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INNOCENT JUVENILE CONFESSIONS

SETH P. WAXMAN*

You're sixteen years old. You like WrestleMania, animals, and videogames. But you don't like talking to people, and in fact, you try not to be around them whenever you can. Because getting words out is really difficult, and you can't follow what other people are saying with their words or their faces. You're in special-education classes at school, and tests have shown that you're borderline disabled.

Things got really bad when your uncle was arrested for a murder that everyone has been talking about. Just a few days after he's arrested, the police talk to you. But nothing happens until a few months later, after your cousin says that you've been acting up. So, the police bring you back in for three different interviews in one day, and on the next day, they take you out of school for another interview.

The detectives aren't acting tough, which makes you feel better. They tell you that they're on your side—one even says that he has a kid your age. They're telling you all kinds of stuff about the murder, stuff that you did and that your uncle did, but they're also quizzing you on it. And they're acting upset when you don't get the right answer.

So, you just guess and guess until you get it right, because you don't like quizzes and it's better if you get the right answers so you can leave. After you've been sitting with the detectives forever, they tell you all the stuff that you've admitted to. All the right answers you've given. And you agree with them, because you really just want to leave and get back to school in time for your sixth-period class. You've got a project due then. But you don't get to leave. You're arrested, and you're scared, and you're really confused, telling your mom that the detectives had gotten to your head. And because you agreed with those things about helping your uncle with the murder, you're put in jail for the rest of your life.

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Millions of Americans are familiar with the story of Brendan Dassey. They've watched his wrenching videotaped interrogation. In a lot of ways, his confession is as comprehensible as it is heartbreaking. Meaning, it's understandable, maybe even unsurprising, that an adolescent with severe social and intellectual limitations, who is subjected to hours of two-on-one interrogations with no lawyer, no parent, no support of any sort, would confess to something he didn't do.

But we know that false confessions don't come only from people like Brendan, people with intellectual and social limitations or people with no real conception of the legal system or their rights.

Take Marty Tankleff, an affluent teenager who wakes up on what's supposed to be his first day of senior year to find his mother dead—she's been slashed and bludgeoned—and his father bleeding heavily in his home office. Immediately he calls 911 and begins to administer first aid to his father. When the police arrive, Marty identifies the likely suspect—his father's business partner who had run up a half-million-dollar debt to his father, had recently threatened his parents, and had been at the Tankleff home late the night before.

Police take Marty to the station, where they tell him that they've found forensic evidence linking him to the crime—his hair on his mother's body. Eventually, one of the detectives leaves the room. And when he returns, he lies to Marty, telling him that his father had woken up from a coma and accused his son of murdering his mother. In fact, his father had *never* woken up and eventually died from his injuries.

What's Marty's response to the detective's lie? He asks, "Could I have blacked out and done it? Could I be possessed?" One of the detectives tells him, "I think that's what happened to you." So Marty confesses, recanting almost immediately and refusing to sign the partial confession the detectives had prepared. Marty is convicted of murdering both his parents anyway, sentenced to 50 years to life in prison. By the time he was exonerated, he had spent one-half of his life in prison.

Stories like Marty's are piling up—accounts of people subjected to psychological coercion who falsely confess to a crime, only to be exonerated years later. Reaching adolescents and adults, the poor and the affluent, the disabled and the high-functioning, these stories raise a critical question: how could we have accepted their confessions as proof of their guilt?

The answer may be as simple as the steadfast belief held by many—including lawyers, law enforcement officials, and judges—that people who are innocent just don't confess. One of the prosecutors spoke that very line to the jury that convicted Brendan Dassey.

If innocent people don't confess, the reasoning goes, there can be no better evidence of a suspect's guilt than his own confession. Understood this way, confessions assume totemic significance in our criminal justice system, exerting what Professor Lackey calls an "illegitimate swamping effect."¹ That effect, she says, "overpowers" all other evidence, including later denials of guilt, and even DNA evidence. The Supreme Court itself has remarked that "[a] confession is like no other evidence" in the profound impact it has on a jury.²

Confessions also have a cascade effect. One who makes a false confession is four times more likely to plead guilty rather than face trial, a decision doubtlessly driven by a fear that a jury simply won't look past the confession. And the cascade effect reaches other suspects as well. With one false confession, police are often able to obtain false confessions from other suspects in the same case. The names and the numbers are notorious. The "Marquette Four," the "Englewood Four," the "Central Park Five," and the "Dixmoor Five."

In the case of the Dixmoor Five, police interrogated Robert Veal, fifteen-years-old and mentally disabled, about the rape and murder of a teenage girl. Veal falsely confessed and implicated Robert Taylor, also fifteen. So, then Taylor confessed, and the police charged Veal, Taylor, and three other teenage boys with the crime. Veal and another pled guilty, agreeing to testify against Taylor and the two other boys in exchange for shorter sentences. By the time of trial, DNA evidence had eliminated each member of the Dixmoor Five as a possible perpetrator, yet the jury convicted all three boys and each was sentenced to at least eighty years. To say these names—Dixmoor Five, Marquette Four—is to demonstrate the force of a false confession.

