Richmond Public Interest Law Review

Volume 11 | Issue 2 Article 4

1-1-2008

DNA Is Different: Implications of the Public Perception of DNA Evidence on Police Interrogation Methods

Christine D. Salmon

Richmond Journal of Law and the Public Interest *Spring 2008*

DNA Is Different: Implications of the Public Perception of DNA Evidence on Police Interrogation Methods

Christine D. Salmon[*]

*J.D. candidate, 2008, University of Richmond, T.C. Williams School of Law; B.A., 2003, *magna cum laude*, Connecticut College. The author would like to thank Professor Corinna B. Lain for her invaluable guidance and mentorship.

"The protection of the innocent is paramount in a criminal justice system whose ideology and rules are predicated on the belief that there can be no worse harm than wrongful conviction and incarceration."[1]

I. INTRODUCTION

For police and prosecutors, a confession is a beautiful thing. At trial, admitting a confession into evidence can render other evidence of guilt "superfluous."[2] Because confessions are so valuable to the prosecution at trial, the police will do anything—and everything—within the parameters of the law to get one.[3] As long as the police inform a suspect in custody of his right to remain silent and his right to an attorney,[4] and the suspect waives those rights, as many do,[5] the police are permitted to employ a number of techniques to convince a suspect that confessing is in his best interest.[6] Police may lead a suspect to believe that they have evidence of the suspect's guilt,[7] including DNA evidence linking the suspect to the crime.[8]

---

[1] Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1122 (1997).

[2] Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 601 (2006) (quoting Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOL. 221 (1997)).

[3] *See* Patrick M. McMullen, Comment, *Questioning the Questions: The Impermissibility of Police Deception in Interrogations of Juveniles*, 99 NW. U. L. REV. 971, 971-72 (2005) ("In every criminal investigation, acquiring a confession is the top priority of the police.").

[4] Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

[5] *See infra* note 84 and accompanying text.

[6] *See, e.g.,* Welsh S. White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001) (describing permissible interrogation methods); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427-28 (1996).

[7] *See, e.g.,* Fraizer v. Cupp, 394 U.S. 731, 740 (1969) (holding that the police officer's misrepresentation of the co-defendant's statement does not render the petitioner's confession involuntary); Morgan v. Zant, 743 F.2d 775, 779 (11th Cir. 1984) (upholding conviction of defendant who confessed after police falsely told him that his footprints

Although the use of deceptive methods in police interrogations can help secure a conviction of the factually guilty, these tactics have dangerous implications for the factually innocent. Police interrogation is inherently coercive,[9] and the methods used by police can result in false confessions.[10] Such false confessions cause serious problems within the criminal justice system. First, and most obviously, an innocent person stands to be punished for a crime they did not commit. Just as disturbingly, the true perpetrator remains free to re-offend, and the discovery of a false confession negatively impacts the integrity of the criminal justice system itself.[11] While the frequency of false confessions has not been firmly established, a summary of four major studies suggests that false confessions are the number one cause of wrongful convictions, accounting for fourteen to twenty-five percent of such cases.[12] Regardless of the exact number of false confessions, in a system that is based on accuracy and justice—particularly when that system allows for the death penalty—even one wrongful conviction based on a false confession is cause for concern.

---

were found at the crime scene); Lewis v. United States, 74 F.2d 173, 179 (9th Cir. 1934) (finding defendant's confession admissible where police faked a photograph depicting the defendant's thumb print on the victim's shoe).

[8] *See e.g.,* United States v. Chee, No. 2:05 CR 733, 2006 U.S. Dist. Lexis 57122, at *4-6, *12-13 (D. Utah Aug. 15, 2006) (finding confession voluntary where officers falsely indicated they had recovered suspect's DNA at the scene); Jason Borenstein, *DNA in the Legal System: The Benefits are Clear, the Problems Aren't Always*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 847, 851 (interpreting State v. Chirokovskcic, 860 A.2d 986, 990–91 (N.J. Super. Ct. App. Div. 2004)).

[9] The United States Supreme Court recognized the inherently coercive nature of police interrogation in *Miranda v. Arizona*, 384 U.S. 436, 448 (1966).

[10] For example, over twenty-five percent of the individuals exonerated by DNA evidence by the Innocence Project were originally wrongfully convicted by, in part, a false confession. The Innocence Project, Understand the Causes: False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited March 25, 2008).

[11] *See infra* notes 120-24 and accompanying text..

[12] Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 907 (2004); *see* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions – and From* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497, 520 (1998) (estimating the number of wrongful conviction resulting from police induced false confessions at anywhere from 10 to 394 a year).

Although the reasons why false confessions occur are not fully understood, it is clear that in the majority of cases, suspects falsely confess because they feel they have no choice.[13] In other words, false confessions are usually involuntary.[14] In evaluating whether a confession is voluntary, and thus admissible against the defendant at trial, the United States Supreme Court uses a totality of the circumstances test.[15] The Court looks at a variety of factors, including characteristics of the defendant, promises of leniency made by the police, and the length of the detention.[16] Because these suspects confess after they have waived their *Miranda* rights, it is difficult to establish that a confession is involuntary absent the use or threat of physical violence.[17]

In recognition of these problems, scholars have offered a variety of reforms that seek to reduce the number of false confessions. Some argue that any statement made by a suspect to the police while in custody is essentially compelled and therefore should be inadmissible.[18] Others

---

[13] *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 146 (1997) ("When an interrogator deceives a suspect as to the nature of the evidence against him, falsely leading him to believe that the police have overwhelming evidence of his guilt, the suspect is likely to give an untrustworthy confession.").

[14] There are, however, very rare instances in which a false confession is voluntary. *See, e.g.,* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 63 (1987) (recalling an instance where the defendant falsely confessed as a joke).

[15] *See* discussion *infra* Part II.

[16] *See* Haley v. Ohio, 332 U.S. 596, 600-01 (1948) (noting the defendant's age and the number of hours he was interrogated by the police); Ashcraft v. Tennessee, 332 U.S. 143, 153 (1944) (detailing the circumstances surrounding the defendant's confession, including the fact that the defendant was questioned, without sleep, for nearly thirty-six hours).

[17] *See* White, *supra* note 13, at 117.

