Journal of Criminal Law and Criminology

Volume 88
Issue 2 *Winter*

Article 2

Winter 1998

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Paul G. Cassell

0091-4169/98/8802-0497
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
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Vol. 88, No. 2
Printed in U.S.A.

PROTECTING THE INNOCENT FROM FALSE CONFESSIONS AND LOST CONFESSIONS—AND FROM *MIRANDA*

PAUL G. CASSELL*

For most of the last several decades, criminal procedure scholarship—mirroring the Warren Court landmarks it was commenting on—spent little time discussing the guiltless and much discussing the guilty. Recent scholarship suggests a different focus is desirable. As one leading scholar recently put it, "the Constitution seeks to protect the innocent."[1]

Professors Leo and Ofshe's preceding article,[2] along with articles like it by (among others) Welsh White[3] and Al Alschuler,[4] commendably adopts this approach. Focusing on the plight of an innocent person who confessed to a crime he[5] did not commit, they recommend certain changes in the rules governing po-

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* Professor of Law, University of Utah College of Law (cassellp@law.utah.edu). Thanks to Professors Richard Leo and Richard Ofshe for providing me a prepublication copy of their article, to Professor C. Ronald Huff and Dr. Gisli Gudjonsson for helpful information about their studies, and to the editors of the *Journal of Criminal Law and Criminology* for outstanding editorial assistance. Al Alschuler, Ian Ayres, Patricia Cassell, Sam Gross, Gisli Gudjonsson, David Hyman, Lee Teitelbaum, the participants in the Virginia Constitutional Law Workshop, and the participants in the conference on coercion at the University of Denver also provided useful assistance. This Article was supported by the University of Utah College of Law Research Fund and the University of Utah Research Committee. My readers should be aware that by general agreement Professors Leo and Ofshe have been given the last word in this exchange. I have not had an opportunity to see, or respond to, their reply in preparing this article.

[1] AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 154 (1997).

[2] Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998).

[3] Welsh S. White, *False Confessions and the Constitution: Safeguards Against Unworthy Confessions*, 17 HARV. C.R.-C.L. L. REV. 105 (1997).

[4] Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997).

[5] Most of the alleged false confessors are men. A disproportionate number of the alleged victims are women and children, a disparity discussed in Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confession*, 22 HARV. J.L. & PUB. POL'Y (forthcoming 1998).

lice interrogation or the admissibility of confessions in court. These articles make interesting reading and are sure to be widely discussed. The articles, however, appear to provide an incomplete justification for the policy measures they endorse because, in protecting the innocent, the analysis cannot focus exclusively on false confessions. The innocent are at risk not only when police extract untruthful confessions—the false confession problem—but also when police fail to obtain truthful confessions from criminals—the lost confession problem.

The lost confession problem arises because restrictions on interrogations can reduce the number of confessions police obtain, which will in turn prevent police from solving crimes. The most recent field research on police interrogations, done by Richard Leo, found that "virtually every detective to whom I spoke insisted that more crimes are solved by police interviews and interrogations than by any other investigative method."[6] A crime that is solved ("cleared" in the police vernacular) is, of course, a crime that police will never attempt to pin on an innocent person. Accordingly, truthful confessions protect the innocent by helping the criminal justice system separate a guilty suspect from the possibly innocent ones,[7] while the failure to obtain a truthful confession creates a risk of mistake. Lost confessions can also cause harm to an innocent who has been erroneously charged. The failure to obtain a confession from the real perpetrator can deny evidence needed to prevent a wrongful conviction or to exonerate an innocent person who has already been wrongfully convicted. Judge Friendly made an analogous argument about the costs of the privilege against self-incrimination, explaining that "[a] man in suspicious circumstances but not in fact guilty is deprived of official interrogation of another whom he knows to be the true culprit . . . ."[8]

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[6] Richard A. Leo, Police Interrogation in America: A Study of Violence, Civility and Social Change 373 (1994) (unpublished Ph.D. dissertation, Univ. of Cal. at Berkeley) [hereinafter Leo, Police Interrogation in America].

[7] *See* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1931 (1993).

[8] Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 680-81 (1968); *see* AMAR, *supra* note 1, at 48-51 (advancing this position with respect to current Fifth Amendment interpretations); Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 716 (1988) (advancing this position with respect to the Fifth Amendment in general); Erwin N. Griswold, *The Right to be Let Alone*, 55 NW. U. L. REV. 216, 223 (1960) (conceding that "[i]t was a mistake" to attempt to defend the

Leo and Ofshe's article here makes much the same point, explaining that "[o]ften police or prosecutors only discover and acknowledge their error in eliciting a false confession or charging an innocent defendant prior to conviction because they have accidentally or unintentionally obtained a reliable confession from the true perpetrator(s) of the crime."[9] Similar conclusions about the importance of confessions in exonerating the innocent have been reported by other researchers on miscarriages of justice.[10] All of these studies suggest that in those rare circumstances in which an innocent person is facing the real possibility of conviction—or, indeed, has been wrongfully convicted—police interrogation is an important means of exoneration.

So far the discussion has focused on innocents within the criminal justice system—innocents wrongly prosecuted for or convicted of committing a crime. But no analysis of the public policy ramifications of interrogation regulation would be complete if it did not also consider another category of innocents: victims of crime. The regulation of interrogation can, by blocking truthful confessions, lead to the release of guilty criminals to commit further crimes—the lost conviction problem. To be sure, the criminal justice system is properly more concerned with the possibility that an innocent person will be convicted than that a guilty person will escape. Blackstone's adage that ten guilty should go free rather than one innocent be convicted[11] remains true today. But Blackstone's adage also reminds us that the acceptable tradeoffs are not unlimited. In evaluating an interrogation regime, the risk to innocents from inadequate crime control must also be assessed.

With these competing risks in mind, we are in a position to evaluate reforms designed to protect the innocent by reducing

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Fifth Amendment on the ground that it protects the innocent); *see also* Peter W. Tague, *The Fifth Amendment: If an Aid to the Guilty Defendant, an Impediment to the Innocent One*, 78 GEO. L.J. 1 (1989). *But see* Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 330-33 (1991) (arguing that the Fifth Amendment helps innocent persons).

[9] Leo & Ofshe, *supra* note 2, at 474.

[10] *See infra* notes 166-69, 282-85 and accompanying text.

[11] 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *accord* William O. Douglas, *Foreword* to JEROME FRANK & BARBARA FRANK, NOT GUILTY 11 (1957); *see also* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 458-59 (1989); *see generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (humorously reviewing the state of Blackstone's adage today).

false confessions. The normative force of these recommendations depends on proof that the benefits from reducing false confessions are not outweighed by the competing risks to the innocent from lost confessions and lost convictions. To be sure, it is possible that a change might produce such a substantial drop in false confessions as to be desirable. But it also is possible that a change might produce such a substantial drop in truthful confessions as to pose a greater risk to the innocent. This is an empirical or "numbers" issue that cannot be resolved by *a priori*, theoretical reasoning. The only way to make an on-balance determination is through some sort of rough quantification of the relative dimensions of the various phenomena and the tradeoffs among them.

Given this need for quantification, it is curious that the false confessions literature never provides even a ballpark estimate of the frequency of false confessions.[12] Instead, the articles in the area, including most prominently Leo and Ofshe's foregoing work, reason solely from anecdotal example. They present notorious illustrations of false confessions to establish that the problem exists. They then remind the reader that "no one can authoritatively estimate the rate of police induced false confessions"[13] or that an assessment of the frequency of false confessions "is difficult to make accurately."[14] Nonetheless, the articles swiftly assert, false confessions "threaten the quality of criminal

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[12] For literature on the subject in addition to the previously cited articles, see GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 235-40, 260-73 (1992); Richard A. Leo, Miranda *and the Problem of False Confessions, in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 271 (Richard A. Leo & George C. Thomas, III eds., 1998); Richard Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997) [hereinafter Ofshe & Leo, *The Decision to Confess Falsely*]; Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. IN L., POL. & SOC'Y 189 (1997) [hereinafter Ofshe & Leo, *Social Psychology*]; Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo and Alschuler*, 74 DENV. U. L. REV. 1123 (1997); Richard J. Ofshe & Richard A. Leo, *Missing the Forest for The Trees: A Response to Paul Cassell's "Balanced Approach" to the False Confession Problem*, 74 DENV. U. L. REV. 1135 (1997); Roger Parloff, *False Confessions*, AM. LAW., May 1993, at 58; Richard J. Ofshe, *Inadvertent Hypnosis During Interrogation*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125 (1992); Richard J. Ofshe, *Coerced Confessions: The Logic of Seemingly Irrational Action*, 6 CULTIC STUD. J. 1 (1989).

[13] Leo & Ofshe, *supra* note 2, at 432.

[14] White, *supra* note 3, at 109.

justice in America"[15] and are "likely . . . in a small but significant number of cases."[16] The articles then conclude by proposing restrictions on police interrogation or the courtroom use of confessions designed to reduce the incidence of the harms from false confessions.[17]

The aim of this empirical essay is to think more carefully about "the numbers"—that is, to try and place the risk to the innocent from false confessions, lost confessions, and lost convictions into some perspective. Some might despair of the effort, since it is obviously impossible to quantify precisely (among other things) the "dark figure" of false confessions.[18] But as Professor Schulhofer has explained in a related context, "the size of a legal problem does matter, and we cannot avoid thinking about it, or rely only on our intuitions, just because a perfect study has yet to be done."[19] Moreover, given the difficulty of quantification, one could simply argue for acceptance of the null hypothesis: the number of false confessions is too small to worry about. Defenders of *Miranda* quickly invoke the null hypothesis to resist arguments for loosening the restraints on police interrogation because many criminals are avoiding conviction.[20] Rather than employ the same maneuver here, I will attempt to shoulder the burden of quantification—a burden that is properly assigned elsewhere.

Part I attempts to quantify the dimensions of the false confession problem. It narrows our focus from all persons who

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[15] Leo & Ofshe, *supra* note 2, at 493; *see also* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 191 (asserting false confessions "occur regularly").

[16] White, *supra* note 3, at 111.

[17] *See* Leo & Ofshe, *supra* note 2, at 491-96; White, *supra* note 3, at 142-55; *see also* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 238-39.

[18] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 191; *accord* Leo & Ofshe, *supra* note 2, at 431-32.

[19] Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 505 (1996).

[20] *See, e.g.*, *id.* at 547 ("To be sure, there could be harmful net effects [from *Miranda*] that did not show up in the studies" but that possibility does not make the affirmative case against *Miranda*); George C. Thomas, III, *Is* Miranda *A Real-World Failure?: A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. Rev. 821, 837 (1996) (arguing that we must accept null hypothesis of no harmful effect from *Miranda*); George C. Thomas, III, *Plain Talk about the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933, 958 (1996) [hereinafter Thomas, *Plain Talk*] (same); Welsh S. White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 20 (1986) (arguing that if *Miranda* had harmed law enforcement "critics of *Miranda* certainly would have unearthed it by now").

have been wrongfully charged with a crime to the subset of those who have been wrongfully *convicted.* If a false confession does not produce a wrongful conviction, then the screens in the criminal justice system have at least operated to prevent this ultimate miscarriage of justice. This Part also narrows our focus to *factually* innocent persons—that is, "wrong person" convictions. Previous research has frequently adopted this approach. With these definitions in mind, the Part considers different approaches to quantification. One method is simply to tabulate the number of reported cases of wrongful convictions from false confessions, as Leo and Ofshe have attempted to do. However, the handful of reported cases that they have collected does not tell us much about the overall performance of the criminal justice system. Indeed, rather than collecting individual cases, the overall frequency could be better determined by sampling a known universe of cases. A few samples are available, which suggest that false confessions are relatively rare. Alternatively, one could make reasonable estimates of the proportion of wrongful convictions in the system which are attributable to false confessions. Based on the available (and quite limited) information, the estimated frequency is somewhere between 1 in 2,400 convictions and 1 in 90,000 convictions, depending on what assumptions one makes.

Part II then turns to an assessment of the relative risk to the innocent from false confessions versus lost confessions. False confessions are a relatively infrequent cause of wrongful convictions. On the other hand, truthful confessions from the true perpetrators of crimes are perhaps the most frequent way in which miscarriages of justice are uncovered. Given these facts, it is likely that the policy proposals aimed at the exotic problem of false confessions may create, by restricting routine police interrogation, more serious risks for the innocent in these other, more quantitatively significant areas. Similarly, restrictions on police interrogation create risks to the innocent by releasing dangerous criminals to commit other crimes. For these reasons, restrictions on police interrogation may well present more risks to the innocent than they would prevent.

Part III provides an escape from these tradeoffs. The existing interrogation regime, largely dictated by the Supreme

Court's decision in *Miranda v. Arizona*,[21] is "upside down"[22] or perverse. On the one hand, it does virtually nothing for the innocent. Those who are innocent of crimes will almost invariably waive their *Miranda* rights, gaining little from anything in the decision, while career criminals become adept at using the rules to avoid interrogation. Indeed, *Miranda* may have actually worsened the plight of innocent false confessors by diverting judicial attention away from the underlying substantive truth of the confession towards procedural issues concerning warnings and waivers. At the same time, *Miranda* has harmed innumerable innocents by preventing police from obtaining confessions from the actual perpetrators of crimes, thus creating the possibility that innocent persons may be charged or even convicted in their stead. To protect the innocent, videotaping of police interrogation should be substituted for the *Miranda* rules. Videotaping provides an excellent protection for false confessors, by allowing judges and juries to see when police have led an innocent person to admit to a crime he did not commit. At the same time, replacing the most burdensome features of the *Miranda* regime—the waiver requirement and questioning cutoff rules—would produce tens of thousands of truthful confessions that would help protect the innocent.[23]

I. THE RISK TO THE INNOCENT FROM FALSE CONFESSIONS

A. CASE EXAMPLES OF FALSE CONFESSIONS

The most straightforward way to quantify the frequency of false confessions is to count the reported cases. Such a project has never before been undertaken, and Leo and Ofshe deserve recognition for their cataloguing effort here.[24] Counting the cases of false confessions, of course, raises a number of methodological questions. Discussion about risks to the innocent must first grapple with the question of who qualifies as an "innocent" person. Previous research on miscarriages of justice has generally focused on wrong-person mistakes—that is, the

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[21] 384 U.S. 436 (1966).

[22] *See* AMAR, *supra* note 1, at 155 (citing, *inter alia*, STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973)).

[23] *See infra* text accompanying notes 206-307.

[24] Leo & Ofshe, *supra* note 2.

conviction of the *factually* innocent.[25] Moving beyond the factually innocent to the *legally* innocent would raise a host of questions not readily susceptible to empirical study, such as what kinds of state of mind defenses (including insanity and entrapment) were erroneously rejected at trial, when did the quantum of proof dip below the beyond a reasonable doubt standard, and so forth. The confessions featured in the false confession literature are invariably those given by suspects who were (allegedly) factually rather than "legally" innocent.[26] This essay will simply follow this focus on wrong person mistakes.

This essay will further narrow its focus to mistakes leading to wrongful *convictions.* False confessions are certainly a problem that needs to be considered by, for example, police administrators and psychologists attempting to understand failures in police interrogation. But for policy purposes, false confessions leading to erroneous convictions are the major point of concern. If a person who has made a false confession is not convicted—because the police do not arrest, the prosecutor does not indict, or the jury does not convict—then the screens in the system have at least worked to prevent the ultimate miscarriage of justice: conviction of an innocent person.[27] Again, much of the previous research has adopted this approach.[28] Leo and Ofshe also seem to adopt this view implicitly, as the main thrust of their policy proposals is not to reduce false confessions *per se,* but rather to prevent wrongful convictions later in the process

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[25] *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN L. REV. 21, 45 (1987); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT 367 (1970); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases,* 44 BUFF. L. REV. 469, 475-76 (1996) [hereinafter Gross, *Capital Cases*]; Michael L Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt,* 13 T.M. COOLEY L. REV. 907, 910-11 (1996); Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt,* 16 J. LEGAL STUD. 395, 396 (1987) [hereinafter Gross, *Eyewitness Identification*].

[26] *See, e.g.,* Leo & Ofshe, *supra* note 2.

[27] To be sure, considerable trauma may occur along the way and, in an ideal system, no such false confessions would be obtained. I mean to minimize in no way such concerns, but to narrow the focus to the justification offered for changing interrogation procedures. *Accord* Gross, *Eyewitness Identification, supra* note 25, at 396-97 (adopting identical focus in discussion of eyewitness misidentification). One public policy reform for reducing pre-trial trauma is probably improved speedy trial measures, a reform I have advocated for other reasons. *See* Paul G. Cassell, *Balancing the Scales of Justice: The Case for and Effects of Utah's Victim's Rights Amendment,* 1994 UTAH L. REV. 1373, 1402-07 (advocating victims' right to a speedy trial).

