

FALSE CONFESSIONS

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This is an important symposium on an important topic, and nobody has made mention yet of the fact that when a wrongful conviction occurs the innocent defendant is not the only victim. There are several others—including the defendant's family and friends as well as victims of later crimes committed by the real perpetrator who was not sought, apprehended, arrested or convicted as a result of the false confession. These shadow stories underlie every one of these cases.

I want to talk about one cause of wrongful convictions. When the DNA exoneration cases started rolling in several years ago, the first very clear signal—you couldn't miss it because it was almost unanimous in the first thirty or forty cases—is that the most common source of error is the eyewitness mistake. And it continues to this day that seventy-five to eighty percent of all DNA exonerations—and likely other wrongful convictions as well—contain one or more mistaken eyewitness identifications.

A collateral and more stunning signal to emerge was that a surprising number of the DNA exonerations contained false confessions in evidence. Confessions have long been regarded the gold standard in evidence, so much so that in the words of one legal scholar, “the introduction of a confession makes the other aspects of a trial in court superfluous.”¹

Yet confession errors occur. They are not a new or uniquely American phenomenon. They can be found in all countries of the world and in all periods of modern history. In North America, false confessions can be traced to the Salem Witch Trials of 1692, where large numbers of mostly women were tried for witchcraft on the

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¹ CHARLES TILFORD MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 316 (2d ed. 1972).

basis of confessions extracted by torture and threats. Today, this phenomenon still exists and is better understood. In recent years, psychologists and other researchers have systematically studied false confessions and have produced a substantial empirical literature concerning their causes, characteristics, and consequences.²

The prevalence rate is unknown and, I would argue, unknowable. But as the DNA exoneration cases came in, one by one, it was apparent that false confessions—a most counterintuitive phenomenon—were a contributing factor in roughly twenty-five percent of those cases.

How does one know that a confession is false? In general, these cases have been identified in four ways: (1) When it is objectively established that the confessed crime did not occur (as when the presumed murder victim is found alive); (2) when it was physically impossible for the confessor to have committed the crime (as when the suspect was in custody or was too young to have produced semen); (3) when the true perpetrator is apprehended and his guilt clearly established; and (4) when DNA or other scientific evidence dispositively establishes the confessor's innocence.

New York State has had more than its share of false confession cases, and the names that you're familiar with—the five Central Park Jogger boys, Douglas Warney, John Kogut, Frank Sterling, Jeffrey Deskovic, Marty Tankleff—represent the tip of an iceberg. Personally, I know of other false confession cases in which police or prosecutors dropped the charges once they recognized that the confessor was innocent.

The most common question I get when I give a lecture, workshop, or expert testimony is, how often do false confessions occur? The simple answer is that I don't know. In fact, I don't think there is a methodology for deriving that estimate. There is just too much missing data—too many false confessions that are detected by police and resolved quietly and without fanfare, too many that result in guilty pleas to lesser charges that are never scrutinized, and too many for which DNA cannot come to the rescue.

² See generally GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK* (2003); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 *LAW & HUM. BEHAV.* 3 (Feb. 2010) (Official White Paper of the American Psychology-Law Society); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 *PSYCH. SCI. IN THE PUB. INT.* 33 (2004).

Let me also say that false confession is not only a criminal justice phenomenon. There is a loss-prevention industry in corporate America through which employees are often induced into confessing to theft in order to compensate a company for losses that accrue from missing merchandise or cash. In these situations, loss-prevention managers—often trained in interrogation in the same schools as police—interrogate employees in an effort to get them to confess and then sign a promissory note, which is how they recover losses from theft. Loss prevention is a parallel universe that looks a whole lot like the criminal justice system—but without some of the protections. And then of course there is a third parallel universe in the military setting and the use of “enhanced” interrogation tactics—which we will learn more about in the upcoming Guantanamo Bay trials. Needless to say, this is a whole other talk in and of itself.

Let me circle back now to the criminal justice setting and the presence of false confessions in the population of wrongful convictions. It is important to understand the different methodologies that researchers have used. For example, some self-report data has been collected across Europe in which various populations were asked whether they had confessed to a crime they did not commit. These surveys have shown that roughly twelve percent of prisoners who had been interrogated by police said they had confessed to a crime they did not commit; so did more than ten percent of high school students (a number that varies from country to country), three to four percent of college students, and one to two percent of older university students.

It’s never quite clear what conclusions can be drawn from self-report data. One might reasonably argue that these self-reported false confessions are overestimated—that people are inflating their tendency to do it. Yet Professor Gisli Gudjonsson, the psychologist who has collected much of these data, believes that they may well underestimate the problem. He believes when these alleged false confessors are interviewed, many are hesitant, as if ashamed, to admit it.

