THE LIMITS OF DECEPTION: AN END TO THE USE OF LIES AND TRICKERY IN CUSTODIAL INTERROGATIONS TO ELICIT THE "TRUTH"?

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The State of New York has a long and ignominious history of wrongful convictions related to false confessions. From George Whitmore, a nineteen year old eighth grade drop-out who was watching Reverend Dr. Martin Luther King Jr.'s "I Have a Dream" speech in Wildwood, New Jersey at the time two "career girls" were murdered in a Manhattan apartment,[1] to the five young minorities wrongfully convicted for raping a jogger in Central Park,[2] scores of innocent people have confessed during custodial interrogations in New York to committing brutal crimes.[3] In fact, after Illinois, New York has the most wrongful convictions based on false confessions in the nation.[4]

And the shocking number is likely to grow. In Brooklyn, the District Attorney's Office has reopened as many as fifty trial convictions involving a detective named Louis Scarcella, whose overbearing and allegedly illegal tactics may have sent innocent men to prison.[5] A panel has been appointed to review the

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[1] *See* Paul Vitello, *George Whitmore Jr. is Dead at 68; Falsely Confessed to 3 Murders in 1964*, N.Y. TIMES, Oct. 16, 2012, at A29. A true crime thriller by ROBERT K. TANENBAUM, ECHOES OF MY SOUL (2013), tells the dramatic story of the case, including the trial that resulted in the conviction of the actual killer, Richard Robles.

[2] *See* SARAH BURNS, THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING ix (2011).

[3] *See* Michael Schwirtz, *Bill to Aid Those Giving False Confessions*, N.Y. TIMES, Feb. 20, 2014, at A19; Editorial, *Authorities Must be Wary of False Confessions*, CHI. SUN-TIMES (Feb. 10, 2014, 8:13 PM), http://www.suntimes.com/opinions/25450396-474/authorities-must-be-wary-of-false-confessions.html.

[4] *See Authorities Must be Wary of False Confessions*, *supra* note 3.

[5] *See* Frances Robles, *A Conflict is Seen in a Review of a Detective's Conduct*, N.Y. TIMES, May 16, 2013, at A23.

convictions[6] and the Legal Aid Society is coordinating with a large group of Manhattan law firms that have taken on individual cases involving Scarcella.[7] Case files relating to Scarcella have been subpoenaed and are being reviewed by a state supreme court justice.[8] As chronicled in the New York Times, Scarcella and others in Brooklyn precincts appear to have used especially coercive techniques to induce confessions in the 1980s and 1990s.[9] But the problem of false confessions is not limited to Brooklyn. In fact, none of the six cases involving disputed confessions heard by the New York Court of Appeals over the past three years involved interrogations by Brooklyn detectives. Interrogations in these cases: *Warney v. State of New York*,[10] *People v. Bedessie*,[11] *People v. Guilford*,[12] *People v. Oliveras*,[13] *People v. Aveni*,[14] and *People v. Thomas*,[15] took place (respectively) in Rochester, Queens, Syracuse, Bronx, Westchester, and Rensselaer Counties. The phenomenon of unreliable, coerced confessions is as broad in New York State as it is deep and longstanding.

That may well change, after a landmark decision by the Court of Appeals this term in *People v. Thomas*.[16] While the court broke no new ground conceptually—following its own and U.S. Supreme Court precedent—the court announced that some police interrogation tactics, when used in combination, cross the line between "voluntary" admissible confessions and "involuntary" or coerced inadmissible confessions.[17] In particular, three types of deception used in the Adrian Thomas case were found by the appellate division to pass muster under the conventional analysis of voluntariness, and defended by the District Attorney's Office, as

[6] Frances Robles, *Panel to Review up to 50 Trial Convictions Involving a Brooklyn Homicide Detective*, N.Y. TIMES, July 2, 2013, at A20.

[7] *See* Vivian Yee, *As 2 Go Free, Brooklyn Conviction Challenges Keep Pouring In*, N.Y. TIMES, Feb. 7, 2014, at A18.

[8] Frances Robles, *Judge to Review Files on Brooklyn Detective*, N.Y. TIMES, Nov. 14, 2013, at A26.

[9] *See id.*; Robles, *supra* note 5.

[10] Warney v. New York, 947 N.E.2d 639 (N.Y. 2011).

[11] People v. Bedessie, 970 N.E.2d 380 (N.Y. 2012).

[12] People v. Guilford, 991 N.E.2d 204 (N.Y. 2013).

[13] People v. Oliveras, 933 N.E.2d 1241 (N.Y. 2013).

[14] People v. Aveni, 6 N.E.3d 1124 (N.Y. 2014).

[15] People v. Thomas, 8 N.E.3d 308 (N.Y. 2014).

[16] *Id.*

[17] *Id.* at 313–14. The court cited and followed *People v. Guilford* in stating that it is the People's burden to prove that the defendant's statements were made voluntarily, using the test established by the Supreme Court in *Culombe v. Connecticut*. *Id.* Further, the *Thomas* court cited *Miranda v. Arizona* to emphasize that statements may be deemed "involuntary" if they are the result of physical or *psychological* coercion. *Id.* at 313.

perfectly acceptable uses of deception by the police officers.[18] The three lies told to Thomas with which the court took issue were that his wife would be picked up for questioning; that Thomas could save his child's life by confessing; and that the police viewed what happened to his son as accidental.[19] After this decision, police departments will need to exercise caution in conducting interrogations, and should not assume that any form of deception is permissible.[20]

I. *PEOPLE V. THOMAS*: BACKGROUND

Adrian Thomas, a twenty nine year old African-American man from Douglas, Georgia, with a tenth-grade education, met his wife Wilhemina Hicks of Troy, New York, at a chicken processing plant in Douglas where they both worked on the production line.[21] They married, moved to Troy, and together had seven children.[22] The last two, twins, were born two months premature, when Mr. Thomas was twenty five years old.[23] The family lived in a two-bedroom apartment, with the five oldest children sleeping in one bed, and the twins sleeping in bed with the parents.[24] The apartment was neatly maintained and the children clean and well behaved.[25] There was no history of hospitalizations or medical records indicating suspected child abuse of any of the children.[26]

On the evening of Saturday, September 20, 2008, one of the twins, Matthew, was feverish, wheezing, and crying excessively.[27] The

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[18] *Thomas*, 8 N.E.3d at 313 (citing People v. Thomas, 941 N.Y.S.2d 772, 730–31 (App. Div. 3d Dep't 2012), *rev'd*, 8 N.E.3d 308 (N.Y. 2014)); *see generally* Respondent's Brief at 50–57, *Thomas*, 8 N.E.3d 308 (No. 08-0174) (discussing the "totality of the circumstances" test used to determine the voluntariness of a confession); Brief for District Attorneys Association of the State of New York as Amici Curiae at 7, *Thomas*, 8 N.E.3d 308 (No. 08-0174) ("Some police deception can be an appropriate investigative tool . . . and a statement should not be 'deemed' involuntary on the basis of deceptive police conduct that did not coerce it.").

