

Shining the Bright Light on Police Interrogation in America

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RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press 2008)

I. INTRODUCTION

Richard Leo is uniquely suited to illuminate and critique the practices and legal standards surrounding police interrogation in America. Many courts and legal scholars through the years have opined on the legal standards adhering to confession law, without a deep understanding of how interrogations are actually conducted in the real world, or of the psychological pressure points that ultimately bear on the matter. Prior to entering legal academia, however, Leo served as an associate professor of psychology and criminology, and performed groundbreaking empirical research into how police interrogators obtain confessions and how their interrogations techniques affect suspects.¹ Now, as a law professor at the University of San Francisco, Leo's new book *Police Interrogation and American Justice*, deeply forges social science with legal scholarship to create an enlightening picture of the modern interrogation room, the contradictions and failures of our laws designed to regulate confessions, and the paths we must take to ensure the integrity and fairness of confessions in the future.

Although interrogation practices, long veiled from public eye, have remained one of the "darkest corners of the American criminal justice system," Leo's

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¹ See, e.g., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW AND HUM. BEHAV. 381 (2007) (with Saul M. Kassin, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy Leach, & Dana LaFon); *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479 (2006) (with Steven Drizin, Peter Neufeld, Brad Hall, & Amy Vatner); *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (with Steve Drizin); *Adapting to Miranda: Modern Interrogators' Strategies For Dealing With The Obstacles Posed By Miranda*, 84 MINN. L. REV. 397 (1999) (with Welsh S. White); *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (with Richard Ofshe); *Missing the Forest for the Trees: A Response to Paul Cassell's 'Balanced Approach' to the False Confession Problem*, 74 DENV. U. L. REV. 1135 (1997); *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189 (1997); *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIM. 266 (1996); *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE: INT'L J. 35 (1992).

analysis, as he notes, is “based largely on the type of data most other scholars do not have access to: direct observations of hundreds of police interrogations.” (P. 5.) Leo’s additional research includes attendance at numerous police interrogation training seminars, analysis of interrogation training manuals published from 1940 to the present, and conducted in-depth interviews over the past decade with scores of interrogators and suspects. His research further includes a thorough review of police reports, trial transcripts, and interrogation tapes of more than 2,000 felony cases involving confessions. (P. 5.) It is fair to say that there are few, if any, scholars who have witnessed the interrogation battlefield from the trenches, as has Leo.

Leo blends his knowledge of interrogations in practice with his deep understanding, as a law professor and legal scholar, of American interrogation law. His powerful combination of law, psychiatry, and hands-on experience gives Leo a perspective on police interrogation that few others share.

Leo provides his insights on questions that he understands are broader than the interrogation rooms where they play out. He writes:

As a symbolic matter, police interrogation is a microcosm for some of our most fundamental conflicts about the appropriate relationship between the state and the individual and about the norms that should guide state conduct, particularly manipulative, deceptive, and coercive conduct in the modern era. In short, police interrogation and confession-taking go to the heart of our conceptions of procedural fairness and substantive justice and raise questions about the kind of criminal justice system and society we wish to have. (P. 1.)

Moreover, police interrogations are a frequently repeated scene in cinema and television because they are a “richly textured narrative and morality play involving innocence and guilt, good and evil, and justice and injustice The drama and power struggle of interrogation hold our rapt attention as they feed our vicarious desire for justice, catharsis, and ultimately, resolution and restoration.” (P. 2.)

Leo’s purpose is to highlight contradictions imbedded in American police interrogation methods and the law designed to regulate them. The overarching contradiction is that the police need confessions to solve crimes, but there is almost never a good reason for a suspect to confess. The tension created by this inherent contradiction leads to several additional contradictions: interrogations remain secret in what is considered one of the most democratic and open societies in the world; police have created “scientific” interrogation techniques that are, in reality, unscientific and unreliable; the law requires that confessions be voluntary, but interrogations are successful because they are designed to convince suspects that they have no choice but to confess; “the truth” is the stated goal and virtue of police interrogation, yet police routinely rely on lies and deception to obtain confessions; police view confessions as reliable, while in reality they are “orchestrated” and “constructed” by the police in a way that is often misleading

and unreliable; and juries view confessions as the most probative evidence of guilt, but they are, in fact, quite often unreliable or even patently false.

While complaints about police interrogation methods have sometimes centered on police brutality, fair play, or human dignity, Leo's loudest complaint is the risk of false confessions by innocents that modern interrogation techniques sometimes produce and modern confession law fails to adequately regulate. Thus, his ultimate suggestions for reform focus on policy and doctrinal improvements to reduce the number of false confessions and ensure that confessions admitted at trial are trustworthy. Among these suggested reforms are implementing a legal corroboration requirement for confession admissibility in the courtroom, and requiring the videotaping of what takes place in the interrogation room from beginning to end.

Let me admit at the outset that with respect to me, at least, Leo is preaching to the choir. Leo's research has been very important in my own development as a confessions-law scholar.² I am a fan. When I first met Richard a few years ago, I was shocked that he was not an elderly white-haired professor with a cane, such is the depth of his body of work. And as the director of an Innocence Project, the problem of false confessions is not just an abstract scholarly interest to me, but something with which I have had to grapple in real life.

While many in law enforcement may object to Leo's analysis and conclusions, he is not an enemy of police interrogation. He argues, and I agree, that when done properly, police interrogation is "an unmitigated social benefit" that renders "enormously important outcomes." (P. 2.) He notes that he has trained police interrogators in numerous states, and served on advisory committees to police departments. (P. 8.) Leo contends that it is critical not to undermine the ability of the police to perform their important function of interrogating suspects, but rather to educate others so that the quality and reliability of confessions can be improved.

Nevertheless, based on my own experiences in attempting to reform interrogation practices in my home state, I know that many will read Leo's book as a broad attack on the institution of police interrogation. Some will write it off as a liberal diatribe of a scholar who does not "understand what the police are up against, and what really goes on in the interrogation room." Unfortunately, because many police departments continue to resist opening up their procedures to examination and study,³ and continue to resist videotaping of interrogations, a procedure that would provide a comprehensive record for further study, we will be

² See, e.g., Mark A. Godsey, *Reliability Lost, False Confession Discovered*, 10 CHAP. L. REV. 623 (2007) (symposium) (extensively citing Leo's works); Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781 (2006) (same).

³ See Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003) (noting resistance of many police departments to taping interrogations); Shaila K. Dewan, *Police Resist Fully Taping Interrogations*, N.Y. TIMES, Sept. 3, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9A06E3D71538F931A3575AC0A9659C8B63>.

unable to fully resolve this dispute. Until law enforcement allows closer scrutiny of its practices, they are on thin ice when attacking Leo's conclusions.

This review is divided into three parts. Part II summarizes Leo's empirical findings with respect to interrogation procedures in the real world. Part III examines Leo's suggested reforms. Part IV offers my own critiques and insights.

II. THE INTERROGATION PROCESS IN AMERICA

A. *Police Interrogation and the Adversary System*

Leo asserts that the proper role of the police is to gather case information in a "neutral and dispassionate manner" at the "preadversary stage" of the criminal process. (P. 19.) The information police collect must be as complete and unbiased as possible, because, in the first instance, prosecutors must use this information to decide whether to charge the suspect, and therefore, commence formal adversarial proceedings against him. When the adversary system later officially commences with the filing of criminal charges, judges, defense lawyers, and ultimately juries rely on the integrity of the neutral fact-finding process performed by the police. Historically and today, police have gone to great lengths, through court testimony and other information disseminated to the public about the investigation process, to cast themselves in this neutral fact-finding role.

