

INTERROGATIONS AND FALSE CONFESSIONS: HOW THE INNOCENT ARE MADE GUILTY

ALLAN FONG*

TABLE OF CONTENTS

I. INTRODUCTION.....	364
II. BACKGROUND	365
A. THE HISTORY OF LAW ENFORCEMENT INTERROGATION PRACTICES IN THE UNITED STATES.....	365
1. The Third-Degree	366
2. The American Judiciary's Rejection of the Third- Degree.....	368
B. MODERN LAW ENFORCEMENT INTERROGATION PRACTICES IN THE UNITED STATES.....	372
III. ARGUMENT AGAINST CURRENT U.S. LAW ENFORCEMENT INTERROGATION PRACTICES	375
A. FALSE CONFESSIONS MAY BE ELICITED FROM SUSPECTS DUE TO DISPOSITIONAL AND SITUATIONAL RISK FACTORS DURING AN INTERROGATION	375
1. Use of "Minimization" Tactics May Lead to Eliciting False Confessions from Suspects	376
2. Presentation of False Incriminating Evidence May Elicit False Confessions from Suspects.....	378
3. Abnormally Long Interrogations May Elicit False Confessions from Suspects.....	380
B. THE U.S. JUDICIARY AND LAW ENFORCEMENT MUST	

* Senior Production Editor, *Southern California Review of Law and Social Justice*, Volume 30; J.D. Candidate 2021, University of Southern California Gould School of Law; B.A. Political Science 2015, Trinity College. My thanks to Professor Dan Simon for his inspiration and contributions to this Note. Dedicated to Noah Benjamin Reisman, who will continue to serve as an inspiration to those who seek to live life to its fullest.

MODERNIZE THEIR CONCEPTIONS OF WHAT
 CONSTITUTES A "VOLUNTARY" AND "TRUSTWORTHY"
 CONFESSION382
 1. United States Interrogation Techniques Should Follow
 the PEACE Method Used in the United Kingdom382
 2. Police Ought to Record the Entirety of All Custodial
 Interrogations386
 IV. CONCLUSION388

I. INTRODUCTION

On a spring evening in 1989, Trisha Meili went for a jog in Central Park. Several hours later, she was found beaten, raped, and was in a coma, which would last for twelve days.¹ Five Black and Hispanic teens between the ages of fourteen and sixteen were the first to be accused of the crime.² Kevin Richardson, Raymond Santana, Antron McCray, Yusef Salaam, and Korey Wise were taken to the police station for interrogation.³

Salaam recalled in a 2016 interview with the Guardian what happened once the teens arrived at the police station: “I [c]ould hear them beating up Korey Wise in the next room They would come and look at me and say, ‘[y]ou realize you’re next.’”⁴ Each of the teenagers confessed—after hours of interrogation without their parents present—that they had touched or restrained Meili while others in the group assaulted her.⁵ DNA evidence found at the crime scene did not implicate any of the five suspects. Nevertheless, prosecutors moved forward on the basis of the confessions. After two trials, the teenagers were found guilty of attempted murder, rape, assault, and robbery, and were sentenced to between six and thirteen years in prison.⁶

In 2002, Matias Reyes, who had been convicted of a string of rapes and a murder, confessed to police that he attacked and assaulted Meili by

¹ *The True Story Behind When They See Us*, BBC NEWS: NEWSBEAT (June 12, 2019), <https://www.bbc.com/news/newsbeat-48609693> [<https://perma.cc/75XC-XEAK>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ John J. Goldman, *3 Found Guilty in Central Park Jogger Attacks*, L.A. TIMES, Aug. 19, 1990, at A1; see Alice Cantwell, Joseph Mcnamara & Maria Mooshil, *2 Guilty in Jog Case*, N.Y. DAILY NEWS (Apr. 9, 2013, 2:00 AM), <https://www.nydailynews.com/services/central-park-five/2-guilty-jog-case-article-1.1304973> [<https://web.archive.org/web/20200109015016/https://www.nydailynews.com/services/central-park-five/2-guilty-jog-case-article-1.1304973>].

himself when he was seventeen years old. He told police details about the attack that were not public knowledge, and his DNA matched samples found at the crime scene.⁷ The five, now grown men, were cleared of all charges after having served almost their full sentences.⁸

This highly publicized series of events is commonly referred to as the case of the “Central Park Jogger.”⁹ However unique the circumstances may appear, the initial suspects’ false confessions illustrate an problem that has plagued the United States justice system since its inception. Researchers estimate that more than 6,000 false confessions occur every year in the United States.¹⁰

This Note first provides the historical context of false confessions and explains why they occur. It then assesses the current state of affairs, including the current judicial treatment of such confessions. Finally, this Note articulates solutions to eradicate the problem of false confessions in the U.S. justice system based on national and international empirical research. This research reveals that the United States should seek to enhance its ability to combat the occurrence of false confessions by requiring that police use interrogation techniques similar to the PEACE method employed in the United Kingdom and requiring that all custodial police interrogations are recorded.

II. BACKGROUND

A. THE HISTORY OF LAW ENFORCEMENT INTERROGATION PRACTICES IN THE UNITED STATES

Confessions have long been acknowledged as some of the most persuasive evidence admissible in a courtroom. In the landmark decision, *Miranda v. Arizona*, the U.S. Supreme Court described confessions as “the most compelling possible evidence of guilt.”¹¹ Mock-jury experiments have substantiated this statement, as have experiments gauging the influence of

⁷ BBC NEWS, *supra* note 1.

⁸ Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1.

⁹ See generally *id.* (referring to the Meili case as the “central park jogger” case).

¹⁰ JEROME H. SKOLNICK & JAMES J. FRYE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 63 (1993).

¹¹ *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).

confessions over judges.¹² Of course, the persuasive power of confessions is not without some legitimate merit.

On one hand, when an alleged criminal admits guilt all that is left to determine is the appropriate sentence for the crime. But on the other hand, the weight attributed to any given confession depends inherently on the process by which it was obtained. On balance, the American criminal justice system has approached confession evidence with at least some skepticism, and has been recently more thoughtful in deeming some confessions inadmissible based on the totality of the circumstances under which they were obtained.¹³ The history of law enforcement's procurement of confessions may explain why this type of evidence is accepted so cautiously.

1. The Third-Degree

The United States has an admittedly long and dark history of methods for obtaining confession evidence from suspects. As noted by the Supreme Court:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.¹⁴

Indeed, modern U.S. history has provided a compendium of reports exposing abuse, coercion, and torture by law enforcement to obtain confessions from suspects.

