones, 322 A.2d 119, 126 (Pa. 1974) (police told the suspect that the co-defendant had given a statement against him); State v. Galli, 967 P.2d 930, 936 (Utah 1998) (police told the defendant that his co-defendants had implicated him in robberies); LAFAVE ET AL., *supra* note 12, § 6.2, at 447 (collecting cases). Courts look with somewhat more disfavor on lies about the law that will apply to defendant. *See* LAFAVE ET AL., *supra*, § 6.2, at 447.

49. In some instances, the Court has resorted to vague language such as whether a defendant's "will was overborne" during interrogation. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 685 (1993) (considering claim that repeated promises of lenient treatment had overborne defendant's will); Arizona v. Fulminante, 499 U.S. 279, 288 (1991) (concluding that threat of physical violence had overborne defendant's will); Illinois v. Perkins, 496 U.S. 292, 303 (1990) (Brennan, J., concurring); Oregon v. Elstad, 470 U.S. 298, 325 (1985) (Brennan, J., dissenting); Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973) (listing factors courts consider in determining if "a defendant's will was overborne"). The Court has also referred to an individual's "autonomy" and "dignity" as concerns implicated by the voluntariness requirement. *See* United States v. Balsys, 524 U.S. 666, 703 (1998) (Breyer, J., dissenting); Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Brennan, J. dissenting); Allen v. Illinois, 478

most consistent, and appropriate, explanation for the Court's voluntariness decisions.[50] The reliability rationale requires the Court to consider whether the procedure by which a confession was obtained produces an unacceptably high risk that even an innocent person would confess to a crime if that procedure were used.[51] State court decisions, perhaps even more than the Court's own decisions, have focused on the reliability rationale for the voluntariness inquiry.[52] The Court's rhetoric in some cases does suggest that there is certain conduct that will not be tolerated as fair and just in a civilized society, even if it may result in reliable confessions.[53] Yet, in most instances, the best predictor of what will be deemed unacceptable is still the reliability principle. Although a particular confession may be reliable in fact, interrogation practices used to obtain that confession may be deemed unacceptable because there is a significant likelihood that the practices could produce unreliable confessions in other cases. Thus, the general

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U.S. 364, 383 (1986) (Stevens, J., dissenting); Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan J., dissenting); Brewer v. Williams, 430 U.S. 387, 423 (1977) (Burger, C.J., dissenting).

50. Reliability was certainly a concern of the Court in *Brown v. Mississippi*, 297 U.S. 278 (1936), where the conviction was based solely on confessions procured by brutal whippings. In its post-*Brown* cases, the Court has, on a number of occasions, referred to the reliability concern. *See, e.g.*, Lyons v. Oklahoma, 322 U.S. 596 (1944); Ward v. Texas, 316 U.S. 547 (1942) (stating that the police actions made the defendant "willing to make any statement that the officers wanted him to make"); White v. Texas, 310 U.S. 530, 533 (1940) (excluding confession obtained after a Texas Ranger repeatedly took defendant into the woods at night and whipped him); Chambers v. Florida, 309 U.S. 227 (1940).

51. In considering the reliability rationale for the due process voluntariness requirement, a court does not ask whether a confession should be deemed reliable given all of the evidence in the case, other than the confession. Instead, a court must ask whether a government procedure, such as the use of a particular form of deception, generally creates an undue risk that an innocent person will falsely confess. *See* White, *Involuntary Confession*, *supra* note 10, at 2022 ("[T]he Court's Due Process confession cases have always focused on the propriety of the officers' interrogation methods rather than the resulting confessions.").

52. *See, e.g.*, LAFAVE ET AL., *supra* note 12, § 6.2, at 456-59.

53. *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 386 (1964) (stating that confessions obtained through coercion are contrary to "the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will' " (quoting Blackburn v. Alabama, 361 U.S. 199, 206-07 (1960))). The Court has appeared to characterize some police methods, conduct, or behavior, as so offensive or improper, that they are barred even if the reliability of the resulting confession does not appear to be in question. *See, e.g.*, Watts v. Indiana, 338 U.S. 49, 51-55 (1949) (involving a series of lengthy interrogations that occurred over seven days); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 322 U.S. 143, 153-56 (1944) (involving 36 hours of continuous questioning). The Court has called various police methods unfair, *see, e.g.*, Lisbena v. California, 314 U.S. 219-236 (1941) ("The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence . . . ."); outrageous, illegal, *see* Spano v. New York, 360 U.S. 315, 320 (1959) (confessions are excluded as involuntary because of "the deep-rooted feeling that the police must obey the law while enforcing the law"); or contrary to fundamental values, *see* Rochin v. California, 342 U.S. 165, 173 (1952) ("Coerced confessions offend the community's sense of fair play and decency.").

statements about which police behavior will not be tolerated in a fair system, often still reflect, at bottom, a concern with reliability.[54]

III. PROPOSED REASONS, BEYOND RELIABILITY, FOR LIMITING DECEPTION

Some of the proposed limits on deceptive interrogation are based on rationales for the voluntariness requirement other than reliability. To evaluate the worth of the proposed limits, it is necessary to consider the asserted rationales.

A. *Equality Between Suspect and Interrogator: "Fox-Hunter" Rationale*

The "fox-hunter," "fair chance," or "sporting theory" rationale for limiting police deception during interrogation provides that deception gives the interrogator so much of an advantage that the suspect has no real chance to avoid confessing.[55] The argument is that the suspect is entitled to some assistance in resisting the powerfully persuasive appeals of the interrogator to confess. The notion of creating some parity between the suspect and his interrogator was evident in *Miranda*'s treatment of suspects as victims.[56] References to the sporting theory

54. In his seminal 1963 article on the Court's involuntary confession cases, Professor Yale Kamisar described the cases as decided based on two reliability standards. The first standard considered whether the confession of the particular defendant, given that defendant's individual characteristics, might be unreliable. The second standard considers whether the police tactic might make some innocent defendant confess, even if there was no concern about the reliability of the instant confession. *See* Yale Kamisar, *What Is an Involuntary Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 755 (1963). A tactic that would never cause an innocent person to confess falsely will rarely be deemed by the Court so outrageous as to be constitutionally barred.

55. Under this theory:

> The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called *law*: leave to run a certain length of way, for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as *unfair* as convicting him of burglary on a hen-roost, in five minutes' time, in a court of conscience.

JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 29 (1993) [hereinafter GRANO, CONFESSIONS] (citing J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk. 9, pt. 4, ch. 3 at 238-39 (1827)). "Bentham sarcastically observed that this concern about the accused's likelihood of success at trial can be rational only under a sporting code that has amusement rather than justice at its end." *Id*; *see also* William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1234 n.22 (1988).

56. *See* Miranda v. Arizona, 384 U.S. 436, 442 (1966) (acknowledging historically unjust methods for interrogating suspects); Joseph D. Grano, *Criminal Procedure: Moving From the Accused as Victim to the Accused as Responsible Party*, 19 HARV. J.L. & PUB. POL'Y 711, 713 (1996) ("*Miranda* . . . expressed concern about the inequality between sophisticated and unsophisticated defendants . . . .") [hereinafter Grano, *Criminal Procedure*]; *see also* Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731, 733-34 (1981) (stating that defendant, because of reliable confession, has no chance of acquittal is "wholly desirable").

are even more pronounced, however, in the work of commentators critical of police interrogation.[57]

The sporting view or fox-hunter rationale for limiting deception should be rejected. It is not in society's interest to give the suspect and the officer an equal chance to prevail in an interrogation. Society is not indifferent as to who wins the hunt.[58] There is no reason, constitutional or otherwise, that guilty defendants deserve an opportunity to avoid prosecution or conviction.[59] Interrogation is not a game in which a suspect matches wits with the police. Law enforcement should be encouraged to build the strongest possible case against a defendant, and one of law enforcement's goals is to solve a crime by obtaining a confession from the wrongdoer. Moreover, other types of evidence are not excluded or limited simply because they make conviction more likely. For example, DNA, fingerprint, and videotape evidence can be even more damning than a confession. Yet no one suggests that by collecting such evidence and introducing it at trial the police create some unfair inequality between the police and the defendant. Nor do we suggest that such powerful evidence makes a trial futile for the defendant because it creates such a strong case for the prosecution. The community benefits when a case is strong, and when a guilty defendant either pleads guilty or is convicted by being found guilty beyond a reasonable doubt.

B. *Equality Among Suspects: The Equal Protection Rationale*

The "equal protection" rationale for limiting interrogation addresses the purported problem that some criminals are smarter, more sophisticated, or more able to resist the pleas of interrogators to confess than are other criminals. Stated in a favorable light, the equal protection rationale means only that all suspects should be equally aware

57. Professor George Dix, one of the leading proponents of the sporting view of interrogation, has concluded that "[a] major objective of the law of confessions . . . should be regarded as assuring that a person who confesses does so with as complete an understanding of his tactical position as possible." George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1 WASH. U. L.Q. 275, 330-31 (1975); *see also* Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 61 (1968) ("[E]ffective measures to right the imbalance created by the 'inherently coercive' atmosphere might be no less than tantamount to the abolition of the institution.").

58. *See* Gerald Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1443 (1985).

59. *See* GRANO, CONFESSIONS, *supra* note 55, at 32 ("What earned the fair chance argument Bentham's derisive fox-hunter's label was its suggestion that, as an end in itself, even guilty defendants should have a fair chance for acquittal."); George C. Thomas III, *An Assault on the Temple of* Miranda, 85 J. CRIM. L. & CRIMINOLOGY 807, 812 (1995) ("Nothing — not even the tired cliche that the United States has an accusatorial and not an inquisitorial system of justice — will make [the fox-hunter] argument work once it is exposed as a call to give guilty suspects a better chance at acquittal." (reviewing GRANO, *supra*)).

of their rights.[60] But when this rationale is viewed more expansively, it means that foolish, ignorant, and unsophisticated suspects must be given the same chance as experienced, knowledgeable suspects to resist interrogation.[61]

Proponents of the equal protection rationale have stated that it is "unseemly for government officials systematically to seek out and take advantage of the psychological vulnerabilities of a citizen."[62] Such a view may have some validity when applied to truly mentally impaired individuals. But if psychological vulnerabilities are meant to include anything that makes a person more likely to confess — from a moderately low I.Q. to a docile personality — than the propriety of interrogating almost any suspect is doubtful. Although the Due Process Clause may require some additional protections for particularly young or impaired suspects, it surely does not protect the foolish and unsophisticated criminal from himself. In fact, society benefits because some suspects confess.[63]

Because *Miranda* guarantees that all suspects are aware of their rights, there is no need to further equalize suspects' ability or inclination to invoke those rights and prevent interrogations. There is no doubt that a foolish or unsophisticated suspect is far more likely to confess than is a strong, smart, sophisticated suspect. But this logical occurrence should not be troubling. The foolish suspect is also more likely to consent to a search, to leave fingerprints and other clues at the crime scene, to be slow or noisy, or to speak loosely to new acquaintances who may be undercover officers. The community is pleased when any of these things happen because the criminal is more likely to be caught. Therefore, we should not be troubled when the suspect's folly leads him to confess when questioned.