If police, on the other hand, are committed to the prosecutorial agenda in their fact-collecting process, and develop evidence in a biased manner with the end of obtaining a conviction, then the formal adversary system starts off-kilter. The perceptions about the case held by the crucial actors in the *real* adversary system—prosecutors, defense lawyers, judges and juries—become distorted. This can lead to erroneous results through a "garbage in, garbage out" sequence.

Based on his empirical research, including many interviews with police interrogators, Leo asserts in Chapter 2 that the police have internalized the values and goals of the adversary system. They see themselves solely as foot soldiers for the prosecution in a war zone—a combat arena. They are "highly partisan, strategic, and goal directed." (P. 11.) They are trained to assume that the suspects they interrogate are guilty, and that all suspects will initially lie about their guilt. (P. 22.) Detectives perceive the innocent man in the interrogation room as an "urban legend perpetuated by naïve liberals, muckraking journalists, or self-serving criminal defense attorneys." (P. 22.) Their job, as interrogators, is to obtain a full confession, which they then label as "the truth." Moreover, the interrogation process is aimed not simply to obtain an "I did it" confession, but to manipulate from the suspect a police-orchestrated narrative designed to ensure a conviction, and even better, a conviction by guilty plea. (P. 22.)

Thus, the reality, says Leo, is that the police interrogation process is not a neutral, "Just the facts, Ma'am", evidence-gathering process. Leo writes, "Once police have decided to interrogate a suspect, they have, in effect, crossed the line that separates police work from prosecutorial work. They have aligned themselves

with the prosecution in orientation and goal; their function at this point becomes more prosecutorial than investigative.” (P. 23.)

In one of many contradictions that pervades the interrogation process, the police shield their true roles from the courts and the public by keeping interrogations hidden from public view, and then putting a spin on what actually occurs in the interrogation through their well-developed “external impression management” strategies. (P. 35.)

The police not only hide their role in the adversary system from the courts and public, they also hide it from the suspects they interrogate. Modern interrogation is “fraudulent” not only because police are permitted to lie to suspects about the evidence they have collected (fingerprints, DNA tests, etc.), but because detectives seek to create the illusion that they share a common interest with the suspect and that he can escape or mitigate punishment only by cooperating with them and providing a full confession. Although the suspect’s self-interest would usually be best served by remaining completely silent, interrogators seek at every step to convince him that what is in their professional self-interest is somehow in his personal self-interest. The entire interrogation process is carefully staged to hide the fact that police interrogators are the suspect’s adversary. While they portray themselves as seeking only to “collect the facts” and to help the suspect if he cooperates, they, of course, try to construct a damning case against him. (P. 25.)

Leo asserts that the “genius and fraud of psychological interrogations . . . lies in its ability to persuade . . . the suspect to view the act of self-incrimination—and thus self-conviction—as both logical and rational under the circumstances.” (P. 28.)

The interrogation process is additionally fraudulent because suspects rarely get the attractive deal that detectives imply that they will get from self-incrimination. Typically, those who confess receive the opposite of what they were promised—“more and higher charges, more and harsher punishment.” (P. 33.) Thus, the suspect is deceived not only about the role of the police in the interrogation process, but the consequences of confessing.

I suspected when first reading Leo’s assertions here that he was preparing for an *Escobedo*-type⁴ argument that suspects must have an attorney present in the interrogation room, pursuant to the Sixth Amendment right to counsel. Indeed, Leo makes a case, reminiscent of arguments heard during the *Escobedo* era, that police interrogation is the *most* crucial and *most* adversarial part of our criminal justice system. He ultimately does not take the Sixth Amendment route, as we will see, perhaps because he deems such a remedy unlikely to be adopted, or perhaps because he sees such a remedy as snuffing out police interrogations altogether—a medicine he does not espouse.

Rather, Leo makes the case that police interrogators see themselves as foot soldiers for the prosecution in our adversary system with two goals in mind: to provide an introductory context for his later recitation of how interrogations unfold

⁴ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

step-by-step in the real world, and to help us understand how police attitudes can ultimately lead to unreliable confessions. This last point sets the stage for his concluding chapters, where he lays out his recommended reforms.

Admittedly, Leo describes the values and goals of detectives during interrogations in absolute and broad terms. One might criticize his analysis by suggesting that he paints with too broad of a brush. It is Leo does not mean to suggest, however, that in *every* interrogation the police automatically assume the suspect is guilty, and that in *every* interrogation the police attempt to bend the suspect's confession to fit their desired version of the facts, regardless of the truth. Rather, Leo is generically describing overarching values that, according to his research, permeate police culture today.

In any event, my response to such criticism strikes a theme that will be frequently repeated in this review. Leo has examined and studied actual interrogations, and conducted interviews with real detectives and suspects, perhaps to a greater extent than any other scholar today. If law enforcement critics wish to rebut Leo's perhaps overbroad generalizations, they need to open up the interrogation process to scrutiny by more widely adopting the videotaping requirement that has been urged by many scholars, legislators, and courts or years.

B. *Police Interrogations in the Real World: Yesterday and Today*

1. Exchanging the nightstick for the polygraph machine

Chapters 2 through 5 of Leo's book describe the evolution of the real-world interrogation process in the past century. Leo asserts that an historical understanding of the evolution of interrogation process is necessary to an understanding of police attitudes toward interrogation today. (P. 46.)

Chapter 2 is dedicated to the "third degree," which describes the physically brutal interrogation techniques frequently employed by detectives to coerce confessions from suspects prior to the Supreme Court's 1936 decision in *Brown v. Mississippi*.⁵ The tortuous interrogation tactics utilized in this era have been adequately described in prior publications⁶ and even in popular media, and need not be recounted in great detail here.

Leo states that the use of the third degree waned after *Brown* through the 1940s, dissipated even more during the 1950s, and then became rare to "non-existent" by the 1960s. (P. 45.)

Acknowledging our country's unfortunate history of interrogation practices is important, however, because Leo contends that many aspects of modern interrogation practices evolved from the third degree. The Wickersham Report,

⁵ 297 U.S. 278 (1936).

⁶ See, e.g., NAT'L COMM'N ON LAW OBSERVANCE AND LAW ENFORCEMENT, REP. ON LAWLESSNESS IN LAW ENFORCEMENT (WICKERSHAM COMM'N REP.) (1931).

the *Brown* decision, and later *Miranda v. Arizona*,⁷ forced detectives to alter interrogation strategies from physical torture to psychological coercion. But many vestiges of the third degree remain. Specifically, the basic values and goals embraced by detectives in the interrogation room remain fixed in a third-degree mentality. Namely, the suspect subjected to interrogation is always guilty, he will lie about his guilt, and the detective must use whatever means and tricks he can legally get away with to obtain not just a confession, but an orchestrated narrative that will guarantee a conviction. (P. 77.) The basic goal of interrogation is the same as it was a century ago: convince the suspect that he has no option but to confess, and that it is in his self-interest to do so. Leo notes that this mentality is at odds with our constitutional requirement that confessions be voluntary to be admissible in court.

The police's insistence on secrecy, and keeping the public and courts in the dark about what occurs in the interrogation room, is another attitude that was burned into police culture in the era of the third degree, and to which police departments continue to cling today. (P. 77.)