[18] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 109–110 (1990) (arguing that because custody in and of itself is coercive, the addition of questioning deprives suspects of the ability to make a free choice).

seek nationwide adoption of the Alaska[19] and Minnesota[20] requirements that all interrogations be tape recorded.[21] More innovative approaches from false confessions expert Richard A. Leo[22] and Innocence Project co-founder Peter J. Neufeld[23] argue for the creation of a *Daubert*-like admissibility determination,[24] where judges act as gatekeepers responsible for excluding untrustworthy confessions.[25] There are also proposals for a per se ban of police deception during

---

[19] In 1985, the Supreme Court of Alaska held that a statement made by a suspect during a police integration is inadmissible unless the police recorded both the confession and the interrogation preceding it. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985). The court considered the recording requirement part of due process and necessary to insure that the suspect's right to counsel, right against self-incrimination, and right to a fair trial are not violated. *Id.* at 1159–60. The court also sought to prevent false confessions. *Id.* at 1161. Similarly, the Texas legislature adopted a requirement that a confession must be recorded in order to be admissible at trial. TEX. CODE OF CRIM. PROC. ANN. art.38.22(3) (Vernon 1996). However, the Texas statute does not require the interrogation leading up to confession be recorded. *See id.* See Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 745–49 & n.199–202 (1997) for a discussion and explanation of the ways other state courts have dealt with the practice of recording.

[20] The Supreme Court of Minnesota held in *State v. Scales* that interrogations must be recorded in order to "ensure the fair administration of justice" rather than on the basis of due process. 518 N.W.2d 587, 592 (Minn. 1994),

[21] *See* Johnson, *supra* note 19 at 721 (arguing that interrogations and confessions should be recorded in order to prevent false confessions and subsequent wrongful convictions); Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 547–55 (2001) (advocating for the recording of the entire custodial interrogation). Specifically, Westling argues that, "[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." *Id.* at 553. *See also* Heath S. Berger, *Let's Go to the Videotape: A Proposal to Legislate Videotaping of Confessions*, 3 ALB. L.J. SCI. & TECH. 165, 166-69 (1993) (describing the advantages and disadvantages of videotaping confessions and concluding that videotaping will regulate police conduct and aid the fact finder at trial).

[22] Professor Leo has written extensively on interrogation methods, false confessions, and wrongful convictions, often in collaboration with Richard J. Ofshe. Their publications are cited throughout this Article.

[23] The Innocence Project was founded at Benjamin N. Cardozo School of Law by Barry C. Scheck and Peter J. Neufeld in 1992. The Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about (last visited March 25, 2008).

[24] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); *see also* Kuhmo Tire Co. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997). In these three decisions, the Supreme Court instructed judges to act as "gatekeepers" by screening expert testimony for relevance and reliability. The standards created in these cases were later incorporated into the Federal Rules of Evidence. *See* FED. R. EVID. 702.

[25] *See* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 520–536 (2006); *see also* Sharon L. Davies, *The Reality of False Confessions - - Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 231–252 (explaining and defending a proposal for trial court assessment of the reliability of confessions).

interrogations,[26] either through legislative[27] or judicial regulation.[28] Finally, some believe that the voluntariness test itself should be revamped to prohibit interrogation methods that are substantially likely to induce false confessions.[29]

These reform proposals have been met with vehement criticism,[30] most of which stem from a concern that any attempt to prohibit or regulate deceptive interrogation methods would decrease the number of confessions and convictions produced by the criminal justice system.[31] With these concerns in mind, this article proposes a different, more moderate reform: a per se ban on the falsification of DNA evidence during police interrogations. This proposal differs from those described above in three important ways. First, the prohibition on fabricating DNA

---

[26] *See* Young, *supra* note 6, at 476 (suggesting that police departments continue the practice of interrogation but prohibit lying in interrogations by administrative regulations); *see also* McMullen, *supra* note 3, at 1005 (concluding that "a per se bar on deception in the interrogation of juveniles is the only constitutionally and morally defensible rule.").

[27] *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 835 (2006) (proposing that "legislators should pass statutes outlawing law enforcement misrepresentations about incriminating evidence and interrogations and limiting the use of trickery during custodial questioning.").

[28] *See* Laura Hoffman Roppe, Comment, *True Blue? Whether Police Should Be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN. DIEGO L. REV. 729, 771-72 (1994).

[29] *See* White, *supra* note 6, at 1232–47 (describing interrogation methods such as threats of punishment, promises of leniency, threats of adverse consequences to a friend or loved one, and misrepresentation of the evidence against the suspect). *Cf.* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination,* 93 CAL. L. REV. 465, 515-540 (2005). Godsey's "objective penalties test" would find confessions inadmissible where the police "impose a penalty on a suspect during an interrogation to punish silence or provoke speech" because such penalties would constitute compulsion and violate the self-incrimination clause of the Fifth Amendment. *Id.* at 516.

[30] *See* Cassell, *supra* note 12, at 498 ("The [suggestions] . . . 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."). Cassell, Leo, and Ofshe frequently criticize and respond to each others work. For an example of this exchange, see Richard A. Leo & Richard L. Ofshe, *Using the Innocent to Scapegoat* Miranda: *Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998).

[31] *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1171–72 (2001) (concluding that existing evidence of false confessions does not justify limiting deceptive methods in police interrogations because such limitations would impose significant costs on society by reducing the number of confessions and convictions of guilty persons).

evidence does not require a change in the voluntariness test used to ascertain the admissibility of a confession. Rather, it fits within current confession law jurisprudence, allowing for easy adoption by state and federal courts, and police departments. Second, the proposal is limited to DNA evidence. It does not include other forensic evidence, such as ballistics, fingerprinting, or blood typing. Instead, it focuses on DNA because of the public perception of DNA infallibility. Finally, the proposal establishes a bright-line rule. Scholars have long complained about the ambiguity of a totality of the circumstances test, which fails to give guidance to lower courts or law enforcement officers, who arguably need it most.[32] Instead, the proposal advocates for a complete prohibition on any interrogation technique designed to convince the suspect that the police have obtained his DNA in connection with the crime. Though more moderate than other reform proposals, it shares one significant similarity: it seeks to increase the fundamental fairness of police interrogation, and to prevent false confessions and wrongful convictions. In short, this article proposes a small step in the right direction.

Part II of this article traces the development of the due process voluntariness test for admissibility of confessions, summarizing the law on confession admissibility. Part III describes current police interrogation techniques, focusing on the Reid Method and its likelihood of resulting in false confessions. Part IV turns to the influence of television on the public understanding of law, forensic science, and the use of DNA evidence in law enforcement, arguing that the so-called "CSI Effect" creates a public perception that DNA evidence is incontrovertible. Part IV concludes that the public perception of the strength of DNA evidence tips the balance of the totality of the circumstances test, such that a confession elicited based upon fabrication of DNA evidence in an interrogation cannot be seen as voluntary. Finally, Part

[32] Godsey, *supra* note 29, at 640; *see* Charles H. Whitehead, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L. J. 471, 472–73 (1985) (explaining the importance of clear guidance for law enforcement officers).

V sets forth the proposal that confessions based on deception regarding DNA evidence be excluded, justifying the proposal under existing law and briefly considering likely criticisms.