[28] *See, e.g.,* Bedau & Radelet, *supra* note 25; Gross, *Eyewitness Identification, supra* note 25.

through such measures as after-the-fact judicial scrutiny of the credibility of confessions.[29] As a result, about half of the Leo and Ofshe catalogue, while perhaps informative for other purposes, is irrelevant to this article. Of Leo and Ofshe's sixty cases in which an innocent person allegedly falsely confessed to a crime he did not commit, twenty-nine led to a wrongful conviction.[30]

With the subject clearly defined—factually innocent persons who have been wrongfully convicted—the question next arises of how to determine who is "innocent." In the post-modern world, one could argue that "objective" truth is unknowable and therefore such determinations are beyond human capacity. Refreshingly, Professors Leo and Ofshe take the view that we can determine whether defendants are really guilty or innocent. I agree with them, but would add that making such determinations requires careful and detached analysis. I have serious questions about how Leo and Ofshe have discharged this task and believe that, in a significant number of their cases, the "innocent" defendants were in all likelihood guilty. To explore all of those cases at the level of detail required to carry the point, however, requires considerable discussion. I pursue the issue elsewhere.[31] For present purposes, I will simply assume that Leo and Ofshe are correct that twenty-nine innocent persons have been wrongfully convicted from false confessions in the last quarter century. The question still remains, however, what conclusions we should draw from this finding.

For public policy purposes, the anecdotal evidence collected by Leo and Ofshe tells us little. The difficulties stemming from reliance on such haphazard stories are well recognized.[32] As one leading scholar put it:

> [A]necdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest

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[29] *See* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 238 (suggesting judicial "credibility" determinations); Alschuler, *supra* note 4, at 973-78 (suggesting judicial suppression of confessions produced in certain ways).

[30] Leo & Ofshe, *supra* note 2, at tbl.B1.

[31] *See* Cassell, *supra* note 5. I also defer to this separate article discussion of Leo and Ofshe's suggestion that a suspect's "post-admission narrative" should be the touchstone of confession admissibility.

[32] For an exceedingly helpful overview and example of the problems with anecdotal evidence, see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 799 (1998).

> inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects . . . and have the power to mislead us into thinking we know things that anecdotes simply cannot teach us.[33]

Perhaps the most salient defect in Leo and Ofshe's anecdotal approach is that we are told nothing about the frequency of false confessions, the critical issue from a public policy perspective. Richard Posner has nicely described the problem in observing that "[i]n a nation of more than a quarter of a billion people all blanketed by the electronic media, every ugly thing that can happen will happen and will eventually become known; to evaluate polices for dealing with the ugliness we must know its frequency . . . ."[34] Claims 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.[35] Leo and Ofshe's collection of twenty-nine cases of wrongful convictions from false confessions, for example, is drawn mostly from homicide cases during 1973 to 1996. In that period, police officers around the country interrogated approximately 368,000 suspects for homicide.[36] Even assuming that all twenty-nine of the

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[33] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1159-61 (1992). For similar conclusions, see, e.g., Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989) (concluding "the rub is that good anecdotes do not care if they are not representative"); Suzanne Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 459 (1996) (cautioning that "[a]necdotal evidence replaces scientific data, and telling stories becomes the equivalent of making rational arguments"); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1098 (1996) ("Unfortunately, much of the debate on the civil justice system relies on anecdotes and atrocity stories and unverified assertion rather than analysis of reliable data"); *see also* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995) (cataloguing similar problems in "narrative" literature).

[34] Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997).

[35] *See* Owen M. Fiss, *Reason in All its Splendor*, 56 BROOK. L. REV. 789, 802-03 (1990) (when the Supreme court "lays down a rule for a nation . . . [it] necessarily must concern itself with the fate of millions of people. . . . Accordingly, the Court's perspective must be systematic, not anecdotal"); *cf.* David A. Hyman, *Consumer Protection in a Managed Care World: Should Consumers Call 911?*, 43 VILL. L. REV. (forthcoming 1998) (concluding "'attack by anecdote' provides no basis with which to assess the overall merits and inadequacies of a system with hundreds of millions of annual encounters between health care providers and patients").

[36] During the period, police arrested roughly 20,000 persons each year for the FBI index crimes of murder and non-negligent homicide. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1973, 121 tbl.24 (1974) (estimating approximatly 19,200 arrests for murder

suspects discussed by Leo and Ofshe were innocent, the cases appear to be, quantitatively speaking, a few drops in this very large bucket.[37] It is quite likely, of course, that other wrongful convictions from false confessions have not been uncovered. But even if further examples are found and tabulated, the important question for public policy purposes would be not whether wrongful convictions from false confessions have ever occurred over the last quarter century—they plainly have—but rather how frequently have they occurred. Any number of tragedies can be said to "occur regularly" in this country,[38] but responsive action to them must be guided by the dimensions of the problem.[39] If it is to be established, as Leo and Ofshe argue, that false confessions "threaten the quality of criminal justice in America,"[40] an approach different from identifying particular alleged miscarriages is needed.

B. SAMPLING METHODOLOGIES

Rather than haphazardly collecting individual cases, a more logical way to assess the frequency question is to take a random sample of cases and evaluate the proportion of false confessions in it. Leo and Ofshe suggest that it is essentially impossible to obtain a random cross-section of cases,[41] but there are reasonable ways to approach the task. One sample that could be ex-

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and non-negligent manslaughter in 1973); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1994, 217 tbl.29 (1995) (estimating 22,100 arrests for murder and non-negligent manslaughter in 1994). This produces a 23 year total of 460,000 arrests for murder and non-negligent manslaughter. The available data indicate that about 80% of all arrested suspects will be interrogated. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 854 (1996) (finding 79% of suspects in sample questioned); *see also id.* at 854-55 (collecting similar evidence from other studies). The figure should be at least as high for homicide suspects. Multiplying the 80% interrogation rate by 460,000 suspects produces 368,000 interrogations.

[37] *Cf.* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 259 (1997) ("Twenty-eight cases [of allegedly innocent persons convicted] is a vanishingly small number in a system that incarcerates a million people at any one time").

[38] *See, e.g.*, 1 U.S. DEP'T OF HEALTH & HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES § 5 (1992) (collecting statistics on deaths from various causes) [hereinafter VITAL STATISTICS].

[39] *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993).

[40] Leo & Ofshe, *supra* note 2, at 493.

[41] *Id.* at 431-32.

amined for these purposes was drawn by Richard Leo for his interesting doctoral dissertation, the results of which he later published in this *Journal*.[42] Leo observed, either in person or on videotape, 182 interrogations in the California Bay Area in 1993. If it is true, as the false confession literature argues, that certain commonly used police interrogation methods are likely to produce false confessions, presumably Leo would have been able to report more than a few false confessions. Yet Leo does not appear to suggest in his published accounts that any of the interrogations by police detectives involved a false confession.[43] The apparent nonexistence of false confessions in the Leo sample suggests that modern police interrogations are, in fact, highly *un*likely to produce false confessions.[44] To be sure, it might have been difficult for Leo to be certain whether any of the confessions he observed was in fact false, since this would involve judgments about all the facts of the case. But one might reasonably assume that Leo, working on his dissertation with Professor Ofshe,[45] would have been well-situated to spot possible false confessions while observing the interrogations.[46] Moreover, Leo and Ofshe could now go back through the confessions in those cases and determine whether any of them were false. While it might be time-intensive to examine all 182 cases, a more economical approach would be simply to look in court records for suppression motions raising reliability or voluntariness concerns.[47] Presumably suspects induced to confess falsely would report this to their lawyers, who would then take action.[48] These few cases could then be examined more carefully. A re-

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[42] Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) [hereinafter Leo, *Impact of* Miranda].

[43] *See generally* Leo, *Inside the Interrogation Room*, *supra* note 42.

[44] $f < 1/182$ (.005), based on the 182 interrogations apparently without a false confession in the Leo sample.

[45] *See* Leo, Police Interrogation in America, *supra* note 6, at i (Professor Richard Ofshe on Committee in charge of dissertation).

[46] I do not mean to imply that Leo was specifically looking for false confessions at the time, but simply that he might have become suspicious about the possibility had a false confession actually unfolded before him.

[47] As far as I can tell, Leo did not consider whether any of the confessions obtained in his sample were later suppressed.

[48] *Cf.* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 209 ("police-induced belief change during interrogation is temporary, inherently unstable, and situationally adaptive . . .").

lated approach would be to look at cases involving prolonged interrogation. Even if they are fast workers, it is doubtful that police could conjure up false confessions speedily.[49] In Leo's sample, the overwhelming majority of interrogations lasted no longer than two hours,[50] again suggesting the infrequency of false confessions. Finally, Leo found that very few of the interrogations he observed involved what he described as "coercive" questioning methods.[51]

A similar conclusion arises from the most recent study of police interrogations in this country, done by Bret Hayman and me in Salt Lake City during 1994.[52] In preparing the study, we saw nothing that indicated there were any false confessions in our sample—although reviewing the cases as they came into the prosecutor's office[53] did not ideally situate us to make such a determination. A stronger suggestion there were no false confessions in our sample is that none of the defendants alleged in court (or otherwise, so far as we are aware) that his confession was false; the few suppression motions filed all revolved around technical *Miranda* issues, not the reliability of the confession.[54] In addition, only one of our interrogations lasted longer than an hour.[55] There is accordingly nothing indicating that our random sample of 173 filed cases involved even a single false confession, let alone a wrongful conviction from a false confession.

These studies are not the only dry well for false confessions. The only other observational study of police interrogation in this country was by the students on the *Yale Law Journal* in the summer of 1966.[56] They do not appear to have seen any false

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[49] *Cf. id.* at 193 ("Most often . . . eliciting a false confession takes strong incentives, intense pressure and *prolonged questioning*") (emphasis added).

[50] Leo, *Inside the Interrogation Room*, *supra* note 42, at 279 tbl.6 (finding that of 153 studied interrogations, 109 lasted less than 1 hour, 32 less than 2 hours and only 12 more than 2 hours).

[51] *Id.* at 282 (finding that of 153 studied interrogations, 4 involved "coercion").

[52] Cassell & Hayman, *supra* note 36.

[53] *See id.* at 851-52 (describing study methodology of reviewing cases during "screening" by prosecutors).

[54] *Id.* at 890.

[55] *See id.* at 892 tbl.7.

[56] *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967) [hereinafter *Yale Project*].

confessions[57] and, indeed, reported that "most detectives claim an innocent man has never confessed in New Haven."[58] Older studies employing various methodologies likewise fail to report (so far as I can discern) even a single clear-cut example of a false confession—not to mention a wrongful conviction from a false confession.[59] Finally, two recent observational studies of police interrogation in Britain, where police apparently employ sophisticated psychological questioning techniques, appear to report no false confessions.[60] It is possible, of course, that all these studies simply failed to detect false confessions within their samples; by and large, these studies' methodologies focused on case outcomes rather than identifying the underlying validity of the confessions. But it should be discomfiting to those claiming that false confessions are the likely result of modern police interrogation that not even one of these studies with random samples of interrogation appears to have stumbled on to a clear-cut case of a false confession.

Further research on this point is plainly warranted and the methodology for such a study is apparent. Researchers outside this country have attempted to determine the frequency of wrongful convictions from false confessions by drawing a sample and then counting the number of false confessions in it. This

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[57] *See id.* at 1589-90 (discussing the need for confessions to obtain convictions; no false confessions mentioned). However, the fact that the New Haven police were generally operating under pre-*Miranda* rules at the time of the study, *see* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 407-08 (1996), may limit the study's value for generalizations about today's post-*Miranda* world.

[58] *Yale Project*, *supra* note 56, at 1611.

[59] *See* DAVID W. NEUBAUER, CRIMINAL JUSTICE IN MIDDLE AMERICA (1974); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of* Miranda, 47 DENV. L.J. 1 (1970); Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968); Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967). Other studies by prosecutors likewise fail to report false confessions, although obviously prosecutors would not be the first to report such mistakes. *See generally* Cassell, *supra* note 57, at 395-416, 424-33 (collecting and discussing other interrogation studies).

[60] *See* BARRIE IRVING, ROYAL COMM'N ON CRIM. PROC., POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE 149-50 (1980) (Res. Study No. 2) (discussing dispositions of cases; no false confessions mentioned); PAUL SOFTLEY, ROYAL COMM'N ON CRIM. PROC., POLICE INTERROGATION: AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS 89-92 (1980) (Res. Study No. 4) (same).

has been done in three studies by Professor Gudjonsson and his colleagues in Iceland,[61] where one might expect to find a higher proportion of false confessions than here because of Iceland's "inquisitorial legal system."[62] In the first study, none of the seventy-four prisoners (0%) claimed to have made a false confession, although one claimed to have made a previous false confession to prevent his girlfriend from going to prison.[63] In the second study, none of the 229 prisoners (0%) claimed to have made a false confession for the offense for which they were currently serving a sentence, although some claimed to have given false confessions at some earlier time.[64] A follow-up study with a larger sample size found that 5 of 509 (less than 1%) of the prison inmates claimed to have made a "false confession" with regard to the offense for which they were currently serving a prison sentence.[65] From the data in this last study, the authors concluded that "a very small proportion of prisoners . . . are

[61] Dr. Gudjonsson has published a text on interrogations, including extensive discussion of false confessions and urging greater awareness of the problem. *See* GUDJONSSON, *supra* note 12, at 205-322. In that text, he concluded that "[h]ow many false confessions occur in different countries is impossible to estimate." *Id.* at 205. His research discussed below appears to be an effort to answer this important question.

[62] Gisli H. Gudjonsson & Jon F. Sigurdsson, *How Frequently Do False Confessions Occur?: An Empirical Study Among Prison Inmates*, 1 PSYCHOL. CRIME & L. 21, 25 (1994).

[63] Gisli H. Gudjonsson & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does it Relate to Their Crime, Attitude and Personality?*, 12 PERSON. & INDIV. DIFFERENCES 295, 298 (1991).

[64] Gudjonsson & Sigurdsson, *supra* note 62, at 23-24. A total of 27 (12%) claimed to have made a false confession during a police interview at some point in their criminal careers. *Id.* It is difficult to evaluate the significance of the 12% figure, because it came from prisoners with extensive records and "frequent previous contacts with the police." *Id.* at 24. If we assume that each of the prisoners had been questioned previously 20 times by police and that the false confessors gave one false confession each, then the frequency of false confessions is about 0.6% (27 false confessions ÷ 229 prisoners x 20 contacts)—an estimate consistent with figure derived in the study cited in the following footnote.

[65] *See* Jon F. Sigurdsson & Gisli H. Gudjonsson, *The Psychological Characteristics of "False Confessors:" A Study Among Icelandic Prison Inmates and Juvenile Offenders*, 20 PERSON. & INDIV. DIFFERENCES 321, 324 (1996). The study also found, consistent with their previous study, *see* Gudjonsson & Sigurdsson, *supra* note 62, that 12% claimed "to have made a 'false confession' at some stage in their lives." Sigurdsson & Gudjonsson, *supra*, at 326. From this fact, the authors concluded that "[t]he great majority (92%) of these 'false confessions' have nothing to do with the offences for which they are currently serving a prison sentence. Indeed, many were associated with interrogations conducted some years previously." *Id.* It is also worth noting that more than three-quarters of the "false confessions" in this study were to property crimes or serious traffic violations. *Id.* at 325 tbl.2. I am indebted to Professor Leo for calling this study to my attention.

currently serving a sentence for an offence they claim they did not commit."[66] The authors also added that all five of the false confessors "had also been convicted and sentenced concurrently for other similar offences. Therefore, it is unlikely that their 'false confession' resulted on its own in a prison sentence although it might have influenced the length of the sentence."[67] Throughout the text of their article, Drs. Sigurdsson and Gudjonsson placed the phrase "false confession" in quotations because it was "dependant on the self-report of the prison inmates" and "[i]n view of the presence of personality disorder among this group, one must be cautious about accepting uncritically their version of events."[68] They also noted that "[n]one of the cases in the present study had been referred to a psychologist for pre-trial report in regard to their 'false confession'" (apparently a readily available procedure in cases with serious issues) and that "none of the 'false confessors' requested assistance from the researchers to prove their innocence."[69]

The same study also took another sample, this one of 108 Icelandic juveniles who had made full admissions to the police and subsequently pleaded guilty. Not one of the juveniles in the sample claimed to have *ever* made a "false confession" to the police.[70] Similarly, a study of sixty British juveniles found that while fourteen reported to have made a false confession, these were all "voluntary"—that is, made to help protect a friend or relative from prosecution.[71] This typically occurred when the suspects were under the age of fourteen and could not suffer legal consequences from confessing. This "service" was provided to older friends, leading the study's author to conclude that "[t]his type of false confession may be unique to a delinquent population."[72] While one must surely be cautious about

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[66] Sigurdsson & Gudjonsson, *supra* note 65, at 326.

[67] *Id.* at 326-27.

[68] *Id.* at 328. In another article based on the same data, Sigurdsson and Gudjonsson also found that the "false confessors" were heavily dependent on illicit drugs. John F. Sigurdsson & Gisli H. Gudjonsson, *Illicit Drug Use Among "False Confessors:" A Study Among Icelandic Prison Inmates*, 50 NORD. J. PSYCHIATRY 324, 327 (1996).

[69] Sigurdsson & Gudjonsson, *supra* note 65, at 328.

[70] *Id.* at 322.

[71] Graeme Richardson, A Study of Interrogative Suggestibility in an Adolescent Forensic Population 87 (1991) (unpublished M.Sc. Thesis, Univ. of Newcastle Upon Tyne) (on file with author). For further discussion of such "voluntary" false confessions, see *infra* notes 105-15 and accompanying text.