The third-degree era taught police departments that the easiest and most expedient way to investigate a case was to coerce a confession from a suspect at the front end of the investigation. In a sense, it made police investigators lazy, hampered the development of their broader investigative skills, and fostered the habit of leaning on the "home run" confession to clear their crowded case dockets. Leo asserts that this over-reliance on confessions, learned during the earlier era, remains a hallmark of police interrogation today. Leo writes:

[T]he decline of the third degree is also a story about the persistence of police institutions and behavior. For the structure of early American interrogation remains largely intact to this day, even if the content has changed As in the era of the third degree, the primary goal of police interrogators is not to elicit the truth per se but to incriminate the suspect in order to build a case against him and assist the prosecution in convicting him. And interrogation still often occurs in secrecy. Contemporary American police have skillfully adapted to the norms of the adversary system, but like their predecessors, they do not aspire to be impartial fact-finders. Rather, they are still essentially agents of the prosecution. And they also continue to exercise a virtual monopoly of power at the front end of the criminal justice system, manipulating suspects to provide damning testimonial evidence against themselves before any of the adversary system's checks and balances can be meaningfully applied. The seeds of modern interrogation were sown in the era of the third degree, and they have left an indelible, if largely hidden, imprint on contemporary police methods. (P. 77.)

⁷ 384 U.S. 436 (1966).

Before turning to his depiction of modern interrogations, Leo pauses in Chapter 3 to describe the emergence of new interrogation weapons developed by police departments to secure confessions without physical violence. Leo asserts, in short, that police interrogators have traded the nightstick and Billy club for pseudo-scientific lie detection devices. Indeed, the police now employ lie detection techniques as a means of coercing confessions. They do so by routinely coaxing the suspect under interrogation into taking a polygraph so “we can close the case and let you go.” They then invariably inform the suspect that he has failed the polygraph—even if he actually passed. Supported by the aura of scientific proof of guilt, a suspect told he has failed the polygraph often comes to believe that he *must* be lying and simply does not remember committing the crime, or, as the interrogator is eager to verify, that all hope is lost, no one will now believe his innocence, and that confessing to obtain the implied mitigation in punishment is the only rational option.

Leo cites studies showing that polygraphs and the like are accurate no more than sixty to seventy-five percent of the time. (P. 89.) Even more troubling is the fact that, when inaccurate, they are more likely to classify a truthful suspect as a liar rather than a lying suspect as truthful. Furthermore, behavior analysis—reading the suspect’s nonverbal cues and then classifying him as truthful or untruthful—is even more unreliable and prone to error. (Pp. 98–99, 104–05.) And worse still, police interrogators often receive just a day or two of training in “demeanor evidence,” and leave convinced that they can “see through” lying suspects, when studies suggest that even an expert well-trained in such techniques has mastered a “science” that has no verifiable reliability.

As a result of police training manuals and interrogation seminars, police officers possess a deep belief in the “oracle-like” status of the polygraph and other lie detection methods. Leo argues that the contemporary reliance on these sham techniques for “divining truth” is no better than trial by ordeal in ancient societies. (P. 81.)

Apparently however, the polygraph alone “was not an adequate substitute for the third degree. Police reformers also turned to the field of psychology, which like the polygraph carried the symbolism and authority of modern science.” (P. 80.) From these related arenas, “the house of modern psychological interrogation was built.” (P. 80.) Today, interrogation is comprised of two elements: “the studied detection of deception and the use of psychologically manipulative methods.” (P. 80.)

2. Modern interrogation

Modern interrogation techniques, Leo contends, are seeped in fraud, manipulation and deception. (P. 120.) Police have developed fraud-based interrogation techniques because they assume that every suspect under interrogation is guilty and needs some coercion and trickery to come clean, and because the police “view themselves as agents of the prosecution and thus the

suspect's adversary." (P. 120.) Fraud and psychological coercion are present in all four stages of modern interrogation outlined by Leo: the "softening up" phase, the *Miranda* warning phase, the interrogation proper, and the post-admission phase. (P. 121.)

The "softening up" stage comes first. The goal of this stage is to disarm the suspect by making him believe that the police simply need to ask him a few questions to help them solve the crime. The encounter is called an "interview" rather than an interrogation. The subject is typically told either that he is not a suspect, or that the police just need a few minutes of his time so that they can check him off the suspect list. (Pp. 121–23.) Hidden from the suspect is the fact that the interrogators have prejudged his guilt, that he is about to be intensely interrogated, and that the sole goal of the interrogators is to obtain a confession for the prosecution. (P. 122.)

The first step is to establish a rapport with the suspect. Police will often flatter or ingratiate themselves with the suspect to create the appearance of a nonadversarial relationship. One detective explained the goal of this stage to Leo as follows: "I don't care whether it is rape, robbery or homicide . . . the first thing you need to do is build rapport with that person . . . I think from that point on you can get anybody to talk about anything" (P. 123.) In short, police interrogation is the first and perhaps most adversarial part of the adversary system, but the "softening up" stage is designed to turn that truth on its head.

After the police have convinced the suspect that the purpose of the "interview" is nonadversarial, and built a rapport with him, the next stage is to move the suspect past the *Miranda* warnings while convincing him that he need not invoke any of his rights. Leo contends that police have "developed multiple strategies to avoid, circumvent, [and] nullify" *Miranda*, and indeed, "work '*Miranda*' to their advantage." (P. 124.)

One way that detectives avoid *Miranda* is to falsely tell the suspect that he is not in custody and that he is free to leave at any time. Because *Miranda* warnings are only required when the suspect is in custody, police will "invite" the suspect to the station for an "interview," and inform him that: "You're here on a voluntary basis. You elected to come in here on your own and I appreciate that, okay? And I told you on the phone I had no intention of arresting you." (P. 125.) The officer's true intention—interrogating the suspect until he confesses and then placing him under arrest—is, of course, never revealed.

Another way police interrogators frequently attempt to avoid *Miranda* is simply to read the suspect his rights and then move straight into the questioning without giving the suspect a chance to absorb the warnings or invoke them. If the "softening up" stage has been executed properly, a suspect will feel it is unnecessary or inappropriate to invoke his rights. If the suspect begins answering the officer's questions, as they typically do, courts will hold that he has implicitly waived his rights. (Pp. 125–26.)

Police interrogators increase the chances that the suspect will not invoke his rights by minimizing, downplaying, and de-emphasizing the importance of the

warnings. The goal is to convince the suspect that the *Miranda* warning/waiver procedure is “akin to standard bureaucratic forms that one signs without reading or giving much thought to.” (P. 126.) The softening up stage, which precedes the warnings, is important here, because it establishes a “norm of friendly reciprocation and the expectation that the suspect will comply.” (Pp. 126–27.)

Police interrogators further deemphasize the warnings by reading them in a “perfunctory tone” and “bureaucratic manner.” They do so without pausing or making eye contact with the suspect, all while implying that the warnings are merely a “matter of routine” and that it is a “foregone conclusion” that the suspect will waive them. (P. 127.) In some instances, the interrogator will expressly inform the suspect that the warnings are an unimportant formality that needs to quickly be “dispensed with” so that the police can interview him and check him off the suspect list. (P. 127.) In other cases, interrogators will persuade the suspect that he must waive *Miranda* and talk, because it will be his only chance to “[T]ell his side of the story” and get the matter cleared up quickly. (Pp. 128–29.)