The 1931 *Report on Lawlessness in Law Enforcement* ("Wickersham Report"), published by the National Commission on Law Observance and Enforcement, was one of the first government publications to provide a comprehensive breakdown of law enforcement interrogation techniques used during the first half of the twentieth century.¹⁵ As well as providing

¹² Saul Kassin, Daniel Bogart & Jacqueline Kerner, *Confessions That Corrupt: Evidence from the DNA Exoneration Case Files*, 23 *PSYCH. SCI.* 41, 41 (2011).

¹³ See generally Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-shallow*, 43 *WM. & MARY L. REV.* 1 (2001) (discussing the history of Supreme Court confession jurisprudence).

¹⁴ Saul Kassin et al., *Police-induced Confessions Risk Factors and Recommendations*, 34 *L. & HUM. BEHAV.* 3, 9 (2010) (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488–89 (1964)).

¹⁵ See generally GEORGE WICKERSHAM ET AL., NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, No. 11, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT* (1931).

graphic revelations of routine police misconduct, the Wickersham Report neatly outlined the use of the “third-degree” techniques utilized by law enforcement across America:

Physical Brutality

Physical brutality is extensively practiced. The methods are various. They range from beating to harsher forms of torture. The commoner forms are beating with the fists or with some implement, especially the rubber hose, that inflicts pain but is not likely to leave permanent visible scars.

Protracted Questioning

The method most commonly employed is protracted questioning. By this we mean questioning at times by relays of questioners—so protracted that the prisoner’s energies are spent and his powers of resistance overcome. At times such questioning is the only method used. At times the questioning is accompanied by blows or by throwing continuous straining light upon the face of the suspect. At times the suspect is kept standing for hours, or deprived of food or sleep, or his sleep is periodically interrupted to resume questioning.

Threats

Methods of intimidation adjusted to the age or mentality of the victim are frequently used alone or in combination with other practices. The threats are usually of bodily injury. They have gone to the extreme of procuring a confession at the point of a pistol or through fear of a mob.

Illegal Detention

Prolonged illegal detention is common practice. The law requires prompt production of a prisoner before a magistrate. In a large majority of the cities we have investigated this rule is constantly violated.¹⁶

Following the Report’s publication, law enforcement’s use of the “third-degree” became a national scandal, with many media outlets, government reports, and Supreme Court decisions condemning such “strong-arm” interrogation methods and calling for their immediate

¹⁶ *Id.* at 153.

reform.¹⁷ Though these techniques were publicly defended by law enforcement leaders and detectives in the 1920s, the use of the “third-degree” was almost universally condemned as immoral by the 1940s.¹⁸ However, the problems with the “third-degree” dug deeper than moral implications. Some authorities cautioned that the use of such torturous methods of interrogation would also lead to innocent people confessing to crimes they did not commit.

Ten years after the Wickersham Report was released, W.R. Kidd, a former police lieutenant, published the first police interrogation training manual in American history, and importantly it condemned “third-degree” practices as “vicious and useless.”¹⁹ Kidd further reasoned that the “third-degree” should never be used by the police because it does not produce the truth. Under sufficient torture, a man will tell you anything you want to know. If you build your case on this “confession” you may find in court the man could not possibly have committed the crime.²⁰

2. The American Judiciary’s Rejection of the Third-Degree

The American judicial system has historically sought to combat abuse of confession evidence and exclude unreliable confessions from admission at trial.²¹ The legal doctrines designed for these purposes have fallen so far into two distinct sets of legal rules: the corroboration rule, known today as the trustworthiness rule, and the voluntariness rule.

The first iteration of the corroboration rule, used by the American judiciary until 1954, was based on an English rule known as *corpus delicti* (meaning “body of the crime”).²² Fundamentally, this rule dictates that no individual can be convicted for murder without proof that a death occurred, namely by showing the existence of a dead body.²³ This rule, more generally applied by American courts, meant that before a jury could hear a confession, the prosecutor had to prove: (1) that a death, injury, or loss took place, and (2) that criminal agency was responsible for that death, injury, or

¹⁷ Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 37, 40 (G. Daniel Lassiter ed., 2004).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ W.R. KIDD, POLICE INTERROGATION 46 (1940).

²¹ Kassir et al., *supra* note 14 at 10.

²² *Id.*

²³ *Id.*

loss.²⁴ Looking at its minimal requirements, *corpus delicti* may have been adequate in protecting individuals who confessed to crimes that never occurred but did little for those who confessed to crimes committed by someone else.

The modern iteration of the corroboration rule, or the trustworthiness rule, stems from two 1954 Supreme Court decisions: *Smith v. United States* and *Opper v. United States*.²⁵ This rule was formulated to replace *corpus delicti*, which the Supreme Court deemed to “serve[] an extremely limited function.”²⁶ The modern corroboration rule moves beyond *corpus delicti*: it requires actual corroboration of the confession in that the prosecution may only introduce a confession in court if it produces “substantial independent evidence which would tend to establish the trustworthiness of the confession.”²⁷ In theory, this stricter requirement should prevent the admission of false confessions into evidence; yet in some cases, it still proves to be insufficient.²⁸ Some police investigators suggest or incorporate details of crimes in their questioning of suspects, and include these details in the written confessions that suspects sign for as an admission.²⁹ In these cases, a suspect’s purported knowledge of details of the crime may only exist as words parroted back to the investigator.³⁰

The second set of legal mechanism by which to combat abuse of confession evidence is known as the voluntariness rule.³¹ In a series of cases during the late nineteenth century, the Supreme Court determined that confessions procured by torture or other forms of coercion must be excluded from admission at trial because they tended to be unreliable.³² One of the most widely cited authorities on excluding involuntary confessions is *Hopt v. Utah*.³³ In the majority opinion in *Hopt*, Justice Harlan states:

The presumption upon which weight is given to [confession] evidence, namely, that one who is innocent

²⁴ *Id.*

²⁵ See *Smith v. United States*, 348 U.S. 146, 152–53 (1954); *Opper v. United States*, 348 U.S. 84, 91 (1954).

²⁶ *Smith*, 348 U.S. at 153

²⁷ *Kassin et al.*, *supra* note 14, at 10 (quoting *State v. Mauchley*, 488 P.3d 477, 488 (2003)).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 11.

³² *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884); *Pierce v. United States*, 160 U.S. 355, 357 (1896); *Sparf v. United States*, 156 U.S. 51, 55–56 (1895); *Wilson v. United States*, 162 U.S. 613, 622 (1896).