[19] *Thomas*, 8 N.E.3d at 314–16.

[20] James C. McKinley, Jr., *Police Coercion Cited in Order for Retrial*, N.Y. TIMES, Feb. 21, 2014, at A21 ("Art Glass, the acting district attorney in Rensselaer County, where Mr. Thomas was prosecuted, said the ruling was likely to force police departments to be more careful during interviews. 'The court didn't provide any bright-line rule or set down any clear boundaries you can't cross,' Mr. Glass said. 'I think what it tells them is to be cautious, more cautious than they have been.'").

[21] Brief for The Innocence Network as Amici Curiae Supporting Defendant-Appellant at 21, *Thomas*, 8 N.E.3d 308 (No. 08-0174).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] People v. Thomas, 8 N.E.3d 308, 311 n.2 (N.Y. 2014).

[27] Brief for The Innocence Network, *supra* note 21, at 21.

parents cooled him down and comforted him, and put him to bed with his twin brother at around 11:30 p.m.[28] At around 3:00 a.m., Matthew woke up with a fever, and Mr. Thomas prepared formula for the twins.[29] After the feeding, Mr. Thomas fell asleep, assured by his wife that Matthew's fever had gone down.[30] The next morning, Mr. Thomas was awakened by his wife, who told him that "the baby is not moving [or] breathing."[31] As his wife performed CPR, he called 911 and the baby was taken in an ambulance to the emergency room at nearby Samaritan Hospital.[32] There, he was found to have hypotension and extremely low blood pressure, white blood cell count, and temperature.[33] The emergency room physician ordered a blood test and gave septic shock as the most likely explanation of her differential diagnosis.[34] Matthew was transferred to the pediatric intensive care unit at Albany Center, arriving there shortly after noon on Sunday, September 21, 2008.[35] A CT scan found fluid collections in his brain, but no skull fracture.[36] That afternoon, the baby was put on life support.[37] Even though the CT scan found no skull fracture, a physician at Albany Medical believed initially that Matthew's symptoms and condition were the result of a skull fracture.[38] He told the Troy Police, "This baby has a fractured skull. This baby was murdered."[39] He said, "The baby was slammed into something very hard like a high speed impact in a vehicle."[40]

On Sunday evening, the Troy Police and Child Protective Services (CPS) visited the Thomas apartment, where Mr. Thomas was caring for his children and took the six children from the home.[41] At midnight, the police returned to the apartment and Thomas agreed to accompany them to the police station.[42] At trial, the prosecution contended that the interrogation that followed was not "custodial,"

[28] *Id.* at 21–22.
[29] *Id.* at 22.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 22–23.
[39] *Id.* at 23.
[40] *Id.*
[41] *Id.*
[42] *Id.*

triggering no Miranda rights.[43] Presumably, since Thomas was given Miranda warnings, the Court of Appeals did not express any view on the custodial nature of the interrogation.[44]

Over the next two hours, the police questioned Thomas in a room set up for video monitoring on the events leading up to Matthew's hospitalization.[45] At around 2 a.m., Thomas expressed a suicidal urge, and the police had him committed to a psychiatric ward.[46] When he was released the next evening, the police resumed the questioning for over the next seven hours, videotaping throughout.[47] Thomas signed three statements over the course of the interrogation, admitting in the last one that on three occasions "he [had] 'slammed' Matthew down on a mattress just 17 inches above the floor."[48] Counsel for Thomas sought unsuccessfully to have the statements excluded from evidence at trial, and Thomas was convicted, following a jury trial, of murdering his son.[49] He was sentenced to a term of twenty five years to life and had served over five years of the sentence before the Court of Appeals' decision, which ordered a new trial with the statements excluded from evidence.[50] On June 12, 2014, Thomas was acquitted by the jury in the retrial, and is now a free man.[51]

II. PSYCHOLOGICAL INTERROGATION, *MIRANDA* AND THE VOLUNTARINESS STANDARD

The psychological techniques employed in the interrogation of Adrian Thomas have been used for decades. These techniques are designed to convince a person who is believed to have committed a crime that it is in his or her best interest (rather than a self-destructive decision) to give in to police demands for a confession.[52] Social scientists specializing in the phenomenon of "false confessions" have explained that "[a]n interrogator strives to

[43] *Id.* at 24.

[44] *See generally* People v. Thomas, 8 N.E.3d 308 (N.Y. 2014). (discussing the voluntariness of Thomas' statement, rather than the interrogation being custodial in nature).

[45] *Id.* at 311.

[46] *Id.*

[47] *Id.*

[48] *See id.* at 309.

[49] *Id.* at 309, 313.

[50] *Id.* at 317; People v. Thomas, 941 N.Y.S.2d 722, 725 (App. Div. 3d Dep't 2012), *rev'd*, 8 N.E.3d 308 (N.Y. 2014).

[51] Bob Gardinier, *Stunning 'Not Guilty,'* TIMES UNION (Albany, N.Y.), June 13, 2014, at A1.

[52] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985 (1997).

neutralize the person's resistance [to confessing] by convincing him that he is caught and that the marginal benefits of confessing outweigh the marginal costs."[53] To accomplish this, the police isolate a suspect from family and friends in a police-dominated environment that is "stress-inducing by design."[54] The interrogation is "structured to promote a sense of isolation and increase the anxiety and despair" arising from continued assertions of innocence.[55] The strategies to achieve this result with presumably guilty suspects are explained in police manuals, the most prominent of which is Inbau & Reid, *Criminal Interrogations and Confessions*, published in 1962, revised over the years, and still in print.[56] The psychologically based Reid Technique, which has replaced the brutal means of persuasion found unconstitutional in *Brown v. Mississippi*,[57] has been widely adopted by police departments[58] and has not been viewed by courts as impermissibly coercive.[59] That is, courts have generally found that confessions elicited using the Reid Technique are "voluntary," absent some other circumstance indicating that they were coerced and thus "involuntary."[60]

To understand why an overtly manipulative method of obtaining confessions has usually been viewed as not "coercive," it is necessary to understand two developments in the jurisprudence on

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[53] *Id.*

[54] Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 6 (2010); *see* Ofshe & Leo, *supra* note 52, at 997–98.