II. CONFESSION LAW: VOLUNTARINESS AND THE TOTALITY OF THE CIRCUMSTANCES TEST

The Supreme Court has used a number of different tests to determine the admissibility of confessions.[33] What began as a common law doctrine of voluntariness[34] moved from the Fifth Amendment's right against self incrimination[35] to the Fourteenth Amendment's right to due process[36] and back.[37] The Court's landmark decision in *Miranda v. Arizona* was, in part, an attempt to harmonize the federal and state law of confession admissibility.[38] However, the jurisprudence in this area has largely returned to where it began, at a consideration of the totality of the circumstances surrounding the confession.[39]

A. *The Pre-*Miranda *Analysis of Confession Admissibility*

[33] See Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998) for a historical account of the developments of confession law.

[34] *See* Leo et al., *supra* note 25, at 488–91 (discussing common law voluntariness).

[35] The Fifth Amendment of the United States Constitution reads, in pertinent part, "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. *See* Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VALPARAISO U. L.R. 311 (1991) (reviewing the history and current scope of the privilege against self-incrimination); Laurence A. Benner, *Requiem For* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH U. L.Q. 59 (1989) (conducting a historical analysis of the right against self-incrimination and its recent application by the Supreme Court).

[36] The Fourteenth Amendment of the United States Constitution provides that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

[37] *See generally* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996) (examining the various methods of due process analysis).

[38] *See* Godsey, *supra* note 29, at 499 (noting that the Supreme Court was dissatisfied with the due process voluntariness standard and began looking for another doctrine).

[39] *Id.* at 508. ("[T]he voluntariness test continues to serve as the rule in cases where Miranda warnings are not required; as the doctrine underlying and justifying the Miranda warnings themselves; and, more importantly, as the only check on police conduct in the high percentage of interrogations where Miranda warnings have been provided and waived.").

The Supreme Court decided its first case regarding the admissibility of a confession in 1884.[40] Finding the confession voluntary and admissible, Justice Harlan borrowed from English precedent:

> [T]he presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature . . . or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprive him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.[41]

The Court thus adopted the common law voluntariness standard where the only concern is the reliability of the statement.[42]

In *Bram v. United States*,[43] the Court incorporated the voluntariness standard of the Fifth Amendment, explaining that the Fifth Amendment was "but a crystallization of the doctrine as to confessions."[44] The majority went on to explain that "a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."[45] Although *Bram* remains good law, courts have not strictly interpreted Justice

---

[40] Hopt v. Utah, 110 U.S. 574 (1884).

[41] *Id.* at 585.

[42] *Id.* The Court continued to use this standard in three subsequent cases. *See* Pierce v. United States, 160 U.S. 355, 357 (1896); Wilson v. United States, 162 U.S. 613, 623–24 (1896), Sparf v. United States, 156 U.S. 51, 55 (1895).

[43] Bram v. United States, 168 U.S. 532 (1897).

[44] *Id.* at 543.

[45] *Id.* at 542–43 (internal citation omitted).

White's admonition on promises of leniency.[46] For example, the Court in *Arizona v. Fulminante*[47] expressly stated that the *Bram* decision's language on government promises and leniency "does not state the standard for determining . . . voluntariness."[48] Instead, courts consider inducements as one factor in the totality of the circumstances analysis and do not impose a per se ban on threats or promises.[49]

In 1936, the Court used the Fourteenth Amendment to invalidate confessions that were obtained after police brutally beat and tortured three African-American men in the seminal case of *Brown v. Mississippi*.[50] The police hung one suspect by a rope to the limb of a tree almost to the point of strangulation, released him, and then hung him up again until he confessed.[51] The rope burns on his neck were still visible at trial.[52] The others were made to strip naked, and were beaten with a leather strap with buckles on it.[53] At trial, one of the deputies admitted to the whipping but stated that it was, "Not too much for a negro; not as much as I would have done if it were left to me."[54] In *Brown*, the Court focused on the circumstances in which the confessions were given, stating, "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the

---

[46] *See* Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947 (1994) (considering the admissibility of confessions induced by broken promises of leniency).

[47] Arizona v. Fulminante, 499 U.S. 279 (1991).

[48] *Id.* at 285.

[49] Marcus, *supra* note 2, at 606–07.

[50] Brown v. Mississippi, 297 U.S. 278 (1936).

[51] *Id.* at 281.

[52] *Id.*

[53] *Id.* at 282.

[54] *Id.* at 284.

confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[55] Although the Court maintained the totality of the circumstances approach, *Brown* drew a bright-line rule banning physical coercion in interrogations.[56] Aside from torture and physical coercion, there are currently no other factors that automatically deem a confession inadmissible; there are no other bright-lines.

In applying the voluntariness test, the Court primarily asks whether the suspect's "will was overborne by official pressure."[57] Significantly, the Court has, over the years, moved away from a reliability-centered approach to one that is more concerned with the behavior of the interrogating officials and characteristics of the suspect.[58] Citing the Fourteenth Amendment, the Court stated in 1961:

> Our decisions . . . have made [it] clear that . . . confessions which are involuntary . . . cannot stand. This is not so 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—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.[59]

Thus, the Court held that confessions could be excluded from evidence for reasons aside from their veracity and that the exclusion of confessions could also be used to deter improper police conduct.[60]

---

[55] *Id.* at 286.

[56] *See id.*

[57] Spano v. New York, 360 U.S. 315, 323 (1959).

[58] *Id.* at 320 ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that police must obey the law while enforcing the law.").

[59] Rogers v. Richmond, 365 U.S. 534, 540–41 (1961).

[60] *Id.*

Over time, the totality of the circumstances test proved difficult to apply.[61] By the 1960s the Court had identified some thirty factors as relevant under the totality of the circumstances test, none of which were determinative, except the prohibition of physical violence.[62] As a result, the totality of the circumstances test failed to provide guidance to police and judges aline.[63] The Supreme Court was in need of a rule.

B. Miranda *and the Post*-Miranda *Analysis of Confession Admissibility*

Miranda v. Arizona was the solution to the "everything relevant, nothing determinative" problem of the due process voluntariness test. The Supreme Court recognized the ambiguity of the totality of the circumstances test and sought to establish a new doctrine that would simplify the application of confession law for both lower courts and law enforcement.[64] In *Miranda v. Arizona*,[65] the Court recognized that police interrogation is inherently coercive[66] and proscribed four warnings designed to counteract that coercion.[67] Police interrogating a suspect in custody must warn the suspect that: (1) he has the right to remain silent; (2) anything he say may be used against him in a court of law; (3) he has the right to an attorney; and (4) if he can not afford an attorney, one will be provided for him.[68] In *Miranda*, the Court set forth a bright-line rule: the

[61] Marcus, *supra* note 2, 638-43.

[62] *Criminal Justice: Concern About Confessions*, TIME, Apr. 29, 1966, at 57.

[63] *See id.*; *see also* Roppe, *supra* note 28, at 742 (noting that the ambiguity of the test failed to provide guidance for lower courts and police interrogators).

[64] *See* Godsey, *supra* note 29, at 499.

