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The Reid Interrogation Technique and False Confessions: A Time for Change

by Wyatt Kozinski

Wicklander-Zulawski & Associates recently issued a press release announcing that it would discontinue teaching the Reid method of interrogation after having taught it for "more than 30 years."[1] Wicklander-Zulawski is one of the largest private agencies engaged in police training in the United States and across the world.[2] The Reid Method (otherwise known as the Reid Technique) has been the predominant interrogation method in the United States, with hundreds of thousands of law enforcement agents trained to use the method since the 1950s, when the technique was first developed and popularized by John Reid, "a former Chicago street cop who had become a consultant and polygraph expert."[3] Reid "had developed a reputation as someone who could get criminals to confess,"[4] and his success in obtaining a confession in the well-publicized case of Darrell Parker in 1955 gave him a platform to launch an agency that today "trains more interrogators than any other company in the world. . . . The company's interview method, called the Reid Technique, has influenced nearly every aspect of modern police interrogation, from the setup of the interview room to the behavior of detectives. The

[1] Wicklander-Zulawski Press Release (Mar. 6, 2017), https://www.w-z.com/portfolio/press-release/ (hereinafter W-Z Press Release), at 1.
[2] According to its press release, "the firm's training experience includes services for a majority of U.S. police departments and federal agencies such as the U.S. Army, FBI, DHS, ICE, CIS, FLETC, EEOC, TSA, FAM's, and the U.S. State Department's Bureau of Diplomatic Security Services. WZ conducts over 450 onsite seminars each year in over fifty countries worldwide and has trained over 500,000 law enforcement and private sector professionals in multiple non-confrontational interview and interrogation methods." *Id.*
[3] Douglas Starr, The Interview, The New Yorker (Dec. 9 2013), http://www.newyorker.com/magazine/2013/12/09/the-interview-7 (hereinafter The Interview).
[4] *Id.*

Electronic copy available at: https://ssrn.com/abstract=3002338

company says that the people it trains get suspects to confess eighty percent of the time."[5] There is widespread agreement that virtually every police department, sheriff's office and other law enforcement agency in the United States[6]—federal, state and local—employs Reid-style interrogation procedures. Reid's manual, *Criminal Interrogation and Confessions*[7] has been referred to reverently as The Interrogator's Bible.[8] Chief Justice Warren, in his *Miranda* opinion, recognized the dominance of the Reid Manual and singled it out for special criticism. [9]

Despite its dominance, or perhaps because of it, the Reid Method has come under sustained attack in recent years. According to the W-Z press release, "[a]pproximately 29% of DNA exonerations in the US since 1989 have involved false confessions to the crime. . . . Academics have chronicled the commonalities among these cases and found the suspect is often mentally or intellectually challenged, interviewed without an attorney or parent, interrogated for over three hours, or told information about the crime by the investigators."[10] While some of these practices are prescribed by the Reid Technique, others are outside the protocol but, nevertheless, frequently employed by Reid-trained interrogators. This has generated a

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[5] *Id.*

[6] And Canada too. "The vast majority of Canadian police officers who receive training for suspect interviewing are taught the Reid Technique . . . or some derivative of it." Brent Snook, Joseph Eastwood, Michael Stinson, John Tedeschini & John C. House, Reforming Investigative Interviewing in Canada, Revue Canadienne de Crimitologie et de Justice Pénale 203, 205 (April 2010) (hereinafter Reforming Canada). *See, e.g.*, Leslie King and Brent Snook, PEERING INSIDE A CANADIAN INTERROGATION ROOM, An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies (Apr. 27, 2009).

[7] Fred E. Inbau, John E. Reid, Joseph P. Buckley & Brian C. Jayne, Criminal Interrogation And Confessions (Jones & Bartlett 2011)(hereinafter Reid Manual).

[8] Anne M. Coughlin, Interrogation Stories, 95 UVA L. Rev. 1599, 1641 & n. 142 (2009), *quoting* Jonathan Goodman, Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation, 21 Me. B.J. 20 (2006) (hereinafter Interrogation Stories).

[9] Miranda v. Arizona, 384 U.S. 436, 449-50, 452, 454-55 (1966).

[10] W-Z Press Release, *supra* n.1, at 1.

Electronic copy available at: https://ssrn.com/abstract=3002338

significant number of false confessions that have later resulted in exonerations,[11] raising the concern that the Reid Technique may be extracting confessions not merely from guilty people but innocent ones as well.

Such criticisms have existed for more than a decade but generally have been confined to academics and certain foreign jurisdictions.[12] The repudiation of the Reid Technique by Wicklander-Zulawski represents a significant milestone. W-Z's eponymous founders were both

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[11] The very case that made John Reid's reputation in the 1950s eventually resulted in an exoneration based on a false confession. After being convicted of raping and killing his wife based on the confession obtained by Reid after 9 hours of interrogation, Darrell Parker was granted a hearing as to the voluntariness of the confession under Jackson v. Denno, 368 U.S. 368 (1964). Sigler v. Parker, 396 U.S. 482 (1970) (per curiam). Instead of holding the voluntariness hearing, the state offered him a time-served deal and he was released after 10 years of imprisonment. Years later, a man by the name of Wesley Peery confessed to the crime (and many similar crimes) in a posthumous memoir and Parker was granted a pardon. Finally, in 2011, half a century after his conviction, Parker was granted complete exoneration under a 2009 state law which allowed wrongfully-convicted defendants to sue the state for up to half a million dollars. "'Mr. Reid succeeded in manipulating and psychologically coercing the plaintiff into giving a totally false confession,' Parker's lawyers wrote in his wrongful conviction lawsuit." Peter Salter, State Apologizes, Pays $500K to Man in 1955 Wrongful Conviction, Lincoln Journal Star (Aug. 31, 2012), https://goo.gl/bsa8im. In paying over the full statutory amount, Nebraska Attorney General Jon Bruning made a press statement: "Today, we are righting the wrong done to Darrel Parker more than fifty years ago . . . . Under the circumstances, he confessed to a crime he did not commit." The Interview, *supra* n.3, at 17. A chilling admission from the state's highest law enforcement officer.

[12] England, in particular, has been highly critical of the Reid Technique. Following a number of high profile wrongful convictions, English authorities closely scrutinized what went wrong and determined that "overly manipulative and coercive . . . interviewing practice contributed to the wrongful convictions." Reforming Canada, *supra* n.6, at 207 (citing Rebecca Milne & Roy Bull, Investigative Interviewing: Psychology and Practice (Chichester: Wiley 1999). The inquiry twice resulted in changes in English law and the adopting of a non-confrontational interview technique called PEACE, which is discussed pp. 26-34 *infra.*

Another member of the investigative community who once used the Reid method but became disillusioned with it is former District of Columbia detective James Tranium who has written a book highly critical of police interrogation tactics inspired by the Reid Technique after he extracted a confession that he later concluded was false. *See* Tom Jackman, Homicide Detective's Book Describes 'How the Police Generate False Confessions', The Washington Post (Oct. 20, 2016) (reviewing James Tranium, How the Police Generate False Confessions: An Inside Look at the Interrogation Room (Rowman & Littlefield 2016), https://goo.gl/nOQrqH.

graduates of the Reid organization[13] and were thus familiar with the Reid Technique. Since 1984, W-Z was licensed by the Reid organization to offer training in the technique. While the significance of the W-Z conversion might be minimized as a ploy to capture business from its arch-competitor, John E. Reid & Associates,[14] the change in attitude appears to be motivated by genuine conviction. For example, the W-Z website carries a video featuring its two senior partners, explaining that the reason for the change in perspective was based on the risk of false confessions when investigators use the confrontational Reid Technique.[15] Moreover, W-Z recently filed an amicus brief in the Seventh Circuit urging the affirmance of the Eastern District of Wisconsin's grant of habeas corpus to Brendan Dassey; the district court had granted the writ on the grounds that Dassey's confession—extracted by Reid-type methods—had been coerced.[16]

The W-Z press release also gives a hint that law enforcement agencies are beginning to back away from using the Reid technique, either because they have come to recognize its defects or because of the bad publicity and loss of confidence when the public becomes aware of repeated instances of false confessions obtained by use of the Reid Method. W-Z may thus be trying to out-flank the Reid organization by providing "progressive, comprehensive training in multiple non-confrontational interviewing techniques with a focus on obtaining truthful

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[13] According to the company's web page: "Prior to co-founding WZ, Doug Wicklander served as the Director of Behavioral Analysis at John E. Reid and Associates. After a career in law enforcement Dave Zulawski was also employed at John E. Reid and Associates as the Director of the Police and Fire Applicant Screening Division. Later they joined Reid Psychological Systems where Mr. Zulawski and Mr. Wicklander co-authored the Reid Survey III, an integrity exam which can be used in the pre-employment process or as part of an investigation." https://www.w-z.com/history/.

[14] https://www.reid.com/.

[15] https://www.w-z.com/truth/.

[16] BRIEF OF AMICI CURIAE JUVENILE LAW CENTER,WICKLANDER-ZULAWSKI & ASSOCIATES, INC., AND PROFESSOR BRANDON GARRETT IN SUPPORT OF APPELLEE AND AFFIRMANCE, No. 16-3397 , UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (Dec. 19, 2016), https://goo.gl/33Fjt6.

information and admissions" rather than confessions, in response to what it sees as a shift in demand on the part of its customers.[17]

Repudiation of the Reid Technique by respected members of the law enforcement community raises serious doubts about the wisdom and efficacy of continuing use of the Reid Technique as an investigative tool. Nevertheless, the dissenting voices are still a tiny minority of the law enforcement community. The overwhelming number of law enforcement investigators still employ the Reid Technique, at least for serious crimes where physical clues do not immediately point to a suspect. And, the *Dassey* district court's decision to the contrary notwithstanding, judges generally approve confessions extracted by the Reid Technique, even when the defendant is a juvenile and/or mentally impaired.[18]

This paper will examine the Reid technique and the comments of some of its defenders and detractors. Next it will examine cases where the Reid Technique was used (or mis-used) to extract confessions that are later proved to be false and try to tease out which features of the Reid Technique may have been responsible for these mishaps. Finally, the paper will make some modest suggestions for reform.