[72] Richardson, *supra* note 71, at 87.

generalizing from foreign experiences, these studies also cast doubt on the claim that wrongful convictions from false confessions are frequent.

C. ESTIMATION METHODOLOGIES

The frequency of false confessions in the United States appears to be so low as to have escaped detection in the various samples that have been drawn. An alternative, second-best approach is to derive an estimate based on assumption about the frequency of wrongful convictions and the proportion of these convictions attributable to false confessions. The approach has the benefit of working even with extremely low probability events. In theory, estimating this number is straightforward:

$WC_{FC} = CV \times ER \times FC$, where

WC_{FC} is the number of wrongful convictions from false confessions,
CV is the number of convictions in the system,
ER is the error rate in the system, and
FC is the proportion of the errors attributable to false confessions.

The difficult part, of course, is in deriving empirically-based estimates of the error rate (*ER*) and the proportion due to false confessions (*FC*). Fortunately, the false confessions literature contains a reference that can serve as a starting point for this enterprise. Leo and Ofshe have cited an article by Professor Ronald Huff and his colleagues[73] placing the error rate (*ER*) at about 0.5% (one out of 200)[74] and estimating the proportion due to coerced confessions (*FC*) at about 8.4%.[75] As Leo and Ofshe observe,[76] Huff et al.'s article suggests that the annual number of wrongful convictions from false confessions for FBI index crimes (using 1,993,000 convictions as the number of index crime convictions) can be derived as follows:

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[73] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 240 n.7 (citing C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 523 (1986)); *see also* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996); Arye Rattner, Convicting the Innocent: When Justice Goes Wrong (1983) (Ph.D. dissertation, Ohio State Univ.) (on file with Univ. Microfilms Int'l).

[74] HUFF ET AL., *supra* note 73, at 62 (placing error rate at 0.5%).

[75] *Id.* at 64 tbl.3.3.

[76] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 240 n.7.

1,993,000 x 0.5% x 8.4% = 840.

While Ofshe and Leo caution that this estimate of 840 wrongful convictions annually is not empirically well-founded,[77] they report that it is at the high end of the "spectrum of published opinion."[78] This calculation might, therefore, be roughly suggestive of a possible upper end estimate of wrongful convictions.[79] Before it can serve that purpose, however, several corrections must be made.

1. The Number of Convictions

The first problem with the calculation is a mistake in determining what should be the simplest part of the equation: the number of convictions. Huff et al. home-brews their own figure by taking 2,800,000 *arrests* for FBI index crimes[80] in 1990 and multiplying by an assumed nationwide 70% conviction rate, to generate about 2,000,000 convictions per year for FBI index crimes.[81] However, the basis for their 70% conviction rate appears to be a Department of Justice table presenting data for adult cases *accepted for prosecution* and filed in court.[82] As any one who has seen the famous "criminal justice funnel"[83] knows, there is considerable slippage in the system between the arrest of a

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[77] *Id.*

[78] *Id.*

[79] Professor Leo has also cited the Huff et al. article to bolster his argument in other contexts. *See* Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, CRIM. JUST. ETHICS, Winter/Spring 1992, at 10.

[80] Index crimes are non-negligent homicide, forcible rape, robbery, aggravated assault, burglary, vehicle theft, and larceny.

[81] HUFF ET AL., *supra* note 73, at 62.

[82] Huff et al.'s book cites a table detailing adjudication outcomes. *See id.* (citing U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, 497 (1995) [hereinafter BJS SOURCEBOOK 1994]). This table deals with "defendants who had felony cases *filed with the court*," BJS SOURCEBOOK 1994, *supra*, at 660 (emphasis added) (describing methodology), thereby missing all pre-filing police and prosecutor screening. In an earlier article, Huff and his colleagues claimed only a 50% conviction rate. *See* HUFF ET AL., *supra* note 73, at 523 (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE (1983) [hereinafter DOJ REPORT]). But this publication does not list conviction rates "from about one-half to about three-fourths of all those arrested," *id.*, but rather a lower range of from 39% to 57%. *See* DOJ REPORT, *supra*, at 45 (reporting percent of arrests leading to conviction). Moreover, this table appears to represent only adult arrests. *See infra* note 84 (discussing this issue).

[83] *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: SCIENCE AND TECHNOLOGY 61 (1968).

suspect and filing of formal charges. Thus, a 70% conviction rate of cases filed in court is the wrong figure to apply to arrests made by the police. Instead, the proper rate is about 33%.[84] Moreover, Huff and his colleagues claim their calculation produces an estimate of the number of wrongful convictions for *felony* crime index offenses.[85] In fact, more than half of their wrongful convictions involve misdemeanors.[86] For present purposes, however, I will not follow Huff et al.'s suggested course of action (focusing on crime index felonies) but will include *both* felony and misdemeanor offenses by simply tracking the FBI's

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[84] *See* Brian Forst, *Prosecution and Sentencing, in* CRIME 363, 364 (James Q. Wilson & Joan Petersilia eds., 1995) (reporting that of 100 felony arrests, 33 typically result in conviction); *see also* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 21 (7th ed. 1990) (estimating that for 1500 felony arrests in a typical jurisdiction, about 550 (36%) will lead to a conviction).

A big difference between these figures and Huff et al.'s 70% figure is the treatment of juvenile offenders. Twenty-eight percent of those arrested for FBI index crimes in 1990 were under the age of 18. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1990, 174 (1991). While some tiny percentage of these offenders were prosecuted as adults, the great bulk of these arrestees were presumably handled by the juvenile court system. For purposes of estimating the magnitude of the problem of wrongful convictions, juvenile offenders probably should be excluded, both because the juvenile system does not lead to criminal "convictions," *see generally* LESLIE J. HARRIS ET AL., FAMILY LAW 1343-50 (1996), and because the consequences of a wrongful juvenile adjudication are less serious because proceedings are often confidential, *see generally* W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 15-16 (1972). *Cf.* HUFF ET AL., *supra* note 73 (not discussing juvenile prosecutions in discussion of wrongful convictions). After juvenile arrests have been excluded, the conviction rate for the remaining adult arrests is in the neighborhood of 50%. *See* Forst, *supra*, at 364 (reporting that of 100 felony arrests, 35 will be referred to the juvenile system; 33 of the remaining 65 result in conviction); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE PROSECUTION OF FELONY ARRESTS, 1988, 2 (1992) [hereinafter BUREAU OF JUSTICE STATISTICS]. Using this data on felony arrests likely overstates the conviction rate among arrests for FBI index crimes, many of which will be for misdemeanors such as larceny, *see infra* note 86 and accompanying text, that will be taken less seriously by prosecutors, victims, witnesses, and the court.

[85] *See* HUFF ET AL., *supra* note 73, at 10 (promising to produce estimate of wrongful convictions "among felony cases"); *see also id.* at 53 (discussing felony imprisonments); *id.* at 58 (discussing "average rate of felonies"); *id.* at 61-62 (using felony conviction rate for felony arrests).

[86] *See* KAMISAR ET AL., *supra* note 84, at 21; DOJ REPORT, *supra* note 82, at 6; *see also* CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 257-61 (1978) (calculating misdemeanor convictions with 1960s data). It must be remembered that about 60% of the crime index is comprised of "larceny-theft" offenses, *see* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1995, 58 tbl.1 (1996) [hereinafter UNIFORM CRIME REPORTS 1995], which includes crimes such as "thefts of bicycles or automobile accessories, shoplifting, [and] pocket-picking." *Id.* at 373.

crime index. The crime index is a widely used figure that also offers the prospect of comparability with other criminal justice research.[87]

Correcting, then, for Huff et al.'s mistake on the number of convictions shrinks the estimate of wrongful convictions from false confessions to felonies in half,[88] producing a total of about 394 wrongful convictions from false confessions each year,[89] an error rate of 0.04% (about 1 in 2400 convictions).

2. *The Error Rate in Convictions*

So far, there should be relatively little controversy about my calculus. This figure is apparently the highest published estimate corrected for an extrapolation mistake. Note, moreover, that this calculation cannot be criticized as failing to recognize that many false confessions are never formally reported or officially acknowledged. The Huff et al. assessment came from knowledgeable persons who were asked to assess the frequency of wrongful convictions—both reported and unreported.[90] To be sure, publicized cases of wrongful convictions may be the "tip of the iceberg."[91] But the Huff et al. estimate is of the size of the entire iceberg, that is, of the entire problem of wrongful convictions.

Huff et al.'s estimated rate of wrongful convictions (0.5%, or 1 in 200) appears to be substantially inflated.[92] It rests on a survey of judges, prosecutors, and others familiar with the Ohio and American criminal justice systems, in which most of the respondents checked a box indicating that the number of wrongful convictions in the United States was "less than one

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[87] *See, e.g.*, Cassell, *supra* note 57, at 440.

[88] 2.84 million arrests for FBI index crimes x .33 conviction rate = 939,000 convictions for FBI index crimes.

[89] 939,000 convictions x 0.5% error rate x 8.4% due to false confessions = 394.

[90] *See* HUFF ET AL., *supra* note 73, at 54-55.

[91] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 191.

[92] Others have ventured the qualitative suggestion that the error rate in the system is low. *See, e.g.*, LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 4-5 (1977) (concluding that "wrong man" convictions are "very rare and almost always attributable to a nonsystemic fault peculiar to the case"); John Kaplan, *Foreword* to ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY viii (1979) (concluding that "the number of cases where someone already convicted is later shown to be innocent is far less than one would expect"); Gross, *Eyewitness Identification*, *supra* note 25, at 396-98 (suggesting that wrongful convictions from eyewitness misidentification may be fewer than is generally thought).

percent."[93] From this data, Huff and his colleagues argue that "most responses [were] hovering near the 1% mark" and they simply choose the "midpoint" between 0% and 1% and used it to estimate the number of wrongful convictions.[94] It is hard to understand how the answers were "hovering" near any particular point. The respondents were given a survey instrument with the categories of "never," "less than 1%," "1-5%," etc.[95] There was no "hovering" to do: the responses were either never, less than 1%, or 1 to 5%, and most fell in the less than 1% category. Of course, the range covered by the response "less than 1%" extends as low as 0.0001% (1-in-a-million) and even lower. There is little reason for assuming that the respondents were estimating the value to be 0.5% rather than, say, 0.0001%. Indeed, the only specific estimate of a figure within the less than 1% range can be derived from a judge in Ohio, who responded in detail that, based on his familiarity with all of the state's major cities, he had the "'strong suspicion that each year in Ohio, at least one or two dozen persons are convicted of crimes of which they are innocent.'"[96] This was a quotation that Huff and his colleagues chose to feature from among all the responses, apparently to show the seriousness of the problem of wrongful convictions from a person with extensive experience in the system.[97] Accordingly, this is a more reasonable estimate of the problem[98]—although it is an estimate not of proven wrongful convictions but rather of "strongly suspected" convictions, and it is an estimate that could itself be substantially too high.[99] The judge, moreover, may have been providing an estimate of wrongful convictions for all crimes, not just index crimes. Index crimes constitute about 20% of the non-traffic arrests processed

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[93] *See* HUFF ET AL., *supra* note 73, at 61.

[94] *See id.*

[95] Rattner, *supra* note 73, at 204.

[96] HUFF ET AL., *supra* note 73, at 522.

[97] *Cf.* Bedau & Radelet, *supra* note 25, at 23 n.12 (criticizing the Huff et al. article because "[t]he authors provide data consisting only of estimates made by others, without giving the basis for these estimates or indicating any way of testing their accuracy").

[98] In a brief footnote commenting on this possibility, Professor White seems to incorrectly suggest that using the experienced *judge's* assessment would be substituting my *own* personal assumptions. White, *supra* note 3, at 132 n.190 (asserting that "Cassell substituted his own assumptions for those of [Huff et al.]") (commenting on Cassell, *supra* note 57, at 481 n.550).

[99] *See infra* notes 117-28 and accompanying text.

by the system.[100] As a rough calculation, then, one can take the judge's estimate of one "dozen" (12) wrongful convictions (rather than two dozen) as an estimate of wrongful convictions for index offenses each year in Ohio. Given the number of index crimes in Ohio, this produces an error rate of 0.035% (1 in 2800),[101] a rate more than ten times lower than the one Huff et al. use. To generalize across the United States, one can assume that Ohio's experience is similar to that in other states[102] to conclude that, on the judge's estimate, approximately 330 wrongful convictions occur around the country each year.[103] Substituting this error rate in our equation produces the result that about twenty-eight wrongful convictions from false confessions occur each year[104]—an error rate of wrongful convictions from false confessions of roughly 0.006% (about 1 in 30,000 convictions).

3. Police Induced vs. Suspect Induced False Confessions

The quantification thus far also assumes that all false confessions are produced by aggressive police questioning of the type featured by Leo and Ofshe. This simplifying assumption is plainly inaccurate. Many such confessions are induced not by police tactics but by suspects' choices. Such confessions have been described elsewhere by Ofshe and Leo as "voluntary/unreliable"[105] and by Dr. Gisli Gudjonsson as simply "voluntary" but false.[106] For example, one spouse might decide to "take the rap" for the other.[107]

The policy recommendations for restricting police methods are misguided if the main problem is voluntary false confessions.[108] Perhaps for this reason, the Leo and Ofshe catalogue

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[100] *See* UNIFORM CRIME REPORTS 1995, *supra* note 86, at 208 tbl.29.

[101] About 3.6% of all index crimes are committed in Ohio. *See id.* at 60-62 tbl.4. This produces an error rate of 12 ÷ (939,000 convictions x 3.6% in Ohio) = 0.035%.

[102] *See* HUFF ET AL., *supra* note 73, at 58 (explaining why Ohio is a representative state for these purposes).

[103] 939,000 convictions x 0.035% error rate = 330.

[104] 939,000 convictions x 0.035% error rate x 8.4% due to false confessions = 28.

[105] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 206.

[106] GUDJONSSON, *supra* note 12, at 226.

[107] *See, e.g.*, Bedau & Radelet, *supra* note 25, at 150-51 (describing the case of George Parker, who confessed because he was in love with the woman who actually committed the crime).

[108] *Cf.* BREYER, *supra* note 39, at 19-29 (discussing problems of selecting the wrong agenda in risk regulation).

apparently excludes such confessions.[109] Similarly, in addressing the concern about unjust incarceration, there is a qualitative difference between someone jailed because of a police error and someone jailed because he is covering for his girlfriend.

To derive a figure for the more policy-relevant number of "police-induced" false confessions, we need to exclude "suspect-induced" false confessions. There are good reasons for believing that, among the narrow universe of wrongful convictions stemming from false confessions, voluntary false confessions will constitute a significant proportion. Common sense suggests that suspects will more often "confess" for understandable reasons (such as protecting a loved one) than because police have somehow convinced them they actually committed a crime. This hypothesis is supported by the only empirical study of this issue: Gudjonsson and Sigurdsson found that, of false confessions among Icelandic prisoners, 48% stemmed from "protecting a significant other," such as a peer, a friend, or a relative.[110] For a ballpark estimate, I will assume that the 48% figure in Iceland applies in the United States, an assumption that probably overstates the proportion of police-induced false confessions in this country because of the Icelandic "inquisitorial legal system."[111] We then need to make one other slight adjustment. The 48% figure is drawn from all false confessions, not false confessions that led to a wrongful conviction. It seems clear that police-induced false confessions are less likely to lead to a wrongful conviction; suspects will usually retract a police-induced false confession[112] but will rarely withdraw a "voluntary" false confession designed to protect another person. Data in the study suggests not only that conclusion, but also that, among false confessions leading to wrongful conviction, the proportion of police-induced false confessions is about 38%.[113]

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[109] Leo & Ofshe, *supra* note 2, at 433 (describing collection as involving "police-induced false confession"); *accord* White, *supra* note 3, at 109 n.28 ("Since voluntary false confessions are not induced by police interrogation, they are not considered in this Article."); *see also* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 210 (noting that "[l]ittle is known about the frequency or risks of a miscarriage of justice attributable to voluntary unreliable confessions").

[110] Gudjonsson & Sigurdsson, *supra* note 62, at 23.

[111] *See supra* note 62 and accompanying text.

[112] *See supra* note 48 and accompanying text.

[113] The study does not report exact data, but notes that of 27 false confessors, 6 later retracted their confession, leaving 21 non-retractors. Three of the 6 retractors

Applying the 38% figure to the equation produces the result that about ten wrongful convictions from false confessions occur each year,[114] an error rate of roughly 0.001%—about 1 in 93,000 convictions. For comparison, lightning kills about fifty Americans each year.[115]

4. Cautions About the Estimation

The estimate reported here relies on an extensive series of extrapolations and assumptions that certainly should not be viewed as generating a hard number. Naturally, more and better data on each of the components of the calculation are desirable. For example, relying on the Ohio judge's estimate[116] requires placing a great deal of weight on the views of one person. Accordingly, this section makes no claim to have "proven" that ten such convictions occur every year. To the contrary, I specifically disclaim any such precision and wish to encourage further research designed to quantify the dimensions of the problem and responses to it. But for the purposes of this essay, it is perhaps enough to suggest that a reasonable starting point may be to estimate that the number of wrongful convictions from false confessions each year in this country might fall some where in the range of 10 (per the calculations above) to 394 (per Huff et al.'s higher estimate). These figures should provide some rough quantification of the magnitude of the problem, subject to the following qualifications.