³³ *Hopt*, 110 U.S. at 574.

will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.³⁴

This passage encapsulates the original rationale and scope of the voluntariness rule as initially adopted by the Supreme Court, though the concept has been expanded upon in later cases.

The Supreme Court further justified excluding involuntary confessions in *Bram v. United States*, in which the Court implicated the Fifth Amendment's command that no person "shall be compelled in any criminal case to be a witness against himself."³⁵ The majority opinion in *Bram*, delivered by Justice White, pointedly delves into the significant history behind the legal principle codified in the Fifth Amendment. Justice White cites precedent as far back as 1616 in recognizing the judicial imperative to reject confession evidence obtained via physically torturous methods.³⁶ *Bram* thoroughly recognized the Fifth Amendment's core principle concerning the admission of confession evidence:

[The] confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.³⁷

Historically contextualized by treatises, it seems natural to read the Fifth Amendment as an acknowledgment that extracting a confession through coercive or torturous methods would deprive one's right to not act as a witness against himself. Indeed, the *Bram* opinion rejects the admission

³⁴ *Id.* at 585.

³⁵ *Bram v. United States*, 168 U.S. 532, 545 (1897); Kassin et al., *supra* note 14, at 11 (quoting U.S. CONST. amend. V.).

³⁶ *Bram*, 168 U.S. 532 at 545–48.

³⁷ *Id.* (quoting G. GILBERT, *THE LAW OF EVIDENCE* 139 (2d ed. 1760)).

of a confession due to a law officer's interrogation methods³⁸: an officer who exerts a level of influence over the defendant enough to render the confession involuntary violates the defendant's Fifth Amendment right against self-incrimination.³⁹

A third rationale for the modern voluntariness rule stems from *Brown v. Mississippi*, in which the Supreme Court held that certain interrogation techniques are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.⁴⁰ The majority opinion delivered by Chief Justice Hughes expressed revulsion at the admission of confession evidence knowingly obtained through merciless police brutality, asserting, "the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."⁴¹

These three rationales serve as the basis of the modern voluntariness rule used to determine the admissibility of confession evidence. As set forth in *Fikes v. Alabama*, the voluntariness rule affords courts discretion to look at the "totality of circumstances" in determining whether interrogation methods were so coercive as to produce an involuntary confession.⁴² This includes examining the suspect's disposition which may make him or her more prone to falsely confessing (for example, age, intelligence, mental stability, and prior contact with law enforcement), as well as the interrogation methods used by law enforcement (for example, threats, promises, use of force, and conditions of detention).⁴³

The trustworthiness and voluntariness rules are intuitive and facially appear effective at preventing unreliable confession evidence from admission at trial. The trustworthiness rule requires independent evidence to corroborate confessions from suspects, thus bolstering their reliability, while the voluntariness rule is meant to ensure that confessions are not coerced from suspects via methods that produce false confessions and deprive individuals of their constitutional rights. As a baseline, these rules adequately protect the U.S. criminal justice system from abuse of confession evidence, and certainly, reject any confession knowingly obtained through use of the "third-degree."

³⁸ See *id.* at 563–66.

³⁹ *Id.*

⁴⁰ *Brown v. Mississippi*, 297 U.S. 278, 285–87 (1936).

⁴¹ *Id.* at 286.

⁴² *Fikes v. Alabama*, 352 U.S. 191–97 (1957).

⁴³ Kassir et al., *supra* note 14, at 11, 19.

Judicial discretion and the amorphous “totality of circumstances” standard, however, have spurred inconsistent applications of these rules. Furthermore, police investigators may refer to details of a case when interrogating suspects or writing an admission statement, thereby creating an illusion of independent corroboration that undermines the trustworthiness rule.

These issues demand further analysis and must be contextualized by modern interrogation practices in the United States.

B. MODERN LAW ENFORCEMENT INTERROGATION PRACTICES IN THE UNITED STATES

Following the exposure and decline of U.S. law enforcement’s use of the “third-degree,” interrogations have since shifted towards psychologically geared methods. Now, American law enforcement primarily follows the “Reid” method, named after the former police investigator who co-authored the most popular interrogation manual in the United States.⁴⁴ Though not all U.S. investigators follow the Reid method step-by-step, virtually all modern police interrogations in the United States use similar or derivative techniques.⁴⁵ The method consists of two stages: (1) a “Behavior Analysis Interview,” followed by (2) an interrogation structured around a nine-step framework.⁴⁶

The Behavioral Analysis Interview is meant to be non-confrontational—it seeks to collect information to assess whether to interrogate the suspect.⁴⁷ The decision to interrogate hinges on the investigator’s ability to detect deceitfulness from the suspect.⁴⁸ A police interrogator is told only to interrogate the suspect “whose guilt, in the opinion of the investigator, seems definite or reasonably certain.”⁴⁹ The deceit detection skill of the interrogator thus becomes the critical element in deciding whether to presume a suspect is guilty. The Reid manual boasts that trained interrogators can distinguish between guilty and innocent

⁴⁴ FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 209 (5th ed. 2011).

⁴⁵ Richard A. Leo, *Police Interrogation and Suspect Confessions*, in *THE CAMBRIDGE HANDBOOK ON POLICING IN NORTH AMERICA* 178, 181–82 (Eric Miller & Tamara Lave eds., 2019) [hereinafter Leo, *Police Interrogation*].

⁴⁶ INBAU ET AL., *supra* note 44, at 207–08.

⁴⁷ John E. Reid, *The Reid Technique*, in *THE INVESTIGATOR ANTHOLOGY* (Brian C. Jayne & Joseph P. Buckley eds., 2d ed. 2018), <https://reid.com/critics-corner/ch-1-the-reid-technique> [<https://perma.cc/HBT2-8UKX>].

⁴⁸ *Id.*

⁴⁹ INBAU ET AL., *supra* note 44, at 185.

suspects 86 percent of the time.⁵⁰ However, this percentage is widely disputed, as a 2014 meta-analysis on lie detection based on multiple cues found that lies can be predicted at a rate of just over 67 percent.⁵¹ This discrepancy is cause for concern, because once a police interrogator deems a suspect guilty, the guilt-presumptive accusatorial interrogation begins.

The interrogation suggested by the Reid technique consists of nine steps. The first step is the “Positive Confrontation,” during which the police investigator confronts the suspect with a direct statement of the suspect’s guilt, such as “our investigation clearly indicates that you are the person who stole this money.”⁵² The investigator then transitions into a sympathetic and understanding demeanor in preparation for step two.