[55] Kassin et al., *supra* note 54, at 6.

[56] *See* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); *see also* Kassin et al., *supra* note 54, at 7 (describing the Reid Technique first published in *Criminal Interrogation and Confessions* as "the most influential approach" to criminal interrogation).

[57] Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[58] *See* Robert J. Norris et al., *"Than That One Innocent Suffer": Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1330 (2011).

[59] Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 800 (2003).

[60] *See, e.g.*, State v. Thaggard, 527 N.W.2d 804, 811–12 (Minn. 1995) (finding confession voluntary where defendant understood the *Miranda* warning, had prior experience with the criminal justice system, and was interrogated for a short period of time by a single police officer, and where defendant was allowed a bathroom break, was not intoxicated, and there were no threats or physical intimidation by the officer); State v. Ulch, No. L-00-1355, 2002 Ohio App. LEXIS 1866, at *11 (Ohio Ct. App. Apr. 19, 2002) (holding that appellant's due process rights were not violated where a detective lied during an interrogation when employing the Reid Technique to encourage appellant to make a statement); State v. Myers, 596 S.E.2d 488, 492 (S.C. 2004) (finding defendant's confession valid in the absence of evidence that defendant's will was overborne or evidence that the confession was not voluntary where defendant was advised of his rights three times, interrogations did not last more than a few hours, and defendant was well rested and offered food).

the due process rights of defendants in criminal cases (and, correspondingly, rights under New York Criminal Procedure Law, which has followed the same pattern).[61] The first development is *Miranda v. Arizona*,[62] and the related case of *Colorado v. Connelly*.[63]

In *Miranda v. Arizona*, the Supreme Court acknowledged in dicta that police-dominated interrogation can "undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely."[64] However, even while explaining how the Reid method psychological techniques can overcome a person's will to refrain from self-incrimination, the Supreme Court addressed the problem of psychologically coercive techniques only by seeking to eliminate the "police-dominated" atmosphere needed for them to succeed, i.e., through the requirement of warnings advising suspects in custody of their constitutional rights to counsel and to remain silent.[65] The Court's observations in *Miranda* as to the coercive nature of psychological interrogation remain dicta, and the requirement for providing *Miranda* warnings to suspects in custody has since come to dominate courts' analyses as to whether defendants' confessions are admissible evidence.[66] Notably, three dissenting justices in *Miranda* pointed out that under the reasoning of the majority, *all* custodial interrogations were deemed coercive, and that, assuming only some were coercive, the majority could have, but did not, specify means to identify or deter actually coercive interrogations (such as requiring observers or setting time limits).[67] The only deterrent to coercive custodial interrogations established in *Miranda* was *Miranda* warnings, which the dissent assumed would rarely be waived.[68] This has been far from the case, as indicated by the six cases recently heard by the New York Court of Appeals, including *Thomas*, in which *Miranda* rights were waived.[69]

Colorado v. Connelly did not involve the psychological techniques used in custodial interrogations, but rather the apparently

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[61] *See* N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2014).

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

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

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

[65] *Id.* at 471.

[66] *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013) (applying the same reasoning as *Miranda* regarding the questioning of unwarned suspects).

[67] *Miranda*, 384 U.S. at 533–34 (White, J., dissenting).

[68] *Id.* at 536.

[69] *See* George C. Thomas III, *Missing* Miranda*'s Story: Gary L. Stuart,* Miranda*: The Story of America's Right to Remain Silent*, 2 OHIO ST. J. CRIM. L. 677, 687 (2005) ("[S]tudies show that roughly eighty percent of suspects waive *Miranda* and talk to the police.").

unreliable confession of a schizophrenic man who was in a psychotic state at the time he confessed to a murder.[70] The Supreme Court found that there had been no "police overreaching," so the confession should not have been suppressed as involuntary.[71] That holding is not the influential part of the decision. Rather, *Connelly* held that the unreliability of the confession was not a matter of constitutional concern, and in the post-*Connelly* era, the coercive nature of psychological techniques in custodial interrogations has generally not been viewed as a violation of due process.[72] The overwhelmingly common approach is to evaluate the due process of a custodial interrogation only in terms of whether proper *Miranda* warnings were provided, understood, and intelligently waived, and not to evaluate the coercive effect of the psychological techniques.[73]

The second development is the separate law developed under the "voluntariness" standard, which remains the legal framework for analyzing the use of psychological techniques in obtaining confessions under the Due Process Clause of the United States Constitution, and New York law.[74] *Miranda* did not disturb the doctrine that the admissibility of a defendant's statements made while in custody must be judged solely by whether they were "voluntary."[75] Involuntary (or coerced) confessions are viewed as a violation of due process under the United States Constitution.[76] So, for example, in *Miller v. Fenton*,[77] the Court explained:

> This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique

[70] Colorado v. Connelly, 479 U.S. 157, 161 (1986).

[71] *See id.* at 169–70.

[72] *See, e.g.*, Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 106, 116–17 (1997) (noting that *Connelly* did not substantially change the post-*Miranda* due process test and therefore the Due Process Clause still provides little to no protection against coercive interrogation techniques); Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 782–83 (2013) (noting that, when determining whether a confession was voluntary under the Due Process Clause, the reliability of the confession is not a concern).

[73] *See* Leo et al., *supra* note 72, at 787–90.

[74] *Id.* at 783; *see, e.g.*, People v. Anderson, 364 N.E.2d 1318, 1319–20 (N.Y. 1977) (discussing whether or not the defendant's confession was involuntary and therefore invalid under the Due Process Clause based on the "totality of the circumstances"); People v. Dunbar, 958 N.Y.S.2d 764, 770–71 (App. Div. 2d Dep't 2013) (discussing the "voluntariness test" the court uses to determine whether a suspect's confession is valid under the Due Process Clause).