Even though I have revised the estimated error rate downward, it still could well be too high. The estimate ultimately relies on subjective estimates of wrongful conviction, and the established human tendency is to overestimate the likelihood of

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were convicted while 18 of the 21 non-retractors were convicted. We can probably safely assume that those who confessed voluntarily to protect another person were not among the retractors. *See* Gujonsson & Sigurdsson, *supra* note 62, at 24 (noting that "the reason the 21 subjects gave for not having retracted the false confession was that they saw no point in it as their intention had been to protect a person who was important to them, and this was generally still true when the case came to court . . ."). This suggests that all of those confessing to protect another person (13 in the study, *id.* at 23 tbl.2) were among the 21 convicted, producing a ratio of 13/21 (62%) suspect-induced false convictions leading to wrongful convictions, and leaving 38% police-induced false confessions which led to wrongful convictions.

[114] 939,000 x 0.035% error rate x 8.4% due to false confessions x 38% police-induced = 10.

[115] 1 VITAL STATISTICS, *supra* note 38, § 5, at 34 tbl.5-5.

[116] *See supra* text accompanying note 96 and accompanying text.

extremely low probability events.[117] Moreover, the estimate of the error rate may include not only "factually" innocent persons (that is, those who did not in fact commit the criminal act with which they were charged) but also "legally" innocent persons (that is, those who were not proven guilty beyond a reasonable doubt of the crimes against them).[118] The respondents in the Huff et al. survey, for example, may not have perfectly distinguished between the two.[119] Juries may also have become less likely to convict in the last decade or so.[120] If such trends are underway, the problem of wrongful convictions from all causes should be diminishing over time.

One suggestion the error rate is too high comes from an international comparison. The British Section of the International Commission of Jurists reported that in the United Kingdom "we doubt whether there are less than 15 cases of wrongful imprisonment a year after trial by jury."[121] Taking the fifteen cases a year and recognizing that the United Kingdom has about one-third the number of crimes as the United States,[122] the American rate would be about forty-five a year—if miscarriages occur in this country at the same rate as estimated there.[123] It is possible, of course, that miscarriages occur more

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[117] BREYER, *supra* note 39, at 39 ("People react more strongly, and give greater importance, to events that stand out from the background."); H. AARON COHL, ARE WE SCARING OURSELVES TO DEATH? HOW PESSIMISM, PARANOIA, AND A MISGUIDED MEDIA ARE LEADING US TOWARD DISASTER 25 (1997) ("We tend to overestimate the dangers of rare events"); LARRY LAUDAN, THE BOOK OF RISKS: FASCINATING FACTS ABOUT THE CHANCES WE TAKE EVERY DAY 14 (1994) (noting tendency "to exaggerate the size of rare or unusual [risks]").

[118] *See* Radelet et al., *supra* note 25, at 910.

[119] At one point, the actual Huff et al. questionnaire asks about "wrongful felony conviction, followed by exoneration beyond doubt," *see* Rattner, *supra* note 73, at 203, but on the page generating the critical error rate estimates, asks only about "wrongful felony conviction," *see id.* at 204, without explaining what qualified. *See generally* Radelet et al., *supra* note 25, at 909-10 (concluding that Huff et al.'s "definition of 'convicted innocents' is weak, creating questions about the criteria used to include a case in their database").

[120] *See* Cassell, *supra* note 57, at 469-70; Skolnick & Leo, *supra* note 79, at 9.

[121] BRITISH SECTION OF THE INT'L COMM'N OF JURISTS, MISCARRIAGES OF JUSTICE 5 (1989). While the Section cautioned that "[t]he figure could be much higher," *id.*, it appeared to base its estimate on cases in which it had "strong doubts" about the jury's verdict, *id.*, a somewhat open-ended standard.

[122] *See* HOME OFFICE, CRIMINAL STATISTICS: ENGLAND AND WALES: 1995, at 22 tbl.1.1 (1996).

[123] This estimate of 45 wrongful convictions per year is well below the figure which would be produced by the extrapolation procedure discussed in the previous section.

frequently in this country. If so, this provides some support for the argument that extensive American "proceduralism" may be one of the causes.[124]

Another very rough methodology producing an even smaller error rate is to consider the number of prisoners who leave prison because of a commutation as a measure of the proven wrongful convictions.[125] In 1993, 264 prisoners left prison because of a commutation.[126] It appears that a number of these commutations were for prison overcrowding reasons, since 83% came from just three states (Texas, Georgia, Oklahoma).[127] Assuming these commutations are irrelevant for present purposes, we can simply look to commutations in the other states to find twenty-six commutations a year.[128] This figure might, of course, understate the error rate, since it would only capture errors officially acknowledged and, in addition, officially acknowledged through commutation to a person in prison. This figure might overstate the error rate because commutations are included for all crimes (not just index crimes) and because they can be granted for various reasons having nothing to do with innocence (prison overcrowding, poor health, rehabilitation, mercy, etc.). For all these reasons, the annual estimate of wrongful convictions here could well be too high.

Before moving on, it is important to emphasize one further misimpression that the estimate of the range of wrongful convictions might create. When discussing cases, the false confession literature invariably features false confessions to murders and other serious violent crimes.[129] The real world false confes-

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The extrapolation generates an annual estimate of 328 wrongful convictions per year (939,000 convictions x 0.035% error rate).

[124] *See infra* notes 229-58 and accompanying text (discussing proceduralism argument).

[125] *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1334 n.54 (1997) (raising this possibility).

[126] *See* BJS SOURCEBOOK 1994, *supra* note 84, at 573 tbl.6.53.

[127] *See id.*; *see also* Givelber, *supra* note 125, at 1334 n.54 (suggesting such commutations are for overcrowding reasons).

[128] It is interesting that in Britain an average of seven innocent persons a year receive compensation for wrongful imprisonment. BRITISH SECTION OF THE INT'L COMM'N OF JURISTS, *supra* note 121, at 5 (cautioning that this must be the "absolute minimum" number of wrongful convictions).

[129] *See, e.g.*, White, *supra* note 3, at 105, 121-25, 128-31 (discussing various murder cases); Ofshe & Leo, *Social Psychology*, *supra* note 12, at 226-38 (same).

sion problem, however, could well be concentrated among less heinous offenses. To begin with, the great bulk of FBI index crimes are property crimes; almost two-thirds of the offenses fall in the single category of larceny-theft.[130] At first blush, then, the bulk of wrongful convictions should be for property offenses. Indeed, it is possible that wrongful convictions are more concentrated in property offenses than the normal case distributions would suggest because, other things being equal, it should be easier for the police to persuade someone to confess falsely to a larceny than to confess falsely to a murder.[131] The Gudjonsson and Sigurdsson study provides strong support for this hypothesis. The study found that 85% of all false confessions were for property offenses or traffic offenses, 7% were for drug offenses and 8% were for sexual offenses and violent crimes.[132] Moreover, jurors may be less likely to convict an innocent person in more serious cases, simply because they demand more evidence to support convictions for such charges.[133] Finally, given that many property offenses (and a surprisingly large proportion of violent offenses) are not punished with imprisonment,[134] it is also important to emphasize that the estimate is of wrongful *convictions*, not wrongful *incarcerations*. All these cautions, among others, should be borne in mind in assessing the

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[130] *See* UNIFORM CRIME REPORTS 1995, *supra* note 86, at 58 tbl.1.

[131] However, it is possible that police try harder to get a confession in more serious cases. *See infra* note 133. *But cf.* Cassell & Hayman, *supra* note 36, at 858 tbl.2 (reporting reasons for police failure to interrogate; minor nature of the offense not among those listed).

[132] Gudjonsson & Sigurdsson, *supra* note 62, at 23 tbl.1.

[133] *Cf.* Gross, *Capital Cases*, *supra* note 25, at 496 (noting the "widely" held belief that "some jurors are more reluctant to convict a defendant who might be executed"). A countervailing argument is the possibility that police try harder to get confessions in more serious cases, producing more false confessions in such cases. *See* White, *supra* note 3, at 133-34 (suggesting that police try harder to get confessions in high profile cases without a suspect); Gross, *Capital Cases*, *supra* note 25, at 485-86 (suggesting false confessions are more frequent in homicide cases). Supporting this argument is the fact that virtually all of the Leo/Ofshe catalogue involves very serious offenses, typically murder. *See* Leo & Ofshe, *supra* note 2. But this catalogue rests entirely on publicly reported false confessions cases, which are almost certainly skewed towards more sensational cases. The press, for instance, is more likely to discover and report false confessions in cases involving serious crimes. The only methodology that avoids this problem is to draw a random sample, such as was done by Gudjunsson and Sigurdsson.

[134] *See* BUREAU OF JUSTICE STATISTICS, *supra* note 84, at 499 tbl.5.48 (70% of felons are sentenced to incarceration in state court, including 81% of violent felons and 66% of property felons).

very tentative estimate of the range of wrongful convictions from police-induced false confessions.

II. THE RISK TO THE INNOCENT FROM LOST CONFESSIONS

So far, interrogating police officers have been the villains, not the heroes of our story, causing somewhere between 10 and 394 wrongful convictions from false confessions each year. As noted at the outset, however, police interrogation cannot only induce a false confession that convicts the innocent, it can also produce truthful confessions that eliminate the prospect that innocent persons will be charged with crimes or that clear innocent persons who have been unjustly convicted. Truthful confessions also frequently lead to the conviction of guilty criminals, which helps protect the innocent from criminal deprivations. These are important points in considering the policy proposals often advanced for dealing with the false confession problem, which frequently involve restrictions on police interrogation. This Part considers the relative risk to the innocent from false confessions as opposed to lost confessions. It first demonstrates that false confessions are a relatively infrequent cause of wrongful convictions. Then, using this insight, it turns to the policy proposals that have been advanced to restrict police interrogation to prevent wrongful convictions.

A. WRONGFUL CONVICTIONS FROM FALSE CONFESSIONS VS. EXONERATIONS FROM TRUE CONFESSIONS

This essay so far has estimated that, of wrongful convictions of innocent persons, 8.4% stemmed from false confessions. That figure came from a compilation of miscarriages of justice assembled by Huff et al. in which 8.4% of the cases were from "coerced confessions."[135] If the figure is even roughly accurate, it raises a point of some salience for policy reforms aimed at preventing false confessions: more than 90% of wrongful convictions stem not from false confessions, but from other causes. By blocking truthful confessions from the perpetrators of crimes that could prevent innocent persons from being charged or exonerate them after charging, restrictions on interrogations

[135] *See* HUFF ET AL., *supra* note 73, at 64 tbl.3.3. It appears that the category for "coerced confession" includes all manner of false confessions, simply because no other category applies. Huff et al. treat the category broadly. *See id.* at 110-41. Eyewitness misidentification was the main cause of wrongful convictions. *Id.* at 66.

might harm the innocent more than help them. As an illustration, recall that (based on the 8.4% figure) 10 to 394 persons are wrongfully convicted each year from false confessions. By the same methodology, 190 to 4600 persons are wrongfully convicted annually for reasons other than false confessions[136]—persons who would undeniably prefer a regime that gave the police more freedom to obtain confessions. Therefore, it is important to examine the 8.4% figure in some detail to determine whether it really is an accurate measure of the proportion of miscarriages attributable to false confessions.

The 8.4% figure is, if anything, probably inflated for purposes of deriving a reasonable, upper end estimate of the *current* proportion of wrongful convictions due to false confessions. The Huff et al. database rests in large measure on cases from the earliest part of this century.[137] The current relevance of such dated data is questionable because police interrogation in the earlier part of this century was, to put it charitably, considerably less civilized than it is today.[138] As the result of twin restraining developments—judicial oversight and police professionalization—coercive questioning methods began to decline in the 1930s and 1940s[139] and by the 1950s their use had "diminished considerably."[140] When the Supreme Court began issuing more detailed rules for police interrogation in the 1960s, it was dealing with a problem "that was already fading into the past."[141] Chief Justice Warren's majority opinion in *Miranda*, while citing the Wickersham Report and other historical records of police abuses, acknowledged that they are "undoubtedly the exception now" and that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."[142] At the time

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[136] These figures are derived by taking 91.6% of wrongfully convicted persons who need a confession to exonerate them.

[137] HUFF ET AL., *supra* note 73, at 62-63 (reporting that of the 205 compiled cases, 60 occurred before 1964, 5 before 1962, 29 before 1959, 13 before 1952, and 54 before 1932).

[138] *See generally* Cassell, *supra* note 57, at 473-75.

[139] Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 38 (1992).

[140] *Id.* at 51; *see also* Cassell, *supra* note 57, at 473-78.

[141] FRED P. GRAHAM, THE DUE PROCESS REVOLUTION 22 (1970); *see* Fred E. Inbau, Miranda v. Arizona—*Is it Worth the Cost?*, PROSECUTOR, Spring 1988, at 31, 36.

[142] Miranda v. Arizona, 384 U.S. 436, 448, 449 (1966); *see also id.* at 499 (Clark, J., dissenting) ("[t]he examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports").

of the *Miranda* decision, the President's Commission on Law Enforcement and the Administration of Justice reported that "today the third degree is almost nonexistent" and referred to "its virtual abandonment by the police."[143] Thus, a collection of wrongful convictions resting on old data will substantially over-represent the problem of coerced confessions, as it will surely include products of abandoned third degree tactics.

Even if the collection was from the last several decades, it is also quite possible that the problem of false confessions would be over-represented. Recently, courts have become more willing to allow expert testimony on false confessions (not infrequently from Professor Ofshe),[144] which means that judges and juries can more often identify such cases. Also, the courts exhibit greater understanding about mental illness and provide psychiatric assistance to defendants more readily.[145] Because mental problems frequently contribute to false confessions,[146] general advances in psychiatry also promise to augment the ability to identify psychologically-induced false confessions. Along with increased understanding of false confessions has come improved ability to expose and prove such cases in court. The most promising means of identifying false confessions is recording police interrogations, a safeguard some law enforcement agencies now employ.[147]

All these trends suggest that, within the very small set of wrongful conviction cases, the subset attributable to false confessions should be shrinking over time, and Leo and Ofshe con-

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[143] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967); *see also* JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 48 (1968); Leo, *supra* note 139, at 52.

[144] *See, e.g.*, United States v. Hall, 93 F.3d 1337, 1341-44 (7th Cir. 1996) (reversing district court's exclusion of expert testimony by Professor Ofshe on the susceptibility of the defendant to false confessions) (conviction obtained on retrial); Amy Burch, *Expert Testimony Upsetting to All Lawyers*, GANNETT NEWS SERVICE, Aug. 29, 1997, *available in* 1997 WL 8835608 (noting that jury convicted even after hearing from Ofshe); 11 Crim. Prac. Man. (BNA) 145 (Apr. 4, 1997) (discussing two Florida trial court decisions suppressing confessions after hearing expert testimony from Ofshe); 11 Crim. Prac. Man. (BNA) 7 (Jan. 1, 1997) (discussing Florida trial court's suppression decision after hearing from Ofshe); 10 Crim. Prac. Man. (BNA) 503 (Dec. 18, 1996) (same).

[145] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (capital defendant entitled to access to a psychiatrist).

[146] *See* Cassell, *supra* note 5.

[147] *See infra* notes 294-306 and accompanying text.

cede as much.[148] Certainly the subset would be much smaller in a compilation from more recent years than from a compilation (like Huff et al.'s) drawn from the 1960s, 1950s, and even the 1930s. This hypothesis is subject to empirical testing. Edward Connors and his colleagues recently published a study of "DNA exonerations," that is, cases in which emerging DNA technology was used to establish the innocence[149] of persons convicted at trial.[150] The study rests on a collection of twenty-eight wrongful convictions from 1979 to 1991.[151] The convictions implicated some form of sexual misconduct, ranging from sexual assault to murder.[152] This is not an unusual feature of wrongful conviction cases, because Huff et al. report that, in their database, more than a third of the wrongful convictions involved forcible rape.[153]

The study by Connors and his colleagues provides a good opportunity to examine the kinds of factors leading to wrongful convictions. As Peter Neufeld and Barry Scheck, Directors of the Innocence Project at Cardozo Law School, explain, these cases "create an opportunity for groundbreaking criminal justice research: on such subjects as 'police interrogation techniques.'"[154] Neufeld and Scheck also suggest that, at first blush, this collection of cases appears to be generally representative.[155] There is, however, some question about whether the study includes "innocent" persons who may have in fact been guilty of involvement in the crimes charged against them.[156]

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[148] Leo & Ofshe, *supra* note 2, at 483 n.447 (concluding that "in more recent cases, a [false confessor] has a better chance" of escaping wrongful conviction because of "advances in scientific technology, the increasing use of audio and video recording during interrogation, and the increasing ability of defense attorneys to explain false confessions at trial").

[149] Or, at least, DNA technology was used to show the failure of the prosecution to establish guilt beyond a reasonable doubt. *See infra* note 156 and accompanying text.

[150] EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 2 (1996).

[151] *Id.* at 12.

[152] *Id.*

[153] HUFF ET AL., *supra* note 73, at 63.

[154] CONNORS ET AL., *supra* note 150, at xxx-xxxi (emphasis added).

[155] *Id.* at xxxi.

