UIC Law Review

Volume 34 | Issue 2 Article 5

Winter 2001

Something Is Rotten in the Interrogation Room: Let's Try Video Oversight, 34 J. Marshall L. Rev. 537 (2001)

Wayne T. Westling

SOMETHING IS ROTTEN IN THE INTERROGATION ROOM: LET'S TRY VIDEO OVERSIGHT

WAYNE T. WESTLING*

INTRODUCTION

Something is rotten in the police interrogation room. When police have a suspect in custody, the standard practice is to engage in incommunicado interrogation. Police manuals and advice emphasize the psychological advantages of interrogation conducted in a private location away from the suspect's familiar environment.[1] The longer the interrogation lasts, the more likely it is to elicit incriminating statements.[2] Chief Justice Warren, writing for the majority in the famous *Miranda*[3] case, stated that the sole purpose of these techniques is to "subjugate the individual to the will of the examiner." He further states that admissions obtained in this manner are tainted by compulsion due to the absence of adequate protective devices.[4] Despite this historical characterization of interrogations, few lawmakers have achieved systematic reform of the interrogation process to date.

Often times, the attempts to recreate events that occurred during an incommunicado interrogation through memory and testimony result in "swearing contests" between police

* Professor of Law & the Elmer Sahlstrom Senior Fellow in Trial Law, University of Oregon. Professor Westling obtained his A.B. from Occidental College and his J.D. from New York University. He wishes to thank Mark Jefferis, a second-year student at the University of Oregon for his help in tracking down some of the more obscure references in this essay.

1. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 26-27 (1992); ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE 56-57 (1976); Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 21, 44-45, 312, 713 (1961). *See e.g.*, Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 730-32 (1997).

2. Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 290-98 (1996).

3. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

4. *Id.* at 458.

interrogators and suspects.[5] Traditionally, police were the invariable winners in these swearing contests. This fact is somewhat surprising particularly in light of the documented cases of physical torture and abuse, psychological torture and abuse, and police perjury.[6] However, a Manhattan jury recently reversed the trend.[7]

During the investigation of the slaying of a teacher, Montoun T. Hart gave the police an eleven-page confession of his role, citing details that only someone present at the killing would know.[8] However, a Manhattan jury acquitted Mr. Hart of all charges in the case.[9] The confession, which seemed to be the strongest part of the prosecution's case, became the reason for the jury's acquittal.[10] The jurors in the case had so many questions about how the police had obtained the confession that they decided it was too unreliable and threw it out.[11]

Mr. Hart said that he was drunk, high on marijuana, and exhausted when he signed the confession.[12] The detectives testified that Mr. Hart was sober during the interrogation and that the confession was genuine.[13] However, after viewing photos of Mr. Hart taken that night, jurors decided he looked "drunk, high or both" and decided that they could not base a conviction on the disputed confession.[14]

Most police departments in the United States, most prosecutors advising their local law enforcement officials, and most courts deciding pre-trial questions of admissibility, persist in the antiquated practice of pretrial swearing contests. This tradition continues notwithstanding the repeated criticism, the documented cases of physical and psychological abuse, documented cases of police perjury, and the occasional jury rejection of supposed confessions reported by police from the interrogation room. The simple straightforward precaution of videotaping the interrogation sessions is steadfastly rejected by police and courts in most American jurisdictions. This policy is

---

5. *See* Ashcraft v. Tennessee, 322 U.S. 143, 152-53 (1944) (concluding that disputes regarding the voluntariness of confessions are "an inescapable consequence of secret inquisitorial practices."). *See generally* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 20 (1980).

6. People v. Arthur, 673 N.Y.S. 2d 486 (1997).

7. David Rohde, *Jurors Faulted Police Work in Murder Case of a Teacher*, N.Y. TIMES, Feb. 13, 1999, at B5.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Rohde, *supra* note 7, at B5.

13. *Id.*

14. *Id.*

foolish and counterproductive.

I. WRONGFUL CONVICTIONS

Even the most ardent advocates of strong law enforcement have no desire to see the wrong person convicted and punished. One of the cardinal principles of our Anglo-American criminal justice system is to err on the side of resolving ambiguous cases in favor of innocence.[15] The policy behind this presumption stems from the horrible fear that an innocent person will be wrongly convicted and sentenced to prison.

In the past few years, an even more horrible specter has been raised—that one or more of the American states may execute an innocent person.[16] The harsh news that approximately one-seventh of those persons convicted of murder and sentenced to death in the United States since 1976 may not have been, in fact, guilty of their crimes[17] has focused national attention on the problem of wrongful convictions. A scholarly survey of homicide cases nationwide revealed that between 1973 and 1995, of the 4,500 death-penalty cases that had completed at least one round of appellate review, 68% were either reversed or remanded.[18]

Those convicted of murder and sentenced to death are the worst-case examples and those cases receive the greatest amount of scrutiny as they pass through the system. Police, prosecutors, defense counsel, and courts work exceptionally hard to make sure that our criminal justice system works properly, especially in these serious cases. It is astounding to think that our society accepts such a high rate of error. The fact that our system produces such a large rate of error in the most serious cases strongly suggests the likelihood that a similar—or greater—error rate exists in non-death penalty cases. One can only guess at the error rate for people convicted of assault, rape, theft, and sex abuse.[19] While the use of DNA testing has exposed some wrongful

15. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1743 (William Draper Lewis ed., Rees Welsh & Company, 1902) (1765); WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE, § 1.4(e) (3d ed. 2000).