[65] Miranda v. Arizona, 384 U.S. 436 (1966).

[66] *See id.* at 448. The Court stated that even absent physical force, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals." *Id.* at 455.

[67] *Id.* at 478–79.

[68] *Id.*

government may not use confessions obtained through compulsion, where compulsion is defined as custodial interrogation without the proscribed warnings to offset any coercion.[69]

Despite the Court's adoption of a bright-line rule of admissibility for confessions in *Miranda*, the totality of the circumstances voluntariness inquiry remains critical to determining the admissibility of post-*Miranda* confessions.[70] Courts still consider factors such as the age of the defendant,[71] the circumstances surrounding the waiver or interrogation,[72] and the defendant's mental health.[73] As with other interrogation methods, police deception is permissible as long as it does not overbear the defendant's will.[74] The totality of the circumstances test, with all its failings, was back. As one scholar put it, "[w]ith such a rich assortment of considerations, it appears impossible to suggest just what rule [a] case stands for under the Due Process Clause."[75] Once again, lower courts and law enforcement are left with little guidance and lots of flexibility to admit a confession absent a clear indication that police action overcame the defendant's free will.[76]

III. POLICE INTERROGATION METHODS AND THE REALITY OF FALSE CONFESSIONS

A. *Interrogation Methods*

[69] *Id.* at 458, 467, 478-79

[70] Godsey, *supra* note 29, at 508.

[71] Haley v. Ohio, 332 U.S. 596, 600-01 (1948).

[72] Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944).

[73] Jackson v. Denno, 378 U.S. 368, 371-72 (1964).

[74] *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969).

[75] Marcus, *supra* note 2, at 640.

[76] *Id.* at 642–44.

In most cases, the purpose of an interrogation is to obtain a confession or incriminating statement that can be used against the defendant at some point during the prosecution of that crime.[77] As one famous interrogation instructor wrote, "[i]n criminal investigations . . . there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution to the crime is the interrogation of the criminal suspect himself."[78] Police and prosecutors are aware of the value, and often the necessity, of a self-incriminating statement. For example, in his study of police interrogation methods, 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."[79] A confession or incriminating statement can have negative repercussions for the defendant throughout the prosecution. Specifically, an individual who confesses will likely receive a higher bail, be charged with a more serious crime, and is less likely to receive a plea bargain.[80] At trial, the jury is likely to weigh a confession more heavily than other evidence of guilt.[81]

---

[77] There are also instances where the investigator uses an interrogation to rule out a suspect or to clarify guilt or innocence. The Inbau Manual includes a separate chapter that deals with the interrogation of suspects whose guilt or innocence is doubtful or uncertain. FRED E. INBAU, CRIMINAL INTERROGATION AND CONFESSIONS 43 (3d ed. 1986). In these circumstances, the investigator's goal is to make an "initial differentiation between the guilty and the innocent." *Id.* at 43. Depending on the investigator's analysis of the suspect's verbal and nonverbal behavior symptoms of indications of truthfulness and deception, *id.*, the investigator may revert to interrogation methods designed for suspects whose guilt is definite or reasonably certain in the mind of the investigator. *Id.* at 77.

[78] *Id.* at xiii–xiv. ("[T]he art and science of criminal investigation have not developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary legal proof of guilt.").

[79] Cassell, *supra* note 12, at 498 (1998) (quoting 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)).

[80] *See* Ofshe & Leo, *supra* note 1, at 984.

[81] *Id.*

Before beginning a custodial interrogation, state and federal law enforcement officers must advise a suspect of his *Miranda* rights.[82] Yet, despite the warnings, most suspects waive these rights, leaving the police free to begin the interrogation.[83] The *Miranda* warnings actually make custodial interrogation more treacherous for criminal defendants, because it is difficult for a suspect to prove that a statement was involuntary after being advised of those rights.

This point is even more forceful given that police have substituted psychological ploys for physical pressure over the years. Following the Supreme Court's prohibition on physical abuse or threats of abuse, interrogators turned to psychological methods to convince a suspect to make an incriminating statement.[84] The Inbau Manual, which promotes the Reid Method of interrogation, includes a nine-step practice aimed at "appealing to the suspect's common sense and reasoning rather than to his emotions; [this method] is designed to convince him that his guilt already is established or that it soon will be established and consequently, there is nothing else to do but to admit it."[85] Although the manual specifically disapproves of force, threats of force, or promises of leniency, it does approve of "psychological tactics and techniques as trickery and deceit that are not only helpful but frequently indispensable in order to secure incriminating information."[86] Thus, police frequently use deceptive methods, including the fabrication of evidence, in order to convince a suspect that a conviction is inevitable and that the

---

[82] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[83] *See* White, *supra* note 6, at 1213. In Richard A. Leo's study, in which he observed police interrogations for over nine months, he found that the suspect waived their Miranda rights seventy-eight percent of the time. Richard A. Leo, *Inside the Interrogation Room*, 88 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

[84] Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581 (1979) ("Use of trickery or deceit in the questioning of criminal suspects is a staple of current police interrogation practices.").

[85] INBAU, *supra* note 78, at 78.

[86] INBAU, *supra* note 78, at xiv.

only way to improve his situation is to confess.[87] As discussed above, because such tactics do not involve physical coercion and come after the waiver of rights, they do not, without more, render a confession inadmissible.[88]

B. *False Confessions*

Unfortunately, false confessions are a reality of the criminal justice system.[89] Despite our common sense disbelief, sometimes a suspect will confess to a crime that he did not commit.[90] The brutal rape and beating of a female jogger in Central Park is one of the most famous instances of this phenomenon.[91] Shortly after the April 1989 incident, New York City police obtained confessions from not one, but five young men.[92] Each claimed to have been involved in

---

[87] *See* Young, *supra* note 6. As Young explained,

> The actual number of cases in which police lie is not known, but there are scores of reported decisions involving police lying in interrogations. Because most criminal cases are concluded with guilty pleas and most cases that are tried are not reported, the reported cases of policy lying represent only a faction of the actual cases in which policy lying occurred. Additionally, police and police seminars recommend police lying, virtually ensuring that each new police officer is familiar with the technique.

Id. at 427–28. *See also* Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies By the Police*, 76 OR. L. REV. 775, 786 – 87 (1997) ("[P]olice believe [deceptive] techniques are necessary to catch criminals . . . because of the suspect's natural reluctance to respond to direct questions and the general prohibition on physically coercive interrogation practices."). Slobogin describes various methods of police deception and evaluates both the justifications for and implications of police lying. *See id.* Margaret Paris's work furthers this discussion and concludes that all police lying, except when necessary to save lives, should be prohibited. *See* Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 819 (1997); *see also* Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3 (1995) (conducting a policy-oriented analysis of the effects of interrogation lies on the relationships between individuals and the government).