[156] The study does not appear to give its criteria for determining the "innocence" of the suspects listed in the report, but claims that the "DNA test results obtained subsequent to trial proved that . . . the convicted persons could not have committed the crimes for which they were incarcerated." *Id.* at 2. This claim is hard to accept. In some cases, DNA testing—if combined with other evidence—may well establish that

The Connors et al. study reveals that the false confessions featured in the Leo-Ofshe and White articles are unusual, even in the narrowly confined universe of wrongful conviction cases. Of the twenty-eight miscarriages of justice, only two involve the kind of false confession discussed in the literature: Daniel Vasquez and Steven Linscott.[157] In one case, Vasquez, a "border-

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another person committed the crime. But in other cases, it may establish only that the victim had intercourse with another person aside from the defendant—perhaps an accomplice or even an otherwise undisclosed lover.

An illustration of this problem can be seen in the case of Bruce Nelson, whom the report describes as having been "cleared of all charges" on the basis of DNA testing. *Id.* at 67. In 1982, Nelson was convicted of participating in the rape and murder of Corrine Donovan with an accomplice, Terence Moore. In 1990, the Third Circuit reversed Nelson's conviction on technical *Miranda* grounds. *See* Nelson v. Fulcomer, 911 F.2d 928 (3d Cir. 1990) (suppressing Nelson's question to Moore "How much did you tell them?" on grounds that Nelson had invoked his *Miranda* rights); *see also infra* note 157 and accompanying text (discussing this case). The prosecution then resubmitted some of its physical evidence for DNA testing. The DNA testing did not match or exclude Nelson as a suspect. Telephone interview with Darrell Dugan, Allegheny County Asst. D.A. (Oct. 2, 1997). Thus, the physical evidence apparently was left in essentially the same position—no better, no worse—than it had been at the earlier trial. *See Nelson*, 911 F.2d at 930 (reporting that testimony at first trial was that the physical evidence matched Moore, but not Nelson). The prosecution accordingly proceeded to a retrial, during which it was forced to drop the charges when evidence surfaced that Moore had tried to falsify a letter implicating Nelson, rendering testimony from the prosecution's main witness insufficiently believable to prove guilt beyond a reasonable doubt. *See* AP, *Man Freed After Nine Years as D.A. Drops Murder, Rape Charges*, Aug. 29, 1991, *available in* 1991 WL 6198452 (charges dropped because one defendant's witness, Moore, wrote a fraudulent letter and signed defendant Nelson's name to it).

The failure to convict Nelson on retrial does not, of course, establish his factual "innocence." Moreover, the prosecution never conceded Nelson was innocent and to the contrary, specifically said later, "[t]he fact that we did not [convict] again does not mean that he is innocent." Jan Ackerman, *Man Freed in Killing Wins Custody of Two*, PITT. POST-GAZETTE, Apr. 20, 1994, at B1. Released from prison in 1991, by 1992 Nelson had committed a string of armed bank robberies. Mike Bucsko, *Six Holdups Linked to Suspect*, PITT. POST-GAZETTE, Sept. 16, 1994, at B1. He was arrested in 1994. *Id.* He was convicted in 1995 and sentenced to 13 years in a federal prison. *Robbery Plotter Jailed*, PITT. POST-GAZETTE, July 28, 1995, at B3.

[157] In five other cases, there were "statements" of one sort or another, but these do not appear to implicate psychologically-induced false confessions. In one of the five cases, while the suspect gave a false name and other misinformation to the police at the time of his arrest, the main evidence against him was blood typing and eyewitness identification. CONNORS ET AL., *supra* note 150, at 50.

In another case, the suspect mentioned a "bloody rock" during a police interview, a statement that police viewed as incriminating. The defense noted that the police had such a rock on the table next to the suspect when he was interrogated. *Id.* at 36. *See* Bloodsworth v. State, 512 A.2d 1056, 1058 (Md. 1986); Bloodsworth v. State, 543 A.2d 382, 386 (Md. Ct. Spec. App. 1988). Moreover, even if the statement is viewed as somehow raising "false confession" issues, it was apparently repeated later to a non-police witness, *Bloodsworth*, 512 A.2d at 1059, and was not the critical evidence against

line retarded" suspect, gave a confession.[158] DNA testing later proved that another man had committed the crime. Linscott involved a so-called "dream confession," in which, in response to a general police request for assistance in solving a sexual assault/murder, Linscott called on his own initiative to report his "dream" about the crime. Linscott wrote down a version of the dream before ever being interviewed by the police and later recounted the dream to the police during a recorded interview. The "dream" was the primary evidence against him.[159] DNA testing later established that Linscott could not have been the source of the semen found at the scene.[160] The case does not seem to present the problem of police-induced wrongful confession because the dream confession occurred before any police involvement; but some might view the matter differently because Linscott's subsequent, parallel confessions might have been shaped by the police. Accordingly, based on the NIJ database, depending on how one characterizes the dream confession, false confessions are responsible for somewhere between one and two out of twenty-eight wrongful convictions, a range of 3.6 and 7.1%—somewhat below the 8.4% estimated earlier.

A second source for exploring the proportion of wrongful convictions due to false confessions over time is the Bedau and Radelet collection of alleged miscarriages of justice in "potentially" capital cases. Although the study must be used with extreme caution because of its questionable characterization of

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the suspect. *Id.* at 1057-59; *Bloodsworth*, 543 A.2d at 387-88 (discussing eyewitnesses placing Bloodsworth with the little girl shortly before her death).

In the third and fourth cases, regarding very complicated proceedings against Hernandez and Cruz, the suspects generally gave incriminating statements that they knew who had killed a little girl, but claimed at trial that the statements "were lies invented to obtain the reward money," People v. Hernandez, 521 N.E.2d 25, 37 (Ill. 1988), or were "fabricated in [an] attempt to collect a piece of the sizeable reward offered for the conviction of the killer." People v. Cruz, 521 N.E.2d 18, 18, (Ill. 1988).

The fifth case, *Nelson*, involved a police-arranged meeting between two suspects, during which Nelson, a defendant, said to Moore, a witness, "How much did you tell them?" *See Nelson*, 911 F.2d at 930. This damaging admission does not appear to be the kind of "false confession" discussed in the literature and, in any event, it may well have been a true confession. *See supra* note 156 and accompanying text (providing an in-depth discussion of Nelson's case). The preceding descriptions rest on the study's summary of "prosecutor's evidence at trial," which lists the most salient evidence against the defendant. *See* CONNORS ET AL., *supra* note 150, at 33-76.

[158] CONNORS ET AL., *supra* note 150, at 73 (discussing the Vasquez case).

[159] *See* People v. Linscott, 500 N.E.2d 420, 421 (Ill. 1986); People v. Linscott, 482 N.E.2d 403, 405 (Ill. App. Ct. 1985).

[160] CONNORS ET AL., *supra* note 150, at 65.

"innocent" defendants,[161] it may be worth noting that Bedau and Radelet found that a "coerced or other false confession" was involved (although not necessarily as the sole causal factor) in 14% of all their alleged miscarriages from 1900 to 1985.[162] Restricting the collection to more recent, post-*Miranda* years (1966-85), the figure falls slightly to about 12%.[163] Particularly interesting, however, is that this figure falls to about 3% if one focuses on the kind of false confession discussed by White and Ofshe and Leo: a psychologically-induced confession as opposed to a confession simply extorted through threats or violence.[164] The Bedau-Radelet collection, therefore, bolsters the suggestion from the Connors et al. database that such false confessions are a relatively infrequent cause of wrongful conviction.[165]

The critical policy implication from this discussion is that police interrogation rarely *causes* wrongful convictions; on the other hand, interrogation frequently prevents or exposes wrongful convictions. The figure 8.4% of wrongful convictions due to false confession should be contrasted with Gross' study of eyewitness misidentification. Gross analyzed cases of eyewitness misidentification, by all accounts the biggest threat to the innocent.[166] He reported that over half the time (54%) the eyewit-

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[161] *See* Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (identifying numerous problems with the study). *But see* Hugo Adam Bedau & Michael L. Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988) (responding).

[162] Bedau & Radelet, *supra* note 25, at 57 tbl.6 (49 ÷ 350 = 14%; denominator derived by summing number of cases counted). A slightly updated version of the article is MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992). Because this book does not contain the coding tables found in the article, the article's database is used for the calculations reported here.

[163] *See* Bedau & Radelet, *supra* note 25, at 177-79 (8 ÷ 68 = 12%; figure derived from column for Table 6 coding schedule). In many cases, the authors listed multiple "causes" of the wrongful conviction, so the 12% cannot be used as an unadulterated measure of wrongful convictions due to false confessions.

[164] Of the eight coerced or false confession cases, it appeared from the authors' descriptions, *see id.* at 91-172, that five involved confessions coerced through threats or violence (Barber, Frederick, Keaton, Ross, Wilkinson), two involved psychologically-induced false confessions (Reilly, Reynolds), and one involved a suspect covering for his girlfriend (Parker, described *supra* note 102). 2 ÷ 68 = 3%. Of course, the very small sample size cautions against placing much weight on this figure.

[165] A similar conclusion that voluntary, false confessions are rare is reached in Rattner, *supra* note 73, at 26 ("There are only a few cases in which a false confession, given voluntarily, has led to conviction . . .").

[166] HUFF ET AL., *supra* note 73, at 64 tbl.3.3 (52% of wrongful convictions due to eyewitness misidentification); *see also* BORCHARD, *supra* note 25, at 367 (concluding that wrongful identification is "[p]erhaps the major source of these tragic errors");

ness' mistake was uncovered when "the actual criminal confessed" and that "[i]n many of these cases the actual criminal happened to get arrested for another crime and confessed to the crime in question as part of a general program of cooperation with the police."[167] Arye Rattner's collection of miscarriages (which provided material for the Huff et al. book) found that the "actual culprit's confession" was the leading means of exoneration, responsible for 40% of the exonerations.[168] Similarly, Bedau and Radelet report that a confession from the real culprit was frequently how errors were uncovered.[169]

While figures on exonerations, such as Gross's 54%, cannot be compared directly with the 8.4% figure on wrongful convictions from false confessions,[170] the role of confessions in protecting the innocent almost certainly dwarfs their role in harming the innocent. Confessions not only exonerate the innocent but far more often prevent the innocent from ever being charged with a crime. If police properly solve a case through a confession, no innocent person will ever be charged for a crime. Some sense of the proportions here can be gained by comparing the approximately 900,000 confessions and incriminating statements to index crimes that police obtain every year[171] with

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Dripps, *supra* note 37, at 261 (noting that "misidentification is the leading cause of unjust convictions"); Gross, *Eyewitness Identification*, *supra* note 25, at 396 ("as far as anyone can tell, eyewitness misidentification is by far the most frequent cause of erroneous convictions"); *cf.* Bedau & Radelet, *supra* note 25, at 57 (finding "witness error," including both perjury and mistaken identification, to be a major source of errors in capital cases).

[167] Gross, *Eyewitness Identification*, *supra* note 25, at 421 (74 confessions exonerating the innocent ÷ 136 cases); *see also* Gross, *Capital Cases*, *supra* note 25, at 498 (concluding "[i]n most cases in which miscarriages of justice are uncovered, the real criminal confesses to the crime").

[168] Rattner, *supra* note 73, at 45-49 & tbl.8; *see also* Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 290-91 (1988).

[169] Bedau and Radelet report that in 47 of the 238 (19.7%) cases in which a cause for discovery of the error could be identified, the "real culprit" was responsible for discovery of the error. Bedau & Radelet, *supra* note 25, at 64 tbl.7 (figure derived by excluding "unknown" intervenor category). This number likely understates the role of confessions because it does not include discovery of errors by (among others) state officials, which presumably includes some state-obtained confessions. *Id.* at 64-65.

[170] The 8.4% figure rests on wrongful convictions from false confessions ÷ wrongful convictions. The 54% figure rests on wrongful convictions discovered through confessions ÷ discovered wrongful convictions. To allow a direct comparison, we would need some estimate of the percentage of wrongful convictions that are discovered.

[171] This figure is derived by taking 2,800,000 arrests for index crimes, *see supra* note 80 and accompanying text, and a 33.3% rate of successful interrogation, *see* Cassell &

the range of 10 to 394 wrongful convictions from false confessions. The 900,000 confessions undoubtedly kept a significant number of innocent persons from being charged or convicted.

B. THE BENEFITS—AND COSTS—OF RESTRICTING POLICE INTERROGATION

Understanding that false confessions relatively rarely cause wrongful convictions and more frequently prevent or expose such convictions, we are now in a position to attempt to assess the recommendation of commentators that certain forms of police questioning ought to be restricted.[172] Professor White, for example, recommends that police should be forbidden "from misrepresenting the strength of the evidence against the suspect."[173] Police could not, under White's regime, tell a suspect that his fingerprints had been found at the scene of the crime when, in fact, no such discovery has been made. Professor Alschuler has similarly suggested that police should be forbidden from falsifying evidence and misrepresenting the strength of the evidence against a suspect.[174]

White and Alschuler make little attempt to assess the net effects of this proposal,[175] which could on balance be undesirable. While precise data are lacking, police interrogators commonly confront suspects with evidence of guilt and not infrequently

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Hayman, *supra* note 36, at 869 tbl.4; *cf.* Leo, *Inside the Interrogation Room*, *supra* note 42, at 280 (reporting a 64% successful interrogation rate, which would produce a confession rate about twice as large the number used in text).

[172] One of Leo and Ofshe's proposals for dealing with the false confession problem is judicial suppression of confessions if the suspect's "post admission narrative" deviates too far from the facts of the crime. *See* Leo & Ofshe, *supra* note 2, at 115. Evaluating this proposal requires careful consideration of the reasons why a suspect's confession might deviate from the facts of the crime. Accordingly, I defer discussion of this proposal to my article dealing specifically with the alleged cases of false confessions. *See* Cassell, *supra* note 5; *see also* Cassell, *supra* note 12, at 1126-29 (raising questions about the proposal).

[173] White, *supra* note 3, at 149. White recommends this prohibition be embodied in legislation; he recommends a narrow proscription be lodged in the Constitution. *Id.* at 149 (recommending as a matter of constitutional law that misrepresentation about forensic evidence be forbidden and that other misrepresentations be closely scrutinized by the courts).

[174] Alschuler, *supra* note 4, at 974.

[175] In fairness, it should be noted that the focus of White's article is to justify his more limited constitutional restrictions, not his legislative ones.

exaggerate its strength.[176] The only recent research on what actually happens during police interrogation, Leo's study in California, suggests that in 30% of all interrogations police confront the suspect with "false evidence of guilt."[177] Thus, the proposal would require police to abandon a tactic they currently use in approximately 475,000 interrogations each year.[178]

Misrepresenting the strength of the evidence is not one of the most successful police tactics, according to research from Professor Leo. He found that in 83% of the cases where police used misrepresentation, a confession or admission resulted.[179] This success rate was not a statistically significant improvement over the base success rate of 76%. Leo also found, however, that suspects who had prior felony records or were below middle class were responsive to such tactics, giving confessions at rates (96% and 88%, respectively) that were statistically significant differences above the norm.[180] Leo's figures plainly suggest that such tactics are particularly useful when dealing with hardened criminals or unsophisticated suspects.

To gain some sense of the potential costs lurking here, one would like to use the Leo data to determine how much the confession rate among these groups would decrease if such tactics were banned. Unfortunately, Leo's data does not permit exact quantification of the effect of a ban on exaggerating evidence against suspects, so any calculations are close to guesswork. But

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[176] *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATIONS AND CONFESSIONS 70 (3d ed. 1986) (discussing "baiting questions" dealing with "either real or nonexistent evidence").

[177] Leo, *Inside the Interrogation Room*, *supra* note 42, at 279.

[178] This figure is derived by taking about 2,000,000 adult arrests each year, *see supra* notes 80-84 and accompanying text, and recognizing that about 79% of the arrestees will be interrogated, *see* Cassell & Hayman, *supra* note 36, at 869 tbl.4. This produces a total of 1,580,000 interrogations each year. If 30% of these interrogations are restructured, one reaches the figure in text.

[179] Leo, *Inside the Interrogation Room*, *supra* note 42, at 294 tbl.14. It should be noted that the interrogation success rate with this tactic was 83%—still higher (although not significantly so) than the baseline of 76%. *See id.* at 294 n.276. Moreover, it is not immediately clear how Leo made the difficult categorizations between police confronting the suspect with "false evidence of guilt" as opposed to "existing evidence of guilt." *See id.* at 294 tbl.14. Presumably for the interrogations Leo observed directly, the participating detectives could have debriefed him on which evidence was "false" and which was "existing," but for other interrogations it is unclear how this was accomplished. *See id.* at 272 n.26 (noting that about one-third of the sample was videotaped interrogations retrieved from police departments apart from the department Leo was observing).

[180] *Id.* at 295 tbl.15.

as a heuristic illustration, one might consider what would happen if the confession rate fell even one percent as a result. Even limiting the focus to suspects with felony records and calculating conservatively, the number of confessions that would be lost annually from White's proposed rule is about 9,000.[181] The overwhelming majority of these lost confessions will be truthful confessions, given the relative infrequency of false confessions.[182] Moreover, it is not clear how much of an effect this proposal would have on the false confession problem. Even in those interrogations where police misrepresented the strength of evidence and obtained a false confession, it is not clear that misrepresentation was a necessary factor. Indeed, Leo and Ofshe have specifically concluded to the contrary that, because false confessions stem from the "inept and/or improper use of interrogation as a whole, no single procedure can be proscribed and thereby adequately protect the innocent."[183] The efficacy of the proposal is also drawn into question by the difficulty of determining when police questioning involves some sort of "false" evidence. For instance, the Inbau interrogation manual recommends that, at the start of each interrogation, "the interrogator should finger through the case folder to create the impression that it contains material of an incriminating nature . . . ."[184] Is that a prohibited "misrepresentation?"