16. JIM DWYER ET. AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 211-22 (2000). *See e.g.*, Alan Berlow, *The Wrong Man,* ATLANTIC MONTHLY 66 (Nov. 1999).

17. *E.g.,* Joseph P. Shapiro, *The Wrong Men on Death Row*, U.S. NEWS & WORLD REP., Nov. 9, 1998, at 22.

18. JAMES S. LIEBMAN ET. AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995 (2000). The United States Senate Judiciary Committee commissioned this survey in 1991. For a news account, see Douglas Holt, *Study: Most Death Cases Have Significant Flaws*, CHI. TRIB., June 12, 2000, at 7.

19. EDWARD CONNORS ET AL., EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (Department of Justice Research Report 1996).

convictions in these areas, it is available in only a small number of cases. The Innocence Project of the Cardozo School of Law, founded by Barry Schech and Peter Neufeld, has received well-deserved attention for using the modern science of DNA to establish innocence in a variety of wrongful conviction cases.[20]

Given the severe risk of error, serious examination should be made of the system to determine the causes of such miscarriages. While other factors play a part,[21] one significant factor that emerges from this examination is unreliable confession evidence.

II. A HOUSE OF CARDS

A large body of American law has emerged concerning the types of conduct that may render a confession admissible or inadmissible.[22] Courts have erected an elaborate set of "do's and don't's" governing the relationship between the state and the suspect during a confession. In specific circumstances, police must admonish a suspect concerning his or her right to remain silent and to have the assistance of counsel.[23] If the suspect elects to speak without the assistance of counsel, a waiver of his or her rights must be freely given.[24] In assessing the validity of a waiver, courts analyze the totality of the circumstances surrounding the

---

20. The Innocence Project, Cardozo School of Law, Yeshiva University.

21. Other factors include inadequate defense lawyering, faulty eyewitness identification, jailhouse snitches fabricating evidence (including confessions), and prosecutorial misconduct. *See generally* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 475-96 (1996); Erin Hallissay, *Study Shows How 62 Innocent Men Were Found Guilty/ Authors Call for More DNA Testing*, S.F. CHRON., Feb. 16, 2000, at A2; Mark Clayton, *Common Causes of Erroneous Convictions*, CHRISTIAN SCI. MONITOR, Mar. 27, 1995, at 11; Mark Tatge, *Wrongful Convictions Put at 10,000 a Year*, PLAIN DEALER, Mar. 16, 1996, at 5B; Martin J. Oberman & Kathleen L. Roach, *Justice Denied*, CHI. TRIB., Nov. 1, 1997, at 21. *See e.g.*, Henry Weinstein, *'Only God and I Knew My Innocence' Crimes: Herman Atkins Speaks Out After Being in Prison for 12 Years for a Rape He Did Not Commit*, L.A. TIMES, Feb. 22, 2000, at B1.

22. *See generally* LAFAVE, *supra* note 15, at Ch. 6; CHARLES H. WHITEHEAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, Ch. 16 (4th ed. 2000); DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS (2d ed. 1994); RICHARD A. LEO & GEORGE C. THOMAS III, THE *MIRANDA* DEBATE: LAW, JUSTICE AND POLICING (1998); Erin E. Brophy & Wendy W. Huang, *Custodial Interrogations*, 88 GEO. L.J. 1021 (2000).

23. *See generally* LAFAVE, *supra* note 15, at § 6.8. William T. Pizzi, *Waiver of Rights in the Interrogation Room: The Court's Dilemma*, 23 CONN. L. REV. 229, 241-52 (1991).

24. Colorado v. Spring, 479 U.S. 564, 573-74 (1987); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding that waiver may be implied); Oregon v. Elstad, 470 U.S. 298 (1985); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984); LAFAVE, *supra* note 15, at § 6.9; James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1043-59 (1986).

interrogation. In addition to personal factors such as age, education, intelligence, physical and mental conditions, courts also consider the explicitness of the waiver and any language barriers that might exist.[25] During the resulting interrogation certain types of conduct, such as physical violence, threats, and promises of leniency, are impermissible.[26] However, other types of conduct, including misrepresentation about available evidence and several types of promises, are permissible.[27]

But the entire set of rules (governing the relationship between a suspect and the state regarding confessions) is built on a house of cards. Its frailty lies in the assumption that the public has the ability to know, with historical accuracy and precision, what transpired during incommunicado police interrogation. As Justice Harlan observed in his dissent, *Miranda* does little to alleviate the conflicts between the interrogating officers' and the suspects' versions of the facts relating to critical issues.[28] The validity of a suspect's waiver now often depends on the resolution of a swearing contest relating to the events surrounding the reading of the *Miranda* rights.[29]

In *Brewer v. Williams*,[30] the notable "Christian burial speech" case, the Supreme Court found that the detective had "deliberately and designedly set out to elicit information from Williams"[31] during a police car trip from Davenport to Des Moines, Iowa, as if no question existed about the accuracy of the transcription. In actuality, the underlying facts are a combination of findings by a state court trial judge in the first instance and a federal district

25. Brophy & Huang, *supra* note 22, at 1031-33.

26. *See e.g.*, Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 845-46 (1997); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 785-86 (1997); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2042-56 (1998) [hereinafter *Involuntary Confession*]; Welsh S. White, *False Confession and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 118-21 (1997) [hereinafter *Safeguards Against Untrustworthy Confessions*].