Leo contends:

If the Supreme Court in *Miranda* sought to “level the playing field” by having detectives notify the suspect that they are his adversary and that the suspect’s best interest may not be served by making statements that will be used against him, then the strategies that American interrogators use to obtain signed waivers have, in effect, turned *Miranda* on its head. *Miranda* is often little more than a continuation of the softening up phase of the interrogation. As in other stages, the detective’s strategy is to create the illusion that he and the suspect share the same interest and that compliance is to the suspect’s advantage. (P. 128.)

After the *Miranda* warnings, the interrogator may ask the suspect a few questions, but then quickly moves on to the third stage. At this stage, the focus changes from asking the suspect questions to “telling him the answers and imploring him to confess.” (P. 132.) The aim of the third stage is to move the suspect from denial to admission. At the base of every interrogation is the same message: “the suspect stands to receive intangible or tangible benefits and avoid harms in exchange for an admission—ideally a full confession—to some version of the offense.” (P. 133.) His confession is “quid pro quo for an end to the interrogation and avoidance of the worse-case scenario—harsher treatment or punishment.” (P. 133.)

Police interrogators induce suspects to confess by introducing negative incentives and offering positive incentives. Negative incentives “break down the suspect’s resistance, reverse his denials; lower his self-confidence; and induce feelings of resignation, distress, despair, fear, and powerlessness.” (P. 134.) After the suspect is broken down, positive incentives are offered “to motivate him to see the act of complying and admitting to some version of the offense as his best available exit strategy and option, given his limited range of choices and their

likely outcomes.” (P. 134.) The Los Angeles Police Department’s interrogation training manual captures this strategy by encouraging detectives to tell suspects: “You did it. We know you did it. We have overwhelming evidence to prove you did it. But the reason makes a difference. So why don’t you tell me about it.” (P. 134.)

Common negative incentives include harsh accusations that the suspect committed the crime, and accusations that he is lying. These accusations are repeatedly made. The suspect’s denials are cut-off, and attacked with further and repeated accusations. Repeated accusations exert psychological pressure on the suspect, and shift the burden of proof. Suspects rarely understand that the prosecution has the burden of proving the case against them. The message instead is that the interrogation will not end until the suspect convinces the police of his innocence, or confesses. Because the police make clear that they do not believe that he is innocent—and never will—the only option to end the interrogation becomes a confession.

Police interrogators strengthen their position at this stage by using false evidence ploys. Evidence ploys are used to convince the suspect that he has no choice but to confess. These tricks include falsely telling the suspect that an eyewitness saw him commit the crime, that his fingerprints have been found on the murder weapon, that his crime was caught on tape by a hidden video camera, or that his DNA was found on the victim’s body. Because suspects rarely understand that the police can lie to them during an interrogation, they begin to see their position as hopeless. (Pp. 138–44.)

At this point, polygraphs and other forms of lie detection are typically brought into the picture. Suspects are told, “It’s 100 percent accurate. There’s no fault in it.” (P. 145.) Suspects are then invariably told that they failed the polygraph. This ploy is intended to “break down a suspect’s resistance by persuading him that he has been exposed, that his denials are futile, and there is no escape from the necessity of admitting guilt.” (P. 145.) This process of accusations, attacking denials, and using false evidence ploys is repeated over and over, often combined with raised voices, screaming, and relentless badgering. As one suspect recounted to Leo:

They just kept on and on. Hounding and hounding and hounding. Finally, I said yes, so they’d just leave me alone I don’t even know what they said I tried to repeat what they said. I try to ask them. “I don’t know what you’re talking about.” I was just tired. It was just like arguing with her. Finally . . . they told me I was done I thought I was going home. I didn’t go home. It was just like a big dream, just like something that just never happened. . . . I was so tired. It was like being so confused. (P. 148.)

After a suspect is convinced that no one will ever believe his claims of innocence, and that his situation is hopeless, interrogators dangle some positive

incentives. The basic idea of positive incentives is simple: he will receive less punishment or “some form of police, prosecutorial, or juror leniency if he confesses, but he will receive greater punishment if he does not.” (P. 151.) Combined with this incentive is a warning that this is the suspect’s only chance to receive mitigation. It is “your opportunity to present your side of the story . . . before it is too late.” A common phrase uttered by interrogators is: “For me to help you, I need to hear your side of the story. . . . I need to understand what happened.” (P. 151.)

After the suspect breaks down and makes an admission—“Okay, I’ll tell you what you want to hear. I did it”—the final stage of interrogation begins. This post-admission stage involves the construction of a narrative. Leo describes this stage not as the confession-taking stage, but the confession-“making” stage. (P. 166.) He asserts that if the suspect’s details do not match the interrogators vision of the crime, the detectives will remain adversarial and combative, and will repeat many of the negative and positive incentives introduced in the pre-admission stage. The post-admission narrative is not a document in which the interrogator simply acts as a stenographer; “[r]ather, it is actively shaped and manipulated—with the suspect’s participation to be sure, but at the interrogator’s direction.” (P. 166.) If the suspect’s narrative does not fit the detective’s expectations, the interrogation continues, with facts often supplied by the detective, until the suspect and detective have a meeting of the minds on all important details. (P. 167.)

The detective’s goal is to obtain a story that not only fits his conception of the crime, but that will be believable and dramatic in court, thus guaranteeing a conviction. The five things good interrogators strive to obtain in this last stage are: (1) a coherent and convincing script; (2) a description of the suspect’s motives and explanations; (3) a display of knowledge of the crime’s intimate details that would only be known by the true perpetrator; (4) a description of what the suspect was feeling at crucial moments; and (5) a strong acknowledgment that the confession is voluntary. (P. 168.)

Leo states that these five goals are obtained through intense pressure. Detectives often suggest emotions and motives for the suspect to adopt. They might, through their questioning and badgering, reveal nonpublic facts about the case that the suspect understands he is supposed to incorporate into his narrative. (Pp. 170, 172.) A trick used by interrogators to make the confession appear more reliable is, after the narrative is complete, to personally write it out by hand while intentionally inserting errors on trivial facts. The interrogator will then ask the suspect to review the confession and correct any errors by replacing incorrect facts with correct ones, and to initial each change. In court, the marked up confession, replete with corrections by the suspect, gives the appearance of a defendant who was in full control in the interrogation room and directing even the intimate details of the confession with confidence. (P. 176.)⁸

⁸ Leo provides numerous examples of this police practice of intentionally inserting mistakes for the suspect to correct and the powerful effect such corrections later have in court, in TOM WELLS

C. The Result: False Confessions and Miscarriages of Justice

Many American courts have for years “reasoned that police deception during interrogation is legally permissible because it is not ‘apt to lead an innocent suspect to confess.’” (P. 190.) Surveys and interviews of jurors, police officers, and prosecutors suggest that this belief is widespread. (Pp. 196–97.) Leo’s extensive body of work on the subject, however, summarized in Chapters 6 and 7, demonstrates otherwise. He calls this misimpression the “myth of psychological interrogation.” (P. 197.) The myth is perpetuated because of the secrecy surrounding modern interrogation; most people simply do not understand how highly manipulative, deceptive and stressful interrogation can be. (P. 197.)

No one can put a percentage on the number of confessions that are false. But the advent of widespread post-conviction DNA testing has revealed that false confessions are disturbingly more common than most believe. Indeed, DNA testing is like a crystal ball, allowing us to look back at old cases and see with great clarity whether a confessor is truly guilty. The DNA revolution can be a great learning moment for the criminal justice system, if we are open to the lessons taught.