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[17] This paragraph from the W-Z Press Release gives a hint:

> Going forward, WZ will standardize their core instruction on multiple techniques including the Participatory Method, Cognitive Interviewing, Fact-Finding and Selective Interviewing, as well as the popular WZ Non-Confrontational Method. **A major city police department recently contracted with WZ to teach this exact combination of industry best practices in seminars for their new detectives.** This customized course was designed to provide progressive, comprehensive training in multiple non-confrontational interviewing techniques with a focus on obtaining truthful information and admissions. It will now become WZ's flagship seminar for law enforcement. [Emphasis added.]

https://www.w-z.com/portfolio/press-release/.

[18] *But see* Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004) (relied on by the *Dassey* district court, Dassey v. Ditman, 14-CV-1310 (E.D. Wis. Aug. 12, 2016), at 86).

The Reid Technique and Its Discontents

Police interrogations prior to the mid-1930s were marked by rough tactics that came to be known as the Third Degree.[19] These included blatant physical abuse, such as beating, kicking, cigarette burns;[20]deniable physical abuse, such as beating with rubber hoses and sandbags, which left no marks;[21] use of the "sweat-box," the "water cure" or "forc[ing] suspects to walk barefoot on an electrically wired mat or carpet;[22] isolation and deprivation of food, toilet facilities and other necessities;[23] and outright threats of harm.[24]

Use of the Third Degree was never legal in the United States. In fact, the Supreme Court in 1897 took a very strong stand against any type of inducement that cast doubt on the voluntariness of a confession.[25] Rather, "police practiced the Third Degree in secret because it violated public and legal norms of acceptable police behavior."[26] As professor Raymond Moley of Columbia noted in 1932, "the essential problem of the Third Degree is not so much whether this method of securing evidence is actually used as whether the public believes it is being used."[27] Police went to great lengths to keep the practice from public view, and they were enabled in doing so by the complicity of a passel of criminal justice officials—jail keepers,

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[19] Richard A. Leo, Police Interrogations and American Justice 66-70 (Harvard U. Press. 2008)(hereinafter Police Interrogations).
[20] *Id.* at 47-48.
[21] *Id.* at 48-50.
[22] *Id.* at 50-51.
[23] *Id.* at 51-53.
[24] *Id.* at 53-54.
[25] Bram v. United States, 168 U.S. 532 (1897). *Bram* swept so broadly that, were it good law today, it would almost certainly vitiate many of the tactics used by police in applying the Reid Technique. Unfortunately, the Court has stepped far back from *Bram*, much of it as a result of *Miranda v. Arizona*, 384 U.S. 436 (1966), which shifted the focus away from voluntariness and towards warnings and waivers. More on this below, pp. 37-39, *infra.*
[26] Police Interrogations, *supra* n.19, at 55.
[27] Raymond Moley, Tribunes of the People: The Past and Future of the New York Magistrates' Courts 197 (Yale U. Press 1932), *quoted in* Police Interrogations, *supra* n.19, at 55.

prosecutors, bail-bondsmen, even judges, who routinely admitted confessions obtained by third-degree tactics.[28] The practice thrived so long as the public remained unaware of it, but attitudes changed quickly once the public became aware that the police were routinely obtaining convictions by illegal, unethical and unreliable methods. Jurors began to doubt the reliability of confessions: As one commentator put it at the time, "[t]rue or false, juries are coming to believe anyone who accuses the police of using the 'Third Degree.' The result is that the reputation the police have won militates against their own efforts."[29] Indeed, '[t]he Third Degree had precipitated a loss of trust in the legal system as a whole."[30]

Reports of such violence in the first decade of the twentieth century prompted the United States Senate to appoint a commission to study the use of custodial violence by federal law enforcement agents, but the commission's report that no such practices existed (relying, ironically, on the testimony of Attorney General George Wickersham).[31] But in 1929 President Hoover appointed the National Commission on Law Observance and Enforcement to study the effects of Prohibition on law enforcement. The Commission, which came to be known as the Wickersham Commission, after its chairman, issued its 14-volume report in 1931, most of it dealing with the impact of Prohibition on law enforcement. However, Volume 11, titled *Report on Lawlessness in Law Enforcement* "created a national scandal."[32]

The thoroughly documented report revealed that the Third Degree and other types of police brutality were practiced routinely in police departments across the country. Widely

[28] *Id.* at 55-56.
[29] Emanuel Lavine, The Third Degree: A Detailed and Appalling Expose of Police Brutality 144 (Garden City Pub. 1930), *quoted in* Police Interrogations, *supra* n.19, at 63.
[30] Police Interrogations, *supra* n.19, at 63.
[31] *Id.* at 68.
[32] *Id.* at 70.

popularized in newspaper and magazine stories, and in a book provocatively titled *Our Lawless Police,*[33] the Wickersham Report changed attitudes across the country. The Third Degree was widely repudiated not only as barbaric and lawless but ultimately counterproductive[34] because "it began to cast doubt on the legitimacy of criminal justice in America. . . . Jurors complained about police in voir dire, expressed skepticism about prosecutions that relied on confessions, and discounted police testimony at trial. Prosecutors blamed acquittals and hung juries on discredited police work."[35]

As Justice Jackson noted in his lone opinion in *Watts v. Indiana,*[36] questioning suspects is an important aspect of solving crimes, and obtaining a confession is often the *only* effective tool for bringing miscreants to justice. Having lost the Third Degree as the premiere method for obtaining what passed for a confessions, police departments across the country started casting about for other means of achieving the same end. Into this void stepped John Reid and his Reid Technique for conducting police interrogations.

John Reid was a Chicago street cop turned polygraph examiner. After leaving the Chicago Police Department he set up shop as a consultant in police interrogation tactics. An imposing, well-dressed man, he combined his polygraph skills with his understanding of folk

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[33] Ernest Jerome Hopkins, Our Lawless Police: A Study of the Unlawful Enforcement of the Law (Viking Press 1931).

[34] *See, e.g.*, W.R. Kidd, Police Interrogation 46-47 (N.Y. Police Journal 1940)(calling third-degree tactics "vicious" and "useless" and warning that "[p]ublic confidence in the police is shattered if knowledge of such methods is publicized"), https://goo.gl/iSHbSl.

[35] Police Interrogations, *supra* n.19, at 63.

[36] 338 U.S. 49, 58 (Jackson, J. concurring and dissenting). Specifically, Justice Jackson stated: "The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two-thirds of the murders already are closed out as insoluble."

psychology to develop a method of extracting confessions from suspects without using the brutalizing methods of the Third Degree.[37] Reid made his reputation in a number of high-profile cases, notably the Darrell Parker case discussed above, and started offering training courses for police and private security agencies. "One large survey of law enforcement personnel found that more than half of the responding officers had received training in the Reid Method."[38]

The Reid Technique consists of a three steps: (1) Factual Analysis; (2) the Behavioral Analysis Interview (BAI); and (3) interrogation.[39] The Reid website explains that first step consists of analyzing available evidence from the crime scene and elsewhere to "eliminate improbable suspects [and] develop possible suspects or leads. . . . One of the key functions of factual analysis during an investigation is to establish an initial expectancy of a suspect's guilt or innocence, which tends to increase the confidence and accuracy in rendering an opinion of the suspect's probable involvement in a crime, once that suspect is interviewed."[40]

After a suspect is identified, the officer conducts the BAI. This step is designed to let the officer assess whether the suspect is being truthful or lying. To that end the interviewer spends 30 or 40 minutes in "a fairly structured non-accusatory question and answer session with the suspect" asking general questions about the suspect's age, marital status, address and occupation. This allows the officer "to evaluate the suspect's 'normal' verbal and nonverbal behavior such as the latency of the suspect's response to questions, the nature and degree of eye contact, as well as general demeanor and posture." [41] The investigator then proceeds to ask some "behavior-

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[37] The Interview, *supra* n. 3, at 1-2.
[38] Dan Simon, In Doubt 122 & n. 11 (Harv. U. Press 2012) (hereinafter In Doubt).
[39] James Orlando, Interrogation Techniques (Conn Office of Legislative Research), https://www.cga.ct.gov/2014/rpt/2014-R-0071.htm.
[40] http://www.reid.com/educational_info/critictechnique.html.
[41] *Id.*

provoking" questions which are "designed to elicit different verbal and nonverbal responses from truthful and deceptive suspects."[42] The officer then decides whether the suspect is being truthful or deceptive. "Those who come across poorly may become potential suspects and spend hours on the business end of a confrontational, life-changing interrogation . . . ." But scientific research shows that what the Reid Manual (and folk psychology) consider to be indicators of deception, in fact are not: "Liars do not avert their eyes in an interview on average any more than people telling the truth do, researchers report; they do not fidget, sweat or slump in a chair any more often."[43]

According to the authors of the Reid Manual, "only people who are believed to be guilty are . . . interrogated."[44] This means that, by the time police get to this stage in the process, they are no longer engaged in the objective collection of information. Instead, their single-minded objective is to get the suspect to admit his guilt and sign a confession that is rich in detail and other indicia of voluntariness and genuineness.[45] While the Reid Manual describes this part of

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[42] Although the Reid Technique purports to rely equally on verbal and non-verbal "tells" about veracity, the training provided in the Reid seminars appears to emphasize reliance on non-verbal behavioral clues. *See* The Interview, *supra* n.3, at 3.

[43] Benedict Carey, Judging Honesty by Words not Fidgets, The New York Times, May 11, 2009, at 1, http://www.nytimes.com/2009/05/12/science/12lying.html (hereinafter No Fidgets).