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60. *See* Caplan, *supra* note 58, at 1456 ("Suspects who do not know their rights, or do not assert them, as a consequence of some handicap — poverty, lack of education, emotional instability — should not, it is felt, fare worse than more accomplished suspects who know and have the capacity to assert their rights.").

61. *See* R. Kent Greenawalt, *Silence as A Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 41 (1981) (noting that deceptive interrogation tactics "work unevenly by undermining the inexperienced and ignorant [while] having little effect on the hardened criminal."); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 872 (1981) (stating under the pre-*Miranda* voluntariness test, the "vulnerable were more likely to be on the losing end of a successful police interrogation" (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY (1980))).

62. Schulhofer, *supra* note 61, at 872.

63. Thomas, *supra* note 59, at 812 (noting that calls for equal treatment in the interrogation room "is like saying that because the police do not solve white-collar crimes as often as crimes of violence, the State should release from custody some of the robbers and muggers").

C. *Trust Rationale*

Some commentators have urged limits on deceptive interrogation techniques in order to "facilitate trust relationships between suspects and government [interrogators]."[64] In fact, one commentator has argued that the primary purpose of interrogation is not to solve crimes, but rather to establish the interrogator's integrity and to elicit the suspect's trust.[65] Interrogation is not, however, a civics lesson for criminal suspects.[66] Interrogation is a critical information-gathering tool in law enforcement's arsenal for solving crimes and protecting the public. Arguments based on the trust rationale ignore the chief purpose of interrogation and the practical realities of law enforcement. Moreover, the trust rationale would require a ban on all undercover investigation. The basis of the trust rationale is that harm occurs when the suspect learns that the police lied to him during interrogation. Yet the suspect in an undercover operation will be similarly harmed by learning that an undercover agent's very identity was a lie.

There is no real support for the claim that suspects would be more likely to confess to an officer whom they trusted.[67] In addition, suspects do not expect complete honesty from law enforcement personnel. Complete honesty would require an officer to inform a suspect that it is most certainly not in the suspect's best interest to confess and that the suspect would be best served by invoking his rights to silence and counsel.[68]

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64. Paris, *Trust*, *supra* note 9, at 6, 62 (1995) (noting that the lack of rules restricting lies creates an atmosphere in which the government is expected to lie and manipulate); *see also* Young, *supra* note 9, at 457-61; Greenawalt, *supra* note 61, at 41 (interrogation about "garden variety crimes, such as petty theft and income tax evasion, [results in] an unhealthy atmosphere of resentment and distrust").

65. Paris, *Lying*, *supra* note 47, at 825 (asserting that an important police objective of interrogation is to "provide important opportunities for police to distribute information to suspects (and more indirectly, the public) about such things as integrity, honest dialogue, and trustworthiness"); Paris, *Trust*, *supra* note 9, at 65 (asserting that "we might sensibly conclude that facilitating trust between individuals and their governments . . . is an important goal to which the truth-seeking function sometimes must submit.").

66. *See, e.g.*, Paris, *Trust*, *supra* note 9, at 6 ("[W]e should want to make interrogation a particularly meaningful encounter for the suspect — one in which the values of trust and trustworthiness are taught by the interrogator's own example — regardless of whether a confession ensues . . . ."); *see also* Greenawalt, *supra* note 61, at 70 ("[W]hat is proper behavior between government and residents will closely resemble what is proper behavior in analogous relationships among private individuals . . . .").

67. Young, *supra* note 9, at 455-68.

68. Professor Paris contends that suspects who are lied to and then convicted will remember the lie when they are released, be resentful about it, and be less likely to act as upstanding citizens. *See* Paris, *Lying*, *supra* note 47, at 830-31. Yet suspects who are not lied to may very well not confess, not be convicted, and will suffer no incarceration or other penalty for their wrong-doing. This unpunished, at-large criminal is certainly no more likely to be an upstanding citizen because he was not lied to by the police. Although he may have feelings of trust for the honest officers, he is just as likely to feel contempt towards them for their inability to apprehend and prosecute him for his wrong-doing.

According to the trust rationale, breaches of trust ultimately deter confessions because the resentful "suspect or defendant today may be the witness tomorrow."[69] There is no evidence, however, that witnesses have refused to talk to the police because the police are not always truthful in talking to suspects. Witnesses have many reasons not to cooperate with the police. For example, witnesses may be unwilling to make court appearances for fear that a defendant will retaliate. In addition, most people are already aware, if only from television, that the police lie during interrogation. There has been no showing that citizens have responded to this police ingenuity by declining to report crimes, assist in investigations, or testify as witnesses. Even if it were true that breaches of trust deterred confessions in the long-run, the police may legitimately feel that "a bird in the hand is worth two in the bush." When the police suspect a person of a particular, already-committed crime, it is not worth forgoing deception, on the off-chance that the suspect might be a useful witness to some other person's future crime.

D. *Dignity Rationale*

In advocating limits on police interrogation, some commentators refer to a concern for the individual's "dignity."[70] According to these commentators, "pressuring a suspect to answer questions is unduly cruel, violating the idea of the basic dignity of all individuals,"[71] and "[i]nterrogation tactics that are calculated to make the suspect feel that he is not a decent or honorable person unless he confesses constitute direct assaults upon [his] dignity."[72] The dignity concern would appear to invalidate most interrogation. Both commentators for[73] and against[74] substantial limits on interrogation refer to a need to respect individual dignity. Nevertheless, acknowledgement of this need does not translate easily into rules that distinguish acceptable and unacceptable interrogation practices.

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69. Young, *supra* note 9, at 458.

70. *See, e.g.*, Greenawalt, *supra* note 61, at 40-41 (arguing that deceiving suspects does not accord with dignity and autonomy).

71. Paris, *Trust*, *supra* note 9, at 48 n.153; *see also* Rosenberg & Rosenberg, *supra* note 9, at 76-77 (asserting that *Miranda* "reflects the ages-old tension between preservation of human dignity and solution of crimes."); Thomas S. Schrock et al., *Interrogational Rights: Reflections on* Miranda v. Arizona, 52 S. CAL. L. REV. 42 n.174 (1978) (citing *Miranda*'s assumption that the constitutional basis of the privilege is the "respect a government . . . must accord to the dignity and integrity of its citizens").

72. White, *Police Trickery*, *supra* note 10, at 628 (stating that "criminal suspects have a right to be treated in a manner that reflects a concern of their dignity as human beings").

73. *See, e.g.*, *id.* at 627-28; Greenawalt, *supra* note 61, at 51 (suggesting that police interrogation be replaced with questioning by a magistrate).

74. *See* GRANO, CONFESSIONS, *supra* note 55, at 22 ("[N]otions of human dignity provide limits on what government may do to solve crime.").

E. *Morality Rationale*

Some commentators have asserted moral limits on interrogation techniques.[75] In particular, a number of these commentators[76] have taken cues from the work of moral philosopher Sissela Bok. Bok has examined the justifications for lying throughout the whole range of human interactions.[77] She details the harms that lying can cause, but concludes that lying is morally justified when there is no alternative, or when the lie results in greater benefits than costs.[78] Thus, Bok finds that lying to one's "enemies" is justified. She does not specifically deal with the matter of interrogation, but she does allow that criminals could be considered "enemies."[79]

Reliance on morality as a basis for limiting deceptive interrogation practices requires two assumptions: 1) that lying and deception are clearly an evil within the everyday relationships of citizens; and, 2) that expectations about everyday relationships should also apply during the questioning of criminal suspects. Both of these assumptions should be questioned. First, even apart from police questioning, in the normal course of affairs among citizens, deception cannot be painted as an unmitigated evil. In fact, deceptions large and small are an ac-

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75. *See, e.g.*, Greenawalt, *supra* note 61, at 17 (concluding that the right to silence is "morally justified"). *But see* State v. McKnight, 243 A.2d 240, 250-51 (N.J. 1968) ("It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process. This must be so if Government is to succeed in its primary mission to protect the first right of the individual to live free from criminal attack.").

76. *See* Paris, *Lying*, *supra* note 47, at 819; Slobogin, *supra* note 8, at 777 (confirming that his article principally relies on Sissela Bok's philosophical work); Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 833 (1997) ("I interpret Bok's approval of deception as further removed from authorizing the deceptive investigative practices considered by Professor Slobogin than he does."); Alschuler, *Constraint*, *supra* note 10, at 974 n.85 (citing Bok to assert that lying "raises deontological concerns that should at least cast the burden of justification on the defenders of deceptive interrogation").

77. *See* SISSELA BOK, LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE (1978) (discussing whether there are such things as justifiable lies and the circumstances in which they would occur).

78. *See id.* at 97, 114-29 (advising an evaluation of the alternatives, consequences, and effects of lying).

79. *See id.* at 141-53; Commentators have reached widely divergent conclusions on whether Bok's theories permit the regular use of deception during interrogation. The different views arise because of disagreement over when a criminal suspect should be deemed an enemy within Bok's theory. *Compare* Paris, *Lying*, *supra* note 47, 817, 819-20 (relying on Bok to find virtually all deception prohibited), *with* Slobogin, *supra* note 8, at 806 (relying on Bok to find that suspects are "enemies" and can be lied to once they are held pursuant to a probable cause determination). Professor Mosteller suggests "the most appropriate reading of [Bok's] work is that the declared-enemies category applies only to a small subset of criminal defendants . . . and not to the typical investigation of past individual criminal conduct." Mosteller, *supra* note 76, at 834. Professor Alschuler suggests that the concerns raised by reference to Bok's theories "should at least cast the burden of justification on the defenders of deceptive interrogation." Alschuler, *Constraint*, *supra* note 10, at 974 n.85.

cepted part of life — from enthusiastic sales pitches to polite greetings and comments.[80]

Second, the rules and expectations governing discourse between citizens does not necessarily apply to police questioning of criminal suspects. Given society's interest in catching criminals, lying during interrogation can be justified as an appropriate means toward achieving this important social end. Thus, conduct by the police towards a criminal suspect cannot be judged by reference to what is morally worthy during interactions between family members, friends, neighbors, and acquaintances.

F. *Pragmatic Concerns*

In contrast to principled criteria for limiting deceptive interrogation practices, commentators have also advanced pragmatic reasons offered for limiting deception during interrogation. The chief pragmatic reason is the slippery slope argument that permitting lying during interrogation leads to widespread police lying in other contexts, including warrants, affidavits, and sworn testimony.[81] Some officers, like some civilian witnesses, do lie under oath. But we assume that ordinary people — such as witnesses, jurors, and even defendants — understand the significance of the oath. Similarly, police officers know, and should be expected to know, what is appropriate and lawful during the many different duties they perform — undercover agent, beat officer, interrogator, affiant, and witness.[82]

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80. William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1910 (1993) [hereinafter Stuntz, *Lawyers*].

> In moral terms, the most reasonable explanation for this behavior is that people make distinctions, based on the relative harmfulness of telling the truth versus dissembling, on whether the false statement is defensive or offensive, or on whether the motivation is selfish or altruistic. Whether the conduct is wrong, and if so how much, depends on context.