[75] *See* Leo et al., *supra* note 72, at 782–83; *Dunbar*, 958 N.Y.S.2d at 770–71.

[76] Leo et al., *supra* note 72, at 781 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[77] Miller v. Fenton, 474 U.S. 104 (1985).

> characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. *Brown v. Mississippi* . . . was the wellspring of this notion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession.[78]

Assuming a suspect was properly given *Miranda* warnings and knowingly and intelligently waived the rights to remain silent and to an attorney, the test for admissibility of custodial confession is whether, based on the totality of circumstances, "the government agents' conduct 'was such as to overbear [a defendant's] will to resist and bring about confessions not freely self-determined.'"[79] As the Supreme Court explained in *Withrow v. Williams*,[80] the totality of the circumstances test for voluntariness presents courts with a list of factors, none accorded more weight than the others:

> Those potential circumstances include not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health. They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation.[81]

The concept of "voluntariness," with its elevated, elusive concept of "free will," has not served defendants well. Missing from this list is any guidance as to the possible coerciveness of specific interrogation techniques. Instead, it is a loose, multi-factor standard, lacking a bright-line rule, which has afforded police departments tremendous leeway and granted excessive discretion to trial courts.[82] Indeed, the term "involuntary" has been termed a

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[78] *Id.* at 109 (citations omitted).

[79] United States v. Kaba, 999 F.2d 47, 51 (2d Cir. 1993) (citing United States v. Guarno, 819 F.2d 28, 30 (2d Cir. 1987)) (quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961)).

[80] Withrow v. Williams, 507 U.S. 680 (1993).

[81] *Id.* at 693–94 (citations omitted).

[82] *See* RICHARD A. POSNER, REFLECTIONS ON JUDGING 86–87, 262 (2013) (critiquing multi-factor tests).

"convenient shorthand" for the complex conclusion that a confession violates the Due Process guarantee of the Fourteenth Amendment of the U.S. Constitution.[83] And, as the Court explained in *Schneckloth v. Bustamonte*,[84] the cases analyzing the admissibility of confessions "yield no talismanic definition of 'voluntariness' mechanically applicable to the host of situations where the question has arisen."[85] Rather, as noted in *Culombe v. Connecticut*, "[t]he notion of 'voluntariness' is itself an amphibian."[86]

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness" incorporates notions of "but-for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.[87]

"It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of 'voluntariness.' Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect."[88] On one hand, the ambiguous meaning of "voluntary" is unfortunate, in light of the heavy freight it bears of some of the foundational beliefs of our criminal justice system.[89] On the other hand, the commodiousness of the "totality of the circumstances" and "voluntary" standards permits courts the leeway to craft a meaningful standard for identifying the kinds of psychological interrogation techniques that can "overbear" a person's "will."[90] The use of deception is one such technique. In *Thomas*, the court fleshed out the voluntariness standard in a manner that should

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

[84] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[85] *Id.* at 224.

[86] *Id.* at 605.

[87] Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72–73 (1966); see Judge Posner's biting analysis of "proximate cause" in POSNER, *supra* note 82, at 65–66.

[88] *Schneckloth*, 412 U.S. at 224–25.

[89] *See* Miller v. Fenton, 474 U.S. 104, 109–10 (1985); Culombe v. Connecticut, 367 U.S. 568, 602, 605 (1961).

[90] *Culombe*, 367 U.S. at 602, 631–35.

prompt police departments to rethink the Reid method and the use of deception in interrogations.[91] What happened in the *Thomas* case, according to the court, was that a "set of highly coercive deceptions . . . were of a kind sufficiently potent to nullify individual judgment."[92] The deceptions were "lethal" to the self-determination of Adrian Thomas, "an unsophisticated individual without experience in the criminal justice system."[93] In finding the inculpatory statements involuntary, the court tied the problem of deception to a bedrock constitutional principle: "[w]hat transpired during defendant's interrogation was not consonant with and, indeed, completely undermined, defendant's right not to incriminate himself—to remain silent."[94] So what was so egregious about the *Thomas* interrogation?

III. PERMISSIBLE DECEPTION

It comes as a surprise to lawyers and lay people alike that the police are permitted to lie to suspects when interrogating them.[95] This seems contrary to the general abhorrence of falsehoods in other legal contexts, and the severe punishment of those who lie, including for lying to the federal government.[96] The tolerance for lying is apparently one-sided: you cannot lie to the government, but the government can lie to you. However, the rationale for this double standard—that misrepresentations to a reluctant suspect can lead to a "true" confession—falls away when the resulting confession is false.

A decades-old Supreme Court case, *Frazier v. Cupp*,[97] is often cited for the proposition that police can use deception in custodial interrogations. The case involved the classic prisoner's dilemma, a strategy used when two suspects are thought to have committed a crime together and both deny their involvement.[98] The police separate them so neither is aware of what the other suspect is

[91] People v. Thomas, 8 N.E.3d 308, 309–17 (N.Y. 2014).

[92] *Id.* at 314.

[93] *Id.*

[94] *Id.*

[95] *See* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 451 (1996).

[96] *See* 18 U.S.C. § 1001(a) (2012).

[97] Frazier v. Cupp, 394 U.S. 731 (1969).

[98] *Compare id.* at 737–38 (describing the police interrogation tactics used against the petitioner), *with* Robert J. Norris & Allison D. Redlich, *Seeking Justice, Compromising Truth? Criminal Admissions and the Prisoner's Dilemma*, 77 ALB. L. REV. 1005, 1018 (2014) (describing the traditional example of a prisoner's dilemma).

saying.[99] Their joint interest would be best served if neither incriminated the other (or themselves), but they separately have an individual interest in avoiding punishment and therefore blame the other.[100] The police take advantage of their lack of information about what the other is saying and misrepresent to one suspect that the other suspect has provided incriminating information about her.[101] This misrepresentation has two goals: first, to make the suspect infer that the evidence against her is so strong that confessing is a rational choice; and second, to make the suspect turn against the other suspect out of a (fabricated) sense of betrayal.[102] If the ploy works with both suspects, the police have elicited two confessions, achieved with deceptive statements about the other suspect's statements.