False confessions are one of the leading causes of wrongful conviction of the innocent, second only to eyewitness misidentification.⁹ The following chart (p. 244) depicts various studies of wrongful conviction cases, and the number and percentage of those convictions that relied on false confessions:

Author/year	No. in study	No. of false confessions	% Wrongful convictions due to false confessions
Bedau and Radelet (1987)	350	49	14
Leo and Ofshe (1998, 2001)	60	60	N/A
Warden (2003)	42	25	60
Drizin and Leo (2004)	125	125	N/A
Gross et al. (2005)	340	51	15
Innocence Project (2007); Garrett (2008)	200	31	16

& RICHARD LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008) [hereinafter “THE WRONG GUYS”].

⁹ See INNOCENCE PROJECT STATISTICS, <http://www.innocenceproject.org/understand/>.

Leo outlines the four ways in which confessions can be discredited. One way is when it is later conclusively proven that the crime did not occur. In one case, for example, several defendants were convicted of murder based on their confessions and a witness's testimony that the defendants had killed her newborn baby and disposed of the body. Scientific evidence later established, after the defendants spent years in prison, that the woman had never had a baby; she had had a tubal ligation operation that prevented her from getting pregnant. (P. 241.)

The second way confessions are proven false occurs when it is demonstrated that it would have been physically impossible for the defendant to have committed the crime. In three different Chicago cases, for example, defendants who confessed were later proven to have been in jail on the date that the crimes occurred. (P. 241.)

Third, a confession is proven false when the identity of the true perpetrator is later discovered. Chris Ochoa, for example, spent years in prison for armed robbery, rape, and murder, until the true perpetrator came forward, confessed, and led the police to the murder weapon and bag where he had hidden the fruits of the crime.¹⁰ (P. 241.)

The final, and most common, way that a confession is proven false is when DNA evidence conclusively clears the inmate. Examples of this method are too numerous to discuss. Indeed, today, 234 individuals have been conclusively proven innocent through post-conviction DNA testing, with the number constantly on the rise.¹¹ An alarming percentage of these innocent suspects falsely confessed as a result of extreme psychological interrogation. I have personally handled two false confession cases in Ohio that are not counted in this group of 234.

Common sense tells us that this number is just the tip of the iceberg. The majority of serious crimes, like armed robbery and murder, are often "non-DNA" cases. In these cases, the crime occurred in such a way that the perpetrator did not leave his or her DNA at the scene.¹² And in most would-be DNA cases, the police do not preserve the DNA after conviction and appeal. In Ohio, for example, in two-thirds of the cases where inmates have sought post-conviction DNA testing, the crucial DNA that could have proven innocence or guilt once and for all had

¹⁰ For details of Chris Ochoa's exoneration, see <http://www.innocenceproject.org/Content/43.php>.

¹¹ See Innocence Project website for profiles on all 220 cases, at <http://www.innocenceproject.org/>.

¹² For example, if A walks up to B in his backyard and shoots and kills him, and then leaves the scene, it is likely that no DNA will exist to identify A as the perpetrator. The fact that most DNA exonerations have occurred in rape cases is simply because rape is the type of crime where the perpetrator most often leaves his biological material. DNA testing in rape cases has proven many rape confessions to be false.

been destroyed or lost by the time the inmate requested testing.¹³ This percentage is typical of the sorry state of DNA preservation in other states as well.¹⁴

There is no qualitative difference between cases in which DNA testing exists to prove innocence and the vast majority of the remaining cases where no DNA is available. The same interrogation techniques are used in both types of cases. The 234 DNA exonerations, with the alarming number of false confessions these cases have laid bare, are just a small percentage of the total number of cases where false confessions may have occurred. The confessions in the remaining cases, however, cannot be demonstrated true or false because no conclusive check exists on the backend to verify the validity of the confession. By any measure, however, the myth that innocent suspects simply do not confess is patently wrong.

Leo next outlines three types of false confessions based on a typology developed by Kassin and Wrightsman.¹⁵ (P. 199.) A *voluntary* false confession occurs when a citizen suddenly confesses on his own, subject to no police coercion. The mentally disturbed defendant in *Colorado v. Connelly*¹⁶ falls into this first category. (Pp. 200–01.)

The *coerced-compliant* false confessor, on the other hand, is a suspect who privately knows while he is confessing that he is innocent. This type of suspect confesses because the extreme interrogation tactics, including false evidence ploys, convinces him that his situation is hopeless, he will be convicted, and that the only way he can get the interrogation to end, and simultaneously avoid harsher punishment, is to tell the interrogators what they want to hear. This type of confessor comes to rationally believe that confessing is his only option, and the lesser of two evils.¹⁷ (Pp. 201–10.)

The final type of false confession is the *coerced-internalized* confession. This type of suspect, hearing the “overwhelming” evidence of his guilt the police have laid at his feet during the interrogation, and not knowing that this evidence is fabricated, comes to doubt his own memory and believe that he *must* have committed the crime. This type of confessor comes to believe that he either committed the crime while sleepwalking or in an alcohol-induced blackout, or that

¹³ See Geoff Dutton and Mike Wagner, *Lost Hope: When DNA Evidence Goes Missing, So Does the Chance for an Exoneration*, THE COLUMBUS DISPATCH, Jan. 27, 2008, available at http://www.dispatch.com/live/content/local_news/stories/2008/01/27/dna1.html.

¹⁴ *Id.*

¹⁵ Saul M. Kassin & Lawrence S. Wrightman, THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE (1985) (Chapter 3, Confession Evidence).

¹⁶ 479 U.S. 157 (1986).

¹⁷ Perhaps the best examples of how false confessions occur can be found in Richard Leo’s new nonfiction work, with Tom Wells, THE WRONG GUYS, *see supra* note 8. In this book, Leo describes from beginning to end how several defendants in that case gave coerced-complaint confessions to a crime they did not commit.

he has simply suppressed his memories of the crime because they are too painful to accept.¹⁸ (Pp. 210–225.)

Although false confessions are highly counterintuitive, and often difficult to wrap one's mind around, one can understand how they occur by reading examples—by examining the actual case studies. Leo provides numerous detailed case studies of each type of false confession. Each story is uniquely compelling. A reader of these case studies can come to fully understand how the suspect would falsely confess as a result of extreme psychological pressures. Other compelling depictions of how false confessions can be manufactured are found in John Grisham's nonfiction work *The Innocent Man*,¹⁹ and in Leo's co-authored nonfiction story, entitled *The Wrong Guys*,²⁰ which describes the numerous false confessions made by the "Norfolk Four." Although providing narrative depictions of interrogations that led to false confessions is beyond the scope of this review, readers who wish to understand this phenomenon should read one of these two excellent books.