27. Colorado v. Spring, 479 U.S. at 565, 574; U.S. v. Ruggles, 70 F.3d 262, 265 (2d Cir. 1995); U.S. v. Wrice, 954 F.2d 406, 411 (6th Cir. 1992); U.S. v. Pierce, 152 F.3d 808, 812-13 (8th Cir. 1998). *See generally* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427-32 (1996); Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 419-31 (1999); Margaret Paris, *Lying to Ourselves*, 76 OR. L. REV. 817 (1997).

28. Miranda v. Arizona, 384 U.S. 436, 505, 516 (1966); Leo & White, *supra* note 27, at 472 n.133.

29. Leo & White, *supra* note 27, at 472 n.133.

30. 430 U.S. 387 (1964).

31. *Id.* at 399.

court judge in a subsequent habeas corpus proceeding.[32]

Sometimes courts confess ignorance as to what occurred during the interrogation. In *State v. Rhoades*,[33] the Idaho Supreme Court stated that, "[t]here is some conflict in the record as to whether Rhoades was read his *Miranda* rights while in the custody of the [arresting] Nevada Officers Miller and Neville, or if he was given the *Miranda* warnings for the first time by Officer Rodriguez after [interrogating officers] Rodriguez, Shaw, and McIntosh arrived at the scene."[34] Nonetheless, the *Rhoades* Court held that the defendant's exculpatory statements were "properly admitted into evidence."[35] The court dismissed the reliability argument, holding that "there is no reason to conclude that testimony which is questionable must be excluded during the guilt determination phase of a capital case.[36] The credibility of evidence in a first degree murder case, as in all others, is an issue for the trier of fact."[37]

In *Traylor v. State*,[38] the Florida Supreme Court bifurcated a confession, admitting the Florida portion and excluding the Alabama portion, because Alabama counsel had requested that the police not question his client.[39] The court determined that the request did not extend to a Florida detective's inquiries about a different crime. In his concurrence, Justice Cogan takes the majority to task for its "wholly unwarranted assumption" about counsel's conversation with his client and for "supplementing the factual record with its own personal conjecture."[40]

In the first situation, appellate courts fashion a rule governing the facts of that particular case. But for "the facts" the appellate court had to rely on fact-finding by a trial judge as to

32. *See generally* Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974); State v. Williams, 182 N.W.2d 396 (Iowa 1970). For cogent criticism of the Supreme Court's reliance on this factual summary, see Yale Kamisar, *Foreword: Brewer v. Williams–A Hard Look at the Discomfiting Record,* 66 GEO. L.J. 209 (1977).

33. 809 P.2d 455 (Idaho 1991).

34. *Id.* at 462.

35. *Id.* This refusal to overturn the trial court rests, at least in part, on the apparently spontaneous nature of the defendant's first comment. According to uncontested police accounts, Rohde made the first "I did it" statement without being questioned or otherwise addressed by any of the officers present. *Id.* Under *Miranda*, the court noted, a spontaneous statement is admissible whether it occurred before or after the defendant was read his *Miranda* rights. *Id.* (citing Miranda v. Arizona, 384 U.S. 436 (1966)) ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence . . . . Volunteered statements of any kind are not barred by the Fifth Amendment.").

36. *Id.* at 462.

37. *Id.*

38. 596 So. 2d 957 (Fla. 1992).

39. *Id.* at 960.

40. *Id.* at 976-77 (Kogan, J., concurring in part, dissenting in part).

what happened in a situation that is entirely shielded from judicial scrutiny. Without an accurate historical record of the words spoken, along with the tone of those words and the surrounding circumstances, the trial judge is hopelessly lost in his or her fact-finding mission. Too many instances of "he said, she said" occur for the court to be confident that the essential factual basis of the rules rests on a solid foundation. In the second situation, courts appear to be so result-oriented that they are willing to improvise an ad hoc decision by ignoring their historic fact-finding role.

III. THE DIFFICULTY WITH CONFESSIONAL EVIDENCE

What is it about confession evidence that makes it unreliable? Many factors contribute to unreliability, but the four most significant factors have been identified as: 1) physical and psychological coercion, resulting in statements that are the product of coercion rather than of the suspect's guilty conscience;[41] 2) interrogation techniques which create confusion and doubt in the suspect and result in false confessions which the suspect may genuinely believe;[42] 3) deliberate fabrication by police interrogators (or jailhouse informants) of "confessions" which did not in fact take place;[43] and 4) errors in nuance, whereby words uttered by a suspect are misinterpreted or misunderstood.[44]

Many examples of torture exist, dating back to early English common law. The practice of laying on stones in order to force an accused to enter a plea was a judicial application of torture.[45] But since the advent of modern police forces in the nineteenth

41. State v. Von Dohlen, 471 S.E.2d 689, 695 (S.C. 1996). GUDJONSSON, *supra* note 1, at 26, 27. *See also* Laura Hoffman Roppe, *True Blue: Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 754-56 (1994). *See e.g.*, Young, *supra* note 27, at 429-31.