[44] Lester King & Brent Snook, Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive Strategies, 36 Criminal Justice and Behavior 674 (2009), http://journals.sagepub.com/doi/abs/10.1177/0093854809335142. This appears to be a widely-held belief among interrogators. The most common response to Prof. Kassin's question to police about whether "their persuasive methods of influence might cause innocent people to confess is "No, because I do not interrogate innocent people." Saul M. Kassin, On the Psychology of Confessions: Does *Innocence* put *Innocents* at Risk?, Am. Psychologist, Apr. 2005, 215, 216, https://www.iiirg.org/assets/Kassin-2005-Does-Innocence-Put-Innocents-at-Risk.pdf (hereinafter Innocents at Risk).

[45] Police will feed the language of the confession to the suspect, who then transcribes it in his own handwriting, and in doing so the police will "introduce some trivial mistakes into the document, which the suspect will correct and initial. That will show the court that the suspect

the Technique as a nine-step process, it actually resolves itself into three major components: (1) tell the suspect you already know for sure he committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect a more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justifiable (minimization);[46] (3) overstate the strength of the evidence the police have inculpating the suspect—by inventing non-existent physical evidence or witness statements, for example—and assuring him he'll get convicted regardless of whether he talks. The driving idea is to persuade the suspect that's in his best interest to give a confession that paints him in a positive light. There is usually the implicit, and sometimes explicit, suggestion that the interrogator will intercede with the prosecutor or the judge on the suspect's behalf so that he'll get away with a light sentence or perhaps no sentence at all. In fact, of course, the suspect is doing himself no good at all by speaking to the police; the only thing the confession accomplishes is to incriminate the defendant, who is promptly arrested and convicted based on his confession, even though there may be strong evidence exonerating him.

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understood what he was signing." The Interview, *supra* n.3, at 5. This will also add to the illusion of voluntariness and spontaneity.

[46] Professor Coughlin spends much time in her article discussing minimization techniques as applied in rape cases: "Victim-blaming is effective when questioning a variety of offenders, but it is said to be *the*-method-most-likely-to-succeed in rape interrogations." Interrogation Stories, *supra* n. 8, at 1646. She quotes the following example straight from the Reid Manual:

> Joe, no woman should be on the street alone at night looking a sexy as she did. Even here today, she's got on a low-cut dress that makes visible damn near all of her breasts. That's wrong! It's too much of a temptation for any normal man. If she hadn't gone around dressed like that you wouldn't be in this room now.

Id. at 1647.

The Reid organization claims that upwards of 80 percent of those interrogated according to the Reid Technique confess. In order to achieve these results, the manual gives detailed advice as to how best to overcome the suspect's natural inclination not to incriminate himself. First and foremost, the suspect must be isolated and not allowed access to a lawyer, friend or family member; he must get the impression that he must face this ordeal by himself, with no help from anyone outside the interrogation room. In a dynamic akin to Stockholm Syndrome, the suspect is nudged into believing that the interrogator is his friend. Helping to drive this dynamic is other advice given in the Reid Manual, "including interrogation room décor [cramped and bleak], suspect-friendly snacks, and sartorial and hygiene tips for the successful host."[47] Interrogations often continue uninterrupted for many hours, with the suspect alternatively badgered and cajoled to admit his guilt. Once that goal is achieved, the interrogator's next task is to obtain a narrative of the crime, preferably written out in the suspect's own handwriting, where he does not merely admit to the crime, but provides vivid detail—detail that tends to corroborate the declarant's participation in the crime and also helps establish the requisite volitional level that justify a higher level of crime, *e.g.* murder rather than manslaughter.

At this point, the reader may well wonder: What about *Miranda*? Much of the Court's opinion in that case described the procedures then employed in conducting custodial interrogations, and they sound remarkably like those taught by the Reid Manual today:

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. . . . The guilt of the subject is to be posited as a fact. . . . The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. . . . Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He

[47] Interrogation Stories, *supra* n. 8, at 1642.

> must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours, pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated.[48]

And, indeed, *Miranda* cited a predecessor of the current Reid Manual as the principal purveyor of this what it clearly considered an abusive interrogation technique.[49] More, the Court's clear implication seemed to be that these hardball interrogation techniques were of a cloth with the not-yet-fully-abandoned Third Degree tactics.[50]

The Court sought to protect suspects from abusive interrogation tactics by essentially handing them the key to the interrogation room door: First, the police were required to give the now familiar warnings advising custodial suspects of their rights, including the right to remain silent and to request an attorney. And, second, requiring the police to stop interrogation once such a request was made. The Justices who joined in the majority opinion must surely have believed that suspects would heed the warnings refuse to talk to the police. It has not turned out that way. The police quickly learned a variety of techniques that would help get them move past

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[48] *Miranda*, 384 U.S. at 450-51 (footnote omitted).

[49] The opinion cites the Reid Manual no fewer than 10 times, never with admiration. *Id.* nn.1, 9. 10, 12, 13, 15, 17, 20, 22, 23.

[50] The Court had reason to believe that third-degree tactics were still in use in some police departments at the time:

> The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep. Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965).

Miranda, 384 U.S. at 446.

what Prof. Leo calls the "*Miranda* moment."[51] "American police have . . . developed multiple strategies to avoid, circumvent, nullify and sometimes violate *Miranda* in their pursuit of confession evidence" so that "[v]irtually all suspects waive their *Miranda* rights or are legally constructed to have waived them."[52] Indeed, there is reason to believe that innocent suspects surrender their *Miranda* rights more readily that guilty suspect, for a variety of reasons, most often "I did not have anything to hide."[53] Like other Grand Experiments, *Miranda* seems to have failed in its purpose.

One big problem with *Miranda* is that it says nothing about how interrogations are conducted and does absolutely nothing to guarantee that confessions are given voluntarily. Its focus is entirely on informing the suspect of his rights and, once the suspect is informed of those rights, *Miranda* ceases to provide any protection. Indeed, *Miranda* makes it much harder to show that confession was not voluntarily given because "judges have created an informal but strong presumption that any statements given [after a *Miranda* warning] are voluntary."[54] For this reasons and other discussed below, it should be re-considered.

The Reid Technique is thus a powerful tool for extracting confessions of guilt from the targets of police interrogation. But a growing number of cases, many of them exposed by the

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[51] Police Interrogations, *supra* n.19, at 129.

[52] *Id.* at 124. Prof. Kassin explains some of these methods, including making small talk to gain the suspect's confidence, referring to the process as a mere formality or simply extracting a waiver that is not *Miranda* compliant but can be used to impeach the suspect if the takes the stand and denies culpability. Innocents at Risk, *supra* n. 44, at 218.

[53] *Id*. Quips Prof. Kassin: "It appears that people have a naïve faith in the power of their own innocence to set them free." Which is doubtless why innocent people waive their right to silence more often than guilty people, S.M. Kassin & R.J. Nowick, Why People Waive Their *Miranda* Rights: The Power of Innocence, 28 Law & Human Behavior 211(2204).

[54] Susan Klein, Transparency and Truth During Custodial Interrogations and Beyond (Public Law & Legal Theory Research Paper Series No. 659), 97 Boston U. L. Rev. 101, 125 (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2907069 (hereinafter Transparency & Truth).

availability of DNA testing, support the proposition that the Reid Technique may be "*too* powerful, i.e. can break down the innocent as well as the guilty."[55] The false confessions cases have been so numerous[56] that they have attracted scholarly attention in both the legal and scientific literature. The consensus appears to be that use—and frequent misuse[57]—of the Reid Technique can and does cause people to confess to crimes they did not commit. In the words of one scholar, "[t]he potential of interrogations to generate false confessions is now indisputable."[58]

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[55] Alan Hirsch, Going to the Source: The "New" Reid Method and False Confessions, 11 Ohio St. J. of Crim. L. 803, 805 (2014)(hereinafter Going to the Source). The most famous of these cases is that of the Central Park Five, where Harlem youths confessed to raping and severely beating a woman who as jogging through Central Park in New York. Even though these confessions were inconsistent with the physical evidence and the DNA at the scene did not match any of the five, they were convicted and served many years in prison until they were exonerated by the confession of an unrelated individual whose DNA *did* match that of the DNA at the scene. Probably the next most famous case of multiple false confessions was that of the Norfolk Four, sailors who serially confessed an implicated each other of the rape and murder of a woman who happened to live next door to one of them. They were each convicted based on their confessions, even though the DNA did not match any of them. The details of these two false confession cases and eight others can be found at http://listverse.com/2013/05/22/10-controversial-convictions-based-on-false-confessions/.

[56] It is far beyond the scope of this paper to document even a small portion of the false confession cases. The most comprehensive compendium of false confession cases to date was conducted in 2004 and included 125 cases where the authors concluded that the confessor was indisputably innocent of the crime to which he confessed. Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in a Post-DNA World, 82 N. Carolina L. Rev. 891 (2004) (hereinafter Post-DNA World), https://goo.gl/9hr64y. *See also* Robin Wader, 10 Controversial Convictions Based on False Confessions, Listverse (MAY 22, 2013), https://goo.gl/r2kS5.

[57] The Reid organization frequently defends its technique by claiming that false confessions were obtained by cops who failed to follow the prescribed protocols and, essentially, abused the methodology to force an innocent person to confess. "'False confessions are caused by investigators stepping out of bounds,' says Joseph Buckley, the organization's president." Robert Kolker, Nothing but the Truth: A Radical New Interrogation Technique (Mary 24 20116) (hereinafter Nothing but the Truth), https://goo.gl/kmxTYm. Though this may be true in some case, it seems beside the point. The fact that the Reid Technique is capable of abuse in the hands of poorly trained or unscrupulous investigators must be taken into account in considering whether the technique may be safely deployed in law enforcement offices across the nation.