In *Frazier v. Cupp*, the Court found that the "prisoner's dilemma" strategy was not coercive in the context of a brief interrogation of adults of average intelligence.[103] Two cousins, who were suspects in a murder investigation, had confessed to the crime during custodial interrogations, and were convicted.[104] In a habeas appeal, one of the cousins argued that his confession should not have been admitted because, *inter alia*, the officer questioning him had falsely told him that his cousin (Rawls) had been brought in and he had confessed.[105] Rather than address head on the permissibility or not of the deception, the Court held, "[t]he questioning was of short duration, and petitioner was a mature individual of normal intelligence. The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible."[106]

This, of course, dodges the question. What if the questioning had gone on for hours? What if the petitioner was not mature, or of below average intelligence? One suspects that the narrow holding resulted from the Court's reluctance to prohibit a highly effective investigative technique that may not, in fact, pose the risk of false

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[99] Norris & Redlich, *supra* note 98, at 1018.

[100] Raymond H. Brescia, *Trust in the Shadows: Law, Behavior, and Financial Re-Regulation*, 57 BUFF. L. REV. 1361, 1388 n.82 (2009); Norris & Redlich, *supra* note 97, at 1018.

[101] David B. Lipsky & Ariel C. Avgar, *Online Dispute Resolution Through the Lens of Bargaining and Negotiation Theory: Toward an Integrated Model*, 38 U. TOL. L. REV. 47, 69–70 (2006).

[102] *See* Brescia, *supra* note 100, at 1388 n.82.

[103] Frazier v. Cupp, 394 U.S. 731, 739 (1969).

[104] *Id.* at 732, 737–38.

[105] *Id.* at 737–38.

[106] *Id.* at 739.

confessions. In the interrogation of Adrian Thomas, the police falsely told him that his wife had told them

> [t]hat Saturday evening the child had suddenly stopped screaming when Mr. Thomas was alone with him, and "she said he started acted funny after that." When Mr. Thomas retells how he had comforted his child and did not notice anything different about him until Sunday morning, Sgt. Mason pretends to level with him: "I ain't going to bullshit you man, all right, your wife said you must have done it last night . . . you must have slammed the baby last night." Mr. Thomas resist[ed] the ploy, even when a police officer [told] him that "She signed the paperwork."[107]

It may be that the kind of deception at issue in *Frazier v. Cupp* does not pose the risk of false confessions that other kinds of deception do.

This holding on a fairly innocuous form of deception has often been taken as carte blanche for the use of deception in interrogations. Courts across the nation have found that the use of deception, trickery, and ruses is just one of the factors in a voluntariness analysis and does not automatically render a confession involuntary.[108] *Frazier v. Cupp* is the likely basis for the

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[107] Brief for The Innocence Network, *supra* note 21, at 25–26 (footnotes omitted).

[108] *Ex parte* Jackson, 836 So. 2d 979, 984 (Ala. 2002); Sovalik v. State, 612 P.2d 1003, 1007 (Alaska 1980); State v. Carrillo, 750 P.2d 883, 894–95 (Ariz. 1988); Goodwin v. State, 281 S.W.3d 258, 265, 267 (Ark. 2008); People v. Smith, 150 P.3d 1224, 1241–42 (Cal. 2007); State v. Klinck, 259 P.3d 489, 495–96 (Colo. 2011); Baynard v. State, 518 A.2d 682, 691 (Del. 1986); *In re* D. A. S., 391 A.2d 255, 258, 259 (D.C. 1978); Martin v. State, 107 So. 3d 281, 298 (Fla. 2012); Moore v. State, 199 S.E.2d 243, 244 (Ga. 1973); State v. Kelekolio, 849 P.2d 58, 70 (Haw. 1993); State v. Bentley, 975 P.2d 785, 788 (Idaho 1999); People v. Melock, 599 N.E.2d 941, 953 (Ill. 1992); Luckhart v. State, 736 N.E.2d 227, 231 (Ind. 2000); State v. Oliver, 341 N.W.2d 25, 31 (Iowa 1983); State v. Randolph, 301 P.3d 300, 309–10 (Kan. 2013); Springer v. Commonwealth, 998 S.W.2d 439, 447 (Ky. 1999); State v. Holmes, 5 So. 3d 42, 73–74 (La. 2008); State v. Nightingale, 58 A.3d 1057, 1069–70, 1070 (Me. 2012); Commonwealth v. Selby, 651 N.E.2d 843, 848–49 (Mass. 1995); People v. Fundaro, No. 301194, 2012 Mich. App. LEXIS 186, at *14–15 (Mich. Ct. App. 2012), *lv. denied*, 815 N.W.2d 445 (Mich. 2012); State v. Thaggard, 527 N.W.2d 804, 810 (Minn. 1995); Davis v. State, 551 So. 2d 165, 169 (Miss. 1989); State v. Flowers, 592 S.W.2d 167, 169 (Mo. 1979); State v. Phelps, 696 P.2d 447, 452 (Mont. 1985); State v. Nissen, 560 N.W.2d 157, 170 (Neb. 1997); Sheriff, Washoe Cnty. v. Bessey, 914 P.2d 618, 621 (Nev. 1996); State v. Wood, 519 A.2d 277, 279 (N.H. 1986); State v. Cooper, 700 A.2d 306, 320 (N.J. 1997); State v. Evans, 210 P.3d 216, 226 (N.M. 2009); State v. Jackson, 304 S.E.2d 134, 147–48 (N.C. 1983), *vacated*, 479 U.S. 1077 (1987); State v. Murray, 510 N.W.2d 107, 113–14 (N.D. 1994) (Levine, J., concurring); State v. Wiles, 571 N.E.2d 97, 112 (Ohio 1991); Pierce v. State, 878 P.2d 369, 372 (Okla. Crim. App. 1994); State v. Quinn, 623 P.2d 630, 639 (Or. 1981); Commonwealth v. Jones, 322 A.2d 119, 126 (Pa. 1974); State v. Marini, 638 A.2d 507, 513 (R.I. 1994); State v. Von Dohlen, 471 S.E.2d 689, 694–95 (S.C. 1996); State v. Wright, 679 N.W.2d 466, 469 (S.D. 2004); McGee v. State, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969); State v. Galli, 967 P.2d 930, 936–37 (Utah 1998), *superseded by*

statement in *Thomas* that "[i]t is well established that not all deception of a suspect is coercive."[109] The court may also have been thinking of "mere deception," the phrase in New York cases pertaining to the limited circumstances in which police are permitted to misrepresent certain facts, such as the fact that a victim has died.[110] Under New York precedent, deception crosses the line from "mere deception" to impermissible coercion when it is combined with a promise or threat, or other coercive techniques that together deprive one of the ability to make a rational decision or induce a potentially false confession.[111] Clearly there is a limit to deception, but courts have not articulated where the line is drawn.