Step two, or “Theme Development,” is when the investigator presents a moral justification for the suspect’s act or theft. This technique, also known as “minimization” among psychology researchers, is meant to “minimize” the suspect’s responsibility for their supposed actions by placing blame elsewhere.⁵³ Minimization tactics present certain risks that will be explored in Section III.A.1 and for which such tactics have been highly criticized by psychologists.⁵⁴

Step three involves “Handling Denials” of the suspect.⁵⁵ During Theme Development, the investigator to anticipates and rejects a suspect’s denials by not allowing the suspect to interject.⁵⁶ The intended result is that the guilty suspect’s denials will weaken over time, while an innocent person’s denials will strengthen—that is, the innocent suspect will attempt to assert control over the interrogation, and halt its progress, thus confirming the suspect’s innocence.⁵⁷

Step four of the Reid technique involves “Overcoming Objections.”⁵⁸ The police interrogator anticipates various objections from a suspect such as “I could never hurt anybody,” “I don’t need the money,” or “I’m a good Catholic.”⁵⁹ The interrogator then uses these statements to continue developing the theme of moral justification for the suspect’s alleged acts,

⁵⁰ INBAU ET AL., *supra* note 44, at 102–03.

⁵¹ Maria Hartwig & Charles F. Bond, *Lie Detection from Multiple Cues: A Meta-analysis*, 28 APPLIED COGNITIVE PSYCH. 661, 667 (2014).

⁵² Reid, *supra* note 47.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Reid, *supra* note 47.

⁵⁹ *Id.*

by responding with statements such as, "I'm glad you mentioned this to me, because it tells me this wasn't your idea."⁶⁰ The interrogator brushes off the suspect's denial and continues monologuing, steadfast in their confidence of the suspect's guilt.⁶¹

The fifth step involves "Procurement and Retention of the Suspect's Attention," during which time the interrogator moves closer towards the suspect.⁶² Step six deals with "Handling the Suspect's Passive Mood" because at this stage in the interrogation, the suspect is anticipated to feel a sense of defeat and realize the ineffectiveness of previous efforts to deny responsibility for the crime.⁶³ The interrogator is encouraged to display sympathy and understanding while urging the suspect to tell the truth.⁶⁴

Step seven urges the interrogator to "Present an Alternative Question."⁶⁵ An alternative question is one in which the interrogator presents to the suspect two incriminatory choices concerning an aspect of the crime, loosely based on the theme the interrogator developed during step two.⁶⁶ For example, if the interrogator had been building the theme that the suspect was a good person who did not plan on hurting anybody, the interrogator might ask, "did you plan this thing out, or did it just happen in the spur of the moment?"⁶⁷ There is no choice of innocence presented to the suspect, only two choices of guilt, one of which is far more heinous than the other. If the interrogator procures an admission through this method, they proceed to step eight, which involves "Having the Suspect Orally Relate Various Details of the Offense," and finally, the ninth step comprises of the interrogator "Converting an Oral Confession into a Written One."⁶⁸

Throughout this process, the interrogator rejects any denials or objections from the suspect, and weaken the suspect's resolve until he or she confesses.⁶⁹ The goal of this interrogation is not to procure the suspect's version of events, but only to elicit an admission of guilt. This gives way to tactics of deceit and coercion, all of which raise the potential for the suspect to falsely confess under pressure.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Reid, *supra* note 47.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

III. ARGUMENT AGAINST CURRENT U.S. LAW ENFORCEMENT INTERROGATION PRACTICES

A. FALSE CONFESSIONS MAY BE ELICITED FROM SUSPECTS DUE DISPOSITIONAL AND SITUATIONAL RISK FACTORS DURING AN INTERROGATION

The legal and psychological research communities associate two general categories of risk factors with the occurrence of false confessions: dispositional risk factors and situational risk factors.⁷⁰ The American judiciary has frequently looked for the presence of some of these risk factors in deciding whether “in the totality of the circumstances” a confession is trustworthy and was obtained without depriving the confessor of his or her constitutional rights.⁷¹

Dispositional risk factors include any mental, cognitive, or behavioral trait that may render a person more susceptible to falsely confessing to a crime.⁷² Juveniles are particularly prone to falsely confessing because they are “developmentally immature, impulsive, naively trusting of authority, submissive, and eager to please adult figures.”⁷³ In other words, their malleable dispositions make them more susceptible to being persuaded into making or affirming false statements without fully grasping the nature and consequences of their responses. Individuals with mental handicaps and intellectual disabilities are similarly prone to falsely confess due to a variety of reasons related to “low intelligence, short attention span, poor memory, or poor conceptual and communication skills.”⁷⁴ Depending on the handicap or illness, an individual may experience heightened anxiety or become easily confused, suggestible, or compliant.⁷⁵ This leads vulnerable suspects to agree with, suggest, or confabulate false information to police investigators during an interrogation.⁷⁶

Situational risk factors, on the other hand, are less focused on the individual being interrogated and more focused on the methods deployed

⁷⁰ Leo, *Police Interrogation*, *supra* note 45, at 184–85.

⁷¹ See generally Dripps, *supra* note 13 (discussing the history of Supreme Court confession jurisprudence).

⁷² Kassir et al., *supra* note 14, at 25.

⁷³ Leo, *Police Interrogation*, *supra* note 45, at 185–86.

⁷⁴ *Id.* at 186–87.

⁷⁵ *Id.*

⁷⁶ *Id.*

during an interrogation.⁷⁷ Situational risk factors include: use of minimization tactics, police statements regarding non-existent evidence, implied or explicit promises and threats, and the length of custody and interrogation.⁷⁸

1. Use of “Minimization” Tactics May Lead to Eliciting False Confessions from Suspects

Minimization, as alluded to above, is one of the most concerning methods that U.S. interrogators employ. Minimization tactics are designed to provide the suspect with moral justification and mitigating excuses for having committed the crime in question. Using this approach, the interrogator sympathizes with the suspect to theoretically provide the suspect with “mental relief and comfort.”⁷⁹ The investigator may even suggest a “morally acceptable” reason for the suspect’s alleged commission of the offense.⁸⁰ And while overtures of sympathy and understanding alone certainly cannot be deemed coercive, police interrogators do not always stick to such benevolent forms of persuasion. The Reid manual, for example, suggests the following tactic to law enforcement interrogators:

The self-defense excuse can also be used in other types of killings or near-killings for the purpose of obtaining the initial admission of guilt. For instance, where the known or presumed motive for a shooting was revenge, the interrogator may say to the subject: “Joe, you probably didn’t go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that’s why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication that he was about to pull a gun on you, and that’s when you had to act to save your own life. That’s about it, isn’t it, Joe?”⁸¹

This line of questioning may not seem to be coercive, but when a police investigator suggests that a suspect has a legally acceptable defense, the suspect may mistakenly treat that as an implied promise of leniency from

⁷⁷ *Id.* at 185–86.