42. GUDJONSSON, *supra* note 1, at 235-240, 260-273; WHITEBREAD & SLOBOGIN, *supra* note 22, at 785. *See e.g.*, 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, 442-55 (1998); *Safeguards Against Untrustworthy Convessions*, *supra* note 26, at 121-30; Ralph Underwager & Hollida Wakefield, *False Confessions and Police Deception*, AM. J. FORENSIC PSYCHOL. No. 3, 1992, at 49, 57-63. *See generally* Margaret L. Paris, *Faults, Fallacies, and the Future of Our Criminal Justice System: Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995) (explaining the significance of trust in the interrogation process).

43. *See generally* Christopher Slobogin, *Reform: The Police: Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042-143 (1996).

44. *See* text at Section IV (c), infra.

45. *See* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 74-77 (1977).

century,[46] the greatest area of concern has been potential abuse by the police, not the courts.

In the not-so-distant past, the trial of the Guildford Four[47] was conducted in the midst of an IRA assault on English targets. The regional police in Surrey physically abused and threatened suspects and obtained confessions for acts of terror, resulting in lengthy prison sentences.[48] After many years in prison, the truth was unearthed and the defendants were released.[49] The case of the Birmingham Six is also replete with similar instances of police oppression to obtain confessions.[50] Many of the concerns mentioned in the recent English book, MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR,[51] relate to police exerting physical or psychological pressure to coerce confessions from suspects.[52] By contrast, in the same time period, Australian police became legendary for their practice of fabricated confessions, called "verbals."[53] When the suspect did not confess, the police would create a confession out of whole cloth, sometimes manufacturing a "record of interview" to a non-existent interview.[54]

United States history also provides examples of the use of physical and psychological pressures to coerce confessions. *Brown v. Mississippi*[55] reached the Supreme Court in 1936 after lower courts had approved of police whipping of a black suspect. Recently Chicago police commander Jon Burge was accused of presiding over a command in the 1970s and 1980s that used physical violence to obtain confessions, or simply made them up.[56]

---

46. CLIVE EMSLEY, THE ENGLISH POLICE: A POLITICAL AND SOCIAL HISTORY, Ch. 2 (2d ed. 1996).

47. This case was the basis for the motion picture, IN THE NAME OF THE FATHER (1991).

48. MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 46 (Clive Walker & Keir Stamer eds., 1999).

49. *Id.* at 47.

50. *Id.* at 47-48.

51. For a discussion of the reality of police coercion of confessions, *see generally id.*

52. *Id.*

53. MARK FINDLAY, ET AL., AUSTRALIAN CRIMINAL JUSTICE 53 (2d ed. 1999); FITZGERALD REPORT ON A COMMISSION OF ENQUIRY 206-07 (Government Printer, Brisbane, 1989); Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lessons from Australia,* 25 AM. J. CRIM. L. 493, 526 (1998).

54. *See supra* note 53 and accompanying text.

55. 297 U.S. 278 (1936). *See, e.g.,* Chambers v. Florida, 309 U.S. 227, 239 (1940); Ward v. Texas, 316 U.S. 547, 555 (1942).

56. *See* THE ILLINOIS SENATE MINORITY LEADER'S TASK FORCE ON THE CRIMINAL JUSTICE SYSTEM REPORT 9-10:

> An independent investigation determined that between 1972 and 1991, more than 60 suspects were tortured by Burge and/or police officer under his supervision. An investigation by the Chicago Police Department's Office of Professional Standards confirmed these

A notorious case in San Diego in 1998 involved psychological pressure applied to three boys, ages 15 and 16, who confessed, only to have the confessions rejected by the trial court after reviewing a videotape of the entire proceeding.[57] Another famous Chicago case involved juveniles accused of the murder of Ryan Harris in 1998.[58] In that case, two boys aged seven and eight apparently confessed to the murder of a young playmate. Later investigation established that the young boys were physically incapable of committing the crime.

At the time of *Brown v. Mississippi*, the Supreme Court was concerned primarily with the reliability or unreliability of confessional evidence.[59] Beginning in the World War II era, the Court turned its attention from the untrustworthiness of coerced confessions to the Due Process concern for offensive or otherwise objectionable police interrogation techniques.[60] Writing for the majority in *Rogers v. Richmond*,[61] Justice Frankfurter held:

> [C]onvictions following the admission into evidence of confessions

---

> allegations, labeled the torture as 'systematic' and revealed that 'the type of abuse described was not limited to the usual beating but went into such esoteric areas as psychological techniques and planned torture.

In a March 1999 federal district court opinion responding to a habeas corpus petition, Judge Milton I. Shadur wrote:

> It is now common knowledge that in the early to mid-1980s Chicago Police Commander Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. Both internal police accounts and numerous lawsuits and appeals brought by suspects alleging such abuse substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis.

United States ex rel. Maxwell v. Gilmore, 37 F. Supp. 2d 1078, 1094 (N.D. Ill. 1999).

57. Mark Sauer, *True Confessions? Crowe Murder Case Raises Questions About How Police Arrive at Admissions of Guilt,* SAN DIEGO UNION-TRIB., Nov. 29, 1998, at D1.

58. *See* Maurice Possley & Steve Mills, *Charges Dropped Against Two Boys; Prosecutors Give Up Their Murder Case Against a Seven Year Old and an Eight Year Old, but Questions Persist About How Police Handled the Investigation of Ryan Harris*, CHI. TRIB., Sept. 5, 1998, at 1 (describing the events which led Cook County State's Attorney's Office to drop murder charges against two young boys). *See also* DeNeen L. Brown, *The Accused; For Two Little Boys, Wrongful Murder Charges Could Stick for Life*, WASH. POST, Nov. 1, 1998, at F1 (discussing the interrogation of two young boys accused of killing a playmate).