Id.

81. *See, e.g.*, Leo & Skolnick, *supra* note 32, at 9 ("When police are permitted to lie in the interrogation context, why should they refrain from lying to judges when applying for warrants, from violating internal police organization rules against lying, or from lying in the courtroom?"); Paris, *Lying*, *supra* note 47, at 829 ("[L]ying in the interrogation context may lead to police perjury under oath."); Young, *supra* note 9, at 463 (asserting that lying during interrogation will teach officers to become accomplished liars, and suggesting that officers may lie to obtain an adrenaline rush).

82. Commentators raising these evidentiary concerns have not addressed the matter of either undercover investigations or the use of ruses during searches. The dangers alleged to arise from deceptive interrogation would seem just as likely, if not more likely, to arise from the deceptions used during undercover operations or as ruses to search. If officers can be relied on to understand the line between undercover operations and sworn testimony, they are equally able to distinguish between interrogation and sworn testimony.

There is one pragmatic concern that has caused a court to exclude a confession because of the use of a deceptive interrogation technique. In the 1989 case of *Florida v. Cayward*, 552 So. 2d 971 (1989), the state court held that there is a distinct difference between acceptable verbal deception and fabrication of scientific documentation, which has the potential to reach the courtroom. *Cayward* specifically held that the police should not have created a

G. *Criticism of the Non-reliability Rationales for Limiting Interrogation Techniques*

Many of the rationales offered for limiting deceptive interrogation techniques, if taken to their logical extreme, would bar not only deceptive interrogation techniques, but other investigative methods as well. Commentators have failed to explain adequately why deception must be barred or substantially limited during interrogation, while the deception used in other areas — such as undercover investigations, wiretaps, ruses, and informants — may continue.[83] A bar on deception during all stages of investigation would make it very difficult to solve some crimes.[84]

Some commentators suggesting limits on interrogation techniques appear most concerned with whether a technique is effective in eliciting confessions. Yet effectiveness is an inappropriate basis for limiting interrogation. The voluntariness requirement does not bar effective interrogation, or even reflect a general hostility to the concept of police interrogation.[85] "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are in-

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false lab report purporting to connect semen found on the five-year-old rape and murder victim to the nineteen-year-old suspect. *Id.* Relying on *Frazier v. Cupp*, 394 U.S. 731 (1969), the court acknowledged that verbal deception does not render a confession involuntary. The court, however, distinguished deception by false documents. 552 So. 2d at 975. The court concluded that there was an unacceptably high risk that such false evidence used during interrogation would somehow be included in the file and later considered true evidence at trial. *Id.* at 975 (suggesting that the heavy caseload of courts may allow manufactured documents to be used as substantive evidence against the defendant). Although this is a danger that should be addressed by appropriate police and prosecution procedures, the *Cayward* court's wholesale bar on documentary deception is overbroad.

83. *See* Grano, *Selling the Idea*, *supra* note 8, at 679 (acknowledging that wiretaps and informants are no more respectful of a suspect's dignity than police interrogations).

84. *See* Slobogin, *supra* note 8, at 778 ("Undercover work is by definition deceptive. It normally involves outright lies.").

85. A few commentators have freely acknowledged their distaste for much or all police interrogation. *See, e.g.*, BORCHARD, *supra* note 9, xvii (urging a rule "prohibiting the use in evidence of all confessions made to the police"); Martin H. Belsky, *Living with* Miranda: *A Reply to Professor Grano*, 43 DRAKE L. REV. 127, 141 (1994) (analogizing intimidating interrogation to child abuse, spouse abuse, or rape); Driver, *supra* note 57, at 60-61 (1968) (arguing that abolition of police interrogation may be necessary to eliminate coercion); Rosenberg & Rosenberg, *supra* note 9, at 91, 113 ("We have a philosophical predilection" for the position "that confessions be considered of no evidentiary value."); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY 21, 46 (1961) (asserting that police interrogation is "irreconcilable" with the self-incrimination privilege).

A number of commentators have proposed that magistrates, not the police, question suspects. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 908 (1995); Dripps, *supra* note 9; Paul G. Kauper, *Judicial Examination of the Accused — A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

herently desirable."[86] Presumably in recognition of the importance of confessions, some commentators urging limits have wisely shifted away from arguments rooted largely in the effectiveness of interrogation techniques, and focused more on the reliability concern.[87]

IV. BASING LIMITS ON DECEPTION DURING INTERROGATION ON RELIABILITY CONCERNS

A. *Commentator Recognition of Reliability as the Limiting Principle*

Despite the wide variety of rationales proffered for the voluntariness requirement, scholars have increasingly emphasized the reliability rationale.[88] Under the reliability rationale, a court must ask whether the procedure used to obtain a confession creates an unreasonable risk that an innocent person would falsely confess.[89]

According to many of these scholars, empirical evidence shows that deceptive interrogation practices cause a significant number of false confessions.[90] Because the reliability rationale focuses on protecting innocent suspects, it offers a more palatable — and appropriate — reason for limiting interrogation.[91] The increased scholarly empha-

86. United States v. Washington, 431 U.S. 181, 187-88 (1977). Professor Grano has been the most thoughtful commentator on the inherent value of confessions. *See, e.g.*, Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061 (1992); Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).

87. *Compare, e.g.*, White, *Police Trickery*, *supra* note 10, at 613-23 (1979) (focusing on a concern that guilty suspects would make an irrational or poor choice about the desirability of confessing), *with* White, *False Confessions*, *supra* note 10, at 105 (emphasizing the risk of false confessions and the reliability rationale for the voluntariness requirement).

88. *See, e.g.*, Alschuler, *supra* note 10, at 975 (including reliability as the chief reason for advocating limits on the use of deception); White, *False Confessions*, *supra* note 10, at 138-42 (discussing the constitutional basis and the formulation of procedural safeguards); Young, *supra* note 9, 461 (including reliability as one basis for a broad argument against lying).

89. There are obvious parallels between the increased focus on reliability by critics of police interrogation and the growing "innocence movement" by opponents of the death penalty. *See, e.g.*, Sara Rimer, *Support For a Moratorium On Executions Gets Stronger*, N.Y. TIMES, October 31, 2000, at A18.

90. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) [hereinafter Leo & Ofshe, *Consequences*]; White, *False Confessions*, supra note 10, at 110 (arguing that "the empirical evidence shows that standard interrogation techniques are likely to lead to untrustworthy confessions in a significant number of cases").

91. *See* Mosteller, *supra* note 76, at 837 ("[C]hanges in the law that increase procedural protections are practical possibilities if they have a greater probability of protecting the innocent. This point dovetails with the reality of popular societal reaction and contemporary press coverage: not surprisingly, it will be abuses of authority involving innocent people that will likely provoke restrictions on investigative deception, and restrictions that are more likely to prevent abuses affecting the innocent are, relatively speaking, more politically viable.").

sis on false confessions has gained greater public support than the more abstract arguments against deception. Professors Leo and Ofshe, in particular, have been able to present their research and arguments extensively in the popular press.[92]

B. *The False Confession Costs of Deceptive Interrogation Practices*

1. *Claims of Significant Numbers of False Confessions*

A number of commentators who have urged limitations on interrogation techniques have made alarming assertions that the false confession problem is widespread.[93] In recent years, Professors Leo and Ofshe have claimed that "[p]olice-induced false confessions are a serious problem for the American criminal justice system" because "confessions by the innocent still occur regularly."[94] They assert that "police-induced false confessions occur often and are highly likely to lead to the wrongful arrest, prosecution, conviction, and/or incarceration of the innocent."[95] They further claim that contemporary psychological methods are "apt to cause an innocent person to confess,"[96] and that "[w]hen police interrogate suspects whose guilt is a mere possibility rather than a reasonable likelihood, they run a significant risk of

92. *See, e.g.*, Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REPORT, November 9, 1988; Robin Topping, *False Confessions, Do the innocent sometimes admit to crimes?*, NEWSDAY, August 27, 1997, at A34; *see also Rivera Live* (NBC television broadcast, April 30, 1997) *available at* 1997 WL 4603535 (explaining that the police use deception during interrogation).

93. *See, e.g.*, MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 85 (1991) (false confessions "are commonplace"); *see also* EDWARD D. RADIN, THE INNOCENTS 8-9 (1964) (suggesting that five percent of convictions are miscarriages of justice in which an innocent person is imprisoned); Alschuler, *Constraint*, *supra* note 10, at 974 ("Especially when suspects are retarded or easily suggestible and when deception is coupled with intimations that leniency will follow confession, this misrepresentation is *likely* to generate false confessions." (emphasis added)); Michael L. Perlin, *"I'll Give You Shelter from the Storm": Privilege, Confidentiality, and Confessions of Crime*, 29 LOY. L.A. L. REV. 1699, 1700 (1996) (relying on Bedau, Radelet, and Huff to conclude that as "many as 740 erroneous convictions each year may be due to false confessions"); Thomas N. Thomas, Book Review, 36 JURIMETRICS J. 343, 344-46, 349 (1996) (reviewing LAWRENCE WRIGHTSMAN & SAUL KASSIN, CONFESSIONS IN THE COURTROOM (1993) and asserting, without citation support, that "many confessions are false" and that both spontaneous and police-induced false confessions are "common," and reviewing GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992) and asserting that Gudjonsson reveals that "the interrogation process . . . can easily evoke false confessions").

94. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

95. Richard A. Leo & Richard J. Ofshe, *Missing the Forest for the Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. L. REV. 1135, 1139 (1997) [hereinafter *Missing the Forest*].

96. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

eliciting a false confession."[97] Finally, Professors Leo and Ofshe reach the sweeping conclusion that "many investigators have recognized" that "the problems caused by police-induced false confessions are significant [and] recurrent."[98]

Professors Leo and Ofshe have found that "[i]t is well established that psychologically-induced false confessions occur frequently enough to warrant the concern of criminal justice officials, legislators and the general public."[99] In comments outside of their written work, they have portrayed the false confession problem even more alarmingly, asserting that false confessions happen "all the time."[100]

Professors Leo and Ofshe are not alone in suggesting that the false confession problem is widespread. For example, Professor White has stated that false confessions are obtained in a "significant" number of cases,[101] and that police interrogation "often yields false confessions."[102] He concludes that the empirical data "indicates that confessions induced by standard interrogation methods are frequently un-

97. *Id.* at 986.

98. Leo & Ofshe, *Consequences*, *supra* note 90, at 430.

99. Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 561 (1998).

100. *See* Maugh II, *supra* note 6, at A1; *Dateline* (NBC television broadcast, Dec. 23, 1997) ("Innocent people confess all the time.... We know it happens all the time."); *Defense Expert Says Boy Forced to Confess*, CLEVELAND PLAIN DEALER, Jan. 29, 1999, at 5-B (quoting Dr. Ofshe as testifying that "people often confess to crimes they didn't commit because of police tactics"). Professor Ofshe is reported to have claimed that as many as 60% of people might falsely confess to a crime when interrogated. *See* Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 729 (1997) (citing CONVICTING THE INNOCENT: THE STORY OF A MURDER, A FALSE CONFESSION, AND THE STRUGGLE TO FREE A "WRONG MAN" 97 (Donald S. Connery ed., 1996) (describing Professor Ofshe's comments at a 1995 public forum in Hartford, Connecticut titled "Convicting the Innocent").