[58] In Doubt, *supra* n.38, at 121. The same conclusion was reached in other countries where the Reid Technique was employed. In Canada, "the Lamer Commission of Inquiry (2006) into

Scholars have identified a number of flaws in the Reid Technique that could, alone or in concert, lead to false confessions. Probably the most frequently mentioned problem is the assertion that interrogators can accurately identify those who are lying during the BAI phase of the interview. This, it will be recalled, is the key step that changes a witness into a suspect and subjects him to an interrogation rather than an interview. Scholars have cast serious doubt on the efficacy of the BAI to separate truth-tellers from liars,[59] and on the ability of police to enhance their truth-detecting abilities through training or experience.[60] There are, moreover, the related problems of investigator bias ("a propensity to view suspects as guilty of the charge") and confirmation bias.[61] Finally, it is far from clear that most of the investigators trained in the Reid

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wrongful convictions in Newfoundland and Labrador identified inappropriate interviewing of witnesses as a major concern. In addition, the Federal-Provincial-Territorial Heads of Prosecutions Committee Working Group (2002) identified poor interviewing practices as a potential contributor to miscarriages of justice in Canada." Reforming Canada, *supra* n.6, at 205. The Reid Technique was the principal method employed in Canada at the time. *Id.* Much the same had happened in England a decade earlier, following a number of high-profile wrongful convictions which were linked to Reid-style interrogation tactics. *Id.* at 207. This led to the development of the PEACE method, discussed at great length below.

[59] *Id.* at 127-32. As Professor Simon points out, the supposed indicators or truth and falsehood are often ambiguous and contradictory: "Jeffrey Deskovic was deemed a suspect because he displayed too much emotion over the death of his high school classmate, whereas Gary Gauger and Michael Crowe drew the suspicion of detectives because they displayed too little emotion in response to the death of their loved ones." (Footnotes omitted.)

[60] "Another study found that training participants to use the BAI actually caused a decrease in the accuracy of their determination, but it inflated their confidence." *Id.* at 131. (Footnotes omitted.) "[T]hose who underwent training were significantly less accurate, more confident, and more biased toward seeing deception." Saul M. Kassin, Sara C. Appleby & Jennifer Torkildson Perillo, Interviewing Suspects: Practice, Science, and Future Directions, Legal and Criminological Psychology 3 (The British Psychological Society 2009) (hereinafter Interviewing Suspects).

[61] *Id.* at 126, 137. "Moreover, the interrogators' initial belief had an apparent effect on the suspect's behavior, resulting in higher defensiveness in responding to the interrogator's questions." *Id. See* Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt, 27 Law & Human Behavior 187 (2003)(hereinafter Presuming Guilt); Christian A. Meissner & Saul M. Kassin, "He's guilty!": Investigator Bias in Judgments of Truth and Deception, 26 Law & Human Behavior, 469, 470 (2002)(" Unfortunately, psychological research has generally failed to

Technique actually bother to go through the rather tedious and unrewarding tasks of trying to figure out if the witness is a liar rather than proceeding directly to the interrogation stage whenever their suspicion is aroused.

Even more serious doubts are raised about the interrogation phase of the Reid Technique. The problem there is that the very same forces that cause guilty suspects to confess—stress, isolation, maximization, minimization—can also cause innocent people to confess.[62] Reid defenders argue that innocent subjects will be immune to such tactics because they would know, for example, that the interrogator is bluffing if he claims that a confederate implicated him or that his fingerprints were found at the scene of the crime.[63] This overlooks the fact that the suspect might believe that someone is telling lies about him or that the police haven't planted evidence to inculpate him.[64] Nor is the innocent suspect immune from the stress of a lengthy and

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support the claim that individuals can attain high levels of performance in making judgments of truth and deception.").

[62] Interviewing Suspects, *supra* n.60, at 134-36.

[63] The Reid Manual confidently proclaims: "*[N]one of what is recommended is apt to induce an innocent person to offer a confession!"* Reid Manual, *supra* n.7, at 313 (emphasis in original).

[64] Professor Gohara explains the process as follows:

> When faced with overwhelming evidence against him, the innocent suspect may rationally conclude that the costs of his confession are relatively low because he is likely to be convicted regardless of whether he confesses. Weighing against these lowered costs of confession are its relatively high benefits; the suspect may be spared a harsh penalty in the long term, and in the short term the stress of an interrogation may be ameliorated or truncated. In other words, a suspect's cost-benefit calculation changes when independent incriminating evidence is added to the equation.

Miriam S. Gohara, A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 23 Fordham Urb. L.J. 791, 818 (2006)(footnotes omitted) (hereinafter A Lie for a Lie). *See also* Timothy E. Moore & Lindsay Fitzsimmons, Justice Imperiled: False Confessions and the Reid Technique, 57 Crim. L.Q. 509, 515 (2011) (hereinafter Justice Imperiled)(" When exaggerated (or fabricated) inculpatory evidence is presented (repeatedly) with unwavering conviction an innocent suspect might infer that if this particular detective is prepared to lie so blatantly, so too might others. Faced with the prospect of a corrupt system, a plea might make rational sense.")

aggressive interrogation: "From the perspective of the hungry, tired, anxious and despondent suspect, complying with the interrogator's demands might seem like the only way to terminate the ordeal and gain the interrogator's favor."[65] Indeed, "innocent suspects may naïvely believe that their innocence will set them free," rendering them more susceptible to such pressures."[66] Then there is the "'internalized false confession,' where a person confronted with allegedly objective evidence of his guilt actually comes to believe he committed the crime.[67]

Finally, there are certain groups such as the young and the mentally impaired who are particularly susceptible to such tactics and consequently overrepresented in the population of false confessors.[68] While watching the Nextflix mini-series, *Making a Murder*, the American public had a ring-side seat at observing how someone suffering from these disabilities could be manipulated by police interrogations. As will be recalled, two men were charged with murdering of Teresa Halbach and burning her body in a bur-pit on the family property. The younger defendant, Brendan Dassey, was just 16 at the time, and had "borderline to below average intellectual ability, meaning he had an I.Q. score in the mid-70s.[69] The evidence against him consisted almost exclusively on his confession, which was extracted by two detectives over the course of several sessions and captured on video. In granting a writ of habeas corpus, the district court in Dassey's case found that "idioms were an aspect of abstract language that Dassey had

[65] *Id.* at 134.
[66] *Id*. at 140.
[67] Going to the Source, *supra* n.55, at 808-09, *citing* Saul M. Kassin, Internalized False Confessions, in 1 Handbook of Eyewitness Psychology 175 (Toglia et al. eds. 2007); Police Interrogations, *supra* n.19, at 210-224 (referring to "persuaded false confessions").
[68] "Seventeen or forty-three percent of the forty DNA exonerees who falsely confessed were mentally ill, mentally retarded, or borderline mentally retarded." Brendan Garrett, The Substance of False Confessions, 62 Stan. L. Rev. 1051, 1064 (2010)(hereinafter False Confessions).
[69] Dassey v. Dittman, No. 14-CV-1310, Decision & Order 77 (E.D. Wis. Aug 12, 2016).

difficulty understanding and that "the investigators' collective statements throughout the interrogation clearly led Dassey to believe that he would not be punished for telling them the incriminating details they professed to already know."[70]

The *Dassey* case highlights another important problem with the Reid Technique, namely the tendency of police interrogators to become vested in obtaining a confession rather than in figuring out what really happened. When they don't soon get what they want, as happened with Dassey, they get frustrated and bend the rules. There's no doubt that Dassey barely understands the questions posed to him and works very hard to say what he thinks the detectives want to hear. On watching the interrogation video, it becomes perfectly clear that Dassey has no idea what the detectives are trying to get him to say and, over time, the detectives feed him key pieces of evidence which he then gives back to them and they take down as his "confession."[71] This, of course, is a perversion of the Reid Technique, but it is a perversion that interrogators are free to use, and frequently *do* use, to add verisimilitude to confessions and help make them stick when presented in court. As Professor Simon notes, "almost all of the DNA exonerees who falsely confessed provided . . . details that were not publicly known, and thus could have been known only by the true perpetrator and the police. It is inescapable that those details were somehow

[70] *Id.* at 82, 83. The Reid Technique makes the suspect's mental state highly relevant in yet another way: Practiced liars and sociopaths are far more likely to deceive the interrogator into believe he is being truthful. *See, e.g.,* Frank S. Perri, Case Study: The Flawed Interview of a Psychopathic Killer—What Went Wrong?, 8 J. Investig. Psych & Offender Profiling 41 (2011). The authors of this case study note that some of the techniques employed by the Reid Method "can backfire when dealing with psychopathic personalities."

[71] *Id.* at 70-72. As the district court explains, Dassey's eventual statement that Avery shot Halbach in the head was fed to him by the detectives' questions, first by insisting that *something* was done to Halbach's head and then, finally asking: "All right, I'm just gonna come out and ask you. Who shot her in the head?"

communicated to the ignorant innocent confessors, by police interrogators, whether deliberately or unwittingly.[72]

Professor Garrett systematically analyzes cases where defendants were convicted based on their richly-textured confessions and found that in all but two of the cases "police claimed that the defendant had offered a litany of details that we now know these innocent people could not plausibly have known independently."[73] And, of course, prosecutors used these details in their summation, pointing out to the jury that only the true perpetrator would have been in a position to know these facts. Juries and even judges (when they serve as fact-finders) find a detailed confession so compelling they will convict even in the face of contrary documentary evidence, including the fact that DNA at the crime scene does not match that of the defendant.[74]

False confessions leading to wrongful convictions create yet another problem the scope of which is hard to detect: Once police extract a confession, they consider the crime solved and so they stop their investigations. If the confession is false, this means that the real culprit—often a murderer or rapist—"may go on to commit more violent crimes."[75] It is difficult to tell how often this happens, but that it does happen can be shown by two well-known cases. After the police extracted a confession from 17-year-old Jeffrey Deskovic, who foolishly went to the police and offered to help them find the man who had raped and murdered his high school classmate, the police subjected him to a Reid-type interrogation. They not only extracted

[72] In Doubt, *supra* n.38, at 136.
[73] False Confessions, *supra* n.68, at 1070-71.
[74] *Id.* at 1101 (discussing the case of Nathanial Hatchett where the judge, as trier of fact, convicted the defendant even though "the victim in that case had been raped by a single stranger-assailant, and DNA testing of rape-kit evidence at the time of the trial excluded Hatchett").
[75] Richard A. Leo, Police Interrogations and Suspect Confessions: Social Science, Law and Public Policy 4, forthcoming in Academy for Justice: A Report on Scholarship and Criminal Justice Reform (Eric Luna Ed. 2017) (hereinafter Suspect Confessions).

confessions but managed to feed him details of the crime so as to make the confession more credible. In fact, so credible was the false confession that a jury convicted Deskovic of rape and murder, even though the FBI tested the semen found in the victim's body and it did not match Deskovic's DNA. It turned out much later that the semen belonged to Steven Cunningham who "had committed another murder while Deskovic was in prison."[76] Had the police conducted a proper investigation rather than focusing on a single suspect because he seemed to display too much sympathy for the victim, it is well possible that Cunningham would have been apprehended, and the life of his second victim (and possibly other victims) might have been spared.