As reported in an article published in 2007, my colleagues and I surveyed 631 police detectives in various states across the country and Canada. We asked we asked respondents to estimate from personal experience the percentage of their suspects who gave a partial or full confession. On average, they estimated that 67.57 percent of suspects make self-incriminating statements. When

asked more specifically about innocent suspects who are interrogated, they estimated a confession rate of 4.78 percent.³

Along with false confession statistics contained within wrongful convictions, it is unfortunate but true that one cannot derive a prevalence rate from these data. An important secondary problem with false confessions, however, is not just that they occur but that it is extraordinarily difficult to overcome their consequences and impact. The criminal justice system presumes that there are a series of layered safety nets within the system—that even if harsh interrogation tactics were used to get a confession from an innocent but vulnerable person, the resulting error will be discovered and corrected. The police or prosecutor would realize the confession was false and drop the charges; if not, the judge would determine that the confession was involuntary and suppress it from evidence; if not, the jury would inherently distrust the coerced statement and acquit the defendant; if not, an appeals court would come back and overturn the conviction.

These safety nets are presumed to succeed. But too often they do not. What I think is the most profound and vexing part of false confession cases, unlike the eyewitness cases, is that they are far more resistant to change. We all fundamentally understand that eyewitnesses make mistakes, that people and their perceptions and memories are imperfect. We don't fundamentally understand, however, that an innocent person would ever confess to a crime he did not commit. It flies too hard in the face of common sense.

For this reason, I want to talk a bit about the impact of false confessions, the failure of the presumed safety nets, and why it is so important to prevent the occurrence of these errors in the first place. First of all, it is clear that people intuitively trust confessions, almost regardless of who the confessor is or the circumstances under which it was taken. The myth that "I would never confess to a crime I did not commit" is absolutely core to all of us.

Second of all, there are lots of data—much of it obtained through mock jury studies—showing that confessions are the most potent of all forms of evidence. When mock jurors are presented with a confession extracted through unduly harsh tactics and asked to determine whether that confession was voluntary or coerced, they

³ Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381 (2007).

will, as logic and law will dictate, perceive it to have been coerced. Nonetheless, when asked for a verdict, even those confessions they see as coerced will substantially increase the likelihood of their voting for conviction. Even when mock jurors see a confession as coerced, and even when they say it did not factor into their decisions, it leads them to convict. It's as if they are mentally unable to disregard or discredit the information in their decision-making.

Recently a doctoral student at John Jay and I collected some data with judges—one hundred thirty-two judges, to be precise, from three different states. We found exactly the same pattern in this sample as we have with mock juries. Even in cases where judges ruled that a highly coerced confession was not voluntary by law, they continued to use that confession as a basis for conviction. Drawing on criminal justice statistics involving proven false confessions, Professors Steven Drizin and Richard Leo found that among innocent confessors who pled not guilty and went to trial, approximately four out of five were convicted.⁴

Here's the reason why I think these safety nets are doomed to fail and why I often ask the questions, what in God's name does it take to exonerate an innocent confessor? How can we get judges, juries, and other decision makers past the commonsense judgment that only perpetrators confess?

There was a case in Pennsylvania that I find particularly illustrative of the problem. I've seen this happen a number of times, but this one was reported in the *New York Times*. In 1989, Bruce Godschalk had been convicted in a town outside of Philadelphia of two rapes on the basis of confessions he gave to police. He spent several years in prison until the year 2000, when he was exonerated thanks to newly tested DNA evidence. The result could not have been clearer. The D.A.'s office split the two semen samples. The defense sent its half to one lab, the D.A. used a second lab, and both came back with exactly the same conclusion: Whoever committed one rape committed both rapes—and that person was not Bruce Godschalk.

Given the unequivocal results one would think that Godschalk was instantly exonerated and released from prison. Yet weeks later the *New York Times* reported that the district attorney was not prepared to join the motion to vacate the conviction. Here is a quote

⁴ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004)

from the *Times* article:

“Even so, . . . District Attorney Bruce Castor, Jr., whose office convicted Godschalk, has refused to let Mr. Godschalk out of prison, saying he believes that Mr. Godschalk is guilty and that the DNA testing is flawed. Asked what scientific basis he had for concluding that the testing was flawed, Mr. Castor said in an interview today: “I have no scientific basis. I know because I trust my detective and my tape-recorded confession. Therefore the results must be flawed until someone proves to me otherwise.”⁵

I have seen this scenario repeatedly. In fact, I am aware of many cases in which a narrative confession is taken only later to be contradicted by DNA. Invariably, and there are numerous instances to illustrate the point, the confession will trump the DNA. It’s about the only area I know of where people trust self-report evidence over science.