Behind these stories is a mountain of social science explaining why—contrary to popular belief—innocent people *do* confess. Take perhaps the most obvious factor, age. Simply put, young people think differently than adults. The brain's prefrontal cortex, which is essential to developing certain cognitive functions—like foresight, cost-benefit assessment, and making decisions that require thinking about multiple sources of information at once—does not develop until late in adolescence. Unable fully to appreciate the long-term consequences of their actions and unfamiliar with the legal system, children and teenagers are more likely to confess in exchange for

¹ Kathleen McGarvey, *Philosopher Jennifer Lackey on Why We're So Apt to Believe Confessions*, U. ROCHESTER NEWSCENTER (Jan. 30, 2019), <https://www.rochester.edu/newscenter/false-confessions-philosopher-jennifer-lackey-humanities-center-361172/> [https://perma.cc/2JRJ-996A].

² *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

what they think will be an immediate benefit, like ending an interrogation, going back home or, in Brendan's case, getting back to class. In a particularly distressing example, sixteen-year-old Nga Truong confessed to killing her infant son. Upon being told that she would be arrested, she asked, "Is it going to be more than a day?"

Development of the prefrontal cortex also relates to the way we perceive time. Children experience intervals of time as lasting longer than adults do. So, an interrogation lasting a few hours might feel interminable to a young person, prompting a false confession.

We also know that young people are more susceptible to leading questions than adults are. That means they're more apt to absorb the information fed to them during questioning and, in the words of Brandon Garrett, to "internalize that narrative and repeat it, possibly becoming convinced of [their] own guilt."³ Just think about Marty Tankleff. After the detective lied and told him his father had implicated him in murdering his mother, Marty asked, "Could I have blacked out and done it?"

Finally, we know that young people are more vulnerable than adults to outside pressure and influence, particularly from authority figures. Positive feedback from interrogators can elicit false confessions, and the opposite is true as well—children and teens succumb more easily to negative feedback. These physiological and psychological attributes of youth help explain why, looking back at the false confession he gave as a barely literate fourteen-year-old, Davontae Sanford described wanting "everything to be right . . . because if it wasn't right he wasn't going to believe me and he would keep me longer. I really wanted to go home." Or, in the words of Marty Tankleff, "It's like having an 18-wheeler driving on your chest. And you believe that the only way to get that weight off your chest is to tell the police whatever they want to hear."

Age aside, we know that people with social and intellectual deficits also are more prone to confess falsely. They're often unable to comprehend or communicate quickly enough to counter detectives' interrogation techniques. And they frequently lack a basic understanding of legal rights, processes, and consequences. Like young people, those with cognitive and social deficits are more inclined to try to appease authority figures, and they are also more suggestible to leading questions.

It's easy to see how certain typical interrogation tactics that may exert particular influence on vulnerable populations would have the potential to extract false confessions from adults as well. Consider the tactic of

³ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1064 (2010).

minimization, which involves understating the harm or the consequences of a crime. If you're led to believe that admitting to the crime won't carry particularly severe consequences and is the fastest ticket out of an interrogation, then why not confess, even if falsely? There's also maximization, which involves intimidating a suspect into confessing by overstating the nature of the crime and the proof against the subject. Fact feeding and leading questions have the potential to warp a suspect's version of truth and cause him or her to adopt an inaccurate version of events.

The psychological and physiological factors I've just mentioned contribute to some pretty startling statistics. Law enforcement officers have estimated that false confessions are obtained in 10% of all interrogations. In the past thirty years, 353 people in the U.S. have been exonerated based on DNA evidence. And nearly 30% of those exonerations involved false confessions. Of 125 cases of proven false confessions in the U.S. between 1971 and 2002, eighty-one were murder cases, and of course those cases usually carry the highest sentences. One study looking at 873 exoneration cases over twenty-three years found false confessions in approximately 15% of the cases. That percentage spiked to over 40% for juveniles.

One would think—or hope—that the growing body of social science research on false confessions, along with these pretty startling statistics, would spur courts to address the problem. Unfortunately, that's not been the case. After getting out in front of the issue early, the Supreme Court has been largely silent for the past forty years.

All the way back in 1884, the Supreme Court gave credence to the notion that a confession had to be voluntary in order to be admissible, declaring in *Hopt v. Utah*⁴ and cases in the following few years that an involuntary confession should not go to the jury. Those early cases invoked the common law tradition of excluding involuntary confessions as unreliable, but cases that followed cast the issue in a constitutional light, holding that such confessions violated both the Fifth and Fourteenth Amendments.

The Court was also very early to recognize the particular problems that attend juvenile confessions. Over seventy years ago, in *Haley v. Ohio*, the Court observed that events that might “leave a man cold and unimpressed” could “overawe and overwhelm a lad.”⁵ In view of the impressionability that comes with youth, the Court required “special care” in scrutinizing the confession of a child.⁶ And almost sixty years ago, the Court invalidated the confession of a fourteen-year-old boy who, after confessing almost

⁴ 110 U.S. 574 (1884).

