

GUARDING AGAINST FALSE CONFESSIONS

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INTRODUCTION

After Antonio Ramirez was gunned down in Oakland, California, the police arrested a sixteen-year-old named Felix.¹ The police held him overnight without a lawyer, refused to let him see his mother, and then coerced a confession out of him.² When Felix gave answers inconsistent with the crime, the police “corrected” him and “reminded him” of details he did not mention.³ Felix, feeling threatened, told the police that he had left the murder weapon with this grandfather.⁴ In reality, both of Felix’s grandfathers were dead.⁵ Only when Felix was provided with details of the charges three days later did he learn the date of the murder—a day Felix locked in a detention facility for violating his probation.⁶ Because Felix could not have killed Ramirez, prosecutors dropped the case.

Felix’s juvenile commissioner was confused.⁷ “Well, I don’t understand — why would he confess?”⁸ His statement demonstrates a striking and unfortunate fact. Many people, including people well versed in the criminal justice system, have a hard time understanding why a suspect would confess to a crime that they did not commit. False confessions occur more frequently than one might expect. Of the 1,900 false confessions in the National Registry of Exonerations, about 12% were caused by false confessions.⁹ Of the DNA exonerations in the United States, 28% involved false confessions.¹⁰ Many of these false confessions are a result of the Reid interrogation technique, which most

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¹ David K. Shipler, *Why Do Innocent People Confess?*, N.Y. TIMES, (Feb. 23, 2012), <http://www.nytimes.com/2012/02/26/opinion/sunday/why-do-innocent-people-confess.html>; see also DAVID K. SHIPLER, RIGHTS AT RISK: THE LIMITS OF LIBERTY IN MODERN AMERICA 55–57 (2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Exonerations by State*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

¹⁰ *DNA Exonerations in the United States*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>.

police officers use. This piece argues that because Miranda rights are minimally effective at protecting against false confessions in the context of such a technique, state legislatures should take additional protective measures. Recording all interrogations and allowing experts to more freely testify about what causes false confessions would help to reduce the considerable damage of false confessions. According to Saul Kassin, an expert on false confessions, “[o]nce the confession is taken, it trumps everything else, it trumps DNA evidence, its effects cannot be reversed.”¹¹

I. ANATOMY OF A FALSE CONFESSION

There are three types of false confessions: voluntary, compliant, and persuaded.¹² The latter two types are the result of police pressure. In a compliant false confession, a suspect gives a confession that he or she knows is false to stop the questioning or receive a future benefit.¹³ In a persuaded false confession, suspects doubt their own memories and actually believe that they committed the crime they are admitting to.¹⁴

The Reid technique—the interrogation method used by most American police officers—is thought to be a significant contributor to false confessions generally.¹⁵ The technique, developed in the 1950’s, is divided into three main stages.¹⁶ The suspect is first isolated in an unfamiliar location—usually the interrogation room.¹⁷ Then, the officer claims to already know that the suspect is guilty, stating one theory of the case.¹⁸ Finally, the officer suggests alternative readings of the scenario that, while still incriminating, are more societally palatable.¹⁹ The goal is to get the suspect to admit to the less abhorrent version of events, and confess.²⁰ The 2008 interrogation of Nha Truong for the death of her thirteen-month-old son provides an example of the Reid

¹¹ Adam Cohen, *Why Innocent Men Make False Confessions*, TIME, (Feb. 12, 2013), <http://ideas.time.com/2013/02/11/why-innocent-men-make-false-confessions/>.

¹² Affidavit of Dr. Richard A. Leo, Ph.D., *Dean v. Smith*, 805 F.Supp.2d 750 (2011) (No. 4:09-CV-3148), 2010 WL 8609818.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Beyond Good Cop/Bad Cop: A Look At Real-Life Interrogations*, NPR, (Dec. 5, 2013), <http://www.npr.org/2013/12/05/248968150/beyond-good-cop-bad-cop-a-look-at-real-life-interrogations>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Gretchen Gavett, *A Rare Look at the Police Tactics That Can Lead to False Confessions*, FRONTLINE, (Dec. 9, 2011), <http://www.pbs.org/wgbh/frontline/article/a-rare-look-at-the-police-tactics-that-can-lead-to-false-confessions/>.

technique in action.²¹ First, the police officers isolated Truong in a small windowless room.²² Then, they insisted that they knew that she was guilty.²³ The officers brought up the earlier death of her three-month-old brother, which happened when she was left alone with him at eight-years-old.²⁴ Although her brother died due to sudden infant death syndrome, they accused her of smothering him and painted her as a repeat baby killer.²⁵ The officers said that her son also died of being smothered, even though they had no evidence of how he died.²⁶ Finally, they started to shift the moral responsibility for the act away from her by blaming her mother for the situation and saying that if she confessed, she would be charged through the more lenient juvenile system.²⁷ When she confessed, she was arrested immediately and charged as an adult.²⁸

Although this interrogation method is widespread, it has garnered criticism for being unscientific²⁹ and manipulative.³⁰ The Reid method has been explicitly criticized in Canada, where the technique is also widely used.³¹ One Canadian judge denounced the technique “find[ing] that its use can lead to overwhelmingly oppressive situations that can render false confessions and cause innocent people to be wrongfully imprisoned.”³²

II. POSSIBLE SOLUTIONS

Here in the United States, Miranda rights ostensibly guard against involuntary confessions.³³ More than 80% of people waive their Miranda rights before talking to police officers, however.³⁴ Douglas Starr, co-director of the Science Journalism program at Boston University explains, “You want to seem like a nice guy when the cops

²¹ David Boeri, *How A Teen's Coerced Confession Set Her Free*, NPR, (Dec. 30, 2011), <http://www.npr.org/2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* It is important to note that this kind of police use of deception during an interrogation is legal and widespread. See Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168 (2001).