101. White, *False Confessions*, *supra* note 10, at 108 ("Over the past two decades, a significant number of suspects have claimed that standard interrogation techniques have led them to give false confessions."); *id.* at 110 ("[S]tandard interrogation techniques [are] likely to lead to untrustworthy confessions in a significant number of cases."). *But see* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 488 (1996) (referring to the "esoteric problem of false confessions induced by noncoercive police questioning") [hereinafter Cassell, *Social Costs*].

102. Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1209 n.4 (1980) ("Those who have sought to limit police interrogation believe that interrogation, often carried out in secret, involves coercion, and often yields false confessions."). Yet he also concedes that "[t]here are only a small number of documented cases in which standard interrogation methods have led to indisputably false confessions." White, *False Confessions*, *supra* note 10, at 131.

trustworthy,"[103] and that "standard interrogation methods precipitate a significant number of false confessions."[104]

These repeated and widely-reported assertions that "contemporary psychological methods" are "apt" to cause an innocent suspect to confess are verifiable and should be verified.[105] Yet, thus far, no one has undertaken the research necessary to prove the claims.[106]

2. *Empirical Data on False Confessions Is Limited*

These alarming claims that false confessions are widespread do not hold up under scrutiny. Although there are reports — in both the academic and popular press — about individual instances of purportedly false confessions, there is no sound empirical proof that such instances are widespread.[107] Thus far, the reports have failed to rebut the intuitive view[108] that the number of persons incarcerated because of police-induced false confessions is quite small.

The existing research is almost entirely anecdotal and focuses on the causes, not the scope, of the problem. Sweeping references to significant, substantial, and widespread instances of false confessions are supported by reference to perhaps a few dozen indisputably false confessions. To justify the claim that the false confession problem is widespread, the new research will need to be based on a statistically significant, randomly-drawn sample of persons who gave confessions during interrogation. To determine whether there is a substantial concern that any of the confessors may actually be innocent, researchers would

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103. White, *False Confessions*, *supra* note 10, at 131. Yet he also concludes that it is "impossible to estimate" the "number of false confessions," White, *Involuntary Confession*, *supra* note 10, at 2039, and that "there are only a small number of documented cases in which standard interrogation methods have led to indisputably false confessions." White, *False Confessions*, *supra* note 10, at 131.

104. White, *Involuntary Confession*, *supra* note 10, at 2042; *see also* White, *False Confessions*, *supra* note 10, at 108 ("Over the past two decades, a significant number of suspects have claimed that standard interrogation techniques have led them to give false confessions.").

105. Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 983.

106. *See id.* at 1135 (acknowledging that there has been no research "to quantify the number and frequency of false confessions or the rate at which they lead to miscarriages of justice").

107. *See* Cassell, *Balanced Approaches*, *supra* note 7, at 1125-26 (stating that "the empirical linchpin" for the proposals of Ofshe, Leo, and Alschuler "is simply missing"). Despite the spirited, on-going debate about police interrogation and confessions, there are surprisingly few studies of confession evidence. *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM ix (1993) ("[I]n contrast to the massive numbers of eyewitness studies, the topic of confession evidence has been almost completely ignored by psychologists and other social scientists.").

108. *See* White, *False Confessions*, *supra* note 10, at 108 ("The idea that a suspect, who is neither insane nor the victim of physical coercion, will confess to a crime he did not commit seems counterintuitive.").

need to examine all available evidence, starting with the court records. It appears that no one has attempted such statistically sound research on false confessions.

a. Most Research Is on the Causes and Types, Not the Number, of False Confessions. Based on the assertions of a widespread false confession problem, one would expect to see hundreds, if not thousands, of false confession cases documented. Yet no such evidence exists. Instead, research on false confessions falls into two categories. First, there are articles referring to collections of several, or at most several dozen, case histories of allegedly wrongful convictions because of false confessions.[109] Second, there are studies, generally by psychologists, not lawyers, on the causes of false confessions.

To justify substantial limits on the ability of the police to solve crimes by interrogating suspects, two questions must be answered: 1) why do some suspects falsely confess; and 2) how many false confessions are actually given. The first question, why a person would falsely confess, must be answered to determine whether limiting certain police conduct would even have the effect of preventing false confessors from confessing. For example, if most false confessors are like the defendant in *Colorado v. Connelly*,[110] who confessed independently of police action, then there is no point in limiting police conduct. Even if the research should establish that police conduct can cause false confessions, we cannot decide whether to limit that conduct without answering the second question on how often the conduct causes false confessions. Although there is a fair bit of research on the first question — why a person might falsely confess[111] — there is absolutely none that adequately answers the second question — how often this phenomenon takes place. Advocates of limits on interrogation tactics fail to make the critical distinction between research on why anyone might falsely confess and how often suspects actually make false confessions.

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109. Professors Leo and Ofshe present twenty-nine cases, involving mostly homicides, from 1973 to 1996. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 429, 435, 478. (The authors present sixty disputed confession cases, but only twenty-nine of the defendants were convicted or pled guilty). During that time, the police interrogated many thousands of suspects for homicide. *See* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions — and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 506 n.36 (surveying 80% of the 460,000 persons arrested for murder and manslaughter according to the FBI reports) [hereinafter Cassell, *Protecting the Innocent*]; *see also* "Felony Sentences in the United States 1996," BUREAU OF JUSTICE STATISTICS BULLETIN NCJ 175045 (reporting that there were 11,766 murder cases in the United States in 1996).

110. 479 U.S. 157 (1986).

111. *See, e.g.*, Gail Johnson, 6 B.U. Pub. Int. L.J. 719 at 726, 729 (explaining that "[m]odern psychology has come a long way towards a more complex and sophisticated understanding of the interplay of factors to leading to false confessions," but deeming "unanswerable" how many people would falsely confess during interrogation).

At best, the existing research has shown: 1) that certain interrogation techniques are more likely than other techniques to result in false confession; and 2) that certain types of people — such as juveniles and the mentally impaired — appear somewhat more likely than the average suspect to give a false confession. The research has not demonstrated, however, how often the techniques in question result in false confessions, nor what number of suspects in these more vulnerable groups give false confessions. The fact that persons in these vulnerable groups appear to be over-represented in the few false confession cases that have been collected and examined does not demonstrate that persons in these groups give false confessions at a substantial rate. The existing research is interesting, but it provides no basis for imposing limits on the current practice of using deception during interrogation.

Commentators asserting that there is a widespread, significant problem with false confessions have relied primarily on three scholarly works: 1) the 1987 Bedau-Radelet study of 350 purportedly erroneous convictions in potentially capital cases since 1900;[112] 2) the 1998 Leo-Ofshe study of sixty post-*Miranda* cases involving purportedly false confessions; and, 3) Dr. Gisli Gudjonsson's 1992 book on the causes and types of false confessions.[113] These works suggest only why an innocent person might falsely confess,[114] not how many people actually do falsely confess.

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112. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); WRIGHTSMAN & KASSIN, *supra* note 107, at 84 (lamenting that Bedau and Radelet's review "has not received the attention it deserves" and uncritically describing all 350 examples in the study as involving an "innocent person"); *see also* Leo & Ofshe, *Consequences*, *supra* note 90, at 433 n.9 (relying on Bedau and Radelet).

113. GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992). *See, e.g.*, Alschuler, *Constraint*, *supra* note 10, at 972-73 (citing Gudjonsson); Thomas, *supra* note 93, at 350 (citing only Bedau and Radelet as support for the assertion that police-induced false confessions are "common").

Many commentators also refer to the much earlier work of Edward Borchard, which presents sixty-five cases of purportedly wrongful convictions of innocent persons. *See* BORCHARD, *supra* note 9; *see, e.g.*, Leo & Ofshe, *Consequences*, *supra* note 90, at 433 n.7. Borchard acknowledged that only a very few of these sixty-five cases involved false confessions. He found that the causes or alleged error were "in the main, mistaken identification, circumstantial evidence (from which erroneous inferences are drawn), or perjury, or some combination of these factors." BORCHARD, *supra*, at viii.

Commentators also refer to two other books: JEROME FRANK AND BARBARA FRANK, NOT GUILTY (1957) (reviewing cases of convictions of allegedly innocent persons), and RADIN, *supra* note 93. Other more recent works cited with some regularity are: 1) Professor Saul M. Kassin's and Professor Lawrence S. Wrightsman's writings on the causes of false confessions, *see, e.g.*, Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221 (1997); Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67-94 (Saul M. Kassin & Lawrence S. Wrightsman, eds., 1985); and 2) Professor Ronald Huff's 1986 opinion survey about false confessions, *see* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 2 CRIME & DELINQ. 518 (1986).

114. Professors Leo and Ofshe have identified three types of false confessors in cases where the police allegedly induced a false confession. *See* Ofshe & Leo, *Decision to Confess Falsely*, *supra* note 10, at 998-1000. The first type, the stress-compliant false confessor,

The widely-cited study by Professors Bedau and Radelet does not examine any randomly drawn sample of cases. Instead, Professors Bedau and Radelet collected 350 cases from the many thousands decided in this century when the defendant received or could have received a capital sentence. Although they concluded that the confession was false in forty-nine of these cases, they acknowledge that few, if any, of these forty-nine allegedly false confessions were caused by police deception. As they explain, some of the confessions were "the result of mental illness;" one defendant confessed "as a joke;" and another claimed to have confessed "to impress his girlfriend."[115] In selecting and describing just forty-nine cases of allegedly false confessions from the thousands of capital or potentially capital cases decided in this century, Professors Bedau and Radelet provide no support for the claim that false confessions are widespread. Their research is of particularly limited use in evaluating interrogation techniques used now, because they included so many cases from the earlier part of the century, when both discrimination against minority suspects and the use of physical abuse against all suspects were far more common.[116]

In their 1998 study of false confessions, Professors Leo and Ofshe presented a collection of sixty cases, selected from the many hundreds of thousands of confession cases decided after *Miranda*, in which they believed the confessions were false. As they acknowledge, those sixty cases "do not constitute a statistically adequate sample of false confession cases."[117] Thus, their study focused not on the number of false

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"makes this choice to escape an experience that for him has always been excessively stressful or one that has become intolerably punishing because it has gone beyond the bounds of a legally proper interrogation." *Id.* at 997. Within the context of the legal doctrine about voluntariness, the "stress-compliant" false confessor just seems like another way of saying that the physical and psychological pressures are so great that an innocent person would confess. The existing law, under the totality of the circumstances test for voluntariness, would almost surely bar any such pressures that would make an innocent person confess.