[88] However, deception employed after the suspect has been formally charged is likely to be prohibited by the Sixth Amendment right to counsel. *See* Slobogin, *supra* note 88, at 787 (citing Massiah v. United States, 377 U.S. 201 (1977); Patterson v. Illinois, 487 U.S. 285 (1969)).

[89] *See* Davies, *supra* note 25 at 212.

[90] *See* Leo et al., *supra* note 25, at 515 (noting that five studies alone have found almost 300 cases of interrogation-induced false confessions since the 1980s).

[91] *See* Davies, *supra* note 25, for detailed account of this case, the false confessions of five young men following police interrogation, and their eventual exoneration. *See also* Leo et al., *supra* note 25.

[92] *See* Davies, *supra* note 25, at 215–16.

the attack.[93] Although their stories were inconsistent, those variations were easily explained at trial, as it is rare for two people to remember the same event in the same way.[94] Moreover, there were no allegations of extensive physical abuse by the police, and many of the confessions were recorded.[95] According to the judge, each interrogation and confession passed constitutional muster.[96] Thus, the confessions were admitted and all five young men were sentenced to lengthy terms in prison.[97] No problem, right? Wrong. We now know for certain that each of the five defendants was innocent of the crime for which he was convicted.[98] DNA tests later confirmed that the semen left by the attacker was that of Martias Reyes, a serial rapist living in Manhattan at the time of the attack.[99]

1. Causes of False Confessions

It is difficult to rationalize a false confession. In the absence of physical force, or threats of force, the average person cannot conceive of why an innocent person would confess to a crime he did not commit, particularly a brutal crime such as rape or murder.[100] Analysis of the interrogation techniques used by police has provided some insight into this arguably irrational

[93] *Id.* at 216.

[94] *Id.* at 219.

[95] *See* Leo et al., *supra* note 25, at 481. There were, however, allegations that the police slapped the young men, yelled at them, and called them liars. *Id.*

[96] *See id.*

[97] *See* Davies, *supra* note 25, at 220.

[98] *See id.* at 220.

[99] *See id.* at 220–21 (chronicling Reyes's confession, the confirmation of his involvement in the attack, and the subsequent exoneration of all five original defendants).

[100] *See* Leo et al., *supra* note 25, at 485 ("Juries tend to discount the possibility of false confessions as unthinkable, if not impossible. False confessions are viewed as contrary to common sense, irrational, and self-destructive.").

decision.[101] As discussed above, investigators use methods that are designed to manipulate the suspect's perception of his situation and his evaluation of his choices.[102] These methods are successful because people make decisions by balancing and evaluating their alternatives.[103]

The Inbau Manual cautions against using its techniques in a way that could lead to a false confession.[104] Specifically, the Manual instructs interrogators to ask, "Is what I am about to do, or say, apt to make an innocent person confess?"[105] The vast majority of false confessions are not the result of an officer ignoring this caution and seeking a confession despite evidence of the suspect's innocence.[106] Instead, false confessions are the result of interrogators misusing these highly effective methods due to poor training and negligence.[107]

These interrogation techniques are particularly coercive when used against individuals who are especially vulnerable to pressure.[108] Specifically, "[i]ndividuals who are highly suggestible or highly compliant—all other things being equal—are more likely to confess . . . Mentally handicapped or cognitively impaired individuals, children, juveniles, and the mentally ill are also unusually vulnerable to police interrogation pressure and are more likely to confess falsely as a result."[109] Psychological studies indicate that when these interrogation methods are

---

[101] *See* Ofshe & Leo, *supra* note 1.

[102] *Id.* at 985.

[103] *Id.* at 985.

[104] *See* INBAU, *supra* note 78, at 216.

[105] *Id.* at 217.

[106] *See* Ofshe & Leo, *supra* note 1, at 983.

[107] *See id.* at 983, 985.

[108] *See* Leo et al., *supra* note 25, at 517-19.

[109] *Id.* at 517-19.

used against individuals who are particularly vulnerable to such tactics, one of two types of false confessions may result: "[C]oerced-complaint false confessions in which a suspect knows he is confessing falsely but confesses in order to obtain some goal or to escape from a stressful or intolerable situation, or coerced-internalized false confessions in which a suspect comes to believe in his own guilt."[110] In either scenario, the suspect believes that the only way to improve his situation is to falsely confess.[111]

2. Frequency of False Confessions

The number of false confessions that have been obtained, or have resulted in a wrongful conviction, is unknown.[112] There are three reasons for the lack of accurate, empirical information on this subject. First, there has not been a systematic effort to collect all of the instances of false confessions, despite numerous studies that have revealed the reasons for and the frequency of false confessions.[113] Second, ascertaining whether a confession is truly false can be difficult because there is rarely a consensus as to the facts admitted during a confession.[114] Moreover, the destruction of valuable evidence can also impair investigation of a possible false confession and wrongful conviction.[115] Third, it is difficult to determine which

---

[110] White, *supra* note 13, at 109 (internal quotations omitted).

[111] *See* Leo et al., *supra* note 25, at 517–18; Bedau & Radelet, *supra* note 14, at 63 (explaining other reasons for false confessions, including a defendant who falsely confessed to impress his girlfriend, and following his conviction for murder, falsely confessed to show that a person's false confession would get them convicted of murder a second time, which it did).

[112] *See* White, *supra* note 13, at 109 & n.30 (explaining the difficulties in determining the number of false confessions).

[113] *See id.*

[114] *See id.* at 109 n.30 (citing Richard Ofshe, *Inadvertent Hypnosis During Interrogation*, 40 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 125, 153 (1992)).

[115] *See* Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239 (2005).

cases of suspected false confessions are actually false because they are not all thoroughly investigated.[116] However, even if the number of false confessions is not firmly established, two points are clear: false confessions do occur with surprising frequency[117] and certain interrogation techniques are more likely to lead to false confessions than others.[118]

3. The Costs of False Confessions

Regardless of their infrequency, each false confession is costly in at least three significant ways. First, an innocent person is convicted of a crime he did not commit.[119] Second, the true perpetrator of the crime is left free to re-offend.[120] In the Central Park Jogger case, Martias Reyes assaulted at least five more women, and murdered one, before his eventual capture in 2002.[121] Because five people had (falsely) confessed to the crime, the New York City Police had no incentive to continue looking for the perpetrator, even when DNA from the victim did not match any of the (falsely) identified perpetrators.[122] Third, false confessions, and the wrongful convictions they induce, negatively affect public confidence in law enforcement when they eventually come to light. In short, "[t]he conviction of innocents erodes the integrity of the justice system along with public confidence in the courts."[123]

---

[116] *See* White, *supra* note 13, at 109 n.30.

[117] *See* Davies, *supra* note 25, at 226 ("[T]he fact that false confessions are obtained in the absence of physical violence is undeniable.").

[118] *See supra* notes 116–118 and accompanying text.