²⁹ Douglas Starr, *The Interview*, THE NEW YORKER, (Dec. 9, 2013), <http://www.newyorker.com/magazine/2013/12/09/the-interview-7>.

³⁰ Douglas Quan, *Judge's Ruling Finds Widely Used Police Interrogation Technique 'Oppressive'*, CANADA, (Feb. 23, 2012), <http://o.canada.com/news/107960>.

³¹ *Id.*

³² *Id.*

³³ Starr, *supra* note 29.

³⁴ *Id.*

are interrogating you, and [the effectiveness of the Reid] technique depends on that.”³⁵ Because a vast majority of people do not exercise their Miranda rights, making it a poor shield against the pressures that can lead to a false confession, some people advocate for the adoption of the so-called P.E.A.C.E. method of interrogation.³⁶ The method, introduced in Britain after a rash of false confessions, is not adversarial and its goal is to find the truth, rather than get a confession. The method is less accusatory and aggressive, and it does not involve exaggerating or lying to the suspect during the interview.³⁷ James Trainum, a retired Washington, D.C. homicide detective claims that the P.E.A.C.E. method could be as effective as the current system.³⁸ However, retraining all police officers with this method would require considerable time and money.³⁹

Another measure that could reduce the rate of false confessions is mandatory recording of interrogations. Some states have already begun recording all interrogations.⁴⁰ This allows investigators to view the lead-up to a confession in order to determine whether details of the crime were fed to the suspect or if overly coercive techniques were used.⁴¹ In the case of Truong, discussed above, the videotape of her interrogation and confession was key to dismissal of her case.⁴² The tape, which was shown at trial, helped the judge to conclude that she was not given her special, juvenile Miranda rights⁴³ and that her statements were not voluntary.⁴⁴ In addition to protecting suspects, recording confessions

³⁵ NPR, *supra* note 15.

³⁶ Tom Jackman, *Homicide Detective's Book describes 'How the Police Generate False Confessions'*, THE WASHINGTON POST, (Oct. 20, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/10/20/homicide-detectives-book-describes-how-the-police-generate-false-confessions/>. “P.E.A.C.E.” stands for preparation, engagement accounting, closure, and evaluation.” *Id.*

³⁷ Saskatoon StarPhoenix, *RCMP Adopts Gentler Grilling of Suspects*, SASKATOON STARPHOENIX, (July 30, 2015), <http://thestarphoenix.com/news/local-news/rcmp-adopts-gentler-grilling-of-suspects>.

³⁸ Jackman, *supra* note 36.

³⁹ *Id.*

⁴⁰ Amelia Hritz et al., *False Confessions*, CORNELL, https://courses2.cit.cornell.edu/sociallaw/student_projects/FalseConfessions.html.

⁴¹ *Id.*

⁴² Boeri, *supra* note 21.

⁴³ Commonwealth v. Truong, No. CV20090385 2011 WL 1886500, at *6–7 (Mass. Super. Feb 25, 2011) (finding that in Massachusetts, the government can demonstrate a juvenile’s waiver by showing the juvenile had “meaningful consultation with the parent, interested adult, or attorney to ensure that the waiver is knowing and intelligent.” At minimum, there must be a “genuine opportunity” for such a consultation).

⁴⁴ Boeri, *supra* note 21.

benefits the police.⁴⁵ Recordings can help protect legitimate confessions against allegations of improper police conduct, and they provide a useful record for later review.⁴⁶ So far, fourteen states and the District of Columbia have laws mandating recording of custodial interrogations.⁴⁷ Many other jurisdictions voluntarily record interrogations.⁴⁸ Although these recordings cannot capture every interaction between a police officer and a suspect, having them is better than not having a record at all.

Given that false confessions can be counterintuitive, expert witnesses can be helpful in explaining the psychology behind them. However, courts tend to exclude this kind of testimony at trial, finding that they do not aid juries or are superfluous.⁴⁹ If even experts have a hard time understanding why innocent people would confess, it is hard to see how this testimony is superfluous. Rules that more freely admit this kind of evidence would help to limit the damage of false confessions and make sure that a jury has the information needed to judge a confession with a critical eye.

CONCLUSION

False confessions can seem like a confusing phenomenon, but it is well documented that they occur. Because our most common police interrogation techniques are especially likely to produce false confessions, it would be irresponsible to do nothing to reduce their likelihood. Though overhauling the entire interrogation system may be costly and expensive, smaller measures such as recording interrogations and allowing expert testimony on the psychology of false confessions could add much-needed protection to vulnerable suspects.

⁴⁵ *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/false-confessions-recording-interrogations/>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Cohen, *supra* note 11; *see, e.g.*, State v. Davis, 32 S.W.3d 603, 609 (Mo. Ct. App. 2000) (upholding exclusion of expert testimony on why false confessions occur calling it “superfluous” because a jury is capable of understanding why a person might falsely confess without an expert); *see also* Vent v. State, 67 P.3d 661, 669–70 (Alaska Ct. App. 2003).