⁷⁸ *Id.*

⁷⁹ INBAU ET AL., *supra* note 44, at 43.

⁸⁰ *Id.*

⁸¹ *Id.* at 44.

the investigator, crossing the threshold to coercive conduct sometimes referred to as a “high-end inducement.”⁸² Numerous field studies by psychological researchers have found that verbalizing high-end inducements during the course of an interrogation remains one of the most favored techniques of U.S. law enforcement.⁸³

Behavioral scientists have long-since discovered that people are highly responsive to reinforcement and the perceived consequences of their behavior.⁸⁴ Furthermore, people have a tendency to process information “between the lines,” thus distorting communications and inferring things neither explicitly stated nor necessarily implied.⁸⁵ Taken together, these behavioral concepts suggest that a suspect may infer promises of leniency from minimizing statements and act in accordance with this inferred self-interest. Indeed, laboratory experiments have shown that the rate of confessions to alleged wrongdoings, both true and false, increases when minimization tactics are used.⁸⁶

In one such experiment, young adult participants took a quiz alongside an undercover experimenter.⁸⁷ After they finished the quiz, the participants (some of whom cheated, some of whom did not) were accused of cheating and subjected to a variety of interrogation tactics, including minimization and high-end inducements (that is, to cut a deal for leniency). The results⁸⁸ are listed below:

TABLE 1
Rates of True and False Confessions and Diagnosticity by Interrogation Condition

Condition	True confessions	False confessions	Diagnosticity
No tactic	46%	6%	7.67
Deal	72%	14%	5.14
Minimization	81%	18%	4.50
Minimization + deal	87%	43%	2.02

Russano et al., *supra* note 86, at 484 tbl.1.

⁸² Leo, *Police Interrogation*, *supra* note 45, at 190–91.

⁸³ Christian A. Meissner et al., *Interview and Interrogation Methods and Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REV., no. 13, 2010, at 1, 11. <https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2012.13> [<https://perma.cc/PQH5-C6XZ>].

⁸⁴ Kassin, Bogart & Kerner, *supra* note 12, at 18.

⁸⁵ *Id.*

⁸⁶ Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI 481, 484 (2005).

⁸⁷ *Id.* at 483.

⁸⁸ *Id.* at 484.

Minimization tactics in this scenario tripled the occurrence of false confessions. Meanwhile, cutting a deal with other participants for leniency more than doubled false confessions compared to participants who were not exposed to these interrogation tactics. Minimization and high-end inducements in tandem increased false confession rate to nearly half of innocent participants. While the practical validity of such laboratory experiments may rightfully be questioned due to the lower stakes of punishment, the results illuminate the manipulative power of such interrogation tactics on young adults.

The use of minimization techniques treads a fine line between offering a suspect sympathy or psychological comfort and implying that a suspect's punishment will be lenient. The former does not violate a suspect's constitutional civil rights, but that is not necessarily the case with the latter. Acts which prey upon the hopes and fears of suspects under stressful conditions to elicit a confession should be scrutinized by the judiciary when applying the "totality of the circumstances" test.

2. Presentation of False Incriminating Evidence May Elicit False Confessions from Suspects

Though presentation of false incriminating evidence and lying to suspects are fair play for law enforcement, psychological research and false confession cases posit that these techniques increase the likelihood of obtaining a false confession. Some state courts do place limits on fabrication of actual reports, tapes, or other evidence, but in every state, false statements by law enforcement regarding evidence are allowed during interrogation.⁸⁹

Psychologists have determined that misinformation can "substantially alter people's visual perceptions, beliefs, motivations, emotions, attitudes, memories, self-assessments, and even physiological outcomes, as seen in studies of the placebo effect."⁹⁰ Coupled with the aforementioned dispositional risk factors, one could reasonably infer that presenting false incriminating evidence, particularly to juveniles and people with mental handicaps or intellectual disabilities, would increase the likelihood of obtaining a false confession.

A 1996 laboratory experiment sought to test the influence that presenting false incriminating evidence has on college-aged participants in

⁸⁹ Kassir, Bogart & Kerner, *supra* note 12, at 28.

⁹⁰ *Id.* at 28-29.

light of an accusation of wrongdoing.⁹¹ Experimenters told participants to take a reaction test on the computer, and after they began the test, the computer screen turned blank.⁹² The experimenter then accused the participants of damaging the computer they used by pressing a key that caused a malfunction.⁹³ In some cases, an experimenter acted as an undercover witness who claimed to have seen the participant press the damaging key.⁹⁴ The witness would incriminate the participant during the interrogation using eyewitness testimony.⁹⁵ All the participants were innocent, however, and the real test began when the experimenters interrogated the participants regarding their alleged wrongdoing.⁹⁶

Experimenters manipulated participants' vulnerability by controlling the pace of the task leading up to the computer error and varying the use of false incriminating evidence during the interrogation.⁹⁷ Overall, 69 percent of the subjects signed a confession despite their actual innocence.⁹⁸ As shown in the table below, the presence of a witness and that witness's presentation of false evidence during the interrogation significantly influenced on whether participants confessed to wrongdoing.⁹⁹

Table 1. Percentage of subjects in each cell who exhibited the three forms of influence

Form of influence	No witness		Witness	
	Slow pace	Fast pace	Slow pace	Fast pace
Compliance	35 _a	65 _b	89 _{bc}	100 _c
Internalization	0 _a	12 _{ab}	44 _{bc}	65 _c
Confabulation	0 _a	0 _a	6 _a	35 _b

Note. Percentages not sharing a common subscript differ at $p < .05$ via a chi-square test of significance.

VOL. 7, NO. 3, MAY 1996

Kassin & Kiechel, *supra* note 91, at 127 tbl.1.

⁹¹ See generally Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCH. SCI. 125 (1996).

⁹² *Id.* at 126.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 126.

⁹⁷ *Id.* at 126–27.

⁹⁸ *Id.* at 127.

⁹⁹ *Id.*

Participants who were confronted with incriminating evidence were significantly more likely to confess than those who were interrogated without reference to the false eyewitness evidence.¹⁰⁰ The discrepancies highlighted in this study amply support the theory that presentation of false incriminating evidence can induce people to admit to—even internalize—blame for outcomes they did not produce.