The second type, the coerced-compliant false confessor, confesses "[i]n response to classically coercive interrogation techniques such as threats of harm and/or promises of leniency . . . ." *Id.* at 998. The third type, the persuaded false confessor, confesses after becoming convinced that it is more likely than not that he committed the crime, despite possessing no memory of having done so. *Id.* at 999 ("A non-coerced persuaded false confession is elicited when an investigator relies on routine influence techniques of interrogation, whereas a coerced-persuaded false confession is elicited when threats, promises, or other legally coercive interrogation techniques are added to this mix.").

Professor White categorizes false confessions similarly but uses only two categories. The "coerced-compliant" confession occurs when "a suspect knows he is confessing falsely but confesses in order to obtain some goal or 'escape from a stressful or an intolerable situation' . . . ." White, *False Confessions*, *supra* note 10, at 109 (quoting GUDJONSSON, *supra* note 113, at 228). "Coerced-internalized" confessions occur when a "suspect comes to believe in his own guilt." *Id.*

115. *See* Bedau & Radelet, *supra* note 112, at 63.

116. Fewer than ten percent of the 350 cases involved defendants convicted after 1977, when the Supreme Court upheld the revised death penalty.

117. Leo & Ofshe, *Consequences*, *supra* note 90, at 435.

confession cases, but only on whether there were any shared characteristics in the very small number of false confession cases that were presented.

Dr. Gudjonsson's book, the leading work on false confessions,[118] is based on cases outside of this country.[119] The book contains illustrative case histories of false confessions, but no random sample of confession cases. Dr. Gudjonsson focuses on perhaps a few dozen cases of purportedly false confessions.[120] He offers interesting case studies of a number of individual cases, but no data on the total number of false confession cases.

Thus far, the studies on false confessions fail to prove, or even strongly to suggest, that a significant number of persons have been wrongly convicted because of false confessions obtained by police using deceptive interrogation techniques.[121] The commentators have not

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118. *See* Scheflin, *supra* note 4, at 1296 ("The leading text on false confessions is Gudjonsson's 1992 book, *The Psychology of Interrogations, Confessions and Testimony*.").

119. Dr. Gudjonsson conducted his research in Great Britain. His book is not necessarily helpful in understanding the interrogation process in this country because the process in Great Britain is somewhat different. On the one hand, the British have no analogue to *Miranda* and no right to remain silent; on the other hand, the British police are more constrained in their use of deception. *See* GUDJONSSON, *supra* note 113, at 278; *see also* James R. Agar II, The Admissibility of False Confessions Expert Testimony, Department of Army Pamphlet 27-50-321 (August 1999) (discussing the Police and Criminal Evidence Act of 1984, sections 76 and 78, which states that deception may render a confession unreliable).

120. *See* Kassin & Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, *supra* note 113, at 67-94. Both authors are psychology professors.

121. The one study that concludes that there are a large number of wrongful convictions of innocent persons, and at least suggests that some portion of these many cases might be due to false confessions, is utterly flawed. *See* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 2 CRIME & DELINQ. 518 (1986). In 1986, Professors Huff, Rattner, and Sagarin asserted that a "conservative estimate" of the number of wrongful convictions of innocent persons each year was 6,000. They arrived at this number without assembling a random sample or examining any case files. Instead, they obtained a figure for the frequency of wrongful convictions by surveying the opinions of 177 persons involved in the criminal justice system, from sheriffs to judges to public defenders. It is hardly clear why all of these people were deemed to know a figure that most other researchers assert is either elusive or unknowable.

The survey was both framed and interpreted in a highly misleading manner. Respondents were asked to estimate the number of wrongful convictions. They were given only the following choices as possible answers: Never, Less than 1%, 1-5%, 6-10%. Because just one case of wrongful conviction would have to exclude the answer "never," not surprisingly, few respondents gave that answer. Also hardly surprising was the fact that the overwhelming majority of the respondents chose the next lowest category offered as a choice, "Less than 1%." Of course, the category of all estimates "Less than 1%" but greater than zero is quite broad. It includes estimates as high as 1 out of 101 as well as estimates of 1 in 1000, 1 in 10,000, 1 in 100,000, and, in fact, every barely perceptible estimate as long as it is higher than zero. Thus, the construction of the survey question should have allowed the researchers to reach almost no conclusion about the estimates by the respondents. Yet the researchers decided to simply take the mid-point of their very broad range and settled on an estimate of one-half of 1% or 1 in 200. They then multiplied this quite high rate of error by an enormous figure representing the number of convictions in this country each year for serious crimes. Thus, they were able to arrive at an alarmingly large number — 6,000 — of purportedly

produced credible evidence that there is a serious problem that should be addressed by substantially limiting police efforts to obtain confessions.[122]

b. Inclusion of Cases Without Convictions. The existing studies are also weakened by the inclusion of persons who gave false confessions but who were never brought to trial and convicted. For example, in the Leo-Ofshe collection of sixty cases involving false confessions, only 29 of the cases involved a person who was actually convicted after making a false confession.[123] In the remaining cases, the criminal justice system successfully identified the unreliability of the confessions at some point before conviction. Instances in which the system worked as it is supposed to — by weeding out false confessions before an erroneous conviction — do not provide a sound basis for drastically limiting police efforts to obtain confessions from all suspects, many of whom are guilty of serious offenses.[124] Thus, researchers should focus on those instances of allegedly false confessions in which the defendant has exhausted his appeals.

c. Inappropriate Sources to Establish Innocence. To verify a wrongful conviction, it is necessary to determine whether a convicted person is, in fact, innocent. Actual innocence is a certainty in only a small fraction of the cases that researchers have used to illustrate the

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wrongful convictions. This number, however, is based on a completely speculative assumption that the respondents were reporting estimates of 1 in 200, rather than much lower estimates.

This sleight of hand with statistics tells us very little about how many wrongful convictions actually occurred, or even much about what the 177 respondents believe. In conducting surveys about matters that may be quite rare, survey questions must be carefully crafted to allow for answers that reveal the true rarity of the matter being studied.

122. Even while asserting that there is a significant false confession problem, some commentators have acknowledged that there are, in fact, few documented cases. *See, e.g.*, White, *Involuntary Confession*, *supra* note 10, at 2043 (recognizing that "a court might conclude that the empirical data" on the false confession problem is "tentative and fragmentary"). Professors Leo and Ofshe, tacitly acknowledging that their list of cases falls well short of establishing that false confessions happen regularly, assert that "it is reasonable to assume that the reported cases represent only the proverbial tip of the false confession iceberg." Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1139. No such assumption is reasonable. The actual frequency of false confessions should be established by studying a random sample of confession cases and not by speculation based largely on isolated cases reported in the media.

123. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 473.

124. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 536. ("If a person who has made a false confession is not convicted — because the police do not arrest, the prosecutor does not indict, or the jury does not convict — then the screens in the system have at least worked to prevent the ultimate miscarriage of justice, the conviction of an innocent person."); *see also* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 408 (1987) ("A misidentified defendant who goes to trial undoubtedly runs a terrible risk of being convicted in error, but it does not take blind faith in trials by jury to believe that the risk is considerably smaller than it is for a guilty defendant and that this highly imperfect filter reduces the number of erroneous convictions considerably.").

problem of wrongful convictions in general and false confessions in particular. Innocence is most clearly and easily established by the criminal justice system itself, when it overturns convictions on grounds of innocence. Actual innocence is unequivocally established, for example, when a court overturns a confessor's conviction because DNA evidence establishes that the defendant did not commit the crime. There are few cases, however, involving judicial determinations of wrongful convictions in cases of purportedly false confessions. In fact, many of the persons whom scholars have labeled as innocent are still in prison because no judge has agreed with the researchers' and defendant's claims of innocence.

The methodology used to establish the innocence of convicted persons raises significant concerns. Because there are so few judicial determinations of actual innocence, researchers have looked for other evidence demonstrating innocence. They have made some claims of innocence based, at least in part, on questionable information such as newspaper assertions and the defendant's own claims of innocence.[125]

The reliance on questionable sources to establish innocence is apparent, for example, in the Bedau-Radelet study of 350 cases of purportedly wrongful convictions. Professors Bedau and Radelet assert that, in these cases, the defendant was subsequently "found to be innocent" of the capital or potentially capital crime for which he was convicted.[126] The phrase "found to be innocent" would seem to suggest that there was a judicial or other official determination of innocence. In fact, for some of the cases, the finding of innocence is a conclusion reached by Professors Bedau and Radelet. Many of the defendants deemed innocent by them actually served their sentences or remain imprisoned because the courts made no such finding of innocence. Professors Bedau and Radelet do make several concessions. First, they admit that the evidence convincing them of innocence in some cases "may not convince others."[127] Second, they admit that their decision to include "a few borderline cases may look to other investigators to be not only debatable but even incorrect."[128] Third, they concede that "the cases form a continuum, from those where the evidence for innocence is conclusive to those where the evidence is slight."[129]

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125. *See* Cassell, *Guilty and "Innocent", supra* note 10, at 578-79 (criticizing Leo and Ofshe's use of seemingly questionable sources); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 122 (1988).

126. Bedau & Radelet, *supra* note 112, at 24; *see also id.* at 38 (asserting that the defendants had been "proved to be innocent").

127. *Id.* at 47.

128. *Id.*

129. *Id.* at 47-48. They also concede that "[i]n none of these cases, however, can we point to the implication of another person or to the confession of the true killer, much less to any official action admitting the execution of an innocent person." *Id. at* 74.

In addition to these admitted defects, a significant problem with the Bedau-Radelet study is that it appears to give greater weight to potentially unreliable post-conviction statements than to the decisions of juries and trial judges that were upheld by appellate judges.[130] The method of establishing innocence used by Professors Leo and Ofshe is questionable. To determine whether a confession is probably false and the defendant probably innocent, they examined the defendant's own post-admission narrative and looked for evidence corroborating the confession. This method of determining innocence is can be "highly subjective."[131] Despite these limitations, other researchers have incorrectly claimed that the Bedau-Radelet studies present "known" instances of wrongful convictions of false confessors.[132]

C. *The Value of Deception During Interrogation*

Deceptive interrogation techniques have value. Deception is needed to obtain some confessions, confessions are needed to obtain some convictions, and those convictions provide great value to society — specifically to existing victims, future potential victims, and innocent persons who might have been wrongly charged absent a confession by the true perpetrator.[133]

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130. *See* Markman & Cassell, *supra* note 125, at 126.

131. James R. Agar II, The Admissibility of False Confessions Expert Testimony, Department of Army Pamphlet 27-50-321 (August 1999); Cassell, *Protecting the Innocent*, *supra* note 109, at 505 ("[I]n a significant number of their cases, the 'innocent' defendants were in all likelihood guilty."). Moreover, for some cases Professors Leo and Ofshe refer chiefly to media accounts as the source of evidence of innocence. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 449. Media accounts are not necessarily a reliable source for definitively establishing innocence. The press bias may be to find an innocent person wrongly convicted, since it is not news that a guilty person is in prison.