IV. DECEPTION INHERENT IN THE REID METHOD

One of the core principles of psychological interrogation is that confessions can be elicited from reluctant suspects if the seriousness of the crime that they are suspected to have committed is "minimized." Police are taught to suggest exculpatory explanations to a suspect, such as self-defense, so that the suspect does not feel judged or blameworthy. As the Supreme Court explained in *Miranda* concerning the Reid method:

> The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to

statute, UTAH CODE ANN. § 76-3-401 (West 2013), *as recognized in* State v. Epling, 262 P.3d 440, 447 (Utah 2011); Rodgers v. Commonwealth, 318 S.E.2d 298, 304 (Va. 1984); State v. Braun, 509 P.2d 742, 745 (Wash. 1973); State v. Worley, 369 S.E.2d 706, 717 (W. Va. 1988); State v. Ward, 767 N.W.2d 236, 246 (Wis. 2009); Garcia v. State, 777 P.2d 603, 606 (Wyo. 1989); *see* Lewis v. State, 404 A.2d 1073, 1081–82 (Md. 1979) (remanding to lower court where the issue of police coercion impacting voluntariness will be addressed); Wilson v. State, 311 S.W.3d 452, 462–64 (Tex. Crim. App. 2010) (discussing police deception when interrogating versus fabricating evidence); State v. Bacon, 658 A.2d 54, 64 (Vt. 1995) (explaining that while police falsely told defendant that they talked to another inmate, the confession was still voluntary); State v. Lawrence, 920 A.2d 236, 258–59 (Conn. 2007) (discussing the dissent's understanding of police tactics in wrongful convictions).

[109] People v. Thomas, 8 N.E.3d 308, 313 (N.Y. 2014).

[110] People v. Pereira, 258 N.E.2d 194, 195 (N.Y. 1970) (quoting People v. McQueen, 221 N.E.2d 550, 554 (N.Y. 1966)) ("No contention is made . . . nor is there evidence that any promise or threat was made to appellant, and the law is well settled that in the absence of such factors mere deception is not enough.").

[111] *See, e.g.*, People v. Tarsia, 405 N.E.2d 188, 193 (N.Y. 1980) (finding confession voluntary where defendant was *not* told that voice-stress test was omniscient and police officers "did not browbeat Tarsia with accusations of untruthfulness").

> minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.[112]

As the Court explained further, to elicit a confession of self-defense from a suspect suspected of a revenge murder, the police supply all the details for the innocent explanation of the shooting, and when the suspect agrees (putting the gun in his hand and agreeing that he pulled the trigger), the police then refer to circumstantial evidence that negates the self-defense explanation.[113] "This should enable him to secure the entire story."[114] In other words, the ostensibly innocent admission is a crucial step in a multi-step process of extracting a confession to a criminal act.

In *Thomas*, the court found the minimization techniques used to be impermissibly deceptive.[115] "The premise of the interrogation was that an adult within the Thomas-Hicks household must have inflicted traumatic head injuries on the infant,"[116] and yet the police officers told Thomas "67 times that what had been done to his son was an accident, 14 times that he would not be arrested, and eight times that he would be going home."[117] Also, whenever Mr. Thomas protested that he had not intentionally hurt his child, the police officer provided "an elaborate explanation" of why seemingly violent actions would not be viewed as intentional.[118] These representations were, according to the court, "undeniably instrumental in the extraction of defendant's most damaging admissions."[119]

People v. Thomas does not entirely prohibit the use of minimization techniques to secure confessions, but it does leave open the possibility that even limited minimization through false assurances could jeopardize the validity of a confession: "Had there been only a few such deceptive assurances, perhaps they might be deemed insufficient to raise a question as to whether defendant's

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[112] Miranda v. Arizona, 384 U.S. 436, 450 (1966).
[113] *Id.* at 451–52.
[114] *Id.* at 452.
[115] People v. Thomas, 8 N.E.3d 308, 316–317 (N.Y. 2014).
[116] *Id.* at 311.
[117] *Id.* at 316.
[118] *Id.*
[119] *Id.*

confession had been obtained in violation of due process."[120] There is enough wiggle room in this statement ("*perhaps* they *might* be deemed insufficient") to rein in the use of deceptive minimization as a standard interrogation technique in New York. The court did not take the view that there is no problem with the use of false assurances, in moderation, to obtain confessions.

V. BASELESS THREATS

After more than an hour of interviewing Thomas without obtaining any inculpatory statements, the police officers tried a new tactic.[121] They told him that they were going to the hospital to "scoop" his wife out.[122] This ploy, unlike the lie that his wife had provided incriminatory information about him, worked extremely well. Thomas agreed to "'take the fall' for his wife."[123] He told the officers that he had not harmed his child, and he did not believe that his wife had either, but that he would take responsibility in order to keep her out of trouble.[124] The officers purported to reject this offer to lie (it was caught on tape after all), but, as the court found, "it is clear that defendant's agreement to 'take the fall'—an immediate response to the threat against his wife—was pivotal to the course of the ensuing interrogation and instrument to his final self-inculpation."[125]

The Court found the threat to arrest Thomas's wife "patently coercive," relying on a Supreme Court case, *Garrity v. New Jersey*,[126] which holds that interrogators may not threaten that the assertion of Fifth Amendment rights will result in harm to the vital interests of the interrogated person.[127] *Garrity* involved confessions by state employees questioned during a corruption inquiry who had been told that they would lose their jobs if they declined to answer questions on the basis of their Fifth Amendment privilege against self-incrimination.[128] The Court relied on one other case, *People v. Avant*,[129] which followed *Garrity* and involved government employees who would forfeit the right to bid on contracts if they

[120] *Id.*
[121] *Id.* at 311.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 314.
[126] Garrity v. New Jersey, 385 U.S. 493 (1967).
[127] *Id.* at 496–97; *Thomas*, 8 N.E.3d at 314, 316–17.
[128] *Thomas*, 8 N.E.3d at 314.
[129] People v. Avant, 307 N.E.2d 230 (N.Y. 1973).

declined to answer questions.[130] Neither case involved a custodial interrogation of a suspect under arrest in a criminal investigation, and neither involved the use of a threat against a suspect who has not asserted a Fifth Amendment right to remain silent, but is rather telling the police an exculpatory narrative.