There is a similar story with respect to Michael Morton who was convicted of murdering his wife, Christine, in 1986, and served 25 years on death row. He was exonerated when it was determined by the use of DNA that the crime was actually committed by another man, Mark Norwood, who was eventually convicted of killing Christine. But while Morton was behind bars and the police were satisfied the crime was solved, Norwood raped and killed another woman, Debra Baker—a crime for which he was finally convicted last year.[77] It is impossible to speculate whether any particular murderer or rapist at large would have been apprehended if police had continued to investigate the crime rather than extracting a false confession or otherwise convincing themselves that they've solved the crime, but these cases illustrate that it *can* happen and given the mounting numbers of known wrongful convictions (and the

[76] Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 17 (Harvard U. Press 2011)(hereinafter Convicting the Innocent).
[77] Pamela Colloff, The Guilty Man, Texas Monthly (June 2013), http://www.texasmonthly.com/the-culture/the-guilty-man/; Christy Millweard, Mark Norwood found guilty of capital murder in 1988 death, KVUE (Sept. 23, 2016), http://www.kvue.com/news/local/verdict-expected-in-norwood-murder-trial-friday/324688199.

indeterminate number of wrongful conviction that can't be proven because the proof of innocence is simply not available), there can be no doubt that it happens with some frequency.

Much more could be said about the methodological and implementation problems with the Reid Technique, as there is now a large body of research on the subject and I have only scratched the surface. But I want to focus, instead, on a problem of a different order that I see as symptomatic of the policing philosophy reflected in the Reid Method. In short, the Reid method is cut from the same cloth as the Third Degree. While police no longer use cruder methods such as rubber hoses and brass knuckles to extract confessions, what they do use is almost as bad—physical privation, intimidation, deceit.

We generally associate torture with physical pain or mutilation, but we have learned that this is not always so: waterboarding, for example, can instill terror without physical pain or wounding the body. Similarly, "[t]he human needs for belonging, affiliation, and social support are a fundamental human motive. Especially under stress, people seek desperately to affiliate with others for psychological, physiological, and health benefits that social support provides. Prolonged isolation thus constitutes a form of deprivation that can exacerbate a suspect's distress and heighten need to extricate himself . . . from the situation."[78] The distress can be particularly acute when the subject is young, mentally impaired and the isolation is prolonged. The need for human connection may drive the suspect to do or say whatever he thinks will elicit a friendly response from his captors. "As in the era of the third degree, the primary goal of police interrogation is not to elicit the truth per se but to incriminate the suspect in order to build a case against him and assist the prosecution in convicting him."[79]

[78] Interviewing Suspects, *supra* n.60, at 6-7.
[79] Police Interrogations, *supra* n.19, at 77.

But the problem goes far beyond the interrogation room; it permeates the entire system of policing in this country. As Professor James Duane explains in his very useful little book, *You Have the Right to Remain Innocent*,[80] the police are not your friends and should never talk to them—advice that (Duane reports) police parents give to their own children. Duane points out that whenever the police approach you in their official capacity they may be viewing you as a suspect. What they are looking for then is a statement from you that they can use to prosecute you. Nothing you say in your own defense will help, as it will not be admissible by you in court, but everything you say that can be construed to harm you *can* and will be used against you. Even if say things that you believe are helpful to you, you may be incriminating yourself because you don't know what evidence the police have against you, and they certainly will not tell you and may even lie to you about it. So don't talk to the police.

The tactics of the Reid Technique are not limited to serious crimes of violence or ticking bomb scenarios, nor are they confined to the interrogation room. Rather, they permeate the entire system of policing in this country. As Prof. Duane points out this includes not only local police and sheriffs, federal law enforcement agencies like the FBI and the DEA but also dozens of specialized federal agencies that have their own armed investigative agents, such as the U.S. Postal Service, the Fish and Wildlife service, the EPA, the Railroad Retirement Board, even the library of Congress.[81] And none of them are your friends; if any of them want to talk to you plead the Fifth or, better yet, the Sixth.[82] Professor Klein summarizes the situation succinctly:

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[80] James J. Duane, You Have the Right to Remain Innocent: What Police Officers Tell Their Children About the Fifth Amendment (Little A 2016)(hereinafter Right to Remain Innocent).
[81] *Id.* at 88.
[82] Prof. Duane points out that in *United States v. Long*, 721 F.3d 920 (8th Cir. 2013), the Eighth Circuit held that the Assistant United States Attorney was entitled to present evidence that defendant invoked his right not to incriminate himself and argued to the jury that they should take that statement into account in assessing guilt.

"[W]e have reached a point where there is very little trust in law enforcement and the criminal justice system writ large. Rioting in Ferguson, Missouri and Charlotte, North Carolina is a serious symptom of distrust. In fact, only about half of Americans report confidence in the police."[83]

John Reid & Associates and Wicklander-Zulawski each claim to have trained hundreds of thousands of law enforcement agents, largely in the Reid Technique. And there is no doubt that this is the overwhelmingly predominant interrogation method in North America today. It's difficult to say whether the method reflects the ethos of law enforcement in this country, which itself was shaped during the Third Degree era, or whether training countless officers every year to use the method shapes the ethos of law enforcement. Probably it is a mutually-reinforcing loop. But, as we have seen, the Reid Technique, and the attitudes it fosters among law enforcement agencies, are highly problematic, not merely in the cases where standard interrogations are conducted but more generally in shaping the relationship between the police and the community they serve.

Much as was the case at the time of the Wickersham Commission, confidence in law enforcement is low. We are seeing protests across the country in response to police brutality that in past years might have gone unnoticed.[84] And the subject of wrongful convictions in cases such as the Central Park Five and the Norfolk Four, where the police extracted confessions from innocent men has gotten nationwide attention.[85] The New Yorker and NPR have covered the

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[83] Transparency & Truth, *supra* n.54, at 106-07 (footnotes omitted).
[84] *E.g.* Ben Montgomery, Why Cops Shoot, Tampa Bay Times (2017)(analyzing 830 police shootings in Florida over a 6-year period).
[85] The Central Park Five case has been the subject of a PBS documentary, https://goo.gl/Xxj3GN and the jogger herself has written a book about her experience. Trisha Meili, I Am the Central Park Jogger: A Story of Hope and Possibility (Scribner 2004). The Norfolk Four case has been the subject of a book, Tom Wells, The Wrong Guys: Murder, False Confessions, and the Norfolk

issue.[86] Rallies supporting the exoneration of Brendan Dassey have been held across the United States, as well as in London, Manchester, Melbourne, Sydney and Perth.[87] And books such as that of former cop James Tranium titled *How the Police Generate False Confessions* further undermine confidence in the honesty and professionalism of the police.[88]

I believe these are all signs that we may be at a defining moment in the relationship of police to the communities they are supposed to serve. Calls for more restrained use of deadly force by cops in the field, and fairer treatment of suspects by detectives in interrogation rooms all suggest that law enforcement must adopt methods that are more consistent with their role as servants of the community rather than its masters. The logo of the Los Angeles Police Department—"To Protect and Serve"—must become the watchword for law enforcement offices across the country. When "some citizens and law enforcement may view each other as the enemy . . . it might be preferable to create rules that are less adversarial and more inquisitorial."[89]

Repudiation of the Reid Technique by its former licensee and close competitor Wicklander-Zulawski & Associates, signals a recognition within the law enforcement community that times have changed and, just as they once abandoned the Third Degree, it is now time to adjust interrogation methods to conform to advances in scientific knowledge and changing community sensibilities toward the police. In the words of one expert, "[l]aw enforcement is hungry for something new and evidence-based. They know there's an issue with

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Four (The New Press 2008) and a Frontline documentary, Frontline, The Confessions, https://goo.gl/8xIAI .

[86] *See* The Interview, *supra* n.3; Fresh Air, Beyond Good Cop/Bad Cop: A Look At Real-Life Interrogations, https://goo.gl/Bv8WnJ.

[87] https://en.wikipedia.org/wiki/Brendan_Dassey.

[88] *See* n.12 *supra.*

[89] Transparency & Truth, *supra* n.54, at 110.

false confessions, and they're looking for an alternative."[90] Wicklander-Zulawski's abandonment of the Reid Technique may be, as much as anything, a case of supply meeting demand—a provider in the marketplace for police training services seeking to get ahead of what had been the number one player in the field by offering services more consistent with the evolving thinking in the law enforcement community.

Looking to the Future

So what steps might be taken to improve the police interrogation process, eliminate the risk of false confessions and instill confidence in the integrity and professionalism of the police. I offer some suggestions based on the materials I have reviewed in preparing this paper.

1. Scuttle Reid, Adopt PEACE

Defenders of current interrogation methods point to the fact that only a miniscule number of false confessions have been discovered, in proportion to the 2.2 million people now behind bars.[91] However, it must be recognized that those who are known to have falsely confessed are

[90] Nothing but the Truth, *supra* n.57, at 17 (quoting Christian Meissner, a psychologist at Iowa State University).