132. *See* Alschuler, *Constraint*, *supra* note 10, at 973 n.78 ("For an indication of the frequency of known false confessions (no more than the tip of the iceberg)," see the works of Professors White, Bedau and Radelet, Leo and Ofshe). Professor Alschuler, like others, has accepted the studies by Professors Leo and Ofshe, and Professors Bedau and Radelet, without questioning what evidence there is of innocence. Professor Alschuler refers to these studies as concerning cases of "known" innocence, even though the researchers themselves concede that in many of their cases, the innocence is, at best, possible or probable, and there has been no judicial acknowledgement of the purportedly "known" innocence of the defendant. *See also* Gregory W. O'Reilly, *Comment on Ingraham's "Moral Duty" To Talk and the Right to Silence*, 87 J. CRIM. L. & CRIMINOLOGY 521, 539 (1997) (relying on Bedau and Radelet after asserting that "the innocent are convicted").

133. *See* Stuntz, *Lawyers*, *supra* note 80, at 1905 ("Deception and advantage taking are . . . at the core of criminal investigation . . . .").

1. *Deception Is Needed to Obtain Some Confessions*

In some instances, the police must use deception to obtain a confession from a suspect.[134] Relatively few suspects enter the interrogation room and promptly offer a full and truthful confession of their wrongdoing. Confessions usually occur only after some form of deception by the officer, from hiding the officer's true feelings about the suspect or the nature of the crime to exaggerating the strength of the evidence. Officers use deception because experience has taught them that it works.[135] Effective interrogations necessarily depend upon a single but significant lie — the "Big Lie." The Big Lie is that it is somehow in the suspect's best interest to confess. In reality, making an uncounseled confession to an officer is rarely in a suspect's best interest.[136] If an interrogator were truly honest, he would inform the suspect that it is generally not in the suspect's best interest to make any

134. Professor Inbau, author of the leading police manual, has explained that "[i]n dealing with criminal offenders, and consequently also with criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens." Inbau, *Police Interrogation*, *supra* note 8, at 19. Inbau observes that conversation between officer and suspect during interrogation does not proceed as it would between two citizens in everyday life. *Id.* Interrogation is part of criminal investigation, not everyday life. There is no reason to require interrogation during an investigation to be any more genteel than a search and seizure during an investigation. For example, a person who seems to have lost an item does not upend a friend's house and search for it even if he has some suspicion that the friend accidentally or intentionally obtained the item. Yet the police, based on probable cause, may conduct a probing search of a home that will be fairly unpleasant for the homeowner.

135. In his observational study of almost 200 interrogations, Professor Leo found that it was commonplace for the police to confront the suspect with false evidence. He found that in 30% of the interrogations, the police confronted the suspect with false evidence of his guilt. *See* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 623 (1996).

Most commentators do not dispute the point that deception is necessary to obtain some confessions. *See, e.g.*, White, *False Confessions*, *supra* note 10, at 111 (stating that "interrogation is indispensable to law enforcement"). *But see* Paris, *Lying*, *supra* note 47, at 825 ("It is far from clear that the amount of information derived from interrogations would be significantly reduced if police were required to tell the truth."). In fact, the arguments against deception are based on the notion that deception is too effective, and that a confession is far more likely to be obtained when the interrogating officer uses some deception than when the officer is entirely truthful. Thus, some of the arguments against deception reflect a view that the police should simply get along with fewer confessions.

136. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 213 (Ballantine Books 1993) ("The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation. It is a fiction propped up against the greater weight of logic itself . . . ."); H. RICHARD UVILLER, TEMPERED ZEAL 210 (1988) (" 'Anybody who stops and thinks about it has to know that he's hurting himself by admitting to a crime . . . .' " (quoting a police officer)); Stuntz, *Lawyers*, *supra* note 80, at 1926 ("If suspects fully comprehended the nature and scope of their legal rights and the likely consequences of relinquishing them, there would be very few police station confessions.").

statement at all.[137] Such a completely honest interrogator would find confessions awfully scarce.

2. *Confessions Are Needed to Obtain Many Convictions*

a. Convictions Lost Because of the Absence of a Confession. Some cases can be successfully prosecuted only with a confession from the defendant. The state has an extremely high burden of proof. Without a statement from the defendant, the physical evidence and testimony from witnesses are sometimes insufficient to obtain a conviction.[138] In other cases, there is little physical evidence, the defendant conceals his face, or there are no witnesses. Some of the most heinous crimes, such as child abuse, may involve no physical evidence and no witnesses, other than the child who may be incompetent to testify due to age. Obviously, the more clever and sophisticated the criminal is, the less likely he is to carelessly leave behind physical evidence or witnesses. Confessions will sometimes offer the only hope of convicting the guilty.[139]

b. Value of a Confession Even If Not Essential to Conviction. A confession may be extremely valuable in a case, even if not essential to a conviction. First, resolution of a case because of a confession allows the police to use their valuable and limited resources to investigate other crimes. Second, confessions greatly reduce the risk that police

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137. In the overwhelming number of cases it is contrary to a suspect's self-interest to confess because a confession will increase the chance that the suspect will be convicted and a penalty will be imposed. But Justice Scalia has pointed out that the suspect may, in fact, achieve some rehabilitative benefit by confessing, rather than continuing to conceal, his wrong-doing. *See* Minnick v. Mississippi, 498 U.S. 146, 166-67 (1990) (Scalia, J., dissenting) (" '[A]dmissio[n] of guilt . . . , if not coerced, [is] inherently desirable,' . . . because it advances the goals of both 'justice and rehabilitation.' " (quoting United States v. Washington, 431 U.S. 181, 187 (1977) and Michigan v. Tucker, 417 U.S. 433, 488 n.23 (1974))). Given that the nation's prisons serve more punitive than rehabilitative goals, and that rehabilitation can also occur in a private setting outside of incarceration, confessing will usually impose greater costs than benefits on the defendant.

138. *See* Columbe v. Connecticut, 367 U.S. 568, 571 (1961):

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains — if police investigation is not to be balked before it has fairly begun — but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

See also Inbau, *Police Interrogation*, *supra* note 8, at 147 ("Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.").

139. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 905-15 (1999) (surveying fifty-nine prosecutors and finding that 61% of confessions were deemed necessary to obtain a conviction; also finding that defendants who confessed were convicted in 78.9% of cases, while those questioned unsuccessfully were convicted in 49.3% of cases).

suspicion will fall on an innocent person. If there is no confession from the true wrongdoer, there is a risk that an innocent person could be investigated, arrested, or even falsely convicted and incarcerated.[140] Third, the existence of a confession may permit the prosecution to obtain a suitable plea agreement. A confession may so strengthen the prosecution's case that a plea bargain to an inappropriate lesser offense can be avoided. Guilty pleas free the courts to move quickly to resolve other cases, spare trauma to the victim, and avoid the financial drain on judicial and prosecutorial resources that would be consumed by a trial.

3. *Value of Convictions Obtained Because of Confessions*

Before considering the proposals to limit substantially various interrogation techniques, it is necessary to consider the obvious benefits of resolving a criminal investigation with a conviction. First, the greatest value to society is the incapacitation of the criminal. During the time that the offender is incarcerated, he is unable to commit new crimes and victimize others. Many criminals commit far more crimes than the few for which they are arrested. Leaving a criminal at large imposes substantial risks on society. Second, if a criminal is not apprehended and convicted, the victim continues to suffer even after recovering from the direct physical and financial injuries caused by the criminal. The victim's emotional recovery is less certain and takes far longer if the victim knows that the criminal remains at large. Both the victim's anxiety about suffering additional harm and the victim's unaddressed desire for justice are significant costs incurred when the absence of a confession means that the perpetrator cannot be convicted.[141]

Finally, if the offender is not convicted, there is no opportunity for rehabilitation. A conviction allows the court not only to incarcerate — and thereby incapacitate — the offender, but also to attempt to rehabilitate the offender with a wide variety of programs, including probationary and parole supervision, boot camp, drug and alcohol treatment, educational opportunities, parenting programs, and counseling. Such supervision benefits the offender who may then be able to lead a rewarding life as a productive citizen. Society benefits, of course, when the offender is rehabilitated and, thus, is no longer a threat to the physical, emotional, and financial well-being of innocent persons.

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140. *See* Cassell, *Protecting the Innocent*, *supra* note 109, 537-38 (1998); Stuntz, *Lawyers*, *supra* note 80, at 1931 ("[M]aking government investigation easier improves the welfare of innocent defendants.").

141. *See, e.g.*, Tatjana Hornle, *Distribution of Punishment: The Role of a Victim's Perspective*, 3 BUFF. CRIM. L. REV. 175, 182 (1999) ("[A]n important function of the [criminal] sentence lies in its message to the victim."). *See generally* DOUGLAS BELOOF, VICTIMS IN CRIMINAL PROCEDURE 7-33 (1998).

D. *Weighing the Costs and Benefits of Deception During Interrogation*

Major policy changes, such as greatly limiting interrogation, should be implemented only after the costs and benefits of making a change have been adequately considered, properly weighed, and balanced against each other.

1. *The False Confession Cost from Permitting Deception: Numbers Do Matter*

In assessing the cost of deceptive interrogation practices, in terms of wrongful convictions resulting from false confessions, numbers do matter. Laws that could affect nearly everyone in the country should not be based on a few compelling, even disturbing, anecdotes.[142] The number of false confessors must be compared to the number of true confessors, and the number of false confessions we could avoid must be compared to the number of true confessions we would lose. Yet, commentators advocating substantial limits on interrogation techniques have relied for support on anecdotal evidence of the false confession problem. The presentation of anecdotal evidence on false confessions may be sufficient to establish a need for additional, and more scientific, study of the matter, but anecdotal reports alone do not provide the evidence which is needed to properly weigh the costs and benefits of deception.

a. Problems with Basing Policy on Anecdotal Evidence. Anecdotes do have value. The recitation of anecdotes, which evoke an emotional response, can be persuasive evidence that a problem exists. "[A]necdotes can crystallize and mobilize public opinion on even the most dull and arcane subject. Unlike statistics, anecdotes offer simplicity and transparency. Little specialized knowledge is necessary to become outraged by a bad anecdote or self-congratulatory about a good one."[143] For some issues, the narrative in anecdotes "puts a human face on a particular problem, brings new voices to the table, makes plain unexamined assumptions and implicit bias, and can enhance the probability of a real solution by transforming the terms of discourse."[144] But anecdotes alone cannot provide the basis for major

142. There is often criticism of laws with broad application that were hastily enacted after a single heinous crime. *See, e.g.*, *60 Minutes* (CBS television broadcast, August 20, 2000) (Professor Franklin Zimring concluded that California's three strikes legislation "was passed in the heat of passion" after the kidnapping and murder of twelve-year-old Polly Klass by a defendant with a long criminal record).

143. David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797, 800-01 (1998).

144. *Id.* at 807-08.

policy or legal changes.[145] The anecdotes, which capture the attention of academics, the press, the public, or legislators, must be shown to be representative of a much larger group of such cases.