59. YALE KAMISAR, ET. AL., MODERN CRIMINAL PROCEDURE 452 (9th ed. 1999); Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2203-32 (1996); *Safeguards Against Untrustworthy Confessions*, supra note 26, at 112.

60. *See generally* Ashcraft v. Tennessee, 322 U.S. 143 (1944); Watts v. Indiana, 338 U.S. 49 (1949).

61. 365 U.S. 534 (1961).

> which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system.[62]

After decades of enforcing that "underlying principle" in an ad hoc fashion, the Court apparently began to feel that they were seeing too many cases in which lower federal courts and state courts were failing in their oversight role. *Miranda v. Arizona*[63] was an attempt to deal with this concern.

In *Miranda*, the Court specifically pointed out the various forms of psychological pressure that are routinely brought to bear by police interrogation techniques.[64] In developing the *Miranda* Rules, the Court apparently thought that suspects informed of their right to remain silent and of the right to counsel would invoke those rights.[65] The Court was sadly mistaken in that belief. Furthermore, the application of those rights and the concomitant waiver created further potential for abuse. As trial judges are called upon to make a pretrial determination of historical facts concerning what was said or done during the incommunicado police interrogation, they are hampered by the lack of reliable evidence as to precisely what transpired.

Confession evidence is powerful.[66] It has been called "the most potent of weapons for the prosecution."[67] A recent survey found that 61% of prosecutors identified confessions as "essential" or "important" for conviction.[68] In the thirty-five years since *Miranda*, police interrogators have become even more

---

62. *Id.* at 540-41.

63. Miranda v. Arizona, 384 U.S. 436 (1966).

64. *Id.* at 447-53.

65. Geoffrey R. Stone, *The Miranda Doctrine in the Supreme Court*, 1977 SUP. CT. REV. 99-169 (discussing *Miranda v. Arizona* (384 U.S. 436 (1977)). For a characterization of *Miranda* as a "compromise" between law enforcement and individual interests, see Yale Kamisar, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 120 (Bernard Schwartz ed., 1996). *See also* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 97-98 (1998) ("In the absence of any effective way of determining in each case whether the police had used improper means to obtain a confession, it seemed better to establish a uniform system that warned suspects of their right to remain silent.").

66. *See* Johnson, *supra* note 1, at 741-43 (discussing the importance of confessional evidence in the trial process).

67. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 L. & HUM. BEHAV. 27, 27 (1997).

68. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-07 (1996).

sophisticated.[69] Because confession evidence is so powerful, it is important that the confessions tendered in court be properly obtained, reliable, and accurate.

IV. THE VIDEOTAPE SOLUTION

Since the Northwestern Law School conference in 1998,[70] a serious push has emerged for electronic recording in the state of Illinois. In January of 2000, Governor George H. Ryan placed a moratorium on executions, pending the results of a special commission on administration of the death penalty in Illinois. Several bills have been introduced in the Illinois legislature that would require videotaping of police interrogation in certain types of criminal investigations. Juvenile legislation[71] originally provided for videotaped interrogation, but that provision was dropped from the bill during the legislative debate.[72]

Electronic recording of all stages of police interrogation of suspects would remove most of the factors that contribute to unreliability. Advances in science and technology routinely find their way into law enforcement practice and courtroom evidence. In 1969, when I began my legal career as a Deputy District Attorney in Los Angeles County, the Breathalyzer machine was relatively new on the scene. We had a number of prosecutions for driving under the influence that were based on non-scientific evidence of the suspects driving and on non-scientific testimony of the arresting officer's observations of the physical appearance of the suspect both before and after administering field sobriety tests. Today, most judges and juries would scoff at such a primitive presentation for a driving under the influence of alcohol case, demanding the readily available scientific evidence of blood alcohol content (or an explanation as to why the suspect had refused to consent to the tests). Similar stories can be told of radar for speeding cases and DNA for all different types of criminal investigations. Entire books are devoted to scientific evidence.[73] If use of modern technology is so vital for traffic enforcement, it is reasonable to demand that other technological improvements, such as electronic recordings, be employed in more serious criminal investigations.

None of these techniques would be a surprise to an Alaskan or

---

69. Leo & White, *supra* note 27, at 408.

70. National Conference on Wrongful Convictions and the Death Penalty, Northwestern University School of Law, Nov. 13-15, 1998.

71. HB 4039, 91st General Assembly (Ill. 1999).

72. Joseph Sjostrom, *Meetings Set to Get Underway on Videotaping of Confessions*, CHI. TRIB., July 18, 1999, at C2.

73. *E.g.*, D. H. KAYE, SCIENCE IN EVIDENCE (1997); ROBERT J. GOODWIN & JIMMY GURULE, CRIMINAL AND SCIENTIFIC EVIDENCE (1997).

a Minnesotan.[74] Two American states–Minnesota and Alaska, and a number of common law countries, have arrived at the same obvious solution. They require police to electronically record the proceedings in the interrogation room. In *Stephan v. State*,[75] the Alaska Supreme Court held that a criminal suspect had a right under the Alaska Constitution to require the police to electronically record the entire interrogation of that suspect, and that any statement obtained in violation of this due process right is generally inadmissible.[76] In *State v. Scales*, the Minnesota Supreme Court followed the lead of *Stephan* and held that all custodial interrogations of criminal suspects, including any information about the suspect's rights, waiver of those rights, and all questioning, must be recorded. Violation of this requirement could lead to suppression of any evidence otherwise obtained.[77] Thus, the perceived benefits of incommunicado interrogation are preserved, while the essential fact-finding function of the judge and jury may be based on reliable information.