[91] Professor Cassell argues that "[c]laims that the legal system should be reformed because of false confessions are ultimately claims that must be assessed with at least some consideration given to the size of the American criminal justice system." He then concludes that "the cases appear to be, quantitatively speaking, a few drops in this very large bucket [consisting of all criminal cases]. Paul G. Cassell, Protecting the Innocent from False Confessions and Lost Confessions--And from *Miranda*, 88 J. of Crim. L. & Criminology 497, 506-07 (1998). Professor Cassell, however, overlooks that the documented false confessions cases are only "the very small tip of a much larger iceberg." Suspect Confessions, *supra* n.75, at 3. This is because a number of unlikely factors have to line up perfectly in order for a defendant to be able to prove that his confession is false: There must still *be* evidence that precludes the convicted defendant from being the perpetrator; the defendant (who is in prison) must have someone on the outside actually looking for such evidence; the defendant must not be precluded from raising the claim of innocence long after the trial by a spider web of doctrines that preclude opening up of convictions, such as failure to make a contemporaneous objection, failure to exhaust, time-limits set by state and federal law, and the existence of a prior (failed) effort at obtaining relief. The fact that, despite these obstacles, we have a fairly solid body of cases where actual innocence was proved after a conviction based on a self-incriminating confession is convincing proof that

the lucky ones—the few who have managed to vault the physical and procedural hurdles standing in the way of having their conviction reconsidered. Some (like the Central Park Five and Darrell Parker) were lucky in that the actual perpetrator confessed in a convincing manner. Others were exonerated by DNA. Still others, like the Norfolk Four were never exonerated, despite the existence of both DNA and a confession from the real rapist/killer. And untold numbers simply cannot come up with evidence of innocence or overcome the stringent procedural bars that stand in the way of having a conviction reconsidered years or decades after the event.

There are now sufficient numbers of proven false confessions that "[t]he potential of interrogations to generate false confessions is now indisputable."[92] Moreover, the public has now seen the degrading, manipulative, dishonest way in which the police treat suspects; it has become part of what we perceive as the police culture and strains further the already tenuous relationship between law enforcement and the community. In the words of the Wicklander-Zulawski press release, "[t]he Reid Method has remained relatively unchanged since the 1970s, and it conflicts with the progressive nature of how people communicate today. The Reid Method does not reflect updates in our legal system and does not acknowledge the availability of scholarly work on the subject."[93]

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for every such case that has come to light there may be dozens or scores or others where the stars did not align to enable the wrongful confessor to prove beyond doubt that he is innocent.

Professor Cassell also overlooks another set of victims of wrongful confessions—people who are the subject of violent crimes committed by the actual perpetrators who get away Scott-free because the police stop investigating the crime after they have "solved" it by means of a false confession. I discuss this below, *see infra* pp. 24-25. Again, the number of such people is very difficult to estimate with precision but we can be confident it's not insubstantial.

[92] In Doubt, *supra* n.38, at 121.

[93] W-Z Press Release, *supra* n.1, at 2.

The basic problem with the Reid Technique is that it continues the fundamental investigatory mindset of the Third Degree, which is that the principal function of interrogation is to obtain a confession rather than figure out how the crime was committed and by whom. This creates a discontinuity between the job of the investigator, which is to analyze clues and witness reports to reconstruct the past, and that of the interrogator, which is that of a thug or trickster whose function it is to cajole or wheedle a confession from an unwilling suspect. Moreover, under the Reid Technique, investigators are encouraged to identify which suspects are likely guilty, not on actual evidence that they have collected, but on a series of clues or tells in the suspect's demeanor. But there is little proof that the indicators of dishonesty taught by the Reid Manual actually provide evidence of guilt or even that the witness is being dishonest. Indeed, scientific studies have shown that detectives trained in the Reid method do no better than a coin-flip in figuring out who is lying and who is telling the truth, and sometimes worse than people not trained in the technique.[94] Nor is there any indication than the Reid Manual has any scientific basis for what it lists as the indicators of lying; they are based entirely on folk psychology and self-reinforcing experience, *i.e.* "we thought he was lying and he eventually confessed, proving that our suspicion is justified."[95] One study concluded as follows: "Overall, these findings suggest that the Reid model of nonverbal behavior is overly simplistic and in some cases simply incorrect."[96]

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[94] Presuming Guilt, *supra* n.61, at 189; Justice Imperiled, *supra* n.64, at 511-12. In fact, "the more confident police officers are about their judgments, the more likely they are to be wrong." Nothing but the Truth, *supra* n.57, at 9.

[95] "When I asked Buckley if anything in the technique had been developed in collaboration with psychologists, he said, "No, not a bit. It's entirely based on our experience." The Interview, *supra* n.3, at 10. Joseph Buckley is the president of John E. Reid & Associates. *Id.* at 9.

[96] J. P. Blair & Brandon Kooi, The Gap Between Training and Research in the Detection of Deception, 5 In'l J. of Police Science & Management 77, 82(2003).

Experience as well as scientific research show that the Reid Technique is far from the best method to conduct an investigation. To begin with, the confrontational approach of the Reid Technique is designed to browbeat the suspect into solving the crime by making a confession rather than ferret out what he actually knows. "As a confrontational strategy built for extracting confessions, standard interrogation technique can be an ineffective tool for gathering lots of useful and accurate information."[97] Second, there is substantial evidence, discussed elsewhere in this paper, that the kind of pressure employed against suspects, especially the young, the feeble-minded, the mentally disturbed creates a high risk of false confessions and consequent conviction of innocent people.[98] Third, the technique encourages tunnel vision on the part of the police: Once they've extracted a confession they tend to consider the crime solved and stop conducting further investigations. Police thus tend to see the confession as the capstone of an investigation, and affirmatively shut down other inquiries (such as DNA testing) so as not to undermine the confession they have obtained.[99]

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[97] Nothing but the Truth, *supra* n.57, at 10.

[98] The latest such case came only last week with the release of Adam Gray of Chicago who was convicted in the murder of two individuals who were killed in a fire supposedly set by Gray in 1993 when he was 14. After 7 hours of interrogation without access to family or a lawyer, Gray confessed. That, along with defective science evidence, was sufficient to convict him. He spent 24 years behind bars. https://goo.gl/inxkWZ.

[99] A typical story is that of LaFonso Rollins who confessed to rape and sentenced to 75 years in prison. At the time, there was DNA evidence available and Joel Schultze, the crime-lab analyst,

> urged detectives and high-ranking crime-lab officials Pamela Fish and Marian Caporusso to send the evidence to the FBI for a DNA test because he strongly suspected Rollins was innocent. Schultze said his request was refused because police said Rollins confessed.
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> . . . .
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> In 1997, four years after Rollins had been convicted and sentenced to 75 years in prison, Schultze took a job as a DNA analyst with the Michigan State Police crime lab. On his last day in Chicago, Schultze met with

Despite its obvious defects, Reid-style interrogations have been in widespread use throughout the United States and the world for many years, largely due to the absence of viable alternatives. If the police reasonably determine that a certain individual is suspected of committing a crime, he becomes an obvious potential source of information and thus a natural target for their inquiry. After all, the perpetrator of a crime is usually in the best position to know what happened, so this is certainly not a source of information that we want to discourage the police from using. Paradoxically, however, the Reid Technique shuts down this source of information by causing detectives to go into their interrogator mode, which will result in either a false confession or, more often, cause the suspect to clam up.[100] Either way, however, the investigators will not obtain what is most valuable from the suspect: an accurate account of what he truly knows about the crime.

"A number of scholars have called for a wholesale shift from a 'confrontational' model of interrogation to an 'investigative' one — one that would redesign interrogations around the best evidence-based approaches to eliciting facts from witnesses and suspects."[101] Alternative interrogation methods have been developed that avoid the pressure and intimidation of the Reid Technique. Prominent among them is PEACE, and acronym that stands for preparation, engagement, accounting, closure and evaluation. PEACE is, in many ways, the antithesis of Reid. While Reid calls for having the investigator do most of the talking, allowing the suspect to

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> Caporusso and told her that he was still haunted by the possibility that Rollins was innocent.
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> Caporusso, Schultze testified, told him, "Don't worry about it ... Have fun with starting your career in DNA up in Michigan."

Rollins spent 11 years in prison. Maurice Possley, Lab Didn't Bother with DNA, Chicago Tribune (Aug. 25. 2006), https://goo.gl/zU1D4N.

[100] Nothing but the Truth, *supra* n.57, at 10.

[101] Nothing but the Truth, *supra* n. 57, at 7.

say nothing inconsistent with a confession, PEACE calls for most of the talking to be done by the witness or suspect. The police are required to prepare for the event by learning all they can about the crime and the subject. They then ask him non-accusatory, open-ended questions and let the witness talk unguided for as long as he wants. They then proceed to do what has been described as a Columbo move, referencing the popular TV show starring Richard Falk, of the seeming bumbling detective who asks mild but probing questions revealing inconsistencies in the witness's story.[102] PEACE investigators do much the same, asking for clarifications and amplifications of the witness's story, sometime throwing in facts that they know but the witness has not mentioned. Unlike Reid, they do not invent alternative facts, bully the suspect to confess or minimize the seriousness of the crime.

PEACE was invented in England following a series of high-profile wrongly convictions (the Guilford Four, the Birmingham Six) and has been adopted in the United Kingdom, Norway and New Zealand, and is gaining acceptance in Sweden, Denmark and Canada; it is endorsed by scholars. Its reported success rate in gaining confessions appears to be about the same as for the Reid method, but without the risk of coerced false confessions.[103] "Dr. [Ray] Bull, who has analyzed scores of interrogation tapes, said the police had reported no dropoff in the number of confessions, nor major miscarriages of justice arising from false confessions. In one 2002 survey, researchers in Sweden found that less confrontational interrogations were associated with a higher likelihood of confession."[104]

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[102] "'These interviews sound much more like a chat in a bar,' said Dr. [Ray] Bull, who, with colleagues like Aldert Vrij at the University of Portsmouth, has pioneered much of the research in this area. 'It's a lot like the old "Columbo" show, you know, where he pretends to be an idiot but he's gathered a lot of evidence.'" No Fidgets, *supra* n.43, at 2.
[103] *See* Reforming Canada, *supra* n.6.
[104] No Fidgets, *supra* n.43, at 2.