Presentation of false incriminating evidence is still a tactic occasionally used by law enforcement in the United States, and some describe it as a “necessary evil, effective, and without risk to the innocent.”¹⁰¹ Other countries such as the United Kingdom, however, have long prohibited use of such deceitful tactics while experiencing no decline in confession rates.¹⁰²

3. Abnormally Long Interrogations May Elicit False Confessions from Suspects

Protracted questioning and lengthy detention of suspects have long been held to produce unreliable evidence, and are widely criticized amongst the legal and psychological communities.¹⁰³ *Criminal Interrogation and Confessions*, for example, recommends law enforcement officials keep interrogations brief, and cautions against interrogations lasting longer than four hours.¹⁰⁴ Perhaps the most telling statistic comes from a 2004 study of 125 cases, in which suspects falsely confessed to a crime, were found guilty, but were later exonerated by DNA evidence.¹⁰⁵ In these 125 cases, the average length of police interrogation was 16.3 hours.¹⁰⁶ This number is striking compared to studies of routine police interrogations in America that suggest that over 90 percent of interrogations last less than two hours.¹⁰⁷

Concerning as it may be, this divergence has long been documented. “[Re]searchers have observed that interrogation-induced false confessions

¹⁰⁰ *Id.*

¹⁰¹ INBAU ET AL., *supra* note 44, at 29.

¹⁰² See, e.g., Police and Criminal Evidence Act of 1984, c. 60, § 76–78 (UK), <https://www.legislation.gov.uk/ukpga/1984/60/contents> [<https://perma.cc/UW7R-88MD>].

¹⁰³ See, e.g., INBAU ET AL., *supra* note 44, at 347–48.

¹⁰⁴ *Id.*

¹⁰⁵ Steven A. Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004), <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=4085&context=nclr> [<https://perma.cc/RB6G-7PYL>].

¹⁰⁶ *Id.* at 948.

¹⁰⁷ *Id.*

tend to correlate with lengthy interrogations in which an innocent suspect's resistance is worn down, coercive techniques are used, and the suspect is made to feel hopeless, regardless of his innocence."¹⁰⁸ Indeed, "excessive time in custody may also be accompanied by fatigue and feelings of helplessness and despair, as well as the deprivation of sleep, food, and other biological needs."¹⁰⁹ Laboratory experiments have explored the effects of lengthy interrogations on other dispositional factors. One such study found that sleep deprivation causes reduced cognitive ability or motivation to discriminate and detect discrepancies between original and misleading information.¹¹⁰ Interrogators often ask leading questions to suspects, and a sleep-deprived individual is much more likely to yield to these questions, regardless of the truth.¹¹¹ Case studies also have found that suspects are prone to falsely confess to crimes after being persistently pressured by interrogating officers for extended durations.¹¹²

Fortunately, cases of prolonged questioning seem to be the outliers as opposed to the norm. In a 2007 research paper based on self-reported practices by police, law enforcement personnel estimated that the mean length of their interrogations of suspects was 1.6 hours.¹¹³ Officers' longest reported interrogations were reported to have lasted an average of 4.21 hours.¹¹⁴ This duration is beyond the limit suggested by Reid and Inbau¹¹⁵ and may begin to wear down a suspect's resistance or alter a suspect's psyche. Furthermore, these self-reports by law enforcement personnel showed that 17.14 percent of interrogations happen between midnight and 8:00 AM, during which time sleep deprivation may play a role in suspect suggestibility.¹¹⁶

The effects of protracted questioning and lengthy detention are worrisome. Interrogations lasting several hours across multiple days

¹⁰⁸ *Id.*

¹⁰⁹ Kassir, Bogart & Kerner, *supra* note 12, at 28.

¹¹⁰ Mark Blasgrove, *Effects of Length of Sleep Deprivation on Interrogative Suggestibility*, 2 J. EXPERIMENTAL PSYCH. APPLIED 48, 48 (1996).

¹¹¹ *Id.*

¹¹² GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 238 (2003), <http://www.al-edu.com/wp-content/uploads/2014/05/Gudjonsson-The-Psychology-of-Interrogations-and-Confessions.pdf> [<https://perma.cc/TZ8Q-APMK>].

¹¹³ Saul Kassir et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 L. AND HUM. BEHAV. 382, 392 (2007), <https://link.springer.com/content/pdf/10.1007/s10979-006-9073-5.pdf>.

¹¹⁴ *Id.*

¹¹⁵ INBAU ET AL., *supra* note 44, at 347–48.

¹¹⁶ Kassir et al., *supra* note 113, at 392.

generally lead to a suspect being sleep-deprived and fatigued, or feeling helpless and filled with despair. Accordingly, while confessions obtained through abnormally prolonged interrogation are not always inadmissible, courts must properly scrutinize to such cases and thoroughly review the circumstances under which a suspect has confessed.

B. THE U.S. JUDICIARY AND LAW ENFORCEMENT MUST MODERNIZE
THEIR CONCEPTIONS OF WHAT CONSTITUTES A “VOLUNTARY” AND
“TRUSTWORTHY” CONFESSION

Given what we know about false confessions, more must be done to minimize the occurrence and admission of false confessions at trial. Interrogation tactics of U.S. law enforcement risk inducing suspects to confess to wrongdoings they did not commit, while dispositional risk factors make certain groups of people more prone to falsely confessing. To curtail these undesirable outcomes, this Note proposes a number of solutions backed by scientific studies and policies successfully implemented in other countries.

1. United States Interrogation Techniques Should Follow the PEACE
Method Used in the United Kingdom

While the accusatorial approach adopted by U.S. interrogators is common, “information-gathering” approaches have gained increasing popularity internationally, and notably in the United Kingdom.¹¹⁷ Research shows that this different mode of interrogation has the potential to reduce the occurrence of false confessions.¹¹⁸ The PEACE model of interrogation used by the United Kingdom was implemented in 1992, and since then, other European countries have adopted similar models.¹¹⁹ While the singular goal of accusatorial models such as the Reid technique is to obtain confessions from suspects, the holistic focus of the PEACE information-gathering approach is “to elicit as many insights and verifiable details as

¹¹⁷ See Meissner et al., *supra* note 83.

¹¹⁸ See, e.g., *id.*

¹¹⁹ Laure Brimbal et. al, *Developing Rapport and Trust in the Interrogative Context: An Empirically-Supported and Ethical Alternative to Customary Interrogation Practices*, in *INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY* 141, pt.II (Steven J. Barela et. al. eds., 2020).

possible from a subject.”¹²⁰ This neutral approach to interrogation is framed by a five-phase process.