Nor would any of this be a surprise to an Englishman, Canadian or Australian. England and Canada have required electronic recording of police interrogations since 1984.[78] Any viewer of Inspector Morse or Inspector Tennyson on the PBS *Mystery* series would have seen the beginning of an interrogation in which the detective switched on the recording device the minute he or she entered the interrogation room. This change was accomplished in England through comprehensive legislation. The same result came about in Australia as the result of a High Court case in 1991.[79]

A Chicago Tribune editorial put the case concisely:

---

74. A letter in the *Voice of the People* section of the Chicago Tribune demonstrates this point:

> As a native of Minnesota and a law student in Chicago, I read "Confession tapes become popular" with some disbelief. Minnesota has videotaped interrogations and confessions of criminal suspects for years, and I don't understand Chicago's reluctance to follow suit.... Videotaping the interrogation process is essential to document the events before the confession. Chicago police sometimes are too effective at obtaining confessions from suspects.... We give our implied consent to be videotaped every day—in elevators, building lobbies, and shopping malls.

Kate Shark, *Roll the Video*, CHI. TRIB., July 20, 1999, *available at* 1999 WL 2894259.

75. Stephan v. State, 711 P.2d 1156 (Alaska 1985).

76. *Id.* at 1159-60.

77. State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

78. R. v. Falcher [1994] W.C.B.2d 591, *available at* 1994 WCB LEXIS 1450; R. v. Luong [1995] 27 W.C.B. 2d 251, *available at* 1995 WCB LEXIS 729; R. v. David Thomas [1984] 13 W.C.B. 473, *available at* WCB LEXIS 1756.

79. McKinney v. The Queen (1991) 171 C.L.R. 468. *See generally* Westling & Waye, *supra* note 53, at 525-26 (explaining the interrogation practices used in the confession room).

> Knowing the truth cannot impede the working of justice; it can only safeguard it .... Videotaping offers protection on two fronts: It protects suspects from being beaten, abused or otherwise coerced into giving false confessions, and it protects police from such accusations when they are untrue.[80]

The technology is readily available to every police department, large and small. It is easy to operate. Video surveillance has become commonplace in other areas of our lives. Shoppers in department stores are regularly observed electronically, even in the otherwise private area of changing rooms. Permanent video cameras are installed in high crime areas to deter street crime and apprehend offenders. Amateur videotaping has exposed police abuses in public areas such as the Rodney King beating and the more recent Philadelphia beating. The police department and citizens review board in my community have just settled on a policy of videotaping public demonstrations which may turn violent, and the police response to potential violence. No rational basis exists for refusing to employ this commonplace technology in a routine fashion for police interrogation of major crimes. Video recording of police interrogations facilitates a number of desirable goals.

A. Reliability in Fact-Finding

Judges are routinely called upon to determine historical facts concerning events that took place in the interrogation room of a police station.[81] Issues of compliance with *Miranda*, voluntariness, physical abuse, psychological overbearing, trickery, and unfairness commonly are presented to a judge in a pretrial hearing. All too often the hearing boils down to a "he said, she said" sort of debate, with the testimony of a police officer on one side and the testimony of an accused on the other side. Absent a reliable way to accurately report the content of the incommunicado interrogations, the judge is left to anachronistic methods of judging credibility in such swearing contests.

B. Accuracy in Reporting

Even the most scrupulous of witnesses is subject to forgetfulness. A large quantity of data is never fully recapitulated through later recall. Psychological manipulation, suggestion of crime details, and verbal threats do not leave marks on the body that are discernible in a court of law. "Nor are police officers likely

---

80. Ryan Harris, Editorial, *A Law to Safeguard the Truth*, CHI. TRIB., Feb. 29, 2000, *available at* 2000 WL 3642984.

81. *See* FED. R. EVID. 104(a) (stating that the Federal Rules of Evidence require courts to hold a hearing on the admissibility of confessions outside the presence of the jury).

to testify accurately about, or perhaps even to understand, the ways in which their interrogation techniques and the defendants' personal characteristics might have combined to produce a false confession."[82] This problem is compounded by the psychological factor that people have a tendency to remember what they want to hear, and thus, may exercise unconscious selectivity in recall.

C. Accuracy in Meaning

Even if the words are accurately recalled, the subtleties of nuance and meaning are sometimes lost in the process. The popular motion picture, *My Cousin Vinnie*, illustrates the problem of nuance in police interrogation. In the film two young men purchased a number of items from a mom and pop grocery store, left the store, and later discovered that one of them had a can of tuna in his pocket that he had not paid for. When the store clerk was shot dead the same day, the two young men were arrested. In a bit of classic comic confusion, they believed they were being interrogated for shoplifting the tuna while the police were actually interrogating them for murder. In the critical scene, when one of the suspects is asked whether he shot the clerk, he responded in a tone of incredulity, "I shot the clerk?? I shot the clerk??" At a subsequent preliminary hearing on the homicide charge, the detective testified that the suspect confessed, "I shot the clerk. I shot the clerk."