There is more to the story. Part of the problem, says Leo, is that detectives are engrained with the belief that all suspects they interrogate are guilty. Training seminars have convinced detectives that they are "highly accurate human lie detectors," thus building false confidence in their biased intuition of guilt. Leo asserts that this phenomenon is both wrong and dangerous. (P. 226.) He writes:

In the more than 2,000 interrogations I have studied, I have rarely encountered interrogators who remember most of the specifics from the laundry list of supposed nonverbal and verbal indicators of deception taught by interrogation training firms such as Reid and Associates. Rather, detectives tend to confidently believe that they can reliably infer whether a subject is lying or telling the truth based on their own intuitive analysis of his body language and demeanor. They sometimes refer to their superior human lie detection skills as stemming from a "sixth sense" common to police detectives. The unfortunate effect is that interrogators will sometimes treat their hunch (or "gut") as somehow constituting direct evidence of the suspect's guilt and then confidently moving to an aggressive interrogation. In my analysis of disputed confession cases, I have found that interrogators are often more certain in their belief in a suspect's guilt than the objective evidence warrants and tenaciously unwilling to consider the possibility that their intuition or

¹⁸ Joe Dick, one of the Norfolk Four described in Leo's book *THE WRONG GUYS*, see *supra* note 8, provided several coerced-internalized false confessions. Dick's interrogators were so convincing that he continued to falsely believe that he had participated in the crime many months later.

¹⁹ JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (Doubleday 2006).

²⁰ See *THE WRONG GUYS*, *supra* note 8.

behavioral analysis is wrong. These tendencies may be reinforced by an occupational culture that teaches police to be suspicious generally and does not reward them for admitting mistakes or expressing doubts in their judgment. (P. 229.)

False confessions also occur because, in cases in which little evidence of guilt exists, the detectives are convinced in their “gut” that the suspect is guilty, so they become Hell bent on obtaining a confession. (Pp. 229–30.) In cases where ample evidence of guilt exists, on the other hand, police may not need a confession or may decide to refrain from interrogation altogether. As a result, extreme psychological interrogation occurs most often when police have relied on little more than their own hunch or intuition to determine guilt. And, as Leo has demonstrated, these intuitions and gut-feelings are often wrong.²¹ Thus, extreme psychological interrogations do their work most often in cases where strong evidence of guilt is lacking, and thus, in cases where suspects are most likely to be innocent.

A confession is usually seen by actors in the criminal justice system—prosecutors, defense attorneys, judges and jurors—as one of the most powerful indicators of guilt. (P. 248.) As a result, when a false confession exists, it is often admitted into evidence at trial and the defendant is convicted as a result of his confession. Studies show that once a suspect falsely confesses, he possibly has more than an eighty percent chance of being wrongfully convicted. (Pp. 250–51.)

III. THE NECESSARY REFORMS: POLICY DIRECTIVES FOR THE FUTURE

Leo’s suggested reforms not surprisingly revolve around the necessity of reducing false confessions. At the outset, he rejects the idea of abolishing police interrogation. He believes that interrogation, properly done, is both a necessary and valuable tool to solve many crimes. (P. 271.) He further dispenses with the suggestion of others that the interrogation function be performed by prosecutors, magistrates, or judges. (P. 271.) Leo contends that prosecutors and judges should remain unburdened by the interrogation process, to ensure that they do not become tainted by the inquisitor’s role. (P. 271.)

The reforms Leo urges come in two forms: legal and practical. Leo first suggests reinvigorating the reliability rationale of the due process voluntariness test. Reliability played an important role in determining the admissibility of confessions for much of American jurisprudential history, until the Supreme Court

²¹ To further illustrate the point, DNA testing performed at the FBI laboratory of suspects identified by police investigation *excluded 20 percent of the primary suspects*, and resulted in a match with the primary suspect in only about 60 percent of the cases. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, PUB. NO. 161258, *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* xxviii (June 1996).

undermined that policy rationale in *Colorado v. Connelly*.²² I have previously echoed these same concerns, noting that *Connelly* was ironically decided shortly before the DNA Revolution commenced, which cleanly laid bare the problems with false confessions and the dire need for a reliability focus in determining confession admissibility.²³

Leo's primary legal focus is on the creation of a new reliability test. A judge should not admit a confession into evidence, Leo argues, unless he or she has weighed three factors and determined the confession is trustworthy. These factors are:

- (1) whether the confession contains nonpublic information that can be independently verified, would be known only by the true perpetrator or an accomplice, and cannot likely be guessed by chance; (2) whether the confession led the police to new evidence about the crime; and (3) whether the suspect's postadmission narrative fits the crime facts and other objective evidence. (P. 289.)

This "totality of the circumstances" analysis should be performed after the court has determined that the confession is voluntary. The prosecution would have the burden of establishing trustworthiness by a preponderance of the evidence. (P. 290.) Of course, for this sort of analysis to work properly, all interrogations would have to be videotaped from beginning to end. Judges would need an objective record by which to analyze and weigh these three prongs. As discussed later, Leo believes that taping should be a universal requirement.

The legal basis for such a reliability test can be found in Federal Rule of Evidence 403.²⁴ Although an unreliable confession may still be minimally relevant under this rule, it is not particularly probative of the suspect's guilt. And because confession evidence weighs so heavily in the minds of jurors, an unreliable confession is unfairly prejudicial to a defendant and devastating to the innocent. (P. 290.) Leo contends that this sort of screening on trustworthiness grounds is not "new or novel." (P. 290.) It routinely occurs with respect to other types of evidence, including most out-of-court hearsay statements.

Leo's primary practical reform goes hand-in-hand with the new reliability test—a requirement of universal videotaping of interrogations from beginning to end. He notes that this reform has picked up momentum in recent years, with several states now requiring taping either by statute or court decree. (P. 292.)

²² 479 U.S. 157 (1986) (Due Process Clause is not violated by the admission of an unreliable confession if the state did not coerce it).

²³ See Godsey, *Reliability Lost*, *supra* note 2.

²⁴ Federal Rule of Evidence 403 excludes evidence if the risk of unfair prejudice substantially outweighs its probative value.

Similar legislation is pending in several states across the country, including my home state of Ohio.²⁵

Leo believes, and I agree, that a broad requirement for videotaping interrogations is the single most important reform. (P. 296.) The benefits of this reform are legion. First and foremost, videotaping creates a clean, objective, and comprehensive record of an interrogation—the equivalent of instant replay. This would prevent false confessions from leading to wrongful convictions in three ways. First, after-the-play scrutiny of police conduct would help professionalize police departments. It would ensure that police play within the bounds of permissible interrogation techniques. Second, it would allow experts to analyze the tape before trial. This opportunity is crucial because expert witnesses could look for earmarks of reliability or falsity, such as whether the police fed the suspect facts to adopt, or whether the suspect truly came up with nonpublic facts on his own. Third, videotaping would provide judges with an objective record to make the three-pronged inquiry in Leo's new reliability test.

Taping protects the police by preventing suspects from making false claims that they were abused in the interrogation room, or that the police officer failed to recite *Miranda* warnings. It removes secrecy from this important part of our adversarial process and “eliminates the gap in our knowledge that the Supreme Court complained of more than four decades ago in the *Miranda* decision.” (P. 297.) Law enforcement agencies benefit because a tape recording of a reliable confession is rock-solid evidence at trial. (P. 301.)

Taping also furthers the investigative abilities of the police. Indeed, things said by a suspect during an interrogation may seem unimportant at the time. As the investigation progresses, however, new facts give rise to new angles. A tape allows the police to go back and capture the suspect's original statements that, without such a clean record, might have been forgotten by the interrogators or gone unnoted. (Pp. 300–01.)

Recording also saves time and money, drastically cutting down on the time police, prosecutors, judges and juries must litigate disputes regarding what was said in the interrogation room. When interrogations are recorded, fewer pretrial suppression motions are made, and fewer claims are made that the police neglected *Miranda*'s dictates. (Pp. 301–02.) Finally, recording improves relations between the police and public. By “removing secrecy from interrogations, recording should increase public perceptions of the legitimacy of the criminal justice system more generally.” (P. 303.)