A similar effort to reform interrogation tactics has been underway in the United States. This, too, came as a result of public disgust with the government's use of Third Degree interrogation tactics—this time in its effort to combat international terrorism by use of waterboarding and other coercive tactics at facilities like Abu Ghraib and Guantanamo Bay. After the American public recoiled from the use of such tactics, the federal government created a joint task force of the FBI, the CIA and the Pentagon to find other methods to extract information from suspected terrorists.[105] In typical bureaucratese, this was called the High-Value Detainee Interrogation Group or HIG. Much of this effort has remained secret, but what is known is that HIG has become a major funder of research into alternative interrogation tactics. Using HIG funding, researchers have studied closely the law enforcement models in countries that have rejected Reid-style interrogation tactics, including the PEACE method. They've learned that people tend to divulge more information when sitting in a spacious room with windows (the very opposite of what the old Inbau-Reid model recommends) and that holding a warm beverage can actually create positive impressions of the people around you."[106]

Other non-coercive interview tactics have been developed that hold promise for detecting whether a witness is lying—liars generally provide significantly fewer details about their story than truth-tellers—and getting them to trip up if they are lying, such as hastening the pace of the questions, asking the witness to recount the events backwards and increasing the cognitive load. All of these techniques apply well-worn psychological techniques to the art of interrogation, apparently with considerable success.[107]

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[105] Nothing but the Truth, *supra* n.57, at 13.
[106] *Id.*
[107] In Doubt, *supra* n.38, at 142-43.

As a result of this research and the experience abroad, law enforcement investigators in the United States are coming to the realization that the tactics of the Reid Technique, like those of the Third Degree on which it is based, are unreliable and counter-productive. The conclusion reached is that"[i]f you want accurate information, be as non-accusatorial as possible — the HIG term is 'rapport-building.'"[108] And it appears that law enforcement agencies are taking heed. For example, the Los Angeles Police Department, has been applying HIG-style non-confrontational methods with considerable success, and is in the process of abandoning Reid-style interrogation methods in favor of non-confrontational techniques developed by the HIG. And, as noted at the outset of this paper, Wicklander-Zulawski has abandoned the Reid method and "will standardize their core instruction on multiple techniques including the Participatory Method, Cognitive Interviewing, Fact-Finding and Selective Interviewing, as well as the popular WZ Non-Confrontational Method."[109]

There is thus a growing consensus in the United States and abroad that the Reid Technique simply is not effective in differentiating between truthful and false confessions, that it causes investigators to have a false sense of security that the crime has been solved because they have gotten someone to confess, that it shuts down fruitful avenues of investigation and misses the opportunity to extract information from the person most likely to have useful information about the case, namely the person that other evidence suggest is the likely perpetrator. Wicklander-Zulawski's abandonment of the Reid Technique thus likely reflects the realization that there are better, more effective, less risky ways of conducting police interrogation and may reflect a turning point in the thinking of the American law enforcement community. It is a trend

[108] Nothing but the Truth, *supra* n.57, at 14.
[109] W-Z Press Release, *supra* n.1, at 1.

that should be encouraged so that other police departments across the country make the switch from use of the Reid Technique to PEACE or some similar non-confrontational method of police interrogation. Based on the experience here and abroad, there is every indication that this will result in extracting more useful information from suspects while sharply decreasing the risk of false confessions.

2. Videotape Custodial Interviews

"Virtually every scholar agrees that taping is necessary, as does the Department of Justice, at least outside of terrorism and public safety cases."[110] It is nearly impossible to determine whether the interrogators used improper coercion or promises to extract a confession unless one can see what was occurred in the interrogation room. Moreover, during a non-recorded interrogation session, police may feed the suspect non-public facts about the case, which the suspect then regurgitates when he is finally induced to confess.[111] Then at trial, the prosecutor

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[110] Transparency & Truth, *supra* n.54, at 133 (footnotes omitted).

[111] Professor Duane describes the imaginary scene as follows:

> You have met with several officers during the interrogation, some of whom may have been in the room at different times, in addition to another officer who had escorted you downtown, and another one who had brought you a cup of coffee. All of them have been feeding you different details about the case, which others merely mentioned them in your presence. At one point in the questioning, possibly after hours of this informal process, one of them tells you that the victim has identified you as the attacker. In exhaustion and frustration, you turn to the police and respond, "Then she's either lying or mistaken, because I never attacked anyone."

Right to Remain Innocent, *supra* n.80, at 70. When the interrogating police officer then testifies, he will make a point of saying that the suspect was never told the victim was a woman, and the defendant will be in the difficult position of trying to remember and prove which particular officer gave him that sliver of information or maybe just said it in a stage whisper within his hearing. *See* Jeremy W. Newton, False Confession: Considerations for Modern Interrogation Home and War Techniques at Home and War, 9 J. of L. & Soc. Challenges 1, 2 (Spring 2008) (describing the case of Joe Lloyd, who had been diagnosed as a paranoid schizophrenic, who fed information about the case during police interrogation, and this information was then used at trial to prove his false confession was genuine).

can argue that the confession is genuine because it contains facts that only the real killer would know.

Many first-world countries, including England, Canada and Australia now require police to tape confessions, and so have "a number of states and hundreds of police departments" in the United States.[112] Surprisingly, they are finding it a help in prosecuting cases rather than a hindrance.[113] Even the Justice Department has adopted a policy that interrogations of persons in federal custody shall be recorded.[114] Now that the cost of high definition video recording has dropped to a negligible amount, there is no excuse for failure to make clear, easily audible recordings of custodial interrogations from start to finish.[115] Courts should insist on it for law enforcement offices that won't do it on their own by excluding confessions that are not taped.

Experts warn, however, that audio-visual recording is not a panacea and, in fact, can make the interrogation process even more unfair, unless strict protocols are followed.[116] Thus, police can actually improve the likelihood that a false confession will be accepted as conclusive by taping the portion of the interview where the suspect is read and waives his *Miranda* warnings, then turning off the recording, and turning it on many hours later, after the suspect has

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[112] In Doubt, *supra* n.38, at 143.
[113] Thomas P. Sullivan, Electronic Recording of Custodial Interrogations: Everybody Wins, 95 J. Crim. L. & Criminology 1127 (2005) (" According to Alan Harris, a veteran prosecutor in Minnesota, it was 'the best thing we've ever had rammed down our throats.'") https://goo.gl/wmxS38; Paul T. Rosynsky, Videotaped confessions helping prosecutors win Oakland cases, The Mercury News (Dec. 22, 2010), https://goo.gl/7AyFkU.
[114] https://goo.gl/740AuB (DOJ Press Release).
[115] Professor Klein suggests "that a system could be devised whereby the recording would begin automatically when the officer turns on the interrogation room light. The recording would be time and date stamped and would only cease once the suspect has been moved to a holding cell. Eventually, as the technology improves, recording should be extended to every place where a conversation may occur between suspect and officer." Transparency & Truth, *supra* n.54, at 133.
[116] David Dixon, Interrogation Law and Practice in Common Law Jurisdictions 11 (hereinafter Common Law Interrogation).

been coerced, cajoled, intimidate and spoon-fed the text of his confession, just in time for him to calmly read it from the text the police dictated to him.[117] An effective video program will have certain features that have been proven effective in jurisdictions that have used audio-visual recordings for many years, such as England and Australia.[118] This will include a recording system that is "part of effectively and comprehensively regulated treatment of suspects, including clear separation between the roles of custody officers and investigators . . .. Crucially, regulation must ensure comprehensive recording of a suspect's treatment during detention," including the use of body cameras by officers transporting suspects between locations. In addition, "cameras must capture the image both of suspect and the investigators," and there must be a process for maintaining the integrity of the audio-visual record. And, it goes without saying, the system must operate autonomously, not at the discretion of the interrogating officers.[119]

3. Limit the Duration of Custodial Interrogations

There is reason to believe that the longer an interrogation session lasts, the more likely it is to result in a false confession.[120] And this makes perfect sense since "suspects who are already sleep deprived, fatigues, distressed, or suffering from physical discomfort" are more likely to confess just to end the ordeal.[121] Custodial interrogations of adults should be limited in time, say

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[117] Convicting the Innocent, *supra* n.76, at 32-33. No wonder police are happy with the cameras.
[118] Common Law Interrogation, *supra* n. 116, at 12.
[119] *Id.*
[120] "More than 80% of the false confessors were interrogated for more than six hours, and 50% of the false confessors were interrogated for more than twelve hours. The average length of interrogation was 16.3 hours, and the median length of interrogation was twelve hours." Post-DNA World, *supra* n. 56, at 948. "The archival study of false confessions found that the median length of these interrogations was about twelve hours, which is many times longer than average interrogations." In Doubt, *supra* n.38, at 140.
[121] Police Interrogations, *supra* n.19, at 163. "Simply put, the longer any person is kept in an undesirable situation – the more desperate they may become to escape it. Many organizations and agencies have implemented timeframe guidelines on the interrogation process due to this issue. Additionally, lengthy interrogations that result in a mentally exhausted, physically tired,

no more than four hours.[122] For vulnerable victims, the maximum time should be cut in half.[123] If more than one interrogation session is deemed necessary, they should be scheduled at 24 hour intervals.