Anecdotes standing alone, however, provide no evidence on the frequency of the problem they illustrate. That is why "anecdotal evidence is heavily discounted in most fields."[146] The persuasive power of an anecdote, especially a well-told anecdote, can obscure the limited role of anecdotes in proving that a problem is widespread, or in analyzing the problem.[147] Although "[s]cientists and medical researchers reject anecdotal evidence for precisely these reasons . . . [t]he rest of the population is less cautious."[148] Lawyers, unlike scientists, often embrace anecdotal evidence.[149] In relying on anecdotes, commentators have established neither the frequency of false confessions nor that false confessors in the anecdotal reports are typical of the many defendants who give confessions.[150]

Professors Leo and Ofshe have asserted that "the important question is not whether false confessions are pervasive or isolated," but why they occur and how they can be prevented.[151] In fact, the question of whether false confessions are pervasive or isolated most certainly is an important question. When the preventive measures suggested

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145. *See id.* at 807 ("[T]he adverse consequences of generalizing from an unrepresentative anecdote can be severe. Unfortunately, as the underlying subject matter becomes more complex and the trade-offs become tougher, the temptation to use anecdotal evidence becomes overwhelming.").

146. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why Not?*, 140 U. PA. L. REV. 1147, 1161 (1992) ("Because we easily remember captivating little stories, when called on to estimate how frequent various legal events and outcomes are, we mistakenly associate the ease of anecdote recall with the numerousness of the type of case.").

147. Harlon Dalton, *Storytelling on Its Own Terms*, *in* LAW'S STORIES 57 (Peter Brooks & Paul Gewirtz eds. 1996) ("When a story is well told, I park my analytic faculties at the door."); Hyman, *supra* note 143, at 808-09 ("Critics respond that the narrative format precludes consideration of the critical issues of frequency and typicality, raises difficult issues of professional discourse, and may even represent the rejection of rationality.").

148. Hyman, *supra* note 143, at 801.

149. *See* Hyman, *supra* note 143, at 801-02 ("Independent of the recent boom in narrative scholarship, lawyers are by training and inclination enthusiastic about anecdotal evidence."); Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989) (arguing that lawyers are more comfortable with words than numbers, with stories than statistical studies).

150. In fact, the available evidence is that the defendants in the anecdotes are not typical of the great number of defendants who are subjected to interrogation and who give confessions. The false confessors in the anecdotes appear to include a much larger percentage of juveniles and mentally impaired persons than is typical of criminal defendants in general. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 584; *see also* Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997) ("The significance of a story of oppression depends on its representativeness . . . [T]o evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social science rather than of narrative.").

151. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1140.

would impose substantial costs on society, in terms of lost true confessions, it is vitally important to know just how many false confessions will be avoided by the measures sought.

Although the use of deception is not a risk-free procedure, the magnitude of the risk must be considered before new limits are imposed. There is no doubt that the conviction of an innocent person because of a false confession is a great miscarriage of justice and a matter of enormous concern. The research presented to date does not establish that false confessions occur with such frequency that drastic measures are warranted. Commentators have highlighted only a few dozen false confession cases out of the pool of thousands, if not millions, of cases in this century in which a person made a confession and was convicted.[152]

b. Statistically Valid Research on False Confessions Could Be Conducted. Commentators urging limits on interrogation techniques seem reluctant to conduct the kind of research necessary to justify these limits. For example, while presenting the false confession problem as significant, Professors Leo and Ofshe assert "that it is presently not possible to quantify the number and frequency of false confessions or the rate at which they lead to miscarriage of justice . . . ."[153] Although they correctly concede that such research has not been conducted, their assertion that such research is "impossible" is not sound.[154]

They assert that there "are at least three reasons why at present it is not possible to devise an empirical study to measure, quantify or estimate with any reasonable degree of certainty the incidence of police-induced false confessions or the number of wrongful convictions they cause."[155] They explain, first, that "American police typically do not record interrogations in their entirety."[156] This fact does not present an insurmountable barrier to researching the frequency of false confessions. Currently, two states and many other individual municipalities videotape confessions.[157] Moreover, a researcher could arrange to ob-

152. *See* Cassell, *supra* note 7, at 1127 ("Even looking solely to the last ten years [1987 to 1997], police officers around the country interrogated approximately 23 million suspects for index crimes." (citing FBI statistics on the number of arrests and assuming approximately 80% of arrestees are questioned)).

153. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1135.

154. Other commentators have also asserted that it is "impossible" to measure how often false confessions occur. WRIGHTSMAN & KASSIN, *supra* note 107, at 85. ("It is impossible to determine or even estimate the frequency with which people confess to crimes that they did not actually commit.").

155. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1136.

156. *Id.* at 1136.

157. *See* Stephan v. State, 711 P.2d 1156, 1157-58 (Alaska 1985); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994); *see also* William Geller, Police Videotaping of Suspect Interrogations and Confessions (Report to the National Institute of Justice, 1992) (reporting that thousands of police departments use videotaping at least some of the time).

serve a large sample of interrogations.[158] These observed cases could then be tracked to determine if there is evidence that the confession was false and it resulted in a wrongful conviction.

The second objection to researching the frequency of false confessions is that "because no criminal justice agency keeps records or collects statistics on the number or frequency of interrogations in America, no one knows how often suspects are interrogated or how often they confess, whether truthfully or falsely."[159] Even assuming that no such total number of confessions for the nation is readily available, the absence of such a number does not impede the research. Random samples could be observed in several representative areas such as large urban, suburban, and rural police departments.[160]

The third reason offered for the absence of research on the frequency of false confessions is that "many cases of false confession are likely to go unreported and therefore unacknowledged and unnoticed" because "most confessors will be arrested, charged, prosecuted and/or convicted."[161] The fact of conviction is certainly strong evidence that the confession was not false. But if there is other evidence that, despite the conviction, the confession was false, it is the admittedly difficult job of the researcher to find that evidence.[162]

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158. In fact, Professor Leo has already relied on this approach by observing a sample, although not an entirely random one, of 182 cases in one jurisdiction. Professor Cassell undertook a similar observational study. He, or his research colleague, observed 173 cases in Salt Lake City. *See* Cassell, *Social Costs*, *supra* note 101.

159. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1137.

160. In two studies that did not specifically look for false confessions, but that did examine samples of confession cases, the researchers did not report that any of the confessions were false. *See* Cassell, *Guilty and "Innocent"*, *supra* note 10, at 529 (discussing Professor Leo's study of 182 interrogations in the San Francisco Bay area, and Professor Cassell's study of 173 interrogations in Salt Lake City).

A random sample survey of the actual number of confessions could be made an even more manageable project if only murder cases were examined. Limiting the research to murder cases makes sense because most of the anecdotal evidence on false confessions involves homicide cases. *See* Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1140.

161. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1137.

162. Professors Bedau and Radelet seem unwilling to acknowledge that better, more comprehensive research could be conducted and is necessary to support their argument about wrongful convictions. They claim that if their existing study "fails to convince the reader of the fallibility of human judgment then nothing will." Bedau & Radelet, *supra* note 112, at 24 (quoting G. SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 262 (1950)). Of course, no one doubted, even before their study, that some wrongful convictions do occur. The key question, and the one on which Professors Bedau and Radelet shed little light, is not whether they occur but how often they occur.

Professors Bedau and Radelet argue that they have already undertaken "a sustained and systematic attempt to identify as many cases as possible" of wrongful convictions. *Id.* at 27. There is no doubt that quite a bit work went into their study. Yet the glaring flaw in their research is that they did not conduct any kind of random survey. They chose their 350 cases from the entire body of cases decided this century throughout the country. A far more useful study would concentrate on a much smaller time frame and geographic area and attempt to identify the total number of wrongful convictions in that time and place. This would allow researchers to have some reasonable estimate of the percentage of wrongful convictions.

2. *The Cost of Limiting Deception*

The argument for broad limits on the use of deception should be evaluated only after considering the costs of imposing such limits. If such limits were imposed, true confessions would be lost either because officers complying with the restrictive limits would fail to elicit a confession, or because a confession would be suppressed if officers questioned a suspect in violation of the limits. Although the precise cost from losing true confessions cannot be specified, there is no doubt that it would be substantial. Given that there is no proof of an unacceptably high rate or number of false confessions, there is no basis for imposing on society the large cost of lost true confessions in order to avoid the much smaller cost of false confessions.

The loss of true confessions, which translates into lost convictions, imposes substantial costs on both existing and potential victims. Unconvicted criminals have the opportunity to commit additional crimes. In fact, a criminal who evades punishment for one crime is even more likely to commit additional crimes because he avoided being rehabilitated and did not experience any deterrence effect from conviction, sentencing, and incarceration. Moreover, in addition to the existing and future victims of crime, other innocent persons suffer from the loss of confessions and convictions when they are wrongly charged for crimes to which the actual wrongdoer has not confessed.[163]

There would be great costs imposed on the criminal justice system if improper deception were defined to include anything that tends "to decrease the suspect's perception of the consequences of confessing."[164] That is precisely what an interrogator must do if he expects to obtain a confession. A suspect who fully comprehends the consequence of confessing will generally not give a full and truthful confession to an officer. If suspects were allowed fully to protect their self-

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Thus far, Professors Leo and Ofshe, too, have demonstrated little interest in undertaking research on the actual number of false confessions. They have asserted that "it is far more important to study the conditions under which [false confessions] occur, the characteristics of such cases and why they led to deprivations of liberty and miscarriages of justice than it is to attempt to quantify" the number of false confessions. Leo & Ofshe, *Missing the Forest*, *supra* note 95, at 1139. They assert that it may not be "worth the effort and expense" to quantify the rate of false confessions because "there appears to be widespread agreement that false confessions and miscarriages of justice occur sufficiently often to warrant the concern of legal scholars, jurists, and legislators." *Id.*

163. *See* Cassell, *Protecting the Innocent*, *supra* note 109, at 498 ("[T]ruthful confessions protect the innocent by helping the criminal justice system separate a guilty suspect from the possibly innocent ones, while the failure to obtain a truthful confession creates a risk of mistake."); Stuntz, *Lawyers*, *supra* note 80, at 1907 ("[G]uilty criminal defendants would benefit substantially if the law were to prohibit deceptive tactics, while innocents would probably be harmed by the impairment of the government's ability to sort cases.").

164. Grano, *Selling the Idea*, *supra* note 8, at 669 (citing FRED E. INBAU, ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 332 (3d ed. 1986)). See also *supra* note 9 for commentators who have urged a very broad definition of deception.

interest during interrogation, then much of what successful interrogators practice, "from insincere politeness to overt trickery, would have to be disallowed."[165] As few suspects spontaneously give full and truthful confessions, many confessions, and thus many convictions, would be lost if all deception were prohibited.

3. *The Value of Deception Outweighs Its Costs*

As shown above, no one has made a credible case that there is truly a substantial number of cases in which persons have been wrongly convicted based on false confessions induced by deceptive interrogation techniques. On the other hand, the substantial value of deception in obtaining confessions is based on long experience.[166] Given the limited proof of the false confession problem, there is little question that the benefit of deception outweighs its costs. Nevertheless, some commentators urge drastic limits on interrogation.