Another suggestion that has been advanced is to limit not the type of police questioning but its use against certain persons. For instance, Professor White suggests that police questioning of "vulnerable suspects" (juveniles and "mentally retarded" persons) should be restricted.[185] However, he is frus-

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[181] Start with about 2,000,000 adult arrests each year. *See supra* notes 80-84. About 79% of the arrestees will be interrogated. *See* Cassell & Hayman, *supra* note 36, at 869 tbl.4. Of these, about 58% will have a prior felony record. Leo, *Inside the Interrogation Room*, *supra* note 42, at 275. About 43% will confess. Cassell & Hayman, *supra* note 36, at 896; *cf.* Leo, *Inside Interrogation Room*, *supra* note 42, at 280 (suggesting higher confession rate). If the confession rate for such suspects were to drop to 42% rather than 43% because of a ban on such tactics, the number of lost confessions would be about 9,000. These lost convictions do not consider juvenile offenders, consistent with their exclusion from the wrongful conviction calculation. *See supra* note 84. One could argue that juvenile offenders should be included here because the harm to the innocent does not depend on the age of the confessor.

[182] *See supra* notes 41-128 and accompanying text.

[183] Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 1115.

[184] INBAU ET AL., *supra* note 176, at 84-85.

[185] White, *supra* note 3, at 142-43.

tratingly vague about what sorts of restraints the courts should impose, recommending only that the police "should be required to determine the suspect's age and mental capacity before interrogation" and that these "findings" should then "dictate the range of permissible interrogation methods."[186] With respect to juveniles, the effect of this rule would presumably be to reduce police effectiveness in responding to the burgeoning juvenile crime problem, an area of considerable and increasing public concern.[187] One can garner some sense of the potential risks here by noting that police around the country arrested about 670,000 juveniles for FBI index crimes in 1995.[188] Assuming that 80% were interrogated,[189] then White is proposing to limit questioning of more than 500,000 criminal suspects. No doubt a substantial number of truthful confessions would be lost from this restriction, a point that White never addresses. Moreover, the empirical basis for concluding that juveniles are especially at risk for false confessions is lacking.[190]

White may well be correct in suggesting that the mentally retarded are unusually susceptible to giving false confessions.[191] But evaluating his proposed restrictions on questioning such suspects is difficult. White never defines with any precision the triggering degree of impairment that renders a suspect "mentally retarded." Nor does he define what form of questioning would be permissible. No matter how the proposal is formulated, however, the administrative difficulties are likely to be considerable. White's suggestion that police should make a

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[186] *Id.*

[187] *See, e.g.*, WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 26 (1996) ("as high as America's body count is today, a rising tide of youth crime and violence is about to lift it even higher"); *see also* U.S. DEP'T OF JUSTICE, OFFICE OF JUV. JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE 21 (1996) (increases in juvenile arrests for a weapons law violation support a picture of growing juvenile violence); James Q. Wilson, *Crime and Public Policy*, *in* CRIME, *supra* note 84, at 489, 492 (warning of coming demographic wave of new young criminals).

[188] UNIFORM CRIME REPORTS 1995, *supra* note 86, at 224 tbl.41.

[189] *See* Cassell & Hayman, *supra* note 36, at 854 (finding 79% of suspects in sample questioned); *see also id.* at 854-55 (collecting evidence from other studies that about 80% of all suspects are questioned).

[190] There is no data in this country on false confessions from juveniles. Data from Iceland and Britain suggest that juveniles are perhaps even less likely to give false confessions than adults (except when they voluntarily confess to get an adult friend off the hook). *See supra* notes 70-72 and accompanying text.

[191] *See* Cassell, *supra* note 5 (developing this argument).

"finding" about "mental capacity" before questioning—with this "finding" then governing permissible methods—might require the police to undertake the impossible.[192] This proposal would generate a host of questions that even the most well-intentioned police departments could not possibly begin to answer.[193] Anyone with doubt on this point should peruse the always-contentious literature on "findings" of insanity or competency to stand trial or face execution.[194] Questions of mental capacity will arise frequently because the population of dangerous criminals is generally of lower-than-average intelligence.[195] Presumably the new rules would be enforced by after-the-fact judicial scrutiny of the police officer's decisions, which would virtually guarantee that legions of psychiatrists would become involved in hearings on the admissibility of confessions.[196] Assessing where all this would balance out is difficult. If innocent but mentally retarded suspects are, as White writes, "eager to

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[192] *Cf.* PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963) (concluding that "mental retardation may not be apparent at the time of interrogation"). The British Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers attempts to resolve the identification issue by requiring an officer to treat a person as mentally handicapped where the "officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or mentally handicapped, or mentally incapable of understanding the significance of questions put to him or his replies . . . ." BRITISH CODE Para. 1.4. Whether such a broad rule could be transferred to the United States is unclear. Moreover, even under the British rule, identification of a person as mentally handicapped does not preclude questioning, but instead requires the police to question in the presence of the "appropriate adult." *Id.* at Para. 11.14. Even this requirement can be dispensed with where a senior officer believes that delay in questioning will "involve an immediate risk of harm to persons or serious loss of . . . property . . . ." *Id.* at Annex C.

[193] *See* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (doubting whether police officers are capable of making a quick evaluation of the "suggestibility and susceptibility of an accused" to questioning); *cf.* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 597 (1979) (concluding that "both from the perspectives of law enforcement and judicial administration, courts should develop legal rules that limit interrogation tactics by objective standards").

[194] *See* Fairchild v. Lockhart, 744 F. Supp. 1429, 1434-506 (E.D. Ark. 1989) (more than 60 page opinion concerning whether one defendant was mentally retarded).

[195] *See* JAMES Q. WILSON & RICHARD J. HERRNSTEIN, CRIME AND HUMAN NATURE 154 (1985) (concluding that the empirical studies estimate a 10-point gap in IQ between offenders and nonoffenders, although the offender population contains relatively few very low IQs).

[196] *Cf.* Fred E. Inbau & James P. Manak, Miranda v. Arizona—*Is it Worth the Costs? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 1 CAL. W. L. REV. 185, 190-91 (1988) (discussing consumption of court time as the result of *Miranda* issues).

please an authority figure and unable to understand the long-term consequences of confessing,"[197] then allowing *any* questioning of mentally retarded suspects could well produce false confessions. To prevent this, some substantial restrictions would need to be imposed. Depending on how White's proposal is structured, its result could well be to sharply reduce the number of truthful confessions obtained from retarded persons, which would be harmful to those who might thereafter wrongfully come under suspicion for these same crimes.

C. LOST CONVICTIONS FROM LOST CONFESSIONS

While proposals to restrict interrogation could well be disadvantageous, even focusing solely on the protection of the innocent within the criminal justice, the cost side of the ledger only increases when we recognize that lost confessions result in guilty persons going free—itself a cost to the innocent members of society given high rates of recidivism.[198] The discussion above suggests that blunderbuss approaches to preventing false confessions will harm effective law enforcement. In this brief essay, I will not attempt to play out precisely where the balance of advantage lies on each proposal that has been advanced to reduce false confessions. Instead, my limited point is that the proponents of the changes have not yet even begun to explain why they see the advantages as outweighing the disadvantages. For example, previously it was shown that preventing police from making false representations about evidence could substantially reduce the number of truthful confessions,[199] which in turn would reduce the number of convictions.[200] This effect is likely to be a general feature of proposals that focus single-mindedly on reducing the incidence of wrongful convictions from false

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[197] White, *supra* note 3, at 124.

[198] Even apart from recidivism, crime victims suffer when guilty offenders escape justice. I will ignore this cost here.

[199] *See supra* notes 172-84 and accompanying text.

[200] The most conservative assumption is that about 19% of lost confessions result in lost convictions. Schulhofer, *supra* note 19, at 541-44 (placing confession necessity rate at about 19%); *cf.* Cassell, *supra* note 57, at 433-37 (estimating that about 25% of all confessions are needed for conviction); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084, 1111 n.161 (1996) [hereinafter Cassell, *All Benefits*] (responding to Schulhofer's downward adjustment to 19%); Cassell & Hayman, *supra* note 36, at 906 (reporting that prosecutors find confessions to be essential or important for conviction in about 61% of all cases).

confessions by changing police and court procedures.[201] To prevent the exotic—a false confession—the proposals have to recommend changing the routine—the day-to-day conduct of police interrogation or judicial processing of criminal cases.[202] There appears to be little hope of surgically tailoring the false confessions reforms to those specific situations where false confessions are most likely. Let me clearly reiterate my view that each case of a wrongful conviction from a police-induced false confession is an undeniable tragedy.[203] Indeed, I am on record as making this point elsewhere and also as pushing for measures to diminish false confessions.[204] But sound public policy can be made only by considering countervailing considerations which argue against greater restrictions on police questioning techniques, e.g., lost confessions.[205] And given public concern about crime, such countervailing considerations will be taken seriously. The only way to guarantee legal changes is to adopt a new paradigm for reform—one that escapes these kinds of tradeoffs.

III. THE RISK TO THE INNOCENT FROM *MIRANDA*

A. *MIRANDA* AS A HINDRANCE TO THE INNOCENT AND AN AID TO THE GUILTY

The preceding section establishes that the proposals for dealing with false confessions are problematic because they decrease the overall number of confessions—both true and false. This creates problems for innocent persons who would have been exonerated through the truthful confessions, not to mention those who suffer when criminals are not brought to justice. From the perspective of the innocent, the ideal public policy re-

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[201] *Cf.* BREYER, *supra* note 39, at 11-19 (discussing this problem of "tunnel vision" in the context of risk regulation).

[202] This argument does not apply to improving police training, *see* Ofshe & Leo, *Social Psychology*, *supra* note 12, at 239 (recommending training), which will cost society only the funds to pay for such training and the time of the officers to receive the instruction rather than patrol the streets. It does, however, apply to Leo and Ofshe's recommendation that courts should exclude confessions when the "post narrative admission" does not sufficiently track the crime scene. For other difficulties with this proposal, see Cassell, *supra* note 5; Cassell, *supra* note 12, at 1131.

[203] Cassell, *supra* note 12, at 1124.

[204] *See* Cassell, *supra* note 57, at 486-89; Cassell, *All Benefits*, *supra* note 200, at 1118-24.

[205] *See supra* notes 6-11 and accompanying text.

form is, accordingly, a discriminating approach that simultaneously reduces false confessions while maintaining (or, ideally, even increasing) truthful confessions. By the same token, the worst sort of public policy reform is one that decreases truthful confessions, while maintaining (or, even worse, increasing) the number of false confessions. With these straightforward observations in mind, the Supreme Court's decision in *Miranda v. Arizona*[206] stands revealed as a disastrous policy. It does virtually nothing about any false confession problem—and, indeed, perhaps even aggravates it—while concurrently reducing the number of truthful confessions.

Miranda does little, if anything, about the false confession problem. If there is any doubt about this point, recall that all of the recent false confessions discussed by Leo, Ofshe, and others were obtained in apparent compliance with the *Miranda* rules.[207] The reason the decision fails to help the innocent is obvious. Innocent suspects want to waive their *Miranda* rights to convince the police of their innocence.[208] As Leo and Ofshe have explained elsewhere, "[a]n innocent person will likely believe that he is not in any jeopardy by waiving his rights and answering questions because police have sought out his help in solving the crime and, after all, he is innocent."[209] As a result, "innocent suspects are likely to waive their rights because they do not perceive a risk in speaking to police . . . ."[210] Psychological research points to the same conclusion of ineffectiveness: persons most likely to give false confessions are highly unlikely to be helped by the *Miranda* rules, because they are unusually trusting of the

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[206] 384 U.S. 436 (1966).

[207] *See, e.g.*, Leo & Ofshe, *supra* note 2, at 433 (limiting research to "the post-*Miranda* era").

[208] *See, e.g.*, GUDJONSSON, *supra* note 12, at 252-53 (discussing the case of Peter Reilly, who did not exercise his *Miranda* right to a lawyer because "I hadn't done anything wrong"); Parloff, *supra* note 12, at 34 (reporting that suspect who would later give false confession waived rights because "I had nothing to hide"). *See generally* Corey J. Ayling, Comment, *Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions*, 1984 WIS. L. REV. 1121, 1194-98 (arguing generally that *Miranda* rules have limited utility in preventing false confessions).

[209] Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 989.

[210] *Id.* at 1002; *see also id.* (noting some innocent suspects "view invoking *Miranda* as wrong and/or tantamount to an admission of guilt").

police[211] and accordingly almost invariably waive their *Miranda* rights.[212]

Once an innocent suspect waives his rights, *Miranda* becomes "virtually irrelevant to the problem of false confessions since few suspects subsequently invoke their *Miranda* rights."[213] It is generally recognized that, after police obtain a *Miranda* waiver, questioning can proceed as it always has under "voluntariness" principles. As the Department of Justice's Office of Legal Policy has concluded, after a waiver, "*Miranda* is . . . virtually worthless as a safeguard against the specific interrogation practices that were characterized as abusive in the *Miranda* decision . . . ."[214] This is not an isolated finding, as there appears to have been "broad agreement among writers on the subject that *Miranda* is an inept means of protecting the rights of suspects . . . ."[215]

It is possible, of course, that a few innocent persons are haphazardly helped by the *Miranda* regime, simply by sheer dint of numbers. Perhaps police fail to obtain a few waivers from innocent suspects (itself a rare event) who, if questioning had proceeded, would have been induced to confess falsely (an even rarer event). Or perhaps the possibility that suspects can invoke their *Miranda* rights to cut-off questioning discourages police from using some coercive techniques that would lead to a few

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[211] *See* GUDJONSSON, *supra* note 12, at 232 (noting common personality factor of false confessors include "good trust of people in authority"); Gisli H. Gudjonsson, *One Hundred Alleged False Confession Cases: Some Normative Data*, 29 BRIT. J. CLINICAL PSYCHOL. 249, 249 (1990) (finding alleged false confessors highly suggestible and compliant); *see also* Sigurdsson & Gudjonsson, *supra* note 65, at 327 (finding no difference on "suggestibility" score between false confessors and other prison inmates but finding possibility of suggestibility difference in "coerced-internalized" false confessors).

[212] *See* Ayling, *supra* note 208, at 1194-98. Since about 80% of all suspects waive their *Miranda* rights, *see* Cassell, *supra* note 57, at 495 & n.623, and since innocent suspects appear to be even more likely to waive their rights, the waiver rate for innocent suspects must verge on 100%.

[213] Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 1116 (footnote omitted). *See* Cassell & Hayman, *supra* note 36, at 860 & tbl.3 (finding 3.9% of suspects re-invoked rights during questioning); Leo, *Inside the Interrogation Room*, *supra* note 42, at 275 (finding 1.1% of suspects re-invoked rights during questioning).

[214] OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION 97-98 (1986) [hereinafter OLP PRETRIAL INTERROGATION REPORT]; *see* 22 U. MICH. J.L. REFORM 437 (1989) (reprinting the Report).

[215] OLP PRETRIAL INTERROGATION REPORT, *supra* note 214, at 97-98.

false confessions.[216] But the lack of any significant suggestions along these lines in the voluminous academic literature praising *Miranda* on every conceivable ground[217] suggests that these possibilities are unlikely.

In any event, to be justifiable as a measure protecting innocents, *Miranda* would need to uniquely protect them. After all, forbidding testimony from witnesses whose last names begin with "R" would protect some innocent persons.[218] But such a rule would not *uniquely* protect innocent defendants—even allowing for our greater concern with convicting innocent defendants—and therefore cannot be championed on this ground.[219] The available evidence suggests that *Miranda*, far from differen-

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[216] The converse is possible as well: that *Miranda*'s questioning cut-off rules have moved police in the direction of psychological questioning techniques, *see generally* Leo, *supra* note 139, which might be more likely to induce false confessions than pre-*Miranda* techniques.

[217] The most visible exception seems to be William Stuntz' suggestion that, because of the questioning cut-off rules, police have a "strong incentive to avoid interrogation tactics that the [suspect] will find too threatening." Stuntz, *supra* note 7, at 1948. This in turn, Stuntz believes, might possibly differentially advantage the innocent because these threatening tactics may disproportionately generate false confessions. *Id.* However, both parts of Stuntz' hypothesis need additional empirical support before they can be accepted.

It is not clear the extent to which questioning cut-off rules have changed police tactics. *See* Leo, *Impact of* Miranda, *supra* note 42, at 645 (summarizing *Miranda* "impact" literature as finding that "once a waiver of rights had been obtained, the tactics and techniques of police interrogation did not change as a result of *Miranda*"). A post-*Miranda* study in Wisconsin, for example, found that "generally most interrogations continued to operate under rules formalized prior to the *Miranda* decision." NEIL A. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA 228 (1971). Nor is it clear that excessive pressure is what extracts false confessions. *Cf.* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 1115 (suggesting that specific techniques are not the issue for false confessions). Based on the recent empirical evidence published after his earlier article, Stuntz now concludes that *Miranda* could well operate to the detriment of the innocent. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 47 n.160 (1997) (reviewing the evidence and concluding that "it is possible that *Miranda* makes it *both* harder to get confessions from the guilty *and* easier to get them from the innocent").