The first phase of the PEACE model of interrogation is “Planning and Preparation.” During this phase, an interviewer creates a plan by reviewing the investigation, establishing what material is already available, deciding the aims and objectives of the interview, and accounting for individual characteristics of the interviewee.¹²¹

The second phase is “Engage and Explain.” During this phase, the interviewer engages the interviewee by first clarifying why the interviewee is being questioned and explaining the objectives and planned structure of the interview.¹²² This initial engagement allows for transparency between the interviewer and interviewee before the substantive portion of the interview. It also allows the interviewer to establish a rapport with the interviewee and effectively manage the conversation without appearing hostile.

The third phase is “Account, Clarification, Challenge.” First, the interviewer prompts the interviewee for an account of events by asking an open-ended question, such as “tell me what happened.”¹²³ The interviewer then allows the interviewee to provide their narrative while the interviewer encourages the interviewee to continue with prompts, such as “what happened next?” After the interviewee has provided an initial account, the interviewer asks the interviewee to clarify and expand on that account by probing topics of interest to the investigation identified during the Planning and Preparation phase. This method of interrogation contrasts starkly with the accusatorial approach, which encourages interrogators to interrupt the interviewee and reject the interviewee’s statements of innocence.

The fourth phase is “Closure.” This phase ensures that the interview does not end abruptly and that the interviewer addresses any clarifications or questions.¹²⁴ The interviewer concludes by accurately summarizing what the interviewee has said and explaining what will happen next.

The final phase is “Evaluation.” After the interview has concluded, the interviewer evaluates interviewee’s statement and determines whether

¹²⁰ *Id.* at pt.II.B.1.

¹²¹ *Investigative Interviewing*, COLL. POLICING, <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing> [<https://perma.cc/X3M5-J84A>].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

any further action is necessary in light of the overall investigation and the interviewer's performance.¹²⁵

To provide a visual comparison, the table below provides a systematic review of information-gathering and accusatorial interrogation methods, which distinguishes information-gathering and accusatorial interrogation techniques in general terms¹²⁶:

Information-Gathering Methods	Accusatorial Methods
Establishes Rapport	Establishes Control
Uses Direct, Positive Confrontation	Uses Psychological Manipulation
Employs Open-Ended, Exploratory Questions	Employs Closed-Ended, Confirmatory Questions
Primary Goal is Elicitation	Primary Goal is Confession
Focuses on Cognitive Cues to Deception	Focuses on Anxiety Cues to Deception

Meissner et al., *supra* note 126, at 461 tbl.1.

These shorthand summaries provide a starting point for looking at experimental research on the effectiveness of each of the two methods. Turning to the information-gathering method's emphasis on establishing rapport, recent interviews and surveys of law enforcement professionals demonstrate that interrogators value building rapport because it plays a critical role in overcoming resistance from interviewees and contributing to a cooperative interrogation.¹²⁷ And indeed, research has begun to empirically link the development of rapport with greater suspect cooperation and information gains in high stakes police interrogations.¹²⁸

The negative consequences of accusatorial methods' use of psychological manipulation, moreover, bears repeating. The use of psychologically manipulative tactics such as minimization and the presentation of false incriminating evidence leads to false confessions and

¹²⁵ *Id.*

¹²⁶ Christian A. Meissner et al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 461 (2014).

¹²⁷ *Id.* at pt.II.C.

¹²⁸ See L.J. Alison et al., *Why Tough Tactics Fail and Rapport Gets Results: Observing Rapport-Based Interpersonal Techniques (ORBIT) to Generate Useful Information from Terrorists*, 19 PSYCH. PUB. POL. & L. 411, 413 (2013).

thus should be avoided.¹²⁹ Research shows that minimizing tactics increase the rate of false confessions from suspects who only confess because they believe that they are acting in accordance with their inferred self-interest.¹³⁰ Meanwhile, experimental research has shown that in 69 percent of cases, presentation of false evidence led to confessions of guilt from the accused despite actual innocence.¹³¹

The different questioning techniques also lead to vastly different results. Psychologist-recommended best practices for information elicitation insist upon use of open-ended questioning funnels, allowing the interrogator to ask only a limited number of closed-ended questions when appropriate.¹³² But during an accusatorial interview, the primary use of closed-ended and leading questions opens the door for more potential bias and memory contamination to seep in.¹³³

The Reid manual boasts that trained interrogators can distinguish between guilty and innocent suspects 86 percent of the time.¹³⁴ Disputing psychologists, however, approximate this figure at just over 67 percent.¹³⁵ This discrepancy is a cause for concern in an accusatorial model of interrogation, because once a police interrogator deems a suspect guilty, the guilt-presumptive accusatorial interrogation begins. To combat this, some psychologists have proposed that the interviewer take a cognitive approach to deception detection during an information-gathering interview.¹³⁶ Namely, instead of using physical cues to detect a suspects' deception, some psychologists suggest that an interviewer should increase the cognitive load of a subject during an interview to make deception more difficult.¹³⁷ This is backed by deception theory, which explains that lying is more cognitively demanding than telling the truth.¹³⁸ By increasing a suspect's cognitive load during an interview, such as by asking unanticipated questions or

¹²⁹ Russano et al., *supra* note 86, at 481–86; Kassin & Kiechel, *supra* note 113, at 127.

¹³⁰ Russano et al., *supra* note 86, at 481–86.

¹³¹ Kassin & Kiechel, *supra* note 113, at 127.

¹³² Martine B. Powell et al., *Investigative Interviewing*, in *PSYCHOLOGY & LAW* 11, 18–20 (Neil Brewer & Kipling D. Williams eds., Guilford Publ'ns 2017). See generally R.P. FISHER & R.E. GEISELMAN, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING* (1992) (explaining principles and specific techniques used in the cognitive interview, and their bases in research in cognitive psychology and other disciplines).

¹³³ See Brimbal et al., *supra* note 119, at pt.II.A.

¹³⁴ See INBAU ET AL., *supra* note 44, at 1523 n.36.

¹³⁵ Hartwig & Bond, *supra* note 51, at 667.

¹³⁶ See Brimbal et al., *supra* note 119, at pt.II.B.

¹³⁷ *Id.* at pt.II.B.1.