Studies show that taping does not decrease the frequency of confessions. (P. 303.) And complaints about cost have not been borne out by departments that have adopted such requirements. In this day and age, recording equipment is

²⁵ See S.B. 358, 127th Leg., Reg. Session (Ohio 2008). See also Geoff Dutton and Mike Wagner, *Proposed Reforms Shown to Work*, THE COLUMBUS DISPATCH, Feb. 24, 2008, available at http://www.dispatch.com/live/content/local_news/stories/2008/02/24/DNA_fix.ART_ART_02-24-08_A1_R29EO33.html.

inexpensive, hours of recording time can be saved on an expensive digital hard drive, and any minimal costs are offset by the cost-benefits of reduced litigation to the entire criminal justice system. (P. 303.) Objections from law enforcement about operator mistakes or equipment failure are resolved in states that have a recording requirement by implementing “safety valves,” or exceptions when recording is not possible or resulted from unintentional error. (P. 304.)

Finally, Leo proposes several “piecemeal” reforms to fight against false confessions. These reforms include improving police interrogation training, requiring probable cause to interrogate, prohibiting implicit and explicit threats and promises, banning false evidence ploys, imposing time limits on interrogations, providing additional protections for vulnerable populations such as the mentally handicapped and juveniles, embracing in-court expert testimony on the reliability or unreliability of confessions, and improving jury instructions.²⁶ Requiring probable cause to interrogate, and banning false evidence ploys, are perhaps the two most controversial of his suggested reforms. I will discuss these reforms further below.

IV. CRITIQUES, INSIGHTS AND ADDITIONAL REFORMS

Two broad questions were in my mind when I finished reading Leo’s book. The first is whether Leo’s conclusions about the attitudes of detectives toward interrogation and their suspects, how interrogations occur in the real world, and the frequency with which false evidence ploys and extreme psychological coercion are used, are entirely accurate. The second question is whether the problem of false confessions outweighs potential benefits to our society from modern forms of psychological interrogation. I cannot definitively answer either question.

Regarding the first question, I, like most scholars, am limited by the fact that I have not performed decades of empirical research as has Leo. To truly test Leo’s claims I would have to review the tapes of the thousands of interrogations he has studied over the past decades, or perform my own empirical research to determine whether his sample set is representative.

We all have our beliefs and biases about police interrogation, however, whether stemming from television, scholarship, or real world experience. I have limited personal experience with interrogations. I participated in several

²⁶ The Supreme Judicial Court of Massachusetts ruled in 2004 that:

[W]hen the prosecution introduces evidence of a defendant’s confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention . . . and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State’s highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording in the case before them, they should weigh evidence of the defendant’s alleged statement with great caution and care.

Commonwealth v. DiGiambattista, 813 N.E. 2d 516, 533–34 (Mass. 2004).

interrogations with federal law enforcement agents as an Assistant United States Attorney, including a twelve-hour interrogation in which the suspect ultimately made incriminating statements leading to a prosecution for murder. None of the psychological techniques or false-evidence ploys described in Leo's article were used. But I was not present for the vast majority of police interrogations that I later introduced into evidence in court. And I have no real world experience, either as a participant or voyeur, outside of that limited realm.

My instincts suggest that Leo is more or less on point, however. Leo's empirical research is extensive. He has probably witnessed, either live or on tape, more actual interrogations than many veteran police interrogators in high-crime urban centers. But, whether his conclusions are biased, I cannot say. This brings me to the point I made in the introduction of this review. I suspect that Leo's most enthusiastic critics will be law enforcement personnel. Such critics should be deflected with a single point. If law enforcement personnel wish to prove Leo wrong, they must open up the process for further scrutiny and study. Those who hide the ball are on thin ice to complain that others have mischaracterized the situation.

I experienced my first resistance to videotaping interrogations in my first weeks as a federal prosecutor in 1995. A suspect and his attorney from another state came in for a "proffer session," an "interview" conducted by an FBI agent and me to determine if he was a suitable candidate for cooperation against other suspects in the same conspiracy. The suspect's attorney asked that the session be videotaped. It seemed like a reasonable request to me. I then asked my supervisor if I could videotape the encounter, but received a strong rebuff. I was informed that such a request was against the policies of the United States Department of Justice. The supervisor explained that the "public would not understand the things we have to do."

More recently, as Director of the Ohio Innocence Project, I have worked to have videotaping legislation passed in Ohio.²⁷ I have given talks in support of the legislation to prosecution groups, sheriffs associations, and police unions across the state. So far, I mostly have been met with stiff resistance. The chief of police of a major Ohio city was quoted as saying that the legislation demonstrates "a great distrust of law enforcement."²⁸ To law enforcement critics of Leo's conclusions about police attitudes and values in the interrogation room, I respond that you do not have a leg to stand on until you allow widespread videotaping, so that Leo's assumptions can be empirically put to the test by a variety of scholars across many spectrums.

My second question is whether the current risk of false confessions outweighs the benefits to society of intense psychological interrogation. We all know the

²⁷ See Dutton & Wagner, *supra* note 25.

²⁸ Jim Siegel, *Columbus PD Finding Problems With New DNA Bill*, THE COLUMBUS DISPATCH, Aug. 21, 2008, available at http://blog.dispatch.com/dailybriefing/2008/08/columbus_pd_finding_problems_w.shtml.

maxim that it is “better that 10 guilty persons escape than that one innocent suffer.”²⁹ But what if current interrogation methods result in one thousand convictions of murderers and rapists who would otherwise still roam the streets for each innocent person who falsely confesses? The bottom line is that we simply do not know—and cannot know—the true costs involved in the various tradeoffs between competing interests. It is quite possible that all of Leo’s suggested reforms could be implemented with little to no loss of prosecutions of the guilty. But Leo does not pretend to know. Rather, he identifies the problem of false confessions, which is real, and then prescribes medicine to remedy *this* problem without any report on the side effects of this medicine. Leo apparently believes that the current state of affairs is simply unacceptable regardless of the unknown costs his proposed reforms might entail. Where others fall on the spectrum of choices may be a matter of personal politics.

Nevertheless, I wholeheartedly agree with two of Leo’s suggested reforms: the need for universal videotaping and the need for judges to vigorously screen out unreliable confessions under Rule 403 for the reasons he stated. Videotaping opens up the process. It professionalizes interrogation practices. Detectives know that judges and juries will later scrutinize their behavior in the interrogation room. Detectives can still push hard for much needed confessions, but the eyes of outsiders provide a check against egregious practices. Videotaping also provides an objective record for future litigation. It cuts down on litigation by ending false claims of abuse or *Miranda* failure. Most importantly, it allows the interrogation to be reconstructed after-the-fact by experts and courts to determine a confession’s reliability.

And Leo’s case for a renewed emphasis on confession reliability as a prerequisite to admission is overwhelming. Leo selects Evidence Rule 403 as the regulator of unreliable confessions. I have made the case in a *California Law Review* article that a stringent requirement for confession reliability is inherent in due process.³⁰ Through a series of doctrinal errors, beginning in *Bram v. United States*³¹ and culminating in *Colorado v. Connelly*,³² the Court stripped the reliability factor from the due process inquiry,³³ even as DNA testing began to shed light on the serious problems of unreliable and false confessions resulting in wrongful convictions in this country.³⁴ For both legal and policy reasons, reliability needs to find a home in our confession law jurisprudence. This home could rest both the Due Process Clause and in Rule 403, as Leo suggests.