[218] *See* Donald A. Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1632 (1996); *see also* Dripps, *supra* note 8, at 715 (noting that any legal rule, like "a revolution or an earthquake," can help innocent persons).

[219] Indeed, it has been cogently argued that the most important protection for the innocent is that the gap between their chances of conviction and the guilty's remain large. If so, prosecutors will have strong incentives to charge only guilty persons. *See* Stuntz, *supra* note 217, at 49.

tially protecting the innocent, especially shields the guilty.[220] In contrast to innocent persons, experienced criminals become adept at wrapping themselves in *Miranda*'s protections. After spending a year with Baltimore detectives, journalist David Simon concluded that

> the professionals say nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials .... For anyone with experience in the criminal justice machine, the point is driven home by every lawyer worth his fee. Repetition and familiarity with the process soon place the professionals beyond the reach of a police interrogation.[221]

The available empirical data support Simon's conclusion. Leo's study found "a suspect with a felony record ... was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record ...."[222] The Prairie City study found that, of those with a prior felony conviction, only 36% confessed, compared to 59% without a prior conviction.[223] The study also found that suspects with a prior conviction were less likely to execute waiver of rights forms, with 68% of those with records waiving compared to 80% of those without a prior conviction.[224] The New Haven study similarly found that a "prior record tends to reduce the likelihood of success."[225] Interrogation was successful for 41% of the suspects with a previous arrest, compared to 60% without.[226] Data from Britain also supports the conclu-

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[220] *See id.* at 47 & n.160.

[221] DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 198-99 (1991). Simon suggests that the impact of *Miranda* is thus limited to professionals. *Id.* at 199.

[222] Leo, *Inside the Interrogation Room*, *supra* note 42, at 286.

[223] David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 105 tbl.2 (1974). For non-property crimes, the differential was even more substantial: only 15% with a prior conviction confessed, compared to 45% without. *Id.*

[224] *Id.* at 104 tbl.1.

[225] *Yale Project*, *supra* note 56, at 1644. The study divided "success" into four categories: "(1) a confession; (2) an oral admission of guilt without a signed statement; (3) a signed statement that was incriminating but less than a full admission of guilt; or (4) oral evidence constituting less than a full admission of guilt without a signed statement." *Id.* at 1564.

[226] *Id.* at 1644 & tbl.A (statistically significant at the .05 level); *see* William Hart, *The Subtle Art of Persuasion*, POLICE MAG., Jan. 1981, at 14, 16 (reporting that successful interrogators find "[p]rofessional criminals are ... hard to question" and that "even the most finely honed tactics often fail" because "[i]f they're professionals, they pretty much know ... not to say word one"); *see also* THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 37 (1981) (for juveniles, refusal to talk tended to increase with the number of prior felony referrals at the time of interrogation).

sion that "hardened criminals" are more likely to take advantage of procedural rights and less likely to confess.[227] However, my study in Salt Lake City found no clear-cut relation between a very broadly defined prior record and interrogation success (although it did find those with a criminal record were slightly more likely to invoke their rights).[228] Virtually all these studies suggest that *Miranda* is of special benefit to the guiltiest of the guilty: career criminals.

Any marginal advantages to the innocent are likely more than offset by a countervailing dangerous feature of *Miranda*: the tendency to divert the court's attention toward procedural issues. Before *Miranda*, the admissibility of confessions was decided exclusively under a "voluntariness" test that blocked a confession if it was, among other things, subject to an influence which made it untrustworthy or probably untrue.[229] Under this test, the risk either that an individual defendant had in fact falsely confessed or, more generally, that the police methods at issue might cause other innocent persons to confess, could lead to the suppression of a confession.[230] Thus, as one noted commentator described the cases before *Miranda*, the voluntariness test required the courts to answer questions related to the truth or falsity of confessions.[231] To be sure, the voluntariness test embraced a "complex of values"[232] that extended *beyond* "the

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[227] *See* ROYAL COMM'N ON CRIM. JUST. REPORT 51 (1993) (reporting that police found experienced criminals less likely to answer questions); SOFTLEY, *supra* note 60, at 69, 75 (observing that suspects with a criminal record are significantly more likely to exercise their right to silence and to request counsel); Stephen Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence During Police Questioning*, 3 CRIM. BEHAV. & MENTAL HEALTH 30, 38 tbl.4 (1993) (finding 21% of suspects with criminal history stayed silent as compared with only 9% of suspects without). *But cf.* Moston et al., *supra*, at 39 tbl.7 (interaction of legal advice with criminal history complicates relationship).

[228] Cassell & Hayman, *supra* note 36, at 895 (using a broad definition of "criminal record" and finding no correlation with interrogation success and small, statistically insignificant increases in the likelihood of those with a record to invoke).

[229] The "voluntariness" doctrine is difficult to describe succinctly. For extended discussions, see, e.g., JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 87-172 (1993); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231 (1988); Yale Kamisar, *What is an "Involuntary" Confession?: Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728 (1963).

[230] *See* GRANO, *supra* note 229, at 115; KAMISAR ET AL., *supra* note 84, at 453; MCCORMICK ON EVIDENCE 373 (3d ed. 1984).

[231] Kamisar, *supra* note 229, at 755 (summarizing the case law).

[232] Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

question of guilt or innocence."[233] But the Court's inquiry also included consideration of whether particular methods might produce unreliable confessions.

Miranda has shifted the focus of the courts away from the reliability of the methods used to obtain confessions and towards technical procedural questions about warnings and waivers. Leo and Ofshe allude to this problem in recommending that courts should focus on the accuracy of the confession rather than "exclusively on the procedural fairness of the interrogation process."[234] Professor White, too, has observed that "[u]ntil about thirty-five years ago, [reliability] played an important role in our constitutional jurisprudence . . . . Over the past three decades, however, courts and legal commentators have largely ignored issues relating to untrustworthy confessions."[235] While one must be cautious of the logical fallacy *post hoc, ergo propter hoc*, the *Miranda* revolution in interrogation law seems like an obvious culprit. In theory, of course, *Miranda* does not require the courts to concentrate "exclusively" on procedural questions—the underlying constitutional "voluntariness" test still remains in play.[236] But in practice, the *Miranda* rules have led the courts away from any close scrutiny of voluntariness—and, hence, trustworthiness—in individual cases, precisely the kind of scrutiny that might help false confessors. Since *Miranda*, the Supreme Court has only rarely reversed convictions on involuntariness grounds.[237] This has produced, in turn, an attitude in many lower courts "toward voluntariness claims that can only be called cavalier."[238] In many cases *Miranda* has "served to insulate

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[233] *Id.* at 206. *Cf.* Rogers v. Richmond, 365 U.S. 534, 544 (1961) (holding that the question of voluntariness should be decided without regard to whether a particular suspect "in fact spoke the truth"); Dix, *supra* note 229, at 263-69 (discussing the Court's ambivalence about reliability).

[234] Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 1119.

[235] White, *supra* note 3, at 156.

[236] *See* GRANO, *supra* note 229, at 207.

[237] *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 745 (1992). Indeed, since *Miranda*, the Court appears to have cut back on the importance of reliability concerns to the voluntariness test. *See* Colorado v. Connelly, 479 U.S. 157, 167-68 (1986) (holding that reliability of confession induced by pressures other than that of state actors is not governed by the Constitution, but by state laws). It is too early to tell how broadly *Connelly* will be interpreted. *See generally* Dix, *supra* note 229, at 272-76 (discussing questions left unanswered after *Connelly*).

[238] Seidman, *supra* note 237, at 746; *accord* Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 877-78 (1981) (reviewing YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAY IN LAW AND POLICY (1980)) (noting the "often

the resulting confessions from claims that they were coerced or involuntary."[239] The net effect is that *Miranda* may actually make it easier to admit confessions from the innocent.[240]

This is an inherent feature of *Miranda*'s radical shift away from attention to individual cases and towards more general regulation of law enforcement techniques. Under the "voluntariness" approach, courts decided whether to admit a confession "on the peculiar, individual set of facts of the case"[241] after making a "broad [inquiry into the] totality of the circumstances surrounding the confession."[242] In contrast, the "the whole point of *Miranda* was to eliminate the old 'voluntariness' test, whereby courts determined case-by-case whether defendant's will was overborne by coercion . . . ."[243] Thus, *Miranda* set forth generalized, legislative-style rules. The Court in *Miranda* itself did not turn to the facts of the cases before it until it had devoted more than fifty pages to a summary of its holding, a history of the Fifth Amendment, a survey of police manuals, an elaboration of its holding, and "a miscellany of minor directives"[244] not actually involved in the cases. The resulting warning-and-waiver regime allowed the Court to adjudicate the problems of "defendants as a group rather than as individuals, and . . . finally abandon the fact-specific investigation of individual circumstances that had been a hallmark of confession law for the previous thirty years."[245] While the Court professed to leave open the possibility that it would consider individual claims of coercion even in cases where police had complied with *Miranda*, it clearly anticipated that the specified procedures would dispense with the need to investigate the vast majority of such claims.[246] This is all well and good if one is concerned about judicial efficiency. But for an innocent false confessor

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conveyed" impression "that *Miranda* marked the death of the due process test and that, at least for the time being, it remains buried").

[239] Seidman, *supra* note 237, at 744-45.

[240] *See* Stuntz, *supra* note 217, at 47 n.160.

[241] Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (Frankfurter, J.).

[242] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[243] People v. Alls, 629 N.E.2d 1018, 1027 (N.Y. 1994) (Kaye, C.J., dissenting in part) (citation omitted).

[244] Miranda v. Arizona, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

[245] *See* Seidman, *supra* note 237, at 738.

[246] *Id.*

ensnared in the system, a fact-specific investigation of individual circumstances is the best hope of escaping conviction.

Miranda has also produced what Professor Grano has aptly described as the "triumph of formalism"[247] that further imperils the innocent. After *Miranda*, courts considering confessions typically are asked to decide such issues as whether the suspect was in custody or was in some way interrogated. These questions are determined under "objective" tests that divert attention away from what a suspect actually thinks or believes. In determining whether a suspect is in custody, for instance, the courts ask "how a reasonable man in the suspect's position would have understood his situation,"[248] an inquiry that, Grano explains, "does not provide a clue to whether the actual defendant felt compelled to answer questions."[249]

The focus does remain on a particular defendant in one area of *Miranda* doctrine: assessing whether a waiver of *Miranda* rights was knowing and intelligent.[250] But even here, the courts are to focus not on the *confession*, but only on the preliminary procedural question of the execution of a waiver. For example, in *Wyrick v. Fields*,[251] the defendant executed a *Miranda* waiver (both orally and in writing) and took a polygraph test.[252] After the test, the operator told the defendant that he had been deceptive and ultimately obtained incriminating statements.[253] As framed by the Court the main issue boiled down not to whether announcing the test results pressured the defendant, but rather to whether a new *Miranda* waiver was required after the polygraph test—an issue the Court resolved against the defendant.[254] Thus, as Leo has suggested, "*Miranda* has shifted the legal inquiry from whether the confession was voluntarily given to whether the *Miranda* rights were voluntarily waived"—the net

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[247] GRANO, *supra* note 229, at 206-16; *see also* Joseph D. Grano, Miranda v. Arizona *and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 267-87 (1986).

[248] Berkemer v. McCarty, 468 U.S. 420, 442 (1984); *accord* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (defining test for whether "interrogation" took place).

[249] GRANO, *supra* note 229, at 208.

[250] *See* North Carolina v. Butler, 441 U.S. 369, 373-74 (1979).

[251] 459 U.S. 42 (1982) (per curium).

[252] *Id.* at 44. Ofshe and Leo suggest that polygraph tests can produce false confessions *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 1036-41.

[253] *Wyrick*, 459 U.S. at 44-45.

[254] *Id.* at 47-49.

result being to "elevat[e] the form of legal process over the substance of legal outcomes."[255] All this accentuates "those features in our system that manifest the least regard for truth-seeking."[256] Thus, the courts addressing these issues are unlikely to be of assistance to innocent persons. Instead of assisting courts in identifying situations where reliability might be of special concern, "*Miranda* has induced judges at all levels to split hairs over the meaning of black-letter rubrics. As they debate the technical requirements of the binding black letter, judges often feel obliged to ignore . . . the underlying purpose of the whole enterprise—the prevention of *compelled* self-incrimination."[257]

Miranda diverts not only judicial attention towards procedural issues, but also, as a consequence, skews defense resources in that direction as well. In a brilliant recent article, Bill Stuntz explained this problem:

> [M]ost *Miranda* violations probably have little to do with the reliability of the statements being suppressed. For these sorts of claims, defense litigation not only fails to advance separation of the guilty from the innocent, it actually retards the system's ability to separate. Defense lawyers shifting time and energy from factual investigation to criminal procedure litigation are probably shifting time and energy from one set of defendants to another, and the losers in this shift are likely to be defendants with colorable but undiscovered factual arguments.[258]

All of these adverse effects on the innocent should come as little surprise, given that *Miranda*'s main concern was not protecting the guiltless, but rather protecting the guilty.[259] Although the opinion briefly alludes to the existence of false confessions,[260] its overwhelming bulk is devoted to the proposition that custodial interrogation "trades on the weakness of individuals"[261]—that is, the unfortunate (in the Court's mind) tendency of some suspects to confess to what they have actually

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[255] Leo, *Impact of* Miranda, *supra* note 42, at 678 (quoting Patrick Malone, *You Have the Right to Remain Silent:* Miranda *After Twenty Years*, 55 AM. SCHOLAR 367, 377 (1986)).

[256] HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF THE CRIMINAL JUSTICE SYSTEM 86 (1996).

[257] GRANO, *supra* note 229, at 215; *see* Leo, *Impact* of Miranda, *supra* note 42, at 678 (reaching similar conclusion).

[258] Stuntz, *supra* note 217, at 47 (footnotes omitted).

[259] *See generally* AMAR, *supra* note 1, at 28 (developing this point in the exclusionary rule context).

[260] *See* Miranda v. Arizona, 384 U.S. 436, 445-58 (1966).

[261] *Id.* at 455.

done.[262] Allowing police questioning to proceed without warnings, the Court alleged, is inconsistent with "our accusatory system of criminal justice," which "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[263] The concern was not with whether what came from the suspect's mouth was a true confession or a false one. The Court's focus on the guilty was no doubt reinforced by the parties before the court: Ernesto Miranda and the three defendants whose cases were all consolidated with Miranda's had all committed terrible crimes.[264] With the Court designing new rules to protect such law breakers, it is almost to be expected that *Miranda* would have unintended consequences for the law abiding.[265]

While doing nothing about, and perhaps even aggravating, the false confession problem, *Miranda* has simultaneously reduced significantly the number of truthful confessions—to the clear detriment of innocent persons who would benefit from having these crimes solved correctly. The Court itself expected to make it harder for the government to resort to the "simple expedient" of garnering confessions.[266] Previously, in other journals, I have outlined five mutually-reinforcing reasons for concluding that *Miranda* produced this anticipated result. First, the reliable "before-and-after" studies of confession rates done at the time of the decision suggest that *Miranda* caused the confession rate to fall by about 16%.[267] Responding to these calculations, Professor Stephen Schulhofer has estimated that the reduction in the confession rate is more accurately pegged at around 5.8% compared to interrogations without any form of warnings, or about 4.1% when compared to interrogations with

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[262] *See generally* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1469-73 (1985).

[263] *Miranda*, 384 U.S. at 460.

[264] On remand, Ernesto Miranda was convicted of kidnapping and rape, Roy Stewart was convicted of first degree murder, and Michael Vignera and Carl Westover pled guilty to robbery. *See* LIVA BAKER, MIRANDA: CRIME, LAW, AND POLITICS 191-94 & n.* (1983).

[265] *See* Givelber, *supra* note 125, at 1379 (concluding that *Miranda* is of greatest immediate benefit to the guilty and that it thus "renders it harder for the truly innocent to have their voices heard and acknowledged").

[266] *Miranda*, 384 U.S. at 460.

[267] *See* Cassell, *supra* note 57, at 416-18.

some warnings.[268] Extrapolating across arrests for FBI index crimes[269] produces the result that lost confessions from *Miranda* are somewhere between 110,000 and 440,000 per year, depending on whether one uses Schulhofer's lowest figure or my higher (and, as I have argued at some length, more reasonable) figure.[270]

Second, supporting the conclusion of the before-and-after studies, confession rates in this country after *Miranda* appear to be lower than the rates reported before the decision. For example, Bret Hayman and I found that police obtained confessions or incriminating statements in Salt Lake City in 1994 in about 33% of their cases, below the roughly 55-60% success rate that apparently prevailed in this country before *Miranda*.[271] Similarly, Professor Leo's 1993 research in northern California reported that detectives who questioned suspects in custody were successful 64% of the time.[272] To be comparable to other studies, this rate needs to be adjusted by considering that some suspects are not questioned, some are not questioned in custody, and some are questioned by less-than-skilled line officers. If these adjustments are made, the resulting confession rate is about 37%,[273] not far from ours and well below those reported before *Miranda*. The few other available post-*Miranda* confession rate figures also suggest that confession rates have fallen.[274]

Third, the confession rates in this country appear to be lower than confession rates in Britain and Canada—countries

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[268] Schulhofer, *supra* note 19, at 545.