[119] *See* Davies, *supra* note 25, at 220 n.43 (noting that the five young men convicted in the Central Park Jogger case received sentences ranging from five to fifteen years); *see also infra* note 126.

[120] *See* Leo et al., *supra* note 25, at 538.

[121] *Id.*

[122] *See* Davies, *supra* note 25, at 217.

[123] *Id.* at 227.

IV. THE OTHER "CSI EFFECT": THE PUBLIC PERCEPTION OF DNA INFALLIBILITY AND ITS IMPLICATION FOR POLICE INTERROGATION METHODS

DNA holds a unique place in the criminal justice system.[124] Since 1989, the Innocence Project has used DNA evidence to clear over 200 individuals sentenced to the death penalty.[125] Both the Project and its co-founders, Barry C. Scheck and Peter J. Neufeld, have sought to increase public awareness of wrongful convictions and the DNA evidence that can set the wrongfully convicted free.[126] The advent of DNA technology and forensic science has even influenced the landscape of television entertainment. The popular program *CSI: Crime Scene Investigation* is centered on the idea that forensic evidence is a silent, and incontrovertible, witness.[127] According to the show's creator, Anthony E. Zuiker, each episode is based on the premise that forensic evidence "speaks[s] for those who cannot speak for themselves."[128] Thus, the public receives messages from both the news media and the entertainment industry that DNA is an infallible key that can either convict or exonerate.

A. *The Influence of Television*

---

[124] *See* Jonathan J. Koehler, *The Psychology of Numbers in the Courtroom: How to make DNA-Match Statistics Seem Impressive or Insufficient*, 74 S. CAL. L. REV. 1275, 1275 (2001) ("By now, everyone knows that forensic DNA analysis represents a stunning theoretical advance for the criminal justice system."); *see also* Borenstein, *supra* note 8 (discussing the benefits and problems with DNA evidence, including human fallibility, admissibility, and weight). The Innocence Project has referred to DNA as a "major factor in changing the criminal justice system." The Innocence Project, About the Innocence Project, http://www.innocenceproject.org/about (last visited November 22, 2006). For a discussion of the repercussions of post-conviction DNA testing on the criminal justice system, *see also* Margaret A. Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J.L. MED. & ETHICS 320 (2006).

[125] The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited March 25, 2008); *see generally* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)

[126] The Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited March 25, 2008).

[127] *See* Kimberlianne Podlas, *"The CSI Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 432 (2006).

[128] *Id.* (quoting VARIETY, Apr. 18–24, 2005 at 9).

The theory of the "CSI Effect" is based on the notion that television influences a viewer's understanding of the topic it portrays.[129] Simply stated, television affects our perception of reality. Specifically, television programs influence our perceptions of crime and the legal system.[130] The television is a staple of the American home and serves as a powerful educator.[131] The majority of Americans watch at least twenty-five hours of television per week,[132] allowing television to become our "primary story-teller, telling most of the stories to most of the people, most of the time."[133] Thus, television shapes the way that non-lawyers understand the legal system.[134] Because the majority of Americans are not attorneys, and have never entered a courtroom, "these pop culture representations obtain an enhanced authority. As these stories of law take root in our psyches, they help to construct our understanding of law and justice."[135]

Not only are people influenced by television, but they are also unable to put aside those influences in real-life situations. Research in this area has focused primarily on jurors.[136] but Specifically, studies suggests that

> . . . the influence of viewing mass media depictions of the criminal and civil justice system on later decisionmaking [sic] during trials may persist even when

---

[129] *See* Podlas, *supra* note 128, at 443.

[130] *See id.* ("[L]egal scholars have accepted that television imagery can influence the public's assumptions and attitudes about the law.").

[131] *See* Podlas, *supra* note 128, at 444; *see also id.* at 447–451 (explaining the theory of the influence of television)..

[132] *See id.*

[133] *Id.* at 445 (quoting Nancy Signorielli, *Aging on Television, Messages Relating to Gender, Race, and Occupation in Prime Time*, 48 J. BROAD. & ELECT. MEDIA 279, 279 (2004)).

[134] *Id.* at 445.

[135] *Id.*; *see* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1084 (2006) (concluding that non-lawyers learn what they know about the law from the media).

[136] *See* Tyler, *supra* note 136, at 1061–64. Because jurors are selected from the general public, the research can be extended to a wider population.

> the legal system makes efforts to limit that influence, either by questioning potential jurors to the trial or by admonishing jurors not to take account of these influences when making decisions.[137]

When people make legal judgments, or interpret a legal situation, they incorporate the lessons they have learned from fictional depictions of the law on television, without distinguishing between factual and fictitious sources of information.[138]

B. CSI *and the Power of Forensic Science*

In 2004, four years after the debut of *CSI*, concerns began to emerge regarding the show's unintended effect on viewers.[139] The "CSI Effect" refers to the three theories regarding the influence of the television show. The first and most well-known CSI Effect holds that *CSI* creates the expectation that all crimes can be solved using forensic evidence.[140] As a result, jurors are less likely to convict when the prosecution has not put forth some type of scientific evidence tying the defendant to the crime.[141] The second purported CSI Effect maintains that the television show has increased lay interest in forensics sciences, causing an increase in criminal

---

[137] *Id.* at 1062.

[138] *See* Podlas, *supra* note 128, at 446-47 ("[E]ven misinformation about the legal system and crime investigation can impact the way in which citizens make legal judgments."); Tyler, *supra* note 136, at 1063 ("Fictional depictions of crime and the criminal process can and do spill over to shape public views about the nature of crime and criminals.").

[139] *See* Richard Willing, *"CSI Effect" Has Juries Wanting More Evidence*, USA TODAY, Aug. 5. 2004, at 01A.

[140] *See* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 386–87 (2004) (noting that jurors looking for forensic evidence in each case due to CSI).

[141] This CSI Effect has caused concern in the law enforcement community. For example, Suffolk County District Attorney Daniel F. Conley stated that jurors are "conditioned to expect forensic science." Editorial, *CSI Effect: Jurors Overestimate Usefulness of DNA Evidence*, TELEGRAM & GAZETTE (Worchester, MA), Jan. 8, 2005, at A12. However, this CSI Effect has yet to be proven by any study or with direct evidence. *See* Tyler, *supra* note 134, at 1053 ("While the CSI effect has been widely noted in the popular press, there is little objective evidence demonstrating that the effect exists. . . . Lacking any empirical data, discussions of the CSI effect have instead been based upon the personal impressions of lawyers and legal scholars."). Tyler later concludes that it is plausible that the CSI Effect influences jurors and their verdicts. *Id.* at 1084.

forensics as a career and funding for forensic sciences.[142] This article focus on the third and final CSI Effect, which refers to how *CSI* has created a perception that forensic evidence is infallible.[143]

CSI is very accessible to viewers. The show has three spin off versions, airs on over 200 stations, [144] and is seen by an average audience of 26.4 million.[145] It "teaches" viewers not only about the law but also about forensic science. *CSI*'s portrayal of the law and forensic science is particularly influential because most viewers do not have real-life situations with which to compare it.[146] Specifically, *CSI* espouses the myth that scientific evidence, including DNA, is infallible.[147] In the show, forensic science always leads the investigators to the right culprit, without any question as to their innocence.[148] The show never portrays the reality that, unbeknownst to most Americans, DNA evidence can be subject to different interpretations,[149] or

---

[142] *See* Podlas, *supra* note 128, at 442-43 & n.91 (noting that there are now ninety forensic science programs, some of which are seeing an increase in the number of applications); *see also* Willing, *supra* note 140.