The same words convey completely different meanings depending on the tone of voice or the nuance used. This problem is compounded by idioms and street jargon. Even an accurately written record cannot capture those verbal nuances. Another commonplace example is the following phrase used in public speaking classes: "So you want a job." This phrase can take on significantly different meanings depending on where the speaker places the emphasis. Exercises such as this demonstrate the vastly different meanings the same words can convey, depending on emphasis and tone of voice. The same problem occurs in police interrogation. Only accurate and complete electronic recording can solve this problem of nuance.

D. Open Government

One of the objectionable features of the current system is that it takes place out of sight of the public. This veil of secrecy is sometimes touted as necessary for the encouragement of honest reliable confessions. It carries with it, however, a healthy skepticism about what takes place behind the closed doors of the police station. We are currently in an era of more open government. Accurate videotaping of the entire interrogation

82. Johnson, *supra* note 1, at 745.

session is aligned with the modern view of citizen involvement in affairs of government. Even the strongest proponent of law enforcement does not want the wrong person convicted. When the risk of this is compromised because of the failure to employ modern technology, there is a diminution in public confidence in the result.[83]

E. Improvement in Police Interrogation Techniques

Videotape recording of police interrogation provides an opportunity for police supervisors, criminal justice administrators, and educators to review the technique used and suggest improvements. Recorded interrogations may also provide educational training tapes when interrogators perform in a particularly outstanding manner. Beyond the police department, such tapes provide opportunities for both prosecutorial and judicial review. To the extent that interrogation practices fail a constitutional or statutory requirement, specific reference may be made and specific corrective action may be taken. To the extent that interrogation practices satisfy all legal standards, this prosecutorial and judicial review will result in a formal endorsement of the practice. The precision of the recording eliminates skepticism of rulings made in the "he said, she said" type of hearing.

F. Cost Effectiveness

The cost of videotape machines and tapes is relatively small when compared with the current cost of investigation time, attorney time, and court time in conducting pretrial hearings.[84] Cost saving factors include: 1) speedier completion of interrogations (since detectives no longer have to take detailed notes), 2) reduction in the number of interrogations that defense attorneys feel obliged to attend, 3) increases in the number of guilty pleas, 4) decreases in the number of suppression hearings, 5) more expeditious handling of cases involving police interrogations, and 6) a reduction in defense challenges to the prosecution's confession evidence.[85] Although the costs come from

83. For a commentary on the concomitant use of video cameras in police cars, see Shante Morgan, *Video Cameras Add to Cop's Arsenal; L.A. Pilot Program Tests Their Value*, SAN DIEGO UNION-TRIB., May 8, 2000, at A3.

84. WILLIAM A. GELLER, NATIONAL INSTITUTE OF JUSTICE, POLICE VIDEOTAPING OF SUSPECT INTERROGATIONS AND CONFESSIONS: A PRELIMINARY EXAMINATION OF ISSUES AND PRACTICES 47-49 (1992). For a state-by-state breakdown of justice system costs, see U.S. Department of Justice, Bureau of Justice Statistics, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Kathleen Maguire & Ann L. Pope eds., 1999), *available at* http://www.albany.edu/sourcebook/1995/pdf/t15.pdf.

85. GELLER, *supra* note 84, at 47-49.

a different budget, effective use of videotaping the complete interrogation session will quickly result in significant cost savings to the criminal justice system.

V. FOOT-DRAGGING

A small minority of American police departments have joined this movement. Jurisdictions that have tried videotaping police interrogations like it.[86] That popularity includes judges, prosecutors, defense counsel and the police themselves. Why, then, do we see foot-dragging about videotaping police interrogations? It should be a no-brainer.

Perhaps it is an "old dogs, new tricks" problem. Police investigators have been conducting interrogations for decades without electronic oversight. But this is hardly an adequate excuse. Once upon a time there was no fingerprint analysis, or blood analysis, or even traffic radar. Police managed to learn these new tricks, and society is better off because of the use of these developments.

What are they trying to hide? There must be something they do not want us to know. Police interrogation almost always takes place incommunicado. There are no outside witnesses. We have a history of physical and psychological abuse in such settings. Perhaps the formal rules regulating interrogations are ignored in that incommunicado setting, perhaps not. Systematic police perjury to circumvent "technical" requirements controlling interrogation and search has been documented.[87] It may be that the judge's quest to determine "the facts" of police interrogation is being deliberately frustrated by false police testimony concerning precisely what occurred in that incommunicado interrogation session. Something of this sort seems to be the only practical reason for not routinely videotaping the interrogation process.

Professor Richard Leo has called this the "gap problem." A gap exists between how law is written in the books and how it is

---

86. *See generally id.* at 95-154. Paul G. Cassell, Miranda's *Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 489 (1996). For a Chicago commentary on this report, see Charles Nicodemus and Jim Casey, *Videotape Confessions? More Cops Are Doing It*, CHI. SUN TIMES, Feb. 17, 1993, at A4.