[269] *See* Cassell, *supra* note 57, at 438-39 (explaining why extrapolation against arrests may produce a more accurate estimate of *Miranda*'s costs); *cf.* Schulhofer, *supra* note 19, at 538-39 (not contesting this aspect of the extrapolation). Using conviction rather than arrest data for the extrapolation would produce a figure about three times lower. *See supra* notes 80-84 and accompanying text (one in three arrests lead to conviction). These figures include juvenile offenders. *Cf. supra* notes 84, 178 (excluding juvenile offenders from calculations).

[270] *See* Cassell, *All Benefits, supra* note 200, at 1084-115 (responding to Schulhofer); *cf.* Leo, *Impact of* Miranda, *supra* note 42, at 676 n.243 (arguing that the "outdated" before-and-after studies "cannot reasonably serve as the basis for extrapolations").

[271] *See* Cassell & Hayman, *supra* note 36, at 868-76. *But cf.* Thomas, *Plain Talk, supra* note 20, at 953-59 (concluding that the Cassell-Hayman study provides insufficient evidence to reject the "null hypothesis" that the confession rate today is the same as before *Miranda*).

[272] Leo, *Inside the Interrogation Room, supra* note 42, at 280 tbl.7.

[273] *See* Cassell & Hayman, *supra* note 36, at 876, 926-30. *But cf.* Thomas, *Plain Talk, supra* note 20, at 953-59 (disputing this recalculation).

[274] *See* Cassell & Hayman, *supra* note 36, at 875-76.

that do not follow *Miranda*-style requirements.[275] Fourth, police officers at the time of *Miranda* reported that the decision harmed their efforts to solve crimes.[276] Fifth and finally, time series regression analysis reveals substantial, post-*Miranda* declines in clearance rates,[277] that is, the rates at which the police solve or "clear" crimes.[278] Crime clearance rates for various crime categories fell sharply in 1966-68, immediately after the *Miranda* decision. In another article, Professor Richard Fowles and I used multiple regression analysis to separate the effects of competing factors and concluded that *Miranda* results in lost clearances each year of 8,000-36,000 robberies, 17,000-82,0000 burglaries, 6,000-163,000 larcenies, and 23,000-78,000 vehicle thefts.[279] All these arguments establish what ought to be a logical point: that when *Miranda* imposed unprecedented new restrictions on police interrogations, the effectiveness of such interrogations declined.[280]

Because *Miranda* has reduced the number of confessions, some innocent persons have been unable to use those confessions to extricate themselves from erroneous charges. This is apparent simply from the vast numbers of lost confessions and clearances; certainly *some* of them would have been useful to innocent persons. Professor Sam Gross' study of eyewitness misidentification independently confirms this important point. Gross found that "the dominant basis of exoneration" for a per-

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[275] *See id.* at 876-80; Cassell, *supra* note 57, at 418-22. *But cf.* Thomas, *Plain Talk*, *supra* note 20, at 942-43 (arguing that Britain and Canada do not share the same "core of relevant characteristics" to allow transnational comparisons).

[276] Cassell, *All Benefits*, *supra* note 200, at 1106-10.

[277] *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN L. REV. 1055 (1998).

[278] *See, e.g.*, UNIFORM CRIME REPORTS 1995, *supra* note 86, at 197.

[279] Cassell & Fowles, *supra* note 277, at 1106. Our findings have prompted a lively debate. *Compare* John J. Donohue, III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (replicating many of the Cassell and Fowles findings and raising questions about them), *with* Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998) (noting replication and responding to Donohue). *Compare also* Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996) (challenging the claim that *Miranda* harmed clearance rates), *with* Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327, 334-40 (1997) (responding to Schulhofer), *and* Stephen J. Schulhofer, *Bashing* Miranda *is Unjustified—and Harmful*, 20 HARV. J.L. & PUB. POL'Y 347, 355-72 (1997) (responding to Cassell). The figures on clearance rates in the text include juvenile offenders. *Cf. supra* notes 84, 178, 269 (excluding juvenile offenders from calculation).

[280] *See* Cassell, *supra* note 279, at 343.

son wrongly identified and wrongly convicted was that later "the actual criminal confessed."[281] Distressingly, Gross also reported that, in his collection of miscarriages spanning the decades from 1900 to 1983, a distinct historical shift was apparent: "[I]t is difficult to read these misidentification stories without concluding that a significant change took place some time between the mid-1950s and the early 1970s."[282] Gross cites as a typical earlier case: "the actual criminal was arrested on an unrelated charge and, after being held in custody for a day or two, she confessed to the perpetration of all the crimes charged to the misidentified suspect."[283] Since then, such exonerations through true confessions appear to have declined significantly. Gross cites among the possible causes the Supreme Court's decision in *Miranda v. Arizona*,[284] which "may result in some reduction in the number of confessions."[285]

Miranda may also perversely harm the innocent by creating precisely those conditions in which Leo and Ofshe believe that police are most likely to extract false confessions: unsolved high profile cases.[286] As Leo and Ofshe explain, "[i]nterrogators sometimes become so committed to closing a case that they improperly and/or inappropriately use psychological interrogation techniques to coerce or persuade a suspect into giving a statement that allows the interrogator to make the arrest."[287] It is easy to believe that *Miranda*—by producing ten of thousands of unsolved crimes—could produce this pressure on police in more than a few cases.

Considered together, *Miranda*'s net effect on false and true confessions is harmful to innocent persons. The decision does virtually nothing to help false confessors (and may actually

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[281] Gross, *Eyewitness Identification*, *supra* note 25, at 421.

[282] *Id.* at 431.

[283] *Id.* (internal quotation omitted).

[284] 384 U.S. 436 (1966).

[285] Gross, *Eyewitness Identification*, *supra* note 25, at 431. Gross also suggests *Gideon v. Wainwright*, 372 U.S. 335 (1963), which recognized the right of indigents to appointed counsel, and "the entire Warren Court criminal procedure jurisprudence" as possible causes of the apparent decline in confessions. Gross, *Eyewitness Identification*, *supra* note 25, at 431. *Miranda* is a far more likely cause. *See generally* Cassell & Fowles, *supra* note 277 (collecting evidence and arguing that *Miranda* is the most likely cause for changes in the confession rate during the 1960s).

[286] *See* Ofshe & Leo, *The Decision to Confess Falsely*, *supra* note 12, at 987.

[287] Leo & Ofshe, *supra* note 2, at 440.

make their plight worse) while not infrequently harming other innocents by preventing police from identifying the actual perpetrators of crimes.

B. REGULATING INTERROGATIONS TO PROTECT THE INNOCENT

Because *Miranda* affirmatively harms the innocent, simply abolishing the decision would be helpful to those who are innocent.[288] In considering ways to protect the innocent, however, we are not limited to choosing between abolishing *Miranda* or retaining it. *Miranda* may have done its most serious damage to the innocent by effectively blocking consideration of superior ways of regulating police questioning. When the Court announced *Miranda* in 1966, various efforts to reform the interrogation rules were underway.[289] The decision itself seemed to invite continued exploration of such alternatives, promising that "[o]ur decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform."[290] The Court's promise has proven to be an empty one. In the quarter of a century since *Miranda*, reform efforts have been virtually nonexistent. The reasons are not hard to imagine. No state is willing to risk possible invalidation of criminal convictions by departing from the *Miranda* regime.[291] As a result, as the Office of Legal Policy concludes, *Miranda* has "petrified the law of pre-trial in-

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[288] Progress in this direction in federal courts would result from enforcing 18 U.S.C. § 3501, the statute "repealing" *Miranda*, and reestablishing the voluntariness test as the sole standard for admissibility of confessions in federal cases. *See generally* Davis v. United States, 512 U.S. 452, 462-63 (1994) (Scalia, J., concurring); United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975) (upholding § 3501). Recently a district judge in Utah upheld the statute and concluded that it superceded *Miranda*. *See* United States v. Rivas-Lopez, 988 F. Supp. 1424 (D. Utah. 1997). The Fourth Circuit has also recently expressed interest in the statute, although the litigation there has yet to produce conclusive results. *See Obscure Anti-*Miranda *Statute Prompts Heated Debate in CA4 Cases*, 11 Crim. Prac. Rep. 375 (Sept. 24, 1997). (Note: I served as counsel for the crime victims groups seeking application of the statute in these cases.) While the current Department of Justice is disinclined to raise the issue in the lower courts, *see id.*, a strong argument can be made that federal judges are obligated to raise on their own initiative the issue of the applicability of an Act of Congress. *See* Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. (forthcoming 1998).

[289] *See* OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 214, at 40-41, 58-61; *Miranda*, 384 U.S. at 523 (Harlan, J., dissenting) (noting the "ironic untimeliness" of the Court's new confession rules in view of on-going "massive reexamination of criminal law enforcement procedures on a scale never before witnessed").

[290] *Miranda*, 384 U.S. at 467.

[291] *See* Stuntz, *supra* note 217, at 53-54 n.178.

terrogation . . . foreclosing the possibility of developing and implementing alternatives that would be of greater effectiveness both in protecting the public from crime and in ensuring fair treatment of persons suspected of crime."[292] Nothing is likely to change in the future so long as *Miranda* remains on the books, perpetuating a perceived risk of invalidation for any state that chooses to go a different way.[293]

The "petrification" of pre-trial interrogation law has effectively prevented consideration of alternatives that would protect the innocent against false confessions, while at the same time allowing police to gain more true confessions to exonerate those who have wrongfully come under suspicion and to prosecute those who are guilty of such offenses. One such solution is to videotape police interrogations while simultaneously loosening the most onerous *Miranda* restrictions on police questioning, a proposal I have spelled out elsewhere.[294] Specifically, police should be required to videotape (or perhaps audiotape) all custodial interrogations, unless the suspects objects or recording equipment clearly malfunctions. With videotaping in place to protect suspects, the *Miranda* rules could then be relaxed to allow police to obtain more confessions, particularly by eliminating the requirements that police obtain an affirmative "waiver" of rights before custodial questioning and that they immediately cease questioning if a suspect asks to see a lawyer. Such modifications are permissible because the *Miranda* restraints extend beyond what the Constitution requires[295] and because such

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[292] OLP PRE-TRIAL INTERROGATION REPORT, *supra* note 214, at 99.

[293] *Id.*

[294] *See* Cassell, *supra* note 57, at 486-98.

[295] *See* GRANO, *supra* note 229, at 173-99; Cassell, *supra* note 57, at 471-73; Cassell, *All Benefits, supra* note 200, at 1115-18; Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 300-03 (1996). *But see* Schulhofer, *supra* note 19, at 553-56. Akhil Amar has also suggested that this videotaping proposal would be constitutional in noting that a variety of schemes for regulating the police interrogation are consistent with the Fifth Amendment. AMAR, *supra* note 1, at 77. Given Amar's overriding focus on protecting the innocent, the empirical evidence discussed in this Article strongly argues in favor of what Amar styles the more "relaxed" versions of police interrogation, *id.* at 77, and against some of the versions Amar discusses that could interfere with police questioning. *See* Michael Stokes Paulsen, *Dirty Harry and the Real Constitution*, 64 U. CHI. L. REV. 1457 (1997) (reviewing AMAR, *supra* note 1, and discussing ways in which confessions would be lost under some of Amar's proposals).

modifications simply adopt the Court's suggestion that alternatives to *Miranda* may be considered.[296]

Videotaping would undeniably help false confessors. Videotaping creates the possibility of detecting police coercion in forcing suspects to give "confessions." The tape also helps reveal whether a suspect is actually confessing to a crime he committed or to crime implanted in his mind by police questioning, as Leo and Ofshe's research generally illustrates.[297] A report in the *American Lawyer* describing three false confessions to involvement in the Buddhist temple murders in Phoenix provides a good example.[298] While tape recorders were running, police obtained several false confessions in apparent compliance with *Miranda*. While the real killers were discovered before the innocent men stood trial, the *American Lawyer* concluded that "[o]nly these tape recordings gave the suspects any chance of defending themselves at trial."[299] The tapes revealed that police had fed information to the suspects, only to have the information fed back to them later, and that the police had been able to "tidy up" details in the suspects "confessions."[300]

Supporters of videotaping on false confessions grounds—including Leo, Ofshe, White, and Alschuler—simply urge that videotaping be added to the *Miranda* rules.[301] But this is plainly not the optimal approach to protecting the innocent. Only by coupling recording with the elimination of the most harmful of the *Miranda* requirements can we unambiguously ensure that the police will receive more true confessions—and thus more exonerations of innocent persons wrongfully under suspicion.

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[296] *See supra* note 290 and accompanying text.

[297] Ofshe & Leo, *Social Psychology*, *supra* note 12, at 238. Others have reached similar conclusions. *See, e.g.*, LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 134-35 (1993) (describing examination of tape of confession to demonstrate that it was false); Gisli H. Gudjonsson, *The Psychology of False Confessions*, NEW L.J., Sept. 18, 1992, at 1277 (concluding that tape recording allows more attention to "the identification of individual vulnerabilities when disputing the reliability of confession statements").

[298] *See* Parloff, *supra* note 12; *see also* White, *supra* note 3, at 128-31 (discussing the temple murder case); Ofshe & Leo, *Social Psychology*, *supra* note 12, at 226-31 (same).

[299] Parloff, *supra* note 12, at 38; *see also* Philip Weiss, *Untrue Confessions*, MOTHER JONES, Sept. 1989, at 20 ("The police made just one mistake: they turned on a tape recorder during Sawyer's sixteen-hour interrogation. Were it not for that recording, Sawyer would have stayed a nobody, good-bye kind of guy . . . who looked like he sure might have killed somebody and had even said as much").

[300] Parloff, *supra* note 12, at 58.

[301] *See, e.g.*, White, *supra* note 3, at 153-55; Ofshe & Leo, *supra* note 12, at 238.

While the available empirical evidence generally suggests that videotaping does not inhibit suspects, there are a few indications to the contrary.[302] For example, 28.3% of police agencies in a National Institute of Justice survey thought that suspects were somewhat less willing to talk on videotape.[303] To guarantee that the new regime produces more true confessions, the old *Miranda* restraints must be loosened at the same time videotaping is added. Changing the *Miranda* waiver and questioning cutoff rules would probably eliminate most of *Miranda*'s costs, producing tens of thousands of additional confessions each year[304]—no doubt exonerating some innocent persons who are wrongfully under suspicion and, as an added benefit, helping to protect the innocent from further criminal deprivations at the hands of these offenders. Scaling back the *Miranda* rules would also direct the courts (and defense attorneys) away from formalistic concerns about *Miranda* procedures and back to considering the voluntariness of the confession itself.[305] Loosening the *Miranda* "handcuffs" also has the important practical advantage of providing a substantial inducement for conservative law enforcement agencies to use videotaping technology.[306]

Some will, of course, oppose any change to *Miranda*. That opposition will be strongest from those who want to preserve—largely for symbolic and political reasons—the epitome of Warren Court activism on behalf of criminal defendants.[307] But no

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[302] *See* Cassell, *supra* note 57, at 492.

[303] WILLIAM A. GELLER, U.S. DEP'T OF JUSTICE, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES—A REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 107 fig.20 (1992).

[304] *See* Cassell, *supra* note 57, at 492-97.

[305] Some might argue that a reinvigorated voluntariness test would be worse for effective prosecution than the current *Miranda* rules. A straightforward comparison of the number of confessions lost due to *Miranda* with the number of cases that might be lost due to the voluntariness test will allay this concern. *Miranda* eliminates confessions from approximately one out of every six (16%) criminal suspects. *See* Cassell, *supra* note 57, at 417. On the other hand, genuine voluntariness issues are presented in only a tiny fraction of cases. *See id.* at 476 (collecting evidence on this point); Leo, *Inside the Interrogation Room*, *supra* note 42, at 282 (finding only 2% of interrogations involve "coercive" methods).

[306] Cassell, *supra* note 12, at 1133.

[307] *Compare* Schulhofer, *supra* note 19, at 562 (not discussing problem of innocent defendants, but opposing videotaping as a replacement for *Miranda*, because "procedure matters"), *with* Cassell, *All Benefits*, *supra* note 200, at 1121 (criticizing Schulhofer for failing to discuss the issue of innocent defendants). *See also* Leo, *Impact of* Miranda, *supra* note 42, at 680 (concluding that "even though *Miranda* may impede the efficiency of some criminal investigations, there would be little point in overrul-

goal of our criminal justice system is more important than protecting the innocent. As between retaining symbols and helping innocent persons, the choice should be clear. *Miranda* epitomizes the wrong turn our criminal justice system made in the 1960s. In that case (among others), the Warren Court lost sight of the goal of protecting the innocent in its zeal to create novel procedural rights primarily of use to the guilty. It is time to restore the traditional focus on the innocent. Replacing *Miranda* with a videotape regime would be a good way to start.

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ing *Miranda* this late in its history"); White, *supra* note 3, at 121 (urging retention of *Miranda* "as a symbol of our commitment to maintaining a fair system of criminal procedure").