Since there are cases closer to the facts than *Garrity*, including *Rogers v. Richmond*,[131] one can infer that the Court relied on the "Rule of *Garrity*" to announce a black-letter rule: when interrogating suspects who are not incriminating themselves, police cannot threaten to deprive them of a vital interest. The opinion suggests that such threats, standing on their own, are sufficient to render the resulting confession involuntary, and thus inadmissible.[132]

VI. THE MEDICAL RUSE

The other "patently coercive representation made to [Thomas] . . . was that his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life."[133] The opinion points out that this representation was made to Thomas twenty one times.[134] As demonstrated by a portion of the transcript quoted in the opinion, the representations that Thomas could save his child's life by disclosing information were dramatically manipulative:

> SERGEANT MASON: The doctors need to know this. Do you want to save your baby's life, alright? Do you want to save your baby's life or do you want your baby to die tonight?
>
> DEFENDANT: No, I want to save his life.
>
> SERGEANT MASON: Are you sure about that? Because you don't seem like you want to save your baby's life right now. You seem like you're beating around the bush with me.
>
> DEFENDANT: I'm not lying.
>
> SERGEANT MASON: You better find that memory right now, Adrian. You've got to find that memory. This is important for your son's life man. You know what happens

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[130] *Thomas*, 8 N.E.3d at 314.

[131] Rogers v. Richmond, 365 U.S. 534 (1961) (involving a suspect who persistently denied involvement in a crime until the police said his wife would be taken into custody, at which point he admitted culpable conduct, which is cited elsewhere in the opinion for a different point).

[132] *Id.* at 548 n.5.

[133] *Thomas*, 8 N.E.3d at 314–15.

[134] *Id.*

> when you find that memory? Maybe if we get this information, okay, maybe he's able to save your son's life. Maybe your wife forgives you for what happened. Maybe your family lives happier ever after. But you know what, if you can't find that memory and those doctors can't save your son's life, then what kind of future are you going to have? Where's it going to go? What's going to happen if Matthew dies in that hospital tonight, man?[135]

This exhortation was thoroughly dishonest since the infant was brain-dead at the time, with no hope of recovery, and any statements by Thomas would help neither the child, Thomas, nor his family.[136] The police officers took advantage of Thomas's lack of medical expertise, falsely claiming that one of them "had experience with head injuries during his military service in Operation Desert Storm."[137] They accused Thomas of "lying" by not admitting to striking his child's head, when they themselves were demonstrably lying to him, and they had no reliable information to contradict Thomas.[138]

The court struggled with the idea that pleading with a parent to save the life of a dying child could give rise to a violation of the Constitution, observing in dicta, "[p]erhaps speaking in such a circumstance would amount to a valid waiver of the Fifth Amendment privilege if the underlying representations were true."[139] But, as the court added, "here they were false."[140] In other words, the deception is the key difference between police conduct that might pass muster and that which does not. Citing no authority, the court used a novel analysis of the situation this deception posed for Thomas: "These falsehoods were coercive by making defendant's constitutionally protected option to remain silent seem valueless."[141] This finding does not take into account that Thomas was not, in fact, seeking to remain silent (rather he was repeatedly asserting his version of what happened), or the crucial question of whether the deception and exhortations "overbore" his will.[142] The explanation is likely that the court took pains to hold that the three kinds of deceptive statements, taken in

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[135] *Id.* at 311–12 (internal quotation marks omitted).
[136] *See id.* at 311.
[137] *Id.* at 312.
[138] *See id.* at 311.
[139] *Id.* at 315.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 316.

combination as the "totality of the circumstances," made Thomas's confession involuntary, and refrained from holding that any of the three types of deception alone coerced the inculpatory statements, making them inadmissible.[143] The result is the unclear legal standard of whether a medical ruse renders a Fifth Amendment right "seem valueless."

The court was clear-headed, however, in addressing an analytical error by the appellate division, which held that the repeated misrepresentations that the doctors could save the child's life if Thomas testified truthfully did not render his statements involuntary because appealing to parental concerns did not create a substantial risk that he might falsely incriminate himself.[144] Even if it were the case that a medical ruse could lead to the truth, that is irrelevant under the Due Process Clause, which looks to coercion, separate and apart from the truthfulness of any statements elicited, as the Supreme Court held in *Rogers v. Richmond*.[145] The court pointed out that under Criminal Procedure Law section 60.45, if an interrogation technique "creates a substantial risk that the defendant might falsely incriminate himself," the resulting statements are "involuntarily made."[146] But this additional protection provided by New York statutory law does not override the constitutional prohibition of using "involuntary" statements against defendants, regardless of whether they are true, as the court recognized.[147]

VII. CONTAMINATION AND THE RISK OF FALSE CONFESSIONS

In a development that bodes well for the return of reliability as a measure of admissible confessions, the Court of Appeals, in the final section of the *Thomas* opinion, used section 60.45 of the New York Criminal Procedure Law as a means to address the extremely troubling contamination of Thomas's statements by the interrogating officers and the likelihood that Thomas's incriminating statements were indeed false.[148] This analysis, based on New York statutory law, supplements, without undermining, the court's holding that coerced statements are involuntary, and thus

[143] *Id.* at 316.
[144] *Id.* at 315.
[145] *Id.* at 315–16 (quoting Rogers v. Richmond, 365 U.S. 534, 540–41 (1961)).
[146] *Thomas*, 8 N.E.3d at 315 (citing N.Y. CRIM. PROC. LAW § 60.45 (McKinney 2014)).
[147] *Id.*
[148] *Id.* at 315–16.

inadmissible, even if the statements elicited are actually true. Indeed, the court indicated in the oral argument of a companion case, *People v. Aveni*, argued the same day as *Thomas*, some discomfort with the notion that the defendant's statement in that case may well have been true.[149] In *Thomas*, by comparison, there was every reason to believe Thomas's "confession" was false.[150]

Contamination occurs when the officers conducting an interrogation, either knowingly or not, disclose nonpublic details of a crime to the suspect, who then incorporates the details into his narrative. The details appear to corroborate the confession and become powerful evidence throughout the prosecution of the suspect.