¹³⁸ *Id.*

having a suspect recount events in reverse order, investigators can theoretically increase the difficulty of maintaining a lie and, in turn, more accurately detect deceit.¹³⁹

Finally, the opposing goals and therefore results of information-gathering and accusatorial methods reveal the two methods' inherent differences. Techniques like the Reid method solely focus on eliciting a confession from the suspect, whereas information-gathering methods like the PEACE model aim to gather as much truthful information as possible. In contrast, the Reid method's targeted goal risks paving the way for deceitful and coercive tactics all for the sake of obtain a confession—no matter its truth. Although the Reid method is certainly a departure from torturous methods such as the third degree, the improvement is significantly less than what can be achieved by pursuing a diametrically different form of questioning—one that does not involve psychological abuse. As a result, courts should be more skeptical of interrogations conducted in such a manner. The judiciary also should be more willing to deem confessions coerced through accusatorial methods of interrogation as involuntary. Guiding legislation that governs police practices, like the United Kingdom's Police and Criminal Evidence Act of 1984,¹⁴⁰ would also help combat widespread use of Reid methods. Additionally, legislation that mandates training similar to the PEACE model used by U.K. police officers would provide U.S. law enforcement with more effective tools for interrogation.

2. Police Ought to Record the Entirety of All Custodial Interrogations

As of 2021, twenty-six states as well as Washington D.C. have made recordings of custodial interrogations a mandatory practice.¹⁴¹ Though it is not required, many police departments in other states have made it a habit to record custodial interrogations.¹⁴² Still, this improvement to the U.S. criminal justice system is so simple and cost-effective, there is no excuse for recordings not being mandatory in the remaining states.

¹³⁹ *Id.* at pt.II.B.2.

¹⁴⁰ Police and Criminal Evidence Act of 1984, c. 60, § 76–78 (UK), <https://www.legislation.gov.uk/ukpga/1984/60/contents> [<https://perma.cc/UW7R-88MD>].

¹⁴¹ *False Confessions & Recording of Custodial Interrogations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/false-confessions-recording-interrogations> [<https://perma.cc/4WG4-6QHH>].

¹⁴² THOMAS P. SULLIVAN, *CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS* 4 (Nw. Univ. Sch. L. 2004), https://media.law.wisc.edu/s/c_37/bxytc/electronicmonitoring.pdf [<https://perma.cc/VW8E-AGFB>].

Innocent suspects benefit from the recording of interrogations in several ways. First, the creation of a record of the entire interrogation contextualizes all of their statements for the judicial fact-finder. If a law enforcement official uses coercive methods to elicit a false confession from a suspect, a recording will provide an accurate portrayal of the circumstances. Similarly, recording an entire interrogation would ensure that the suspect's rights are protected during the interrogation process and that any foul play is captured on video. Furthermore, mandatory recording of all custodial interviews would create a deterrent against improper coercive techniques that might be employed by bad actors. The more serious the crime, the higher the stakes are for the suspect being interrogated. It is perhaps partly for this reason that some states currently only require interrogations to be recorded for more serious crimes such as homicide.¹⁴³ However, the beneficial value of recording custodial interviews remains constant, regardless of the accusation against the accused, with a downside of little to no cost or expense. For this reason, recording of custodial interviews should be mandatory regardless of the offense.

It bears noting that mandating police to record all "custodial" interviews does not inherently ensure fair play. "Custodial" is a malleable standard, often leaving officers with discretion as to when recordings must begin.¹⁴⁴ In fact, many police departments have no written regulations or guidelines that govern when and how recordings are to be conducted.¹⁴⁵ It is common, however, for officers to begin recording when suspects are given *Miranda* warnings until the interview has concluded, with no breaks or omissions in the recordings.¹⁴⁶ This may partly be due to the fact that law enforcement are not entirely opposed to recording their suspect interrogations.

Recording interviews would not only benefit suspects, it would also benefit law enforcement. Recordings of custodial interviews would prevent disputes regarding officers' treatment of suspects.¹⁴⁷ This could enhance public confidence in law enforcement. An audio or video record of a suspect's statements, furthermore, is much more difficult for a defendant to

¹⁴³ See JUST. PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 4 (2020), <https://www.congress.gov/116/meeting/house/110815/documents/HMKP-116-JU00-20200617-SD004.pdf> [<https://perma.cc/6S8X-BVY3>].

¹⁴⁴ See SULLIVAN, *supra* note 142, at 4–6.

¹⁴⁵ *Id.* at 4.

¹⁴⁶ *Id.* at 5.

¹⁴⁷ Suggested citation: See SULLIVAN, *supra* note 142, at 10 (quoting Int'l Ass'n of Chiefs of Police).

challenge in court. Lastly, recording the entirety of each custodial interrogation from the *Miranda* warnings to the conclusion of the interview would allow officers to concentrate on the interview as opposed to taking notes during the interrogation.

IV. CONCLUSION

Confessions are the most damning piece of evidence admissible in a courtroom, and as such, courts must carefully analyze the circumstances under which they are given. The rules governing admissibility have evolved, but recently have fallen behind modern interrogation practices. Minimization tactics, presentation of false evidence, and abnormally long interrogations all heighten the risk of eliciting false confessions from innocent suspects. U.S. law enforcement should adopt an approach similar to the U.K. PEACE model to elicit more consistently truthful statements from suspects. An information-gathering interrogation technique has the benefit of obtaining true confessions and information at similar rates compared to the Reid method while reducing the risk of producing false confessions from suspects.

In addition to reforming interrogation techniques, U.S. law enforcement officers should record the entirety of all their custodial interrogations, from the issuance of *Miranda* warnings until the interview's conclusion. Recordings of this sort would prevent disputes over officer conduct and enhance public confidence in law enforcement. A mandatory recording requirement of every suspect's interview regardless of the alleged crime also facilitates the administration of justice because recordings are more accurate than written recollections. This aids the prosecution by making it much more difficult for defendants to change initial accounts provided to law enforcement. Recordings also are beneficial to defendants because full recordings contextualize suspect statements at trial, protect suspect rights during interrogation, and deter bad actors from employing improper or coercive techniques.

The United States has a disturbing history of coercing confessions from suspects using physical and mental torture. And while progress has been made, the country still lags behind others in recognizing the widespread use of dangerously coercive methods of interrogation. The normalization of the Reid method of interrogation is a hindrance to the country's system of criminal justice. Instead of dismissing torturous methods and coercion altogether, the Reid method has served more as a "toned down" use of the same principles behind the third-degree. In order to service real reform, the U.S. judiciary and law enforcement must

recognize that interrogations should be used to seek out the truth, rather than a confession. The suggestions made in this Note would serve as a step in the right direction, but any meaningful reform will be forced to stand on the shoulders of victims like Kevin Richardson, Raymond Santana, Antron McCray, Yusef Salaam, and Korey Wise, who hopefully serve as a cautionary tale to those who fail to seek the truth.