[143] *Id.* at 437 ("On its own, scientific evidence can be rather seductive. In conjunction with CSI, it becomes insurmountable.").

[144] *Id.* at 432 nn.13–14 (citing VARIETY, Apr. 18–24, 2005 at 14). The spin-offs include *CSI: Miami* and *CSI: NY*. The original version takes place in Las Vegas, Nevada.

[145] *Id.* at 432 (citing THE HOLLYWOOD REP., Apr. 20, 2005, at 13).

[146] *Id.* at 451 ("[B]ecause most viewers have no actual knowledge of this field to displace what they see on TV, the messages of CSI may exert an enhanced impact.").

[147] *Id.* at 437.

[148] *See id.* at 437-38.

[149] *Id.* at 438; *see* William C. Thompson, *Accepting Lower Standards: The National Research Council's Second Report on Forensic DNA Evidence*, 37 JURIMETRICS J. 405 (1997). Thompson noted,

> The procedure for resolving ambiguity . . .rests on the subjective judgment of a forensic analyst who usually knows the suspect's pattern and often is familiar with other evidence in the case (from the police perspective) through direct communication with detectives. Analysts may (intentionally or not) be influenced by such information when scoring ambiguous data.

Id. at 412.

that errors in the laboratories, including human error, may distort the results.[150] As one defense attorney stated, "[T]he American public . . . is being perpetually inundated with distorted perceptions of forensic science's capabilities. What . . . Hollywood refuse[s] to inform their . . . viewers is that while forensic science can effortlessly identify serial offenders it can just as easily inculpate a wholly innocent person."[151]

The third CSI Effect may, despite the limited attention it has received by scholars and practitioners, be more valid than the first two. Tom R. Tyler concluded that "whereas media reports argue that CSI standards make real trial evidence look bad, it is also possible that the portrayal of science as the ultimate crime-fighting tool actually encourages the already existing overbelief in the value of the flawed scientific findings that jurors confront in actual trial."[152] Whether the viewers of *CSI* are potential jurors or potential suspects, the effect is the same – *CSI* encourages the myth that forensic science is infallible.[153]

C. *The Power of DNA Evidence*

---

[150] In fact, discovery of human error in crime labs in both Texas and West Virginia resulted in the overturning of many convictions that were based on the testimony of the forensic pathologist. *See In re* Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 438 S.E.2d 501 (W. Va. 1993) (detailing the misconduct of state serologist Fred Zain); Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14 (recounting the exoneration of Josiah Sutton, due to problems in the Houston crime lab). Liptak reported that,

> Legal experts say the laboratory [in Houston] is the worst in the country, but troubles there are also seen in other crime laboratories. Standards are often lax or nonexistent, technicians are poorly trained, and defense lawyers often have no money to hire their own experts. Questions about the work of laboratories and their technicians in Oklahoma City, Montana and Washington State and elsewhere have led to similar reviews. But the possible problems in Houston are much greater. More defendants from Harris County, of which Houston is a part, have been executed than from any other county in the country.

Id.

[151] *See* Cooley, *supra* note 141, at 388

.

[152] Tyler, *supra* note 136, at 1071.

[153] *See* Tyler, *supra* note 136, at 1072.

Current confession law permits police to use deception, including deception regarding DNA evidence, in order to obtain an incriminating statement from a suspect. While the majority of suspects who confess following the use of such a method are actually guilty, the perception of infallibility of DNA evidence can have dangerous implications for the factually innocent.[154] It is this uniqueness that makes DNA an invaluable tool for identification.[155]

DNA, or deoxyribonucleic acid, is a distinctive genetic material found in each individual.[156] The United Kingdom began using DNA in criminal investigations in the 1980's and it was quickly adopted by law enforcement in the United States.[157] As explained above, the introduction of DNA into the world of criminal law has garnered significant attention such that DNA evidence is "generally trusted as being a key to solving criminal cases."[158]

D. *The Need for Reform*

False confessions usually occur when a suspect believes that police have amassed irrefutable evidence against him, such that continuing to maintain his innocence is futile.[159] Police frequently use fabrication of evidence as a method that is designed, not to make a suspect falsely confess, but to convince a suspect they believe to be guilty to make an incriminating

[154] *See* White, *supra* note 6, at 1243.

[155] *See* Robert W. Schumacher II, *Expanding New York's DNA Database: The Future of Law Enforcement*, 26 FORDHAM URB. L.J. 1635, 1635 (1999) (explaining DNA technology).

[156] Jerilyn Stanley, *DNA: Law Enforcement's Miracle of Technology: The Missing Link to Truth and Justice*, 32 MCGEORGE L. REV. 601, 601 (2001).

[157] *See* Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 127 (2001). DNA first was introduced at trial in 1988 and used to convict an Orlando man of rape. *See* Andrews v. State, 533 So. 2d 841, 850 (Fla. Dist. Ct. App. 1988).

[158] Borenstein, *supra* note 8, at 849.

[159] *See* discussion *supra* Part III.B.1.

statement.[160] False evidence ploys that are based on science or forensics leave a suspect with limited opportunity to counter.[161] For example, in one interrogation, the investigator stated, "[T]he DNA doesn't lie. That's the only thing that doesn't lie."[162] However, fabricating DNA evidence in a police interrogation is a "troubling development considering how much a misleading DNA test could potentially influence a suspect's behavior."[163] The CSI Effect indicates that, because television is so influential, viewers are likely to internalize the lessons they learn and fail to separate them out as fictional when it comes to making real-life judgments.[164] It is therefore possible that an innocent suspect who believes that DNA evidence is infallible and that false confessions do occur—perhaps on knowledge based on the media—will see a false confession as the only way to help himself in the face of irrefutable evidence and an imperfect justice system.

The possibility of an interrogation-induced false confession runs contrary to the purpose and function of the justice system: to separate the factually innocent from the factually guilty. Indeed, a false confession has ramifications for the defendant from the bail hearing to the sentencing.[165] As the Central Park Jogger case illustrates, "once a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly

---

[160] Leo, *supra* note 84, at 279. Out of 182 interrogations, ninety percent of the time detectives began the interview by telling the suspect about evidence against him and then said that it was in the suspect's best interests to confess. In thirty percent of these cases, that evidence was false. *Id.*

[161] Ofshe & Leo, *supra* note 1, at 1031.