4. Rethink *Miranda*

There is significant evidence that *Miranda* has not lived up to its promise. Worse, it turns out that "the *Miranda* protections actually facilitate the interrogative process . . . ."[124] Skilled interrogators have learned to persuade suspects that reciting the warnings and signing the waiver card is a mere formality on the way to the purpose of the meeting, which is to talk about the crime being investigated. Often, this gives the interrogator an opportunity to establish rapport with the suspect, as they work together diligently to get past this bureaucratic paperwork. And, once the waiver is signed, courts treat it as a "virtual ticket to admissibility" of the subsequent confession.[125] In addition, "*Miranda* warnings perversely assist those least in need; wealthy suspects and recidivists. Virtually everyone else—upwards of 80% of suspects—waives their *Miranda* rights, a move that is almost never in their self-interest, and demonstrates that the

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hungry and dehydrated subject can easily result in unreliable information obtained by the interviewer." Dave Thompson, *I Did it?! Why Innocent People Confess,* W-Z Blog post, (Feb. 22, 2107), https://www.w-z.com/2017/02/22/i-did-it-why-innocent-people-confess/ .

[122] Professor Klein would create a presumption that any confession obtained after less than four hours of interrogation is voluntary. *See* Transparency & Truth, *supra* n.54, at 134. She would also have vulnerable subjects, like youth and the mentally impaired, questioned by a magistrate rather than a detective. *Id.*

[123] The added susceptibility of vulnerable subjects to giving false confessions after lengthy interrogations is well documented. *Id.;* In Doubt, *supra* n.38, at 140 & n.130. *See supra* n.98 (case of Adam Gray).

[124] In Doubt, *supra* n.38, at 139.

[125] Missouri v. Seibert, 542 U.S. 600, 608-09 (2004)(plurality opinion). Professor Klein, who is highly critical of *Miranda* as it is now used in the criminal justice process, notes: "Though police continue to employ the same tac-tics they used prior to *Miranda*, the fact that the warnings were read essentially guarantees that any subsequent statements are admitted as voluntary." Transparency & Truth, *supra* n.54, at 112.

Miranda decision did nothing to alleviate whatever inherent compulsion is part of the custodial interrogation experience."[126]

It is highly unlikely that the Supreme Court will reconsider *Miranda* and return to the day when it reviews the voluntariness of the confession rather than validity of the waiver[127]—although there is much to be said for doing so.[128] However, the Court could insist that the waiver be administered in a meaningful way. One problem with the way *Miranda* warnings are administered is that "[t]he interrogator is often the same agent that communicates the caution, which, if properly grasped, is going to preclude any interrogation taking place. Consequently, when explaining legal rights to a suspect, police may (consciously or not) minimize their importance, present the rights as mere formalities, and neglect to ensure actual understanding, or pressure suspects into compliance."[129] One way to avoid putting "the police . . . essentially in a conflict of interest" situation,[130] is to insist that the waivers be administered by someone other than the investigator conducting the interrogation, perhaps someone like a notary public or

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[126] *Id.*
[127] *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").
[128] Professor Klein proposes an ambitious program of overhauling the *Miranda* regime. While Professor Klein has many good ideas, which I cite elsewhere in my paper, her overall reform program hinges on rejecting the traditional *Miranda* warnings, which most people who watch television can recite by heart, and replacing them with a 670-word warning that so complex that it is likely beyond the capacity of most detectives to administer correctly and beyond the ability of most suspects to absorb and understand. Transparency & Truth, *supra* n.54, at 135-37. This warning, which is central to Professor Klein's approach, is so unwieldy as to make the proposal un-administrable. Professor Klein recognizes the problem, *id*. at 138-39, and suggestions that "[p]erhaps the answer is to give no warning at all," rather than give "inaccurate and deceptive warnings . . . ." I believe that solution is precluded by *Dickerson. See supra* n.114.
[129] Justice Imperiled, *supra* n.64, at 527 (footnotes omitted).
[130] *Id.* at 528.

compliance officer whose principal responsibility it is to administer valid rights waivers by ensuring that the witness is fully aware of and understands his rights.

Alternatively, or in addition, the Court could insist that a certain period of time—say an hour--elapse between the time the waiver is first signed and the interrogation begins. This "cooling off" period may give the suspect an opportunity to re-think his waiver and assert his rights. There are no doubt other such ideas, but they will not be seriously considered until the Supreme Court recognizes that *Miranda* simply isn't working the way the *Miranda* Court intended it to.[131]

5. Prohibit Police From Lying During Interrogations

A strong case can be made that police should not be allowed to extract confessions during interrogations by lying to suspects.[132] One reason is that police lies to suspects about what evidence they have can persuade an innocent suspect that he had better confess quickly so as to cut a better deal for himself.[133] More generally, lying can breed suspicion and contempt of the police. Nevertheless there are strong contrary arguments. Crime detection is serious business and criminals use a variety of dishonest and unfair tactics to avoid detection. Some believe that it would unjustifiably hamper the police's ability to detect and apprehend criminals if they were required to tell the truth all the time. As Justice Lamer of the Supreme Court of Canada famously put it, "the investigation of crime and the detection of criminals is not a game governed

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[131] In Professor Klein's words, "the [*Miranda*] Court did not anticipate that over 80% of suspects would waive all *Miranda* rights, and future Courts did not predict that *Miranda* would become riddled with exceptions and that officers would learn to work around it." Transparency & Truth, *supra* n.54, at125. She calls "*Miranda* a perverse failure." *Id.*

[132] *See generally* A Lie for a Lie, *supra* n.64. Professor Klein makes a somewhat more limited proposal: "I further suggest that the practice of producing false evidence to encourage suspects to confess be strictly prohibited, and the use of deceit dur-ing custodial interrogation be discussed and then limited. " Transparency & Truth, *supra* n.54, at 111.

[133] *See supra* pp. ___.

by the Marquess of Queensberry rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit."[134]

But the subject of police deception during investigation is broad, including such things as undercover work, use of paid informants and sting operations, placing officers pretending to be prostitutes in areas known as prostitution meeting grounds, tapping phone lines, and other such shady tactics. Much of this conduct may well be appropriate and necessary for conducting effective police work. It's less clear that use of deception during police interrogations is either necessary or appropriate. Police deception during interrogation consists of what in Reid Technique terms is called maximization and minimization. The former is telling the suspect—often falsely—that there is a mountain of evidence stacked against him, so much so that there can be no doubt of his guilt. Minimization involves persuading the suspect that the crime of which he suspected isn't all that serious or morally reprehensible, often with the implicit promise that if the suspect confesses to the minimizing scenario he will suffer minimal or no punishment.

These kind of deceptions during the inherently coercive process of an interrogation seem to serve no legitimate purpose in ferreting out information the suspect may have about the crime. They are designed purely to pressure the suspect to confess. Moreover, as discussed earlier, the suspect will feel roughly the same degree of pressure whether he is guilty or innocent. The assumption by advocates of the Reid technique that "an innocent suspect will recognize the interrogator's lie(s) and refuse to capitulate,"[135] is simply not borne out by the numerous cases where innocent suspects *do* confess. Other types of lies during interrogation, such as ones designed to test the suspect's independent knowledge of the actual events by telling him falsely

[134] Rothman v. The Queen [1981] 1 SCR 640 at 697, https://goo.gl/blfJXW.
[135] Justice Imperiled, *supra* n.64, at 515.

that the evidence points in one direction to test whether he'll push back based on knowledge that only the perpetrator would have, presents a legitimate use of false information and should probably be permitted. But false facts that have no purpose other than to bludgeon a suspect into making a confession, or that carry the implicit promise that a prompt confession will result in leniency, should not be permissible for the reasons explicated by Professor Gohara above.[136] And it appears to be unnecessary: Lying to suspects during interrogation is prohibited in England and has not impaired the effectiveness of police work, according to Andy Griffiths, a detective superintendent with the Sussex, England Police Department.[137]

6. Wickersham II?

While interrogation methods that produce false confessions present a particularly pernicious practice that is in need of reform, it is by no means the only serious problem in our criminal justice system. As Judges Kozinski[138] and Rakoff[139] have pointed out, the problems in our criminal justice system are many and varied. They include the use of junk forensic evidence, undue power accorded to prosecutors, overlong sentences—to name just a few. The public is becoming aware of the prevalence of these problems and this is eroding public confidence in our criminal justice system, much as was the case when President Hoover appointed the Wickersham commission to study the problems with law enforcement in light of Prohibition.

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[136] *See* A Lie for a Lie, *supra* n.64.
[137] The Interview, *supra* n.3, at 14. Apparently, that is becoming the norm in western countris: "In many first world countries (e.g., England, Germany, Australia), police are not permitted to lie to suspects to elicit confessions." Suspect Confessions, *supra* n.75, at 22. During my research for this paper I conducted a Skype interview with Detective Griffith, and he confirmed the workability and efficacy of the PEACE method as practiced in England. Interview of Andrew Griffith by Wyatt Kozinski, May 2, 2017.
[138] Alex Kozinski, Criminal Law 2.0, 44 GEO. L.J. ANN. REV. CRIM. PROC (2015), https://goo.gl/BQyqNy.
[139] Jed S. Rakoff, Why Innocent People Plead Guilty, The New York Review of Books, (Nov. 20, 2014), https://goo.gl/H5G4lR.

Conclusion

As the Supreme Court has recognized, "[a] confession is like no other evidence."[140] "Confessions are perceived to be the strongest evidence of guilt the State can bring against an individual. Mock and real world juries treat confession evidence as more impactful on verdicts than other forms of evidence, even when the confessions judged to be the product of coercion and/or contradicted by other case evidence."[141] In case after case, juries disregard exculpatory physical evidence, even DNA, when shown a confession made by the defendant. After all, he wouldn't say he was guilty if he wasn't.[142]

And yet we know for a fact that defendants *do* make false confessions and there is good reason to believe that happens regularly as a result of the coercive tactics of the Reid Technique. We have put the Third Degree behind us, now it's time to put an end to the Reid Interrogation Technique. Justice demands it.

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[140] Arizona v. Fulminante, 499 U.S. 279, 296 (1991).
[141] Suspect Confessions, *supra* n.75, at 18 (footnote omitted).
[142] According to Wigmore, the "confession of a crime is usually as much against a man's permanent interests as anything well can be ... no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance. " 3 Wigmore on Evidence 303 (Chadbourn rev'd ed. 1970).