There are at least three possible explanations why some commentators urge drastic limits on deceptive interrogation techniques on the basis of such limited evidence of false confessions. First, some commentators may believe that the few cases they discovered are somehow only the tip of the iceberg. Second, and more likely, these commentators may believe that even a very small number of cases of false confessions is too high a price to pay for the continued use of deception. In reaching this conclusion, these commentators either fail to appreciate or substantially undervalue the costs that would be imposed on society by drastically limiting deception. Third, the commentators who focus on the few documented cases of innocent persons convicted because of police-induced false confessions may also be interested in reducing the far greater number of confessions obtained from guilty persons. The absence of a confession will sometimes mean that there will be no conviction or that the case will be so much weaker that the guilty defendant will be offered a plea bargain and allowed to serve less time. There is a range of reasons why some commentators may prefer to have even guilty persons either not be convicted or serve less time. For example, they may believe that criminal penalties are generally too harsh, that prisons are overcrowded and violent, or that many

165. Grano, *Selling the Idea*, *supra* note 8, at 670. Academic critics of deception tend to ignore or downplay the enormous value in permitting deception during interrogation. *See* Grano, *Criminal Procedure*, *supra* note 56, at 714 ("When commentators make reference to crime control, they usually use such narrow terms as 'the police interest' or 'law enforcement goals.' Unlike the discussion of perceived police abuse, in which passion abounds, the passing references to the possibility of uncaught murderers and rapists are flat. It is the police rather than the criminals who are treated as aliens." (emphasis omitted) (quoting Caplan, *supra* note 58, at 1425 n.47 (1985))).

166. That is why defendants routinely and strenuously object, in motions to suppress and at trial, to the use of deception during interrogation.

guilty defendants turned to crime as a consequence of an underprivileged upbringing, drug or alcohol use, or after difficult life experiences. But placing limits on the use of deception, and thus reducing the number of convictions of guilty persons, is not the appropriate means of addressing these other valid concerns about how best to treat persons who are convicted of a crime.

4. *No Reason to Single Out Deception Out from Other Causes of Wrongful Conviction*

The existing research has documented only a very small number of convictions caused by false confessions from police deception. Even if additional studies were to show more such cases, the very broad limitations on interrogation would still not necessarily be warranted. Interrogation, like many other investigative tools in the criminal justice process, has the potential to result in some number of erroneous convictions. The argument has not been persuasively made, however, that interrogation should be singled out from other practices that also have the potential to cause erroneous convictions.

False confessions appear to be one of the least common reasons for an erroneous conviction. In fact, there is virtually universal agreement that misidentifications by victims and eyewitnesses cause far more erroneous convictions than do false confessions.[167] Yet there are few limits on the ability of eyewitnesses to testify against a defendant. Procedures such as showups, lineups, and photo arrays all sometimes result in misidentifications and erroneous convictions. Although these procedures cannot be so suggestive as to make a identifications unreliable,[168] the procedures that are permitted still result in some misidentifications. These procedures are permitted, however, because they are

167. Misidentification by witnesses was recognized as the "major source" of false convictions in Borchard's classic work. BORCHARD, *supra* note 9, at xiii; *see also* EDWARD CONNORS ET AL., NATIONAL INSTITUTE OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 24 (1996) (stating that eyewitness misidentification is the main reason for false convictions); Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 642 (1999) ("The major reasons [for false convictions], in order of importance, are inaccurate identifications, official misconduct, and ineffective defense counsel."); *id.* at 656 ("Erroneous identification evidence remains the single leading cause of false convictions."); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1347 (noting studies showing that eyewitness misidentification is the primary source of false convictions); Gross, *supra* note 124, at 396 ("[A]s far as anyone can tell, eyewitness misidentification is by far the most frequent cause of erroneous convictions.").

168. *See* Manson v. Brathwaite, 432 U.S. 98, 111-12 (1976) ("[T]he Court's concern with the problem of eyewitness identification" was the "driving force" behind *United States v. Wade*, 388 U.S. 218 (1967)), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967)); *see also* Neil v. Biggers, 409 U.S. 188, 198 (1973) (stating that courts must determine if an identification procedure is so suggestive that it raises "a very substantial likelihood of irreparable misidentification").

recognized as necessary if crimes are to be solved, and wrongdoers prosecuted.

V. THE LIMITING PRINCIPLES BEYOND RELIABILITY ARE NARROW

Although reliability is the primary basis for setting limits on interrogation, there are additional reasons for setting some limits. But these additional reasons are few. Some of the additional reasons offered by commentators simply collapse down to the reliability rationale. For example, much of the objection to inappropriate "police methods" is best understood as an objection to methods with an unacceptably high risk of causing a false confession.[169] There may, however, be a small number of interrogation techniques that would violate due process without implicating reliability concerns. Professor Grano suggested one such situation with a hypothetical concerning the use of a police officer who impersonates a chaplain to obtain a confession in the interrogation room.[170] Arguably, such a deception should be barred because it intrudes on society's fundamental value in religion.[171]

The Court has suggested that a "shock the conscience" standard may be useful for determining when police deception during interrogation goes too far. The Court applied the shock the conscience standard when it considered police deception not towards a suspect, but towards the attorney for the suspect who was interrogated. In 1986, in *Moran v. Burbine*, the Court heard a claim that the police violated due process: 1) by failing to inform the defendant that an attorney, retained by his sister, was trying to contact him; and, 2) by falsely telling the attorney that the suspect would not be questioned that day. The Court rejected the claim, finding that "egregious . . . police deception might rise to a level of a due process violation,"[172] but that the conduct in *Moran* "falls short of the kind of misbehavior that so shocks sensibilities of civilized society as to" violate due process.[173]

Under a shock the conscience standard, techniques cannot be considered shocking simply because they are successful in convincing suspects to give truthful confessions. The shock the conscience standard bars only those few techniques that, even though they do not involve

169. *See* Laurie Magid, *Questioning the Question-Proof Inmate*, 58 OHIO ST. L.J. 883, 909-12 (1997).

170. *See* GRANO, CONFESSIONS, *supra* note 55, at 109; Grano, *Selling the Idea*, *supra* note 8, at 681. The hypothetical of an officer impersonating a priest was originally offered by Professor Kamisar to show that some police methods must be barred even if the resulting confession would be reliable. *See* Kamisar, *supra* note 54, at 747.

171. Moreover, even if the particular jurisdiction does not provide a priest-penitent privilege, the suspect may believe that such a privilege exists.

172. Moran v. Burbine, 475 U.S. 412, 432 (1986).

173. *Id.* at 433-34.

the physical coercion clearly forbidden under the voluntariness test, and even though they do not implicate the concerns of the reliability rationale, nevertheless violate "canons fundamental to the 'traditions and conscience of our people.' "[174] Although the hypothetical involving the imposter chaplain is not the only technique that shocks the conscience by violating a fundamental value, it is one of only a small group.[175]

VI. CONCLUSION: ADDITIONAL LIMITS ON DECEPTION ARE UNWARRANTED

Interrogation techniques have changed little in the years since the *Miranda* Court itemized them, cast a disapproving look, but concluded that they were permissible as long as a valid waiver of rights was obtained. The *Dickerson* Court affirmed the balance struck in *Miranda*, in which rights, warnings, and waivers protect suspects. But *Miranda* left (and *Dickerson* continues to leave) interrogators with a wide berth for obtaining truthful confessions. A compelling argument has not yet been made that drastic limits on the use of deceptive interrogation techniques are either required or advisable. The non-reliability rationales for such limits — such as equality, trust, and dignity — largely reflect the inappropriate view that certain interrogation techniques should be barred because they are too effective in obtaining confessions. In fact, there is nothing wrong with obtaining a truthful confession of wrongdoing from a guilty person.

Reliability, however, is an appropriate concern. Interrogation techniques must be limited when they endanger reliability by creating a likelihood of producing a false confession. In advocating limits on deceptive techniques, however, some commentators have overstated the false confession problem and minimized the costs of limiting interrogation. The alarming claims of a widespread false confession problem have not yet been demonstrated with a statistically valid sample of confession cases. Thus far, the evidence of the false confession problem consists only of anecdotal reports. On the other hand, broad limits on deception could result in the loss of many thousands of confessions by guilty persons. Because there is insufficient proof of the scope of the false confession problem, the reliability rationale does not provide a basis, at least yet, for barring or greatly limiting deception during interrogation.

174. *Moran*, 475 U.S. at 432 (quoting Rochin v. California, 342 U.S. 165, 169 (1952)).

175. If barring an officer from impersonating a chaplain is appropriate, should an officer also be barred from impersonating a physician? Beyond clearly fundamental values such as religion, it is far less clear which interests are so important outside of the interrogation room that they should not be impinged on by interrogation techniques.

Moreover, even if researchers provide additional empirical proof on the false confession problem, alternatives to drastic prohibitions on interrogation techniques should be considered. For example, there is widespread agreement among commentators that interrogations should be videotaped. At least some of the concerns raised about false confessions could be addressed by the use of videotaping, rather than by strictly limiting interrogation techniques.[176]

There is no question that deceptive interrogation techniques can contribute to the unpleasantness that suspects, both guilty and innocent, endure during interrogation. Nevertheless, once there is probable cause to suspect a person of a crime, some level of discomfort is considered acceptable because of society's interest in investigating and solving crimes. Deceptive but nonthreatening interrogation will generally be no more unpleasant than the other intrusions deemed reasonable after a showing of probable cause — such as having one's home thoroughly searched pursuant to a warrant, or being placed in a detention facility during post-arrest processing.[177] The probable cause standard provides an appropriate threshold of protection from both the pressures of custodial interrogation and the unpleasantness of deceptive interrogation techniques.

There is a growing view that reliability is the appropriate focus of the debate over the use of deceptive interrogation techniques. There should also be a greater acknowledgement that, before these techniques are drastically limited, there must be statistically sound, empirical research to determine if there truly is a widespread problem with police-induced false confessions. In the meantime, we should let the police do their job of investigating crime, but we should also be alert to the possibility of that tragic case in which an innocent person has been wrongly convicted because of a police-induced false confession.

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176. *See* Leo & Ofshe, *Consequences*, *supra* note 90, at 494 ("The risk of harm caused by false confessions could be greatly reduced if police were required to video- or audio-record the entirety of their interrogations."). For additional support of videotaping, see Cassell, *Social Costs*, *supra* note 101, at 486-97; KAMISAR, *supra* note 31, at 132-36; Yale Kamisar, *Foreword:* Brewer v. Williams — *A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 236-43 (1977). Even when there is no videotape, defendants may be able to raise the false confession concern with the use of expert psychological witnesses. At this time, however, the false confession research is not sufficiently developed for witnesses on false confessions to qualify as experts under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). "[A]dmissions of expert testimony based on this new theory is premature" largely because "the empirical base that supports the theory has too many unanswered questions . . . ." *See* James R. Agar, II, The Admissibility of False Confession Expert Testimony, 1999 Aug. Army Law 26, 42 (1999) (explaining that two federal appellate courts have admitted such evidence while the thirteen state courts that have ruled are divided on the issue). Scientific advances in DNA and other areas, however, do provide an additional measure of protection against wrongful convictions.

177. *See* Caplan, *supra* note 58, at 1468 (comparing due process to the Fourth Amendment which was understood as forbidding only "unreasonable" invasions of privacy).