²⁹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Clarendon Press 1765).

³⁰ Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005).

³¹ 168 U.S. 532 (1897).

³² 479 U.S. 157 (1986).

³³ See Godsey, *Reliability Lost*, *supra* note 2.

³⁴ *Id.*

Leo's other reforms—embracing expert witnesses on the reliability issue, improving police interrogation training, and creating new jury instructions to deal with the issue of unreliable confessions—are all needed reforms. Coupled with videotaping and a new thrust toward screening out unreliable confessions on the front end, these reforms together would go a long way toward minimizing the harmful impact of false confessions.

In one respect, I would go farther than Leo. Leo seems to give up on the ideal of improving *Miranda*, but I believe that *Miranda* can be revitalized to some extent, to help it achieve its intended function. I made the case in a *Minnesota Law Review* article that an additional warning should be added: “If you choose to remain silent, your silence cannot be used against you.”³⁵ This warning was not part of the original *Miranda* warnings because the Court had not yet ruled in *Doyle*³⁶ that post-*Miranda* silence is inadmissible. The Court in *Miranda* believed that this *Doyle*-warning was implicit; suspects will naturally understand that silence cannot be used against them.³⁷ But Leo's own empirical research has shown that suspects do not “get” this right as the *Miranda* Court believed. Many suspects feel they have no choice but to talk—and thus are compelled to speak—simply because of an erroneous belief that silence in the face of damning accusation will equate with guilt in the eyes of the jury.³⁸

Leo established that *Miranda* has little effect, in part because detectives deemphasize it by reciting the warnings quickly, in a perfunctory tone and then launching into intense interrogation without giving a suspect the chance to absorb or consider his rights. His description made me suddenly consider a new way to combat this *Miranda* nullifying effect. Now that we are in the digital age, with universal taping of interrogation within our grasp, I would consider having *Miranda* warnings recited to suspects in custody by a judge or defense attorney via videotape. Much like the “seatbelt” video one watches on commercial airplanes, *Miranda* could be neutrally explained and emphasized in a way that ensures that suspects truly understand their rights and have time to consider them. Suspects could then verify in writing that they have watched the video, understand their rights, and wish to submit to questioning before interrogation commences. Some have suggested having suspects brought before a magistrate for *Miranda* warnings or interrogation. Leo asserts that this improperly crosses separation-of-power lines. But a video of a magistrate informing the suspect of his rights would help cure *Miranda*'s ills without infringing on the judiciary's independent role.

Leo also urges the prohibition of any threats or offers during interrogations. I have a different—although somewhat similar—take on this issue. Although a full recitation of my admittedly complicated theories about penalties and offers are

³⁵ Godsey, *Reformulating the Miranda Warnings* *supra* note 2.

³⁶ *Doyle v. Ohio*, 426 U.S. 610 (1976).

³⁷ See Godsey, *Reformulating the Miranda Warnings*, *supra* note 2 at 790–92.

³⁸ *Id.* at 794 (citing Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and the Irrational Action*, 74 *DENV. U. L. REV.* 979, 1002 (1997)).

beyond the scope of this review, I have previously set forth an argument that the Self-Incrimination Clause was designed to regulate this matter to ensure that suspects are not penalized in any way for exercising their right to remain silent.³⁹

The reforms with which I continue to struggle are Leo's requirement for probable cause to interrogate and his proposed ban on false evidence ploys. Leo argues that detectives should, just like with search warrants, have to go before a magistrate and establish probable cause before they may interrogate a suspect. (Pp. 307–08.) I understand his reasons for setting forth such a requirement. Police interrogate more intensely the more they need a confession. They most need confessions in cases where other evidence of guilt is weak. The requirement of probable cause might reduce the risk of false confession.

I also suspect, however, that a large number of serious crimes are solved each year with *reliable* confessions that would not have been solved with such a probable cause requirement.⁴⁰ If this were the only reform available at this time to combat the problem of false confessions, I might consider it. I think the proper balance can be struck, however, by requiring videotaping, a three-pronged reliability inquiry prior to confession admissibility, embracing expert testimony, and improving jury instructions. If the only evidence of guilt in a given case is the defendant's confession, having the interrogation on videotape, so that proper examination of the confession's reliability can be performed, sufficiently attacks the problem without eliminating otherwise reliable confessions and convictions that might be unattainable with such a probable cause requirement.

Finally, I do not have enough data to agree at this time with his proposed ban on false evidence ploys. Leo argues that it is hypocritical for detectives to hold out interrogation as a truth-seeking venture when they intentionally intersperse lies in the interrogation process. And while lying is generally unseemly as a cultural matter, I am not yet convinced that false evidence ploys do not result in a net gain in the pursuit of truth. I imagine, but lack data to back it up, that falsely telling a suspect his fingerprints have been found at the scene often results in a guilty suspect giving up the game and confessing, allowing scores of crimes to be solved.

In a recent Ohio Innocent Project case, I was convinced beyond probable cause that an alternate suspect committed the rape for which my client had spent more than a decade in prison. I interviewed the alternate suspect on the street along with a retired detective who volunteers for my organization. The alternate suspect made some strange and semi-incriminating statements, but did not confess. I must admit that although I did not lie to him, I was tempted to falsely tell him that our private DNA testing efforts put him at the crime scene. Why? Because I wanted to see how he would respond. I intuitively believed that he would not confess unless he knew that the game was over. If he did not confess in response to this news, I at least wanted to gauge his reaction. Did he quickly provide an

³⁹ See Godsey, *Rethinking the Involuntary Confession Rule*, *supra* note 30.

⁴⁰ Leo also does not explain how his requirement for probable cause would work in *Terry* stop scenarios based on reasonable suspicion.

explanation for why his DNA was at the scene, which could later be discounted through investigation? Did his response give the impression that he was expecting to hear such news and had premeditated a story to try to explain it away? Or was he genuinely stumped? This would have been supremely helpful information to obtain.

Without knowing how many true confessions and incriminating statements are obtained each year through false evidence ploys, I cannot say that their tendency to cause innocent suspects to falsely confess outweighs their potential benefits. And while I agree that a detective lying to a suspect during an interrogation is unseemly, I believe other reforms Leo has suggested are sufficient. Detectives will know that their actions will be caught on tape and viewed by a judge and jury at a later time. Detective will be held accountable for their actions, and the factfinders will be able to determine whether the suspect's responses merited the detective's approach. The judge, making a reliability determination before admitting the tape into evidence, will be able to see whether the false evidence ploys eventually beat down the suspect and convinced him that he had no choice but to conjure up a false confession. Or, the judge will see that the false evidence ploy immediately led to strange and incriminating statements from the suspect, such as providing non-public information about the crime. Experts will be able to view such tapes as well, and offer their opinions as to whether the false evidence ploys had a detrimental effect on the truth seeking purpose of the interrogation.

V. CONCLUSION

Richard Leo body of work, summarized in *Police Interrogation and American Justice*, shines the bright light on police interrogation in American today. He depicts the values and structure of interrogation in a way that few, outside of the actual subjects/victims of interrogation, fully understand. Although I do not agree with all of his conclusions and proposed reforms, his work convincingly raises a point that we must heed: If we are to ensure the integrity and fairness of confessions in this country, we must adopt universal videotaping requirements across all jurisdictions, and develop new reliability tests to screen out false confessions.