⁵ 332 U.S. 596, 599 (1948).

⁶ *Id.*

immediately upon arrest, was then held in isolation for five days before signing the confession that would support his conviction.⁷ That the boy's confession had come "tumbling out" didn't matter, and certainly, the Court said, it didn't make the confession constitutional. In invalidating his conviction, the Court made clear that youth was a "crucial" factor in considering the voluntariness of a confession.

Five years later, the Court articulated an even stronger standard, stating that "the *greatest care* must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy or fright or despair."⁸

Finally, in 1979, the Court said in *Fare v. Michael C.* that in the case of a juvenile confession, the totality-of-the-circumstances test requires inquiry into the minor's age, experience, education, background, and intelligence.⁹

Fare was the last we've heard from the Supreme Court on the issue of juvenile confessions, even though in the forty years that have elapsed, the Court has relied on social science research to reassess youth and intellectual disability in other criminal justice contexts. For example, the Supreme Court has held that a sentence of life without parole is unconstitutional if it fails to take into consideration an adolescent's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."¹⁰ And the Court has also outlawed the death sentence for crimes committed by people under eighteen.¹¹

When it comes to juvenile confessions, the Court's silence is problematic not only because we would like prevailing caselaw on the topic to reflect the evolving science behind involuntary confessions. The silence is problematic because it has also permitted lower courts to be derelict in enforcing the "greatest care" standard.

With the dearth of recent cases from the Court, I had hoped the Justices would see Brendan's petition as a perfect opportunity to bring the law and the lower courts in line with the reality of involuntary juvenile confessions. Brendan's was the rare case where his interrogation and confession were videotaped. There was no dispute about what was said, what tactics were or were not used. His failure to grasp the magnitude of the situation is on full view, as is his struggle to correctly answer the detectives' leading questions.

⁷ Gallegos v. Colorado, 370 U.S. 49 (1962).

⁸ In re Gault, 387 U.S. 1, 55 (1967) (emphasis added).

⁹ 442 U.S. 707 (1979).

¹⁰ Miller v. Alabama, 567 U.S. 460, 477 (2012).

¹¹ Roper v. Simmons, 543 U.S. 551 (2005).

Perhaps most important, in Brendan's case, his confession was the *only thing* linking him to the crime. No DNA evidence linked him to the murder of Teresa Halbach. No witnesses put him there.

Unfortunately, the Court denied Brendan's petition. It's hard for me to recall an outcome in all my decades of law practice that has troubled me more than the failure to get Brendan merits consideration in the Supreme Court. We may never know whether the denial of certiorari signaled a lack of interest in updating the juvenile voluntariness doctrine or something else. But it's my hope for Brendan and for many others like him that petitioners continue to seek cert on this issue. The voluntariness doctrine is simply too consequential to lie fallow.

As I see it, how we update the doctrine depends on what we're trying to achieve. Why do we value confessions and what values do they reflect? We want justice for victims, and deterrence of and retribution for criminal conduct. But as a first principle, we are trying to achieve fundamental fairness in our criminal justice system.

That basic concept transcends guilt or innocence, and as the Supreme Court has said, it demands that we discard involuntary confessions *even when* there is corroborating evidence of the confessor's guilt. It offends fundamental fairness for a government actor to extract a confession by physical or psychological force. A fair criminal justice system requires that a confession be the product of free will and rational intellect.

Of course, we are searching for truth. True confessions are reliable confessions, and there is no doubt that reliability and voluntariness are inextricably related. In the case of Brendan, the officers' coercive tactics and his own vulnerabilities resulted in a confession that was not simply involuntary. It was also internally incoherent and belied by the evidence at the crime scene. Truth is an end in itself. But it's also important for the simple reason that unreliable or *untrue* confessions mean that the actual perpetrator may still be at large.

Voluntary confessions are also emblematic of the sort of accountability that is crucial to any ordered society. Government actors, the people who take the confession, should themselves be compelled to live within the law.

Finally, for those who think confessions contain cathartic value and are a step toward repentance and remorse, those things are of course demeaned by involuntary confessions.

Now, I've just ticked through some high-minded concepts. The operative question is how to implement those concepts in practice, in the interrogation room. I won't presume to prescribe best practices, because unlike many of the panelists today, who will no doubt share their studied

views on how to improve interrogations and ensure that confessions are voluntary, I'm no expert.

I'll just say, based on my experience over many decades, that it's clear we cannot accept a one-size-fits-all approach to interrogations. Detectives cannot assume—cannot be permitted to assume—that the same tactics used on socially and intellectually sound adults are safe or appropriate for use on young people or those with impairments.

I look forward to hearing about how today's panelists have been thinking about the problem of involuntary confessions and what solutions they might propose. With that, I'll just say thank you to Northwestern's *Journal of Criminal Law and Criminology* and to the Center on Wrongful Convictions. It's a privilege to be here.