87. *See generally* H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE DEPARTMENT 111-18 (1988); JEROME SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 221 (2d ed. 1975); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312-13 (1994); Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 95-115 (1992); Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596-97; Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, 3 TRIAL 41, 41 (Aug-Sept. 1967); Martin Garbus, *Police Perjury*, 8 CRIM. L. BULL. 363, 363 (1972); WHITEHEAD & SLOBOGIN, *supra* note 22, at 776-815.

actually practiced by legal actors in the social world.[88]

[E]lectronically recording custodial interrogations promotes the goals of truth-finding, fair treatment, and accountability in the legal process. By creating an objective and reviewable record of police questioning, we further the policy objectives that underlie our dual concerns for crime control and due process.[89]

Professor Barry Feld, former prosecutor and now law professor at the University of Minnesota, commenting on his state's mandatory videotape requirement, said:

> These types of court rules work to the benefit of both the prosecution and the defense by providing an objective record of exactly what happened. And to the extent that the criminal justice process is supposed to determine the truth, it's hard to see how anybody could be opposed to having an objective record of the entire process.[90]

VI. COMPLETE RECORDING

There is one more critical element. To be of maximum value, the entire interrogation session must be recorded. Entire means entire, beginning with the first, "Hello, my name is X." It is vitally important that all the preliminaries be recorded. That is one of the key holdings in the Minnesota case. These preliminaries are the breeding ground for claims of physical and psychological pressure. Some departments, including Chicago, have taken the shortcut of recording only the end result of the interrogation.[91] This practice undermines the value of a videotape program.

Professor Richard Ofshe, an expert on police interrogation techniques and the phenomenon of false confessions, testified before the Illinois House Task Force on Videotaping Interrogations and Confessions in 1999. Ofshe said that merely videotaping the recapitulation without also taping the prior police interrogation can result in "sham" cases being filed against innocent suspects. Without taping the entire process, officers could mentally or physically torture suspects until they would be willing to confess on tape just to end the ordeal. On the other hand, he said officers properly trained in sophisticated interviewing techniques with the videotape rolling cold obtain "bulletproof" concessions that could withstand any legal challenge by a defense attorney. In short, "[t]he major enthusiasm for videotaping will come from the detectives who are using it."[92]

---

88. Leo, *supra* note 2, at 266.

89. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 692 (1996).

90. Maurice Possley & Ray Long, *Bill Seeks Statewide Taping of Suspects*, CHI. TRIB., Feb. 8, 2000, *available at* 2000 WL 3634325.

91. http://www.web.amnesty.org/ai.nsf/index/AMR511681999

92. Bradley Keoun, *Videotaped Confessions Not Perfect, Panel Told,* CHI. TRIB., Sept. 18, 1999, *available at* 1999 WL 2913294.

In discussing a proposal from Ofshe and Leo that corroborating evidence and taping be employed to permit evaluation of the truth of a questioned confession, Professor White comments:

> [I]f the tape of the interrogation is to provide evidence from which a judge can determine whether the facts admitted by the suspect are independent of facts supplied by the interrogators, it will not be sufficient to tape the interrogation in which the suspect admits guilt and provides a post-admission narrative of the crime. Every other communication between the suspect and his interrogators must be taped and available for scrutiny by the judge.[93]

It is the initial contact that engenders the greatest difficulties. It is at that initial contact that *Miranda* warnings are given and waivers accepted; it is then that allegations of physical or psychological pressures are most likely to arise; it is the content of these initial contacts that fuel the pretrial hearings on admissibility of the admissions or confessions. Failure to record this portion of the interview, therefore, fails to accomplish the main goal of such a program—creating an accurate, detailed, complete record of precisely what was said and the manner in which it was said.

CONCLUSION

Soon videotaped confessions will be perceived to be of benefit to police and prosecutors, as well as defendants and society. The report of a Manhattan jury that rejected the confession of a mentally retarded, drugged suspect is the thin end of a larger wedge.

Richard Ofshe, a social psychologist at the University of California at Berkeley and an expert on police interrogation, said that while it was still quite rare, a growing number of juries were believing defendants when they recanted confessions.[94]

"Over the last decade, there have been many examples of police soliciting false confessions from the innocent," Professor Ofshe said. "Any case where someone has been charged and convicted and is proven innocent does get a lot of attention."[95]

The interrogation session in the Manhattan case could easily have been videotaped—sometimes they are videotaped in New York City. If it had been recorded, reliable information would

---

93. Welsh S. White, *What Is An Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2026 (1998). Professor White is skeptical of the administrative feasibility of the Ofshe/Leo proposal. *Id.* at 2027-28.

94. David Rohde, *Jurors Faulted Police Work in Murder Case of a Teacher*, *available at* http://www.texas-justice.com/nytimes/confession990213.htm (last visited Mar. 23, 2001).

95. *Id.*

have been provided to the judge in his/her pre-trial role, and to the jury in their trial role. In the Manhattan case, the jury had to "make do" as best they could with the conflicting tales of what happened behind the closed doors.

Monroe Freedman, a professor at Hofstra University Law School, said that the jurors—based on the lack of a recorded confession—appeared to have made the right decision. "I think that jurors are quite properly skeptical if confessions are introduced and there isn't videotaped evidence," he said. "It's not as if it's some kind of new, novel device."[96]

When more judges and juries reject alleged confessions, there will no longer be foot-dragging. Instead, there will be widespread use of videotape during police interrogations. It cannot come too soon.

96. *Id.*