So why are confessions so powerful? Why does confession evidence pose such a vexing problem? First there is the commonsense assumption, and we all make it, that people do not confess to crimes they did not commit. To further complicate matters, most false confessions are not mere bare bones admissions of guilt. In virtually all of these cases, the simple admission that “I did it” is followed by a full narrative statement, often filled with exquisite, vivid, accurate details about the crime, the victim, and the scene—statements that describe “what I did, how I did it, and why.” In a recently published analysis of thirty-three DNA exoneration cases in which there were false confessions in evidence, Professor Brandon Garrett found that all but one contained accurate details about the crime that were not in the public domain. As these confessors were factually innocent, it is now clear that the facts contained within their statements could not have originated from these suspects; rather, they emerged as a byproduct of the interrogation process.⁶

In some cases I’ve seen, the innocent confessor drew a map or a sketch of the crime scene. In many instances they apologize and express remorse. Sixteen-year old Kharey Wise of the *Central Park Jogger* case said it was his first rape and proclaimed that he would

⁵ Sara Rimer, *Convict’s DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES, Feb. 6, 2002, at A14.

⁶ Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

never do it again. Fourteen-year old Kevin Richardson, also of the *Central Park Jogger* group, stood up and demonstrated how he ripped the jogger's pants off. Can a judge or jury ever really be expected to overlook such a richly detailed confession, regardless of the circumstances under which it was taken? I think the answer is self-evident.

To give you a further sense of how tricky it is to distinguish between true and false statements, consider that many written false confessions contain not only the innocent suspect's signature but errors sprinkled throughout that he corrected and initialed. What most judges and all juries do not realize is that detectives who are specially trained in the practice of interrogation are taught to insert deliberate errors into the written confession to see if the suspect can identify those errors. When I first heard of this tactic I thought it was an ingenious diagnostic tool since only the true perpetrator is in a position to detect the inserted error. The problem is, many false confessions signed by innocent people contain corrected errors as well. In these instances, detectives pointed out the errors and told the suspect to handwrite and initial the necessary corrections.

One final point I want to make about confessions is that they are toxic. Not only do they have a corruptive effect on fact finders; sometimes they actually taint other evidence. I recently examined data from the Innocence Project files and could not help but notice that a vast majority of false confession cases contained additional errors that were used in the wrongful conviction—most notably, incorrect forensic science, jailhouse snitches and other informants, and mistaken eyewitness identifications. Interestingly, too, I found that in most of these multiple-error cases, the confession came first; the other errors followed.

This notion that confessions corrupt other evidence can be seen in recent experiments and in real cases. Here is one example. There was a case in Pennsylvania in which Barry Laughman confessed in vivid detail to the rape and murder of his elderly neighbor. Police knew at the time that the rapist had Type A blood. Immediately upon confession, therefore, Laughman was arrested and blood was drawn. Yet the results indicated that he had Type B blood, thus undermining the confession. What was the response? Police did not re-interview Laughman, seek additional corroboration, or re-open the investigation. Instead, the forensic serologist working for the state concocted four theories—none of them grounded in science—to explain away the mismatch and, therefore, save the confession. Other discrepancies were similarly set aside. Two witnesses

appeared at the police station and insisted with certainty that they saw the victim alive after Laughman was supposed to have murdered her. These witnesses were promptly ignored. One was told that she must have seen a ghost. The rest of the story is history. Laughman was convicted in 1988 on the basis of his confession and exonerated by DNA sixteen years later.

The history of wrongful convictions, including the current generation of post-conviction DNA exonerations, reveals a number of problems with confession evidence. Having identified these problems, researchers now seek solutions that inform policy and practice.

One goal is to improve the quality of confession evidence through changes in the methods by which police interrogate suspects—many of whom, after all, are innocent; some of whom are highly vulnerable under stress. A second goal is to improve the way confessions are evaluated in and out of court. Toward this end, the most important mechanism, I believe, far more important than the use of expert witnesses, is to ensure that prosecutors, judges, and juries can observe how the disputed confessions came about by requiring that police videotape *entire interrogations* for subsequent review.

There are many advantages to a videotaping policy. Notably, the presence of a camera should deter interrogators from using highly coercive tactics; disable frivolous defense claims of coercion; and provide a full and accurate record of the transaction, a common source of dispute in courts. For the purpose of this presentation, I would add that videotaping will enlighten prosecutors and defense attorneys and increase the fact finding accuracy of judges (in ruling on voluntariness, they will observe firsthand the suspect's physical and mental state, the conditions of interrogation, and the tactics that were used) and juries (in rendering a verdict, they will observe not only how the statement was taken but where the crime details, if accurate, originated). Clearly, when it comes to false confessions, the most effective safety net is to record for firsthand observation the process by which they were obtained.