Americans learned about the unconscious phenomenon of contamination when a retired detective named Jim Trainum reviewed an old case file on a woman who had confessed to killing a man but was not charged because she had a strong alibi. He suspected that she had gotten away with murder because of the insider things she knew about the victim, such as that he was wearing his wedding ring and where his credit card had been used. When he looked back at the file he learned that the interrogation had accidentally been videotaped. To his surprise, he found that the tape showed exactly how an innocent person could have known the insider deals: they had shown her the credit card slips, and a crime scene photograph that showed a wedding ring![151]

Contamination occurred in nine out of ten false confession cases in New York studied by Professor Brandon Garrett.[152] This high correlation is because there is a direct connection between contamination and the specious trustworthiness of a confession that is in fact false. In *Warney v. State of New York*, involving whether a statement was "voluntary" in the context of a statute governing the eligibility of wrongfully convicted persons for state compensation,

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[149] *See* Transcript of Oral Argument at 69–72, People v. Aveni, 6 N.E.3d 1124 (N.Y. 2014) (No. 19), *available at* http://www.nycourts.gov/ctapps/arguments/2014/Jan14/Transcripts/011414-18-19-Oral-Argument-Transcript.pdf. The court upheld the decision below in *Aveni* in favor of the defendant on technical grounds, not deciding whether coerced, but true, statements should be excluded. *Aveni*, 6 N.E.3d at 1126.

[150] *See Thomas*, 8 N.E.3d at 315–16.

[151] Jim Dwyer, *After Baby Hope Confession, Assessing the Value of Taped Interrogations*, N.Y. TIMES, Oct. 25, 2013, at A20 (recounting the experiences of Washington Detective Jim Trainum in relation to a decision by the New York City Police Commissioner to begin videotaping suspect interrogations in serious cases).

[152] *See* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 *passim* (2010).

Judge Smith observed in his concurring opinion that numerous details in Warney's confession "point strongly to the conclusion that the police took advantage of Warney's mental frailties to manipulate him into giving a confession that contained seemingly powerful evidence corroborating its truthfulness—when in fact, the police knew, the corroboration was worthless."[153] Judge Smith concluded that "a confession cannot fairly be called 'uncoerced' that results from the sort of calculated manipulation that appears to be present here—even if the police did not actually beat or torture the confesser, or threaten to do so."[154] This "calculated manipulation" was police contamination.[155]

In *Thomas*, the contamination consisted of the police officers informing Thomas of non-public (and most likely erroneous) information provided by the treating physician—that the child's head had been hurled at a high speed against a hard surface.[156] For hours, Thomas provided no information that supported that explanation of the child's death.[157] Instead, as the court found, every single inculpatory fact was suggested to Thomas by the police.[158] The videotape of the confession (key excerpts of which can be seen in the documentary Scenes of a Crime) contains chilling images of an officer forcefully throwing down a notebook to dramatize how Thomas allegedly threw his son onto a bed.[159] But, as the court pointed out, Thomas merely engaged in a "closely directed enactment" of what he was bidden to do, with the direction he should not "'sugar–coat' it."[160]

Holding that the various misrepresentations and false assurances used to elicit and shape Thomas's admissions "manifestly raised a substantial risk of false incrimination," the court ruled that the "confession provided no independent confirmation that he had in fact caused the child's fatal injuries."[161] In other words, no aspect of Thomas's dramatic reenactment provided any assurance that the confession was actually true, since the police officers had

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153 Warney v. New York, 947 N.E.2d 639, 646 (N.Y. 2011) (Smith, J., concurring).

154 *Id.*

155 *Id.*; *see also* Garrett, *supra* note 152, at 1053–54 (discussing how police sometimes manipulate the suspect to "parrot back an accurate-sounding narrative" of a crime, thus resulting in "confession contamination").

156 People v. Thomas, 8 N.E.3d 311 (N.Y. 2014).

157 *See id.* at 312.

158 *Id.* at 316–17.

159 *See* SCENES OF A CRIME (New Box Prod. LLC 2014).

160 *Thomas*, 8 N.E.3d at 317.

161 *Id.*

contaminated the process by telling him what happened, and how he had done it. Testimony by the treating physicians—that the child had sustained severe head trauma, causing his death—did not corroborate the confession.[162] The court found that "[t]he agreement of [Thomas's] inculpatory account with the theory of injury advanced by those doctors can be readily understood as a congruence forged by the interrogation."[163]

Reading between the lines of this dense application of Criminal Procedure Law section 60.45, one senses a movement, however tentative, by the court toward reintroducing the unreliability or untrustworthiness of coerced confessions as a rationale for reining in high-pressure interrogation techniques.[164] The untrustworthiness of coerced confessions has historically been viewed as one of the main reasons that they have been kept from juries. As the Supreme Court explained in *Jackson v. Denno*:[165]

> It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[166]

Unfortunately, the focus on these higher ideals has moved courts away from the practical reality of false confessions in this age of far too many wrongful convictions. Advocates for reform have urged courts to develop means for discriminating between reliable and unreliable confessions, such as requiring some corroboration of a disputed confession with a fact not known to the suspect.[167] In dismissing the medical diagnosis as no corroboration for Thomas's

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[162] *Id.* at 317.

[163] *Id.*

[164] *See id.* 315–16.

[165] Jackson v. Denno, 378 U.S. 368 (1964).

[166] *Id.* at 385–86 (quoting Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960); Spano v. New York, 360 U.S. 315, 320–21 (1959)).

[167] *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, 522.

dramatic enactment, the court suggested the potential value of such an exercise.

VIII. CONCLUSION

The *Thomas* decision represents a significant step forward, in recognizing that deceptive interrogation techniques can be coercive, and create a substantial risk of false confessions. While the court refrained from providing a bright-line test, its unanimous opinion will put an end to the belief by some police officers, prosecutors, and judges that deception is permissible in an interrogation, regardless of the kind of deception or its impact on a suspect. As courts and prosecutors gain experience with the rich documentary record that will be provided by the ever-increasing practice of videotaping entire confessions, the *Thomas* opinion will provide guidance on the limits of deception under the Due Process Clause of the Constitution and Criminal Procedure Law section 60.45.