[162] *Id.* (quoting Interrogation Transcript of Stephen Lamont Williams, San Mateo County, Cal., Sheriff's Detective Bureau Office 53 (July 6, 1992)).

[163] Borenstein, *supra* note 8, at 851.

[164] *See* discussion *supra* Part IV.

[165] *See* Ofshe & Leo, *supra* note 1, at 984.

contradicted by other evidence."[166] Yet the purpose of the criminal justice process is to seek out and punish those who are truly responsible for a crime. In order to prevent a false confession and subsequent wrongful conviction, reform is justified even if it is only designed to protect those who are especially vulnerable, such as juveniles and the mentally impaired.[167] Because of the occurrence of false confessions, and the media's reinforcement of the public perception of DNA infallibility, police should be prohibited from fabricating DNA evidence during interrogations.

E. *The Benefits of a Per Se Ban on Fabrication of DNA Evidence During an Interrogation*

Interrogation law, particularly the rule regarding voluntariness, is a "vital and perplexing" component of the criminal justice system.[168] The Supreme Court itself recognized the complexities of the totality of the circumstances test.[169] A bright-line rule, such as the prohibition on the use of physical force during interrogations,[170] provides law enforcement officers with clear guidance.[171] As an FBI trainer put it, "[W]ithout clear rules, the police will have no reliable idea of what they may do, [and] mistakes will be made."[172] A judicially or legislatively created rule barring the use of fabricated evidence of DNA sends a clear and easily applicable message to law enforcement.

---

[166] Davies, *supra* note 25, at 253.

[167] *See* Davies, *supra* note 25, at 229 (noting that juveniles are particularly susceptible to interrogation methods).

[168] Marcus, *supra* note 2, at 642.

[169] *See supra* note 65 and accompanying text.

[170] Brown v. Mississippi, 297 U.S. 278 (1936).

[171] Whitehead, *supra* note 32, at 472.

[172] *Id.*

Although the totality of the circumstances test usually does not consider one factor as dispositive of voluntariness,[173] this proposal fits within the parameters of modern confession law. Specifically, the Court has focused on government action that will overbear the defendant's will such that he is no longer capable of free choice.[174] As discussed above, the implication that the government has DNA evidence against a suspect, especially a suspect who is particularly vulnerable to interrogation methods, may overbear that suspect's will to maintain his innocence.[175] Moreover, because this area of law is best served by applying a bright-line rule,[176] a universal determination that the influence of false DNA evidence compromises the self-incrimination clause is both permissible and appropriate.

Critics to reforms in police interrogation and confession law caution against "lost confessions," which are truthful confessions from guilty suspects.[177] The concern is that reforms to the interrogation methods would, if adopted, decrease the number of truthful confessions rather than false confessions, allowing guilty individuals to remain free to re-offend.[178] However, over the last thirty years, detectives have become increasingly successful in obtaining incriminating statements from suspects.[179] Just as the advent of the *Miranda* warnings has not proven to be the great barrier to obtaining confessions that it was feared to be by law

---

[173] Connelly v. Colorado, 479 U.S. 157, 164 (1986).

[174] *See id.* at 157.

[175] *See* discussion *supra* Part III.

[176] Godsey, *supra* note 29, at 502.

[177] Cassell, *supra* note 12, at 538 ("[s]ound public policy can be made only be considering countervailing considerations which argue against greater restrictions on police questioning techniques, e.g., lost confessions."); *see also* Magid, *supra* note 31.

[178] Davies, *supra* note 25, at 252.

[179] Leo, *supra* note 84, at 302.

enforcement,[180] a simple reform in interrogation methods such as this proposal is unlikely to limit an interrogator's ability to obtain an incriminating statement from a truly guilty suspect.

V. CONCLUSION

DNA testing and its transformation of criminal investigation has received so much attention by the media that even those who are unfamiliar with scientific advancements know about DNA and associate it with conclusive, unassailable evidence of guilt.[181] Moreover, the persistent message that DNA is the infallible key to conviction or freedom—either through television shows such as *CSI* or reports on Innocence Project exonerations—reinforces the idea that DNA is foolproof.[182] While DNA is usually the champion of the innocent, it can have dangerous repercussions when police tell innocent suspects that they found DNA evidence connecting the suspect to a crime.

False confessions occur as a result of highly effective interrogation methods, mostly because the suspect believes that he has no other choice than to confess.[183] Yet, because this type of false confession is elicited by methods that are not considered coercive or fundamentally unfair by the courts, the law does not offer protection against their admission into evidence.[184] Thus, when standard interrogation methods are not found to be legally coercive or fundamentally unfair, the Fourteenth Amendment totality of the circumstances test does not provide any

---

[180] Charles L. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1827 (1987) ("Although at the outset many feared that *Miranda* would cripple law enforcement efforts to obtain confessions from guilty suspects, many of the studies conducted shortly after the decision concluded that there was no substantial reduction in confessions."); *see* Leo, *supra* note 84, at 276. *But 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).

[181] Ofshe & Leo, *supra* note 1, at 1029.

[182] *See* discussion *supra* Part IV.

[183] White, *supra* note 13, at 109.

[184] Ofshe & Leo, *supra* note 1, at 1117.

protection against the admission of false confessions.[185] The reality is that because jurors are likely to convict on a confession, even those controverted by physical evidence, police procedures that are likely to produce false confessions violate the government's fundamental commitment to protect the innocent.[186] Therefore, judicially or legislatively created rules that seek to decrease false confessions, such as this proposal to prohibit the use of fabricated DNA evidence in interrogations, are necessary to maintaining a valid and accurate criminal justice system.

Although opponents of reforms such as this proposal are concerned that law enforcement would be hindered in their efforts to convict the truly guilty, studies indicates that detectives would still be able to obtain confessions in the majority of their cases, even without using interrogation methods that are likely to produce false confessions.[187] Moreover, in most contexts, the harm to society produced by a false confession outweighs the potential value of a true confession.[188] A false confession and subsequent wrongful conviction punishes an innocent person, leaves the true perpetrator free to re-offend, and undermines public confidence in law enforcement.[189] In short, there is little to lose and much to gain from prohibiting the use of fabricated DNA evidence in police interrogations, so that the innocents who are most vulnerable to interrogation methods do not find themselves the victim of a system designed to protect them.

---

[185] *Id.* at 1116-17 ("At the moment when an innocent suspect is most likely to feel inherently compelling pressures of police questioning, he is least likely to invoke his constitutional right to end the interrogation.").

[186] Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2040-41 (1998).

[187] *Id.* at 2040.

[188] *Id.* at 2037.

[189] *See supra* note 120